SRI LANKA SUPREME COURT **Judgements Delivered (2018)**

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Judgments Delivered in 2018

13/ 12/ 18	SC Appeal 103/ 2012	The Director General, Commission to Investigate Allegations of Bribery or Corruption, No. 36, Malalasekara Mawatha, Colombo 07. Complainant Vs, Imbulana Liyanage Dharmawardana, No. 145/53, Walawuwatta, Waliweriya. Accused And Imbulana Liyanage Dharmawardana, No. 145/53, Walawuwatta, Waliweriya. Accused- Appellant Vs, The Director General, Commission to Investigate Allegations of Bribery or Corruption, No. 36, Malalasekara Mawatha, Colombo 07. Complainant-Respondent And now between The Director General, Commission to Investigate Allegations of Bribery or Corruption, No. 36, Malalasekara Mawatha, Colombo 07. Complainant-Respondent-Appellant Vs, Imbulana Liyanage Dharmawardana, No. 145/53, Walawuwatta, Waliweriya. Accused- Appellant-Respondent

12/ 12/ 18	SC FR Application No. 351/ 2018 SC FR Application No. 352/ 2018 SC FR Application No. 353/ 2018 SC FR Application No. 354/ 2018 SC FR Application No. 355/ 2018 SC FR Application No. 356/ 2018 SC FR Application No. 358/ 2018 SC FR Application No. 359/ 2018 SC FR Application No. 360/ 2018 SC FR Application No. 361/ 2018	PETITIONERS Rajavarothiam Sampanthan, No176, Customs Road, Trincomalee. Petitioner (SC FR 351/ 2018) 1. Kabir Hashim, 156 Lake Drive, Colombo 8 2. Akila Viraj Kariyawasam, 306 (D2) Bauddhaloka Mawatha, Colombo 7 Petitioners (SC FR 352/ 2018) 1. Centre for Policy Alternatives (Guarantee) Limited No. 6/5, Layards Road Colombo 00500 2. Dr. Paikiasothy Saravanamuttu No. 3, Ascot Avenue Colombo 00500 Petitioners (SC FR 353/ 2018) Lal Wijenayake Secretary, United Left Front, 1003, 1/1 Sri Jayewardenepura Mawatha Rajagiriya Petitioner (SC FR 354/ 2018) Gabadagamage Champika Jayangani Perera, Attorney-at-Law, 60 Anderson Road, Kalubowila, Dehiwela. Petitioner (SC FR 355/ 2018) 1. Anura Kumara Dissayanake, No, 464/20, Pannipitiya Road, Pelwatta, Battaramulla. 2. Bimal Ratnayake, No.1, 2nd Lane Jambugasmulla Mawatha, Nugegoda 3. Vijitha Herath, No. 154, Yakkala Road, Gampaha 4. Dr. Nalinda Jayatissa, No. 41, Hospital Road, Homagama. 5. Sunil Hadunetti, No. 4, Yeheyya Road, Izadeen Town, Matara 6. Nihal Galapaththi, No. 208/2, Muthumala Mawatha, Pallikudawa, Thangalle. Petitioners (SC FR 356/ 2018) Manoharan Ganesan, MP, No. 24, Sri Maha Vihara Road, Pamankada, Dehiwala. Petitioner (SC FR 358/ 2018) 1. Hon. Rishad Bathiudeen, MP, Leader, 2. Hon. Ameer Ali, MP, Chairman, 3. Hon. Abdullah Mahroof MP National Organizer, 4. Hon. Ishak Rahuman, MP, Deputy Leader, All of All Ceylon Makkal Congress 7th Floor, 296, Galle Road, Colombo 6. Petitioners (SC FR 359/ 2018) 1. Rauff Hakeem, Leader-Sri Lanka Muslim Congress, Dharussalam, 51, Vaxhaul Lane, Colombo 2. 2. Seyed Ali Zahir Moulana, Dharussalam 51, Vaxhaul Lane, Colombo 2. 3. Faizal Casim, Dharussalam, 51, Vaxhaul Lane, Colombo 2. 4. H. M. M. Harees, Dharussalam, 51, Vaxhaul Lane, Colombo 2. 5. M. I. M. Mansoor, Dharussalam, 51, Vaxhaul Lane, Colombo 2. 6. M. S. Thowfeek, Dharussalam, 51, Vaxhaul Lane, Colombo 2. 7. A. L. M. Nazeer, Dharussalam, 51, Vaxhaul Lane, Colombo 2. Petitioners (SC FR 360/ 2018) Professor S Ratnajeevan H Hoole Member of the Election Commission Elections Secretariat P O Box 02 Sarana Mawatha, Rajagiriya 10107 and 88, Chemmany Road, Nallur, Jaffna. Petitioner (SC FR 361/ 2018) Vs. RESPONDENTS 1. Hon. Attorney General Attorney General‘s Department, Colombo 12. Respondent in all cases 2. Mahinda Deshapriya, Chairman 3. N.J Abeysekara PC Member 4. Prof. Ratnajeevan Hoole, Member 2nd to 4th of: The Election Commission, Election Secretariat, Sarana Mawatha, Rajagiriya. Respondents in all cases except in SC FR 352/2018 and 354/2018 AND Honourable Karu Jayasuriya, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayewardenepura Kotte. 5th Respondent in SC FR 353/ 2018 and in 355/2018 AND Commissioner General of Elections, Election Commission, Election Secretariat, Sarana Mawatha, Rajagiriya Dhammika Dassanayake, Secretary General of Parliament, Parliament of Sri Lanka, Sri Jayawardenapura, Kotte 5th and 7th Respondents in SC FR 356/ 2018 AND M. A. P. C Perera, Commissioner General of Elections, Elections Secretariat, PO Box 02, Sarana Mawatha, Rajagiriya, 10107 Udaya Seneviratne, Secretary to the President

12/12/18	SC. FR Application No. 351/2018	Rajavarothiam Sampanthan 176, Customs Road, Trincomalee Petitioner Vs. 1. Hon. Attorney General, Attorney Generalʺs Department, Colombo 12. 2. Mahinda Deshapriya Chairman 3. N J Abeysekera PC Member 4. Prof. Rathnajeevan Hoole Member All of Election Commission, Election Secretariat Sarana Mawataha, Rajagiriya Respondents AND 1. Prof. Gamini Lakshman Pieris No.37, Kirula Place, Colombo 5. 2. Udaya Prabath Gammanpilla 65/14G, Wickramasinghe Mawatha, Kumaragewatta Road, Pelwatta, Battaramulla 3. Wellawattage Jagath Sisira Sena de Silva No.174/10, Uthuwankanda Road, Thalawathugoda 4. Mallika Arachchige Channa Sudath Jayasumana. 21/1A,Upananda Road, Attidiya. 5. Premanath Chaminda Dolawatta No.50, Ihala Bomiriy, Kaduwela. Added Respondents
12/12/18	S.C. (CHC) Appeal No. 53/2012	Suntel Limited, No. 110, Sri James Peiris Mawatha, Colombo 2. Plaintiff Vs. Electroteks Network Services (Private) Limited, No. 429D, Galle Road, Ratmalana. Defendant AND NOW BETWEEN Dialog Broadband Networks (Private) Limited, No. 475, Union Place, Colombo 2. Plaintiff-Appellant Electroteks Network Services (Private) Limited, No. 429D, Galle Road, Ratmalana. Defendant-Respondent
11/12/18	S.C. (CHC) Appeal No. 53/2012	Suntel Limited, No. 110, Sri James Peiris Mawatha, Colombo 2. Plaintiff Vs. Electroteks Network Services (Private) Limited, No. 429D, Galle Road, Ratmalana. Defendant AND NOW BETWEEN Dialog Broadband Networks (Private) Limited, No. 475, Union Place, Colombo 2. Plaintiff-Appellant Vs. Electroteks Network Services (Private) Limited, No. 429D, Galle Road, Ratmalana. Defendant-Respondent

11/12/18	SC (F/R) Application No: 62/2018	1. Menura Nanwidu Rambukkanage, No:27, Nihal Silva Mawatha, Kirulapone, Colombo 06. 2. S.T.Kodithuwakku, No: 27, Nihal Silva Mawatha, Kirulapone, Colombo 06. PETITIONERS Vs. (1) B.A. Abeyrathne, The Principal and the Chairman of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo, Royal College, Colombo 07. (2) A. Galahitiyawa Member of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo, Royal College, Colombo 07. (3) K.D.S. Siyaguna, Member of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo, Royal College, Colombo 07. (4) Harshana Matharaarachchi, Member of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo, Royal College, Colombo 07. (5) K.A.H. Karasingha, Member of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo, Royal College, Colombo 07. (6) K.G. Wimalasena The Chairman of the Appeals and Objections Board to admit Students to Grade 1 of Royal College of Colombo, Royal College, Colombo 07. (7) Amith Dharmapala, The Member of the Appeals and Objections Board to admit Students to Grade 1 of Royal College of Colombo, Royal College, Colombo 07. (8) W.N.P. Kumara, The Member of the Appeals and Objections Board to admit Students to Grade 1 of Royal College of Colombo, Royal College, Colombo 07. (9) S.P.M. Gunasekara The Member of the Appeals and Objections Board to admit Students to Grade 1 of Royal College of Colombo, Royal College, Colombo 07. (10) Charana Gunasekara The Member of the Appeals and Objections Board to admit Students to Grade 1 of Royal College of Colombo, Royal College, Colombo 07. (11) Director National Schools, Ministry of Education, Isurupaya, Pelawatta, Battaramulla. (12) Sunil Hettiarachchi, Secretary, Ministry of Education, Isurupaya, Pelawatta, Battaramulla. (13) Honorable Attorney General, Department of Attorney General, Colombo 12. RESPONDENTS

11/12/18	SC Appeal No. 95/2015	Henry Perera Samarakoon, No.200, Batahena Road, Sooriyagama, Kadawatha. Plaintiff -Vs- 1. Abeysinghe Pathiranage Indrani, No.166 / 2 / B, Weboda Road, Kirillawala, Kadawatha. 2. Rupasinghe Jayasundara Muhandhiram Tilak Pathmasiri Rupasinghage, I.G.Gold House, Super Market, Borella, Colombo 08. 3. Padma Alwis, No.715/1/a, Erawwala Road, Pannipitiya. 4. Sandaradura Nihal Lakshman Silva, No. 3/7, Ragama Road, Mahabage. 5. Cader Meedin Mohamed Anzar, No.464/2, Kasawatte, Batagoda, Kandy. Defendants AND BETWEEN 5. Cader Meedin Mohamed Anzar, No.464/2, Kasawatte,Batagoda, Kandy. 5th Defendant Petitioner -Vs- Henry Perera Samarakoon, No.200, Batahena Road, Sooriyagama, Kadawatha. Plaintiff - Respondent 1. Abeysinghe Pathiranage Indrani, No.166/2/B, Weboda Road, Kirillawala, Kadawatha. 2. Rupasinghage Jayasundara Muhandhiram Tilak Pathmasiri Rupasinghage, I.G. Gold House, Super Market, Borella, Colombo 08. 3. Padma Alwis, No.715/1/a, Erawwala Road, Pannipitiya. 4. Sandaradura Nihal Lakshman Silva, No. 3/7, Ragama Road, Mahabage. Defendants - Respondents AND NOW BETWEEN 5. Cader Meedin Mohamed Anzar, No.464/2, Kasawatte, Batagoda, Kandy. 5th Defendant – Petitioner - Appellant - Vs-Henry Perera Samarakoon, No. 200, Batahena Road, Sooriyagama, Kadawatha. (Deceased) Solanga Arachchige Wimalawathie Perera, No.200, Batahena Road, Sooriyagama, Kadawatha. Subtituted Plaintiff-Respondent- Respondent 1. Abeysinghe Pathiranage Indrani, No.166/2/B, Weboda Road, Kirillawala, Kadawatha. 2. Rupasinghage Jayasundara Muhandhiram Tilak Pathmasiri Rupasinghage, I.G. Gold House, Super Market, Borella, Colombo 08. 3. Padma Alwis, No.715/1/a, Erawwala Road, Pannipitiya. 4. Sandaradura Nihal Lakshman Silva, No. 3/7, Ragama Road, Mahabage. Defendants- Respondents -Respondents
02/12/18	SC Appeal 137/2015	Tropicaland Commodities (Private) Limited of First Floor, State Bank of India Building, Fort,Colombo -01. Plaintiff-Appellant. Vs. Mediterranean Shipping Company S.A. 12 -14, Chemin Rieu, CH 1208, Geneva, Switzerland Carrying on business through its office of Sri Lanka, Dr. Danister de Silva Mawatha, Colombo -08. Defendant-Respondent

02/12/18	SC Appeal 5/2013	1. Maththumagala Kankanamalage Victor Alwis 2. Mallawaarachchige Nalani Chandralatha 3. Maththumagala Kankanamalage Dushantha Sanjeewa All of No.191/29 Maladolawatta, Ihala Biyanwala, Kadawatha Plaintiff Vs Maththumagala Kankanamalage Newton Alwis No.589, Kandy Road, Eldeniya, Kadawatha Defendant AND THEN BETWEEN Maththumagala Kankanamalage Newton Alwis No.589, Kandy Road, Eldeniya, Kadawatha Defendant-Appellant Vs 1. Maththumagala Kankanamalage Victor Alwis 2. Mallawaarachchige Nalani Chandralatha 3. Maththumagala Kankanamalage Dushantha Sanjeewa All of No.191/29 Maladolawatta, Ihala Biyanwala, Kadawatha Plaintiff-Respondents AND NOW BETWEEN 1. Mallawaarachchige Nalani Chandralatha 2. Maththumagala Kankanamalage Dushantha Sanjeewa All of No.191/29 Maladolawatta, Ihala Biyanwala, Kadawatha Plaintiff-Respondent-Petitioner-Appellants Vs Maththumagala Kankanamalage Newton Alwis No.589, Kandy Road, Eldeniya, Kadawatha Defendant-Appellant-Respondent-Respondent

02/ 12/ 18	SC. (FR) Application No. 384/2016	Upali Sarath Kumara, Pothuwewa, Maddegama, Wellawa. PETITIONER -Vs- 1. S.A. Anura Sathurusinghe, Conservator General of Forests, Forest Department, “ Sampathpaya” No.3, Battaramulla. 2. M.L. Abdul Majeed, Conservator of Forests (Planning and Monitoring) (formerly Protection and Law Enforcement), Forest Department, “Sampathpaya”, No.3, Battaramulla. 3. Nimal Rathnaweera, Special Forester (Protection and Law Enforcement), Forest Department, “Sampathpaya”, No.3, Battaramulla. 4. P.A.G.S. Nandakumara, Conservator of Forests (Protection and Law Enforcement) Forest Department, “Sampathpaya” No.3, Battaramulla. 5. R.S. Kulatunga, Additional Conservator General of Forests, (Forest Protection, Operations & Management), Forest Department, “Sampathpaya”, No.3, Battaramulla. 6. L.A.D. Geetha Indrani, Additional Conservator General of Forests (Human Resource Management, Administration & Institutional Development), Forest Department, “Sampathpaya”, No.3, Battaramulla. 7. Udaya R. Seneviratne, Secretary, Ministry of Mahaweli Development and Environment, No.82, “Sampathpaya”, Rajamalwatte Road, Battaramulla. 8. A.H.L.D. Gamini Wijesinghe, Director (Education Training and Research), Ministry of Mahaweli Development, and Environment, No.82, “Sampathpaya”, Rajamalwatte Road, Battaramulla. 9. Dharmasena Dissanayake, Chairman, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05. 10. A. Salam Abdul Waid, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo- 05. 11. D. Shirantha Wijayatilaka, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05. 12. Prathap Ramanujam, Member, Public Service Commission, No.177, Nawala Road Narahenpita, Colombo -05. 13. V. Jegarasasingam, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05. 14. Santi Nihal Seneviratne, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05 15. S. Ranugge, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05 16. D.L. Mendis, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05 17. Sarath Jayathilaka, Member, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo-05. 18. Nayanamala Ranasinghe, Director, Sri Lanka Scientific Service/ Technological Service/Architectural Service, Ministry of Public Administration and Management, Independence Square, Colombo-07. 19. Jagath Dias, Director General of Pensions, Maligawatte Secretariat, Maligawatta, Colombo-10. 20. M.L. Abdul Majeed, 72/10, Sri Sangaraja Mawatha, Colombo-10. 21. Hon. Attorney-General, Attorney-General’s Department, Colombo-12. RESPONDENTS
02/ 12/ 18	SC Appeal 194/2012	

02/12/18	SC Appeal 207/2016	Hasini Dilshani Wijesinghe Jayawardane No.465/50, Nelum Place, Jalthor, Ranala. Minor appearing by her Next Friend Amitha Damayanthi Konggahage Jayawardane No.465/50, Nelum Place, Jalthor, Ranala. Plaintiff Vs Pitakanda Wahumpurage Rohana Sumith Ananda. No.402, Himbutana Road, Mulleriyawa, New Town. KMD Samantha No.467/8, Rajasinghe Mawatha, Udumulla, Mulleriyawa, New Town. Wajira Sumith Udunuwara No.406, Udumulla Mulleriyawa, New Town Defendants AND Wajira Sumith Udunuwara No.406, Udumulla Mulleriyawa, New Town 3rd Defendant-Petitioner-Appellant Vs 1. Amitha Damayanthi Konggahage Jayawardane No.465/50, Nelum Place, Jalthor, Ranala. Plaintiff-Respondent 2. Pitakanda Wahumpurage Rohana Sumith Ananda. No.402, Himbutana Road, Mulleriyawa, New Town. 3. KMD Samantha No.467/8, Rajasinghe Mawatha, Udumulla, Mulleriyawa, New Town. Defendant-Respondents AND NOW Wajira Sumith Udunuwara No.406, Udumulla Mulleriyawa, New Town 3rd Defendant-Petitioner-Appellant- Petitioner-Appellant Vs 1. Amitha Damayanthi Konggahage Jayawardane No.465/50, Nelum Place, Jalthor, Ranala. Plaintiff-Respondent-Respondent-Respondent 2. Pitakanda Wahumpurage Rohana Sumith Ananda. No.402, Himbutana Road, Mulleriyawa, New Town. 3. KMD Samantha No.467/8, Rajasinghe Mawatha, Udumulla, Mulleriyawa, New Town. Defendant-Respondents-Respondent-Respondents
28/11/18	SC (FR) Application 24/2018	1. HIMANSHU SUNETH NANAYAKKARA 2. KALAVANA VIDANALAYA KANTHILATHA LAKMINI KUMARI NANAYAKKARA 3. THISULI SENETHMA NANAYAKKARA [MINOR] Appearing through her Next Friend HIMANSHU SUNETH NANAYAKKARA All three of No. 26B, Fife Road, Colombo 05. PETITIONERS VS. 1. S.S.K. AVIRUPPOLA Principal, Visakha Vidyalaya, Vajira Road, Colombo 05. 2. VICE PRINCIPAL [HEAD OF PRIMARY SECTION] Visakha Vidyalaya, Vajira Road, Colombo 05. 3. CHAIRPERSON OF SCHOOL DEVELOPMENT SOCIETY Visakha Vidyalaya, Vajira Road, Colombo 05. 4. SUNIL HETTIARACHCHI Secretary, Ministry of Education, Isurupaya, Battaramulla 5. DR. JAYANTHA WICKRAMANAYAKA Director of Education, National Schools Branch, Ministry of Education, Isurupaya, Battaramulla. 6. L.M.D. DHARMASENA Principal, Mahanama College, Colombo 03. 7. HON. ATTORNEY GENERAL Attorney General’s Department, Colombo 12. RESPONDENTS

26/11/18	SC (F/R) Application No: 514/2010	Hewawasam Sarukkalige Rathnasiri Fernando, 07 D,Warapitiya, Darga Nagaraya. PETITIONER Vs. (1) Police Sergeant Dayarathna (Service No 501) Police Station, Welipenna. (2) Police Constable Madusanka (Service No 67080) Police Station, Welipenna. (3) Jayasingha Police Staff Assistant, Police Station, Welipenna. (4) Police Inspector A.D.Kariyawasam, Office-in-Charge, Police Station, Welipenna. (5) Inspector General of Police, Police Headquarters, Colombo 01. (6) Honorable Attorney General, Attorney General Department, Colombo 12. RESPONDENTS
22/11/18	SC /FR/ Application No 599/2009	Galapita Hene Gedara Nandani Kumari, Kahakotuwe Gedara, Borgambara, Kaikawela, Matale. Petitioner Vs, 1. Padma Kumari Ekanayake, Kahakotuwe Gedara, Borgambara, Kaikawela, Matale. 2. H.M. Ekanayake, Office-in-Charge, Matale Prison, Matale. 3. Office-in-charge, Police Station, Raththota. 4. PS 12862 Wasantha, Police Station, Raththota. 5. Superintendent of Prison, Bogambara Prison, Kandy. 6. B.M. Amunugama, Female Guard, Bogambara Prison, Kandy. 7. L.D. Wijesingha, Female Guard, Bogambara Prison, Kandy. 8. M.S. Kumari Subasingha, Female Guard, Bogambara Prison, Kandy. 9. N.P. Somapala, Female Guard, Bogambara Prison, Kandy. 10. Commissioner General of Prisons, Department of Prisons, Baseline Road, Colombo 09. 11. The Inspector General of Police, Police Headquarters, Colombo 01. 12. Hon. the Attorney General, Attorney General's Department, Colombo 12. Respondents
20/11/18	SC (FR) Application 137/2016	1. T.M.V.K. THENNAKOON No. 98, Thennakoon Traders, Belummahara, Mudungoda. 2. T.M.G. TENNAKOON No.148/4, Belummahara, Mudungoda. 3. H.G. LILINONA No. 78/B, Belummahara, Mudungoda. 4. N.W. UNDUGODA No. 190/3A Mudungoda. 5. W.A. SHAMINDAPRIYA PATHMAKUMARA No. 75, Bogaha Road, Gothatuwa, Angoda. 6. M.G. INOKA DILRUKSHI No. 935/3, Bogaha Junction Road, Gothatuwa. 7. P.S.U.K. PERERA No. 110/2, Kandy Road, Belummahara, Mudungoda PETITIONERS VS. 1. HON. ATTORNEY GENERAL Attorney General's Department, Colombo 12. 2. RAVI KARUNANANYAKE Minister of Finance, Ministry of Finance, The Secretariat, Colombo 01. 2A.MANGALA SAMARAWEERA Minister of Finance, Ministry of Finance, The Secretariat, Colombo 01. 3. DIRECTOR GENERAL OF CUSTOMS No. 40, Main Street,Colombo 11. 4. COMMISSIONER GENERAL OF MOTOR TRAFFIC Department of Motor Traffic, No. 341, Elvitigala Mawatha, Narahenpita, Colombo 05. 5. A.K. SENEVIRATNE Director General, Department of Fiscal Policy, Ministry of Finance, The Secretariat, Colombo 01. 5A.K.A. VIMALENTHIRAJAH Director General, Department of Fiscal Policy, Ministry of Finance, The Secretariat, Colombo. 6. SRI LANKA PORTS AUTHORITY No. 19, Chetiya Road, Colombo 01. RESPONDENTS

20/11/18	SC CHC Appeal No. 04/2017	John Devakumar Wilson, No. 173/B, Model Farm Road, Colombo 08. Plaintiff Vs. 1. Rajendra Wasanthikumari 2. Sinnadurai Rajendran Both A9 Road, Paravipanchan, Killinochchi. 3. Masilaman Sivarasa, Anandapuram, Killinochchi. 4. Sellaiya Sendiban, Pungawana Junction, Mulativu Road, Killinochchi. 5. Siva Johnson, A9 Road, Paravipanchan, Killinochchi. 6. Suppaiya Selvendran, No. 336, YMCA Junction, Bharathipuram, Killinochchi. 7. Veluraja Sekaran, No. 414 02/02, Thirungar South, Killinochchi. Defendants And now between In the matter of an application, inter alia, under section 757 of the Civil Procedure Code and section 5A(1) and 5A(2) of the High Court of the provinces (Special Provisions) (Amendment Act No. 54 of 2006 for leave to Appeal from the Order made by the District Court of Killinochchi in case No. L/325 on 10. 03. 2014) John Devakumar Wilson, No. 173/B, Model Farm Road, Colombo 08. Plaintiff-Petitioner Vs. 1. Rajendra Wasanthikumari 2. Sinnadurai Rajendran Both A9 Road, Paravipanchan, Killinochchi. 3. Masilaman Sivarasa, Anandapuram, Killinochchi. 4. Sellaiya Sendiban, Pungawana Junction, Mulativu Road, Killinochchi. 5. Siva Johnson, A9 Road, Paravipanchan, Killinochchi. 6. Suppaiya Selvendran, No. 336, YMCA Junction, Bharathipuram, Killinochchi. 7. Veluraja Sekaran, No. 414 02/02, Thirungar South, Killinochchi. Defendant-Respondents Now In the matter of an Application for Leave to Appeal in terms of Section 5(C) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 127 of the Constitution. 1. Rajendra Wasanthikumari 2. Sinnadurai Rajendran Both A9 Road, Paravipanchan, Killinochchi. 3. Masilaman Sivarasa, Anandapuram, Killinochchi. 4. Sellaiya Sendiban, Pungawana Junction, Mulativu Road, Killinochchi. 5. Siva Johnson, A9 Road, Paravipanchan, Killinochchi. 1, 2, 3 & 5th Defendants-Respondents-Petitioners Vs. John Devakumar Wilson, No. 173/B, Model Farm Road, Colombo 08. Plaintiff-Petitioner-Respondent
20/11/18	SC Appeal No.139/2014	Democratic Socialist Republic of Sri Lanka Complainant Vs. 1. Panangalage Don Nilanka 2. Kodituwakkulage Pradeep Samantha alias Fredie Accused And Now 1. Panangalage Don Nilanka 2. Kodituwakkulage Pradeep Samantha alias Fredie Accused-Appellants Vs. The Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent And Now Between Kodituwakkulage Pradeep Samantha alias Fredie Presently at Welikada Prison Baseline Road Borella. 2nd Accused-Appellant-Petitioner Vs. The Hon. Attorney General Attorney General's Department, Colombo 12. Complainant-Respondent-Respondent

20/11/18	SC APPEAL No. 55/2013	Kambapolegedara Sumith Jayalath, Walgama, Yatagama, Rambukkana. Plaintiff Vs Athaudagedara Siriyawathie, Walgama, Yatagama, Rambukkana. Defendant AND Kambapolegedara Sumith Jayalath, Walgama, Yatagama, Rambukkana. Plaintiff Appellant Vs Athaudagedara Siriyawathie, Walgama, Yatagama, Rambukkana. Defendant Respondent AND NOW BETWEEN Athaudagedara Siriyawathie, Walgama, Yatagama, Rambukkana. Defendant Respondent Appellant Vs Kambapolegedara Sumith Jayalath, Walgama, Yatagama, Rambukkana. Plaintiff Appellant Respondent
11/11/18	SC Appeal No. 29/2009	K.M.A. ANULAWATHIE MENIKE Randiwala, Mawanella. PLAINTIFF VS. A.H.M.J. ABEYRATNE 'Lakshmi',Yatimahana, Makehelwala DEFENDANT AND K.M.A. ANULAWATHIE MENIKE Randiwala, Mawanella. PLAINTIFF-APPELLANT VS. A.H.M.J. ABEYRATNE 'Lashkmi', Yatimahana, Makehelwala DEFENDANT-RESPONDENT AND NOW BETWEEN A.H.M.J. ABEYRATNE 'Lakshmi', Yatimahana, Makehelwala DEFENDANT-RESPONDENT- PETITIONER/ APPELLANT VS. K.M.A. ANULAWATHIE MENIKE Randiwala, Mawanella. PLAINTIFF-APPELLANT-RESPONDENT
08/11/18	SC Appeal 118/17	The Democratic Socialist Republic of Sri Lanka Complainant. Vs. 1. Junaiden Mohomed Haaris. 2. Abdul Razak Mohomed Salam (deceased) 3. Pakeer Mohomed Kamaldeen Accused. AND NOW 1. Junaiden Mohomed Haaris. 3. Pakeer Mohomed Kamaldeen 1st and 3rd Accused Appellants. Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Respondent. AND NOW BETWEEN Junaiden Mohamed Haaris, No.13, Kothmale Road, Nawalapitiya. Presently at, Welikada Prison, Borella, Colombo 08. 1st Accused Appellant Petitioner Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Respondent-Respondent
08/11/18	SC Appeal 220/2014	Office-in-Charge, Police station, Buttala. Complainant Vs, Kotuwila Kankanamalage Premalal Leonard Perera, No. 02, Kuda Gammanaya, Pelwatta Sugar Company, Buttala. Accused And between Kotuwila Kankanamalage Premalal Leonard Perera, No. 02, Kuda Gammanaya, Pelwatta Sugar Company, Buttala. Accused- Appellant Vs, 1. Hon. Attorney General, Attorney General's Department, Colombo 12. 2. Office-in-Charge, Police station, Buttala. Defendant-Respondents And now between Kotuwila Kankanamalage Premalal Leonard Perera, No. 02, Kuda Gammanaya, Pelwatta Sugar Company, Buttala. Accused-Appellant-Petitioner-Appellant Vs, 1. Hon. Attorney General, Attorney General's Department, Colombo 12. 2. Office-in-Charge, Police station, Buttala. Complainant-Respondents-Respondents-Respondents

07/11/18	SC. Appeal No. 75/2011	NAGALINGAM SELVARAJA Dikhena, Weweldeniya, Kegalle. PLAINTIFF VS. RAMAIYA RAJAMMA No. 245, North Circular Road, Weweldeniya, Kegalle. DEFENDANT AND RAMAIYA RAJAMMA No. 245, North Circular Road, Weweldeniya, Kegalle. DEFENDANT-APPELLANT VS. NAGALINGAM SELVARAJA Dikhena, Weweldeniya, Kegalle. PLAINTIFF-RESPONDENT AND NOW BETWEEN RAMAIYA RAJAMMA No. 245, North Circular Road, Weweldeniya, Kegalle. DEFENDANT-APPELLANT -PETITIONER/APPELLANT VS. NAGALINGAM SELVARAJA Dikhena, Weweldeniya, Kegalle. PLAINTIFF-RESPONDENT -RESPONDENT
04/11/18	SC Application No. 459/2017 (FR)	Mrs. R.M. Dayawathi of 20/2, 14th Milepost, Walawatte, Udawala, Teldeniya. Petitioner Vs. 1. The Principal, Girls' High School, 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
30/10/18	SC (FR) Application 412/2016	1. MALIKA JOTHIRATHNA 2. R.M.N. ODARA [a Minor] Both of No. 26, Halwathura, Willegoda Ambalangoda. PETITIONERS VS. 1. SUMITH PARAKRAMAWANSHA 2. REKHA NAYANI MALLAWARACHCHI 3. DIYAGUBADUGE DAYARATNE 4. MALLIYAWADU SHIRLEY CHANDRASIRI 5. NILENTHI SANTHAKA THAKSALA DE SILVA The former Principal, the Secretary and the Members of the Interview Board, Dharmashoka College, Ambalangoda. 6. W.T.B. SARATH 7. P.D. PATHIRATHNA 8. K.P. RANJITH 9. JAGATH WALLAGE The President and Members of the Appeals Board, Dharmashoka College, Ambalangoda. 10. HASITHA WETHTHIMUNI, Principal, Dharmashoka College, Ambalangoda. 11. DIRECTOR OF NATIONAL SCHOOLS Isurupaya, Battaramulla. 12. THE HON. ATTORNEY GENERAL The Attorney General's Department, Hulftsdorp, Colombo 12. PETITIONERS

29/ 10/ 18	SC FR 168/2010 with SC FR 170/2010, SC FR 189/2010, SC FR 190/2010 and SC FR 246/2010	1. Rajapaksha Senarathge Gamini Jayakodi, Pasala Idiripita, Thiladiya, Puttalam. and 119 others PETITIONERS Vs. 1. Inspector General of Police, Police Headquarters, Colombo 01. and 324 others RESPONDENTS SC FR 170/2010 1. M.K.M.B. Jayawardena, No. 106, “Barathywass”, Koralawella, Moratuwa. and 35 others PETITIONERS Vs. 325. Hon. Attorney General, Attorney General’s Department, Colombo 12. and 324 others RESPONDENTS SC FR 189/2010 1. M.A. Harsha Dammika Perera, 1/2/1, Anderson Flats, Colombo 05. and 43 others PETITIONERS Vs. 1B. Poojith Jayasundera, Inspector General of Police, Police Headquarters, Colombo 01. and 564 others RESPONDENTS SC FR 190/2010 1. Rannathige Aruna Shantha, A-400-1-Pirivena Area, Ampara. 2. Kamal Priyantha Kodithuwakku, 251/11, Samagi Mawatha, Kadawatha. and 45 others PETITIONERS Vs. 1. Mahinda Balasuriya, Former Inspector General of Police, Police Headquarters, Colombo 01. and 613 others RESPONDENTS SC FR 246/2010 1. Hendawasam Manil Bhathiya, Jayasinghe Wenamulla, Ambalangoda. and 50 others PETITIONERS Vs. 1. Secretary, Ministry of Defense, Public Security, Law & Order, Colombo 01. and 20 others RESPONDENTS
22/ 10/ 18	SC (FR) Application 479/2009	1. PALLE KANKANAMGE SUNIL SHANTHA, Imbulgahakanda, Sadagoda, Meegahathenna. 2. LOKUNARANGODAGE SHANTHA, Amundara, Rideewita, Meegahathenna. 2A. PALLE KANKANAMGE YAMUNA NANDANI WIJEGUNAWARDENA, 597/01, Imbulgahakanda, Sadagoda, Meegahathenna. PETITIONERS VS. 1. SUB-INSPECTOR SENEVIRATNE, Police Station, Meegahathenna. 2. MUKUNANA KARIYAKARANAGE ANURUDDHA MANGALA, Amundara, Rideewita, Polgampala. 3. OFFICER IN CHARGE MEEGAHATHENNA POLICE STATION, Police Station, Meegahathenna. 4. THE INSPECTOR-GENERAL OF POLICE Police Headquarters, Colombo 1. 5. HON. ATTORNEY GENERAL Attorney General’s Department, Colombo 12. RESPONDENTS
21/ 10/ 18	SC FR 364 / 2015	1. W.A.P. Mudunkotuwa, No. 53/H/12, Police Flats, P.F.F.H.Q., Colombo 05. And 189 Others. Petitioners Vs 1. S. Dadallage, Secretary, Ministry of Public Administration, Provincial Councils, Government and Democratic Governance. And 13 Others Respondents

18/ 10/ 18	SC APPEAL 31/2016	1. W.G.Chandrasena, No. 136/1, Lake Round, Kurunegala. 2. W.S.Wijeratne, No. 38A, Siri Saranankara Road, Dehiwala. Petitioners Vs 1. Sudharma Karunaratne, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. 2. M.M.I. Marikkar, Superintendent of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. Respondents AND NOW BETWEEN 1. W.G.Chandrasena,No. 136/1, Lake Round,Kurunegala. 2. W.S.Wijeratne, No. 38A, Siri Saranankara Road, Dehiwala. Petitioner Appellants Vs 1. Dr. Neville Gunawardena, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent) 1A. R.Samasinghe, Acting Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent) 1B. Chulananda Perera, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent) 1C. Ms. P.S.M. Charles, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent) 2. M.M.I. Marikkar, Superintendant of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. Respondent Respondents
18/ 10/ 18	SC APPEAL 171/2011	Subasinghage Heenhamy, Hinguraara, Embilipitiya. Plaintiff Vs Hewagamage Ariyarathne, Near Yatiyana Kade, Embilipitiya. Presently of No. 31, Near the Hospital, New Town, Embilipitiya. Defendant AND Hewagamage Ariyarathne, Near Yatiyana Kade, Embilipitiya. Presently of No. 31, Near the Hospital, New Town, Embilipitiya. Defendant Appellant Vs Subasinghage Heenhamy, Hinguraara, Embilipitiya. Plaintiff Respondent AND NOW BETWEEN Subasinghage Heenhamy, Hinguraara, Embilipitiya. Plaintiff Respondent Appellant (Deceased) Jayaweera Gama Ethige Gunaratne, No. 1337, Godauda Waadiya, Hinguraara, Embilipitiya. Substituted Plaintiff Respondent Appellant Vs Hewagamage Ariyarathne, Near Yatiyana Kade, Embilipitiya. Presently of No. 31, Near the Hospital, New Town, Embilipitiya. Defendant Appellant Respondent
17/ 10/ 18	SC Appeal 164/2011 SC Appeal 165/2011	G. Kothandan, “Bethany” Golf Links Road, Bandarawela Applicant Vs, Agarapatane Plantations Limited, No. 53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 01 Respondent And Agarapatane Plantations Limited, No. 53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 01 Respondent -Appellant Vs, G. Kothandan, “Bethany” Golf Links Road, Bandarawela Applicant-Respondent And now between Agarapatane Plantations Limited, No. 53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 01 Respondent-Appellant-Appellant Vs, G. Kothandan, “Bethany” Golf Links Road, Bandarawela Applicant- Respondent -Respondent

15/ 10/ 18	SC APPEAL 20/2015	1.Dodampahala Gamage Gunapala 2.Dodampahala Gamage Weerasinghe 3.Dodampahala Gamage Sumaderis All of Ambagahawatte, Kandeketiya, Ratmalwala. Plaintiffs Vs 1. K.P.Nuwan Ranjan De Silva, Helekada, Angunukolapelessa. 2. Angunukolapelessa Pradeshiya Sabhawa Angunukolapelessa Defendants AND THEN BETWEEN 1.K.P.Nuwan Ranjan De Silva, Helekada, Angunukolapelessa. 2.Angunukolapelessa Pradeshiya Sabhawa Angunukolapelessa Defendant Appellants Vs 1.Dodampahala Gamage Gunapala 2.Dodampahala Gamage Weerasinghe 3.Dodampahala Gamage Sumaderis All of Ambagahawatte, Kandeketiya, Ratmalwala. Plaintiff Respondents AND NOW BETWEEN 1.Dodampahala Gamage Gunapala 2.Dodampahala Gamage Weerasinghe 3.Dodampahala Gamage Sumaderis All of Ambagahawatte, Kandeketiya, Ratmalwala. Plaintiff Respondent Appellants Vs 1. K.P.Nuwan Ranjan De Silva, Helekada, Angunukolapelessa. 2. Angunukolapelessa Pradeshiya Sabhawa Angunukolapelessa Defendant Appellant Respondents

11/10/18	SC (F/R) Application No. 402/2016	1. Laboratory Equipment Co. (Pvt) Ltd, No. 126/3/1, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 2. Ruwindi International Trade (Pvt) Ltd, No. 126/M/4, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 3. Proso Manpower Tours & Travels (Pvt) Ltd, No. 126/18, Ground Floor, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 4. Inter Marine C&F (Pvt) Ltd, No. 126/2/28, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 5. Monsell International (Pvt) Ltd, No. 126/19/B, Ground Floor, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 6. Expo Cargo Links (Pvt) Ltd, No. 126/3/19, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 7. Sripala Shipping (Pvt) Ltd, No. 126/3/2, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 8. S. Saverimuttu and Co, No. 126/3/3/, 3rd Floor, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 9. Demiyan Sunil Abeyratne Abeyratne & Co, No. 126/2/18, 2nd Floor, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 10. Treven Edward Weinman, Trust Freight Systems, No. 126/2/6, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 11. Stanley Wijesinghe, S.W. Cargo Service, No. 126/3/5, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 12. Mahathanthri Rathnasiri, Rathnasiri Ruhunu Hostel, No. 126/4, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 13. J.P.M. Fernando, Libosree Agency, No. 126/16, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 14. M.R. Priyantha Fernando, Nirmala Agencies, No. 126/B-7C, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 15. Swani Maria Pillai, Management Accountants, No. 126/3/23, 3rd Floor, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 16. K.N.V.K. Tennakoon, Eagle Freight, No. 126/1/10B, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 17. I.A.M. Sugandika Indurugalla, Ceylon Express International, No. 126/1, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 18. S.M. Sachchithanandam, V.M. Perempalam & Co. No. 126/1/2/, 1st Floor, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 19. R.P. Priya Nilaksha Perera, LAK SEE Photo Traders, No. 126/B/37 and No. 126/B/1A, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 20. Priyadarshani Fernando nee T.M. Nicholas, Priyaa Trading Company, No. 126/3-22, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 21. K.P.L. Amarasinghe, Sasiri Associates, No. 126/5/1, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. 22. M.A.J. Laknath, Kunchana Opticians, No. 126/8/B, Sri Baron Jayatileka Mawatha, YMB Building, Colombo 1. PETITIONERS Vs. 1. Ceylon Electricity Board, No. 50, Sir Chittapalam A Gardiner Mawatha, Colombo 2. 2. General Manager, Ceylon Electricity Board, No. 50, Sir Chittapalam A Gardiner Mawatha, Colombo 2. 3. Public Utilities Commission of Sri Lanka, 6th Floor, BOC Merchant Towers, St. Michael‟s Road, Colombo 3. 4. Director General, Public Utilities Commission of Sri Lanka, 6th Floor, BOC Merchant Towers, St. Michael‟s Road, Colombo 3. 5. Colombo Young Men‟s Buddhist Association, No. 126/B/1A, Sir Baron Jayathilaka Mawatha, Colombo 1. 6. Major General Harsha Weerathunge, General

10/10/18	SC/FR No. 108/2016	1. Tirathai Public Co. Ld, 516/1, Moo 4 Bangpoo Industrial Estate, Praksa Muang, Samutprakan 10280, Thailand. 2. H.R. Holdings (Pvt) Ltd. 476/10, Galle Road, Colombo 03. Petitioners - Vs - 1. Ceylon Electricity Board, No. 50, Sir Chittampalam Gardiner Mawatha, Colombo 02. 2. Dr. B.M.S. Batagoda, Secretary, Ministry of Power & Renewable Energy, 72, Ananda Coomarswamy Mawatha, Colombo 07. 3. Mr. S.A.N. Saranatissa, Chairman, Ministry Procurement Committee (Ministry of Power & Renewable Energy) Additional Secretary, 72, Ananda Coomarswamy Mawatha, Colombo 07. 4. Mr. M.C. Wickramasekera, Member, Ministry Procurement Committee (Ministry of Power & Renewable Energy) General Manager, 50, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. 5. Dr. A.M. Asanga Dayarathne, Member, Ministry Procurement Committee (Ministry of Power & Renewable Energy), Additional Secretary, Ministry of Policy Planning, Economic Affairs, Child, Youth and Cultural Affairs, 72, Ananda Coomarswamy Mawatha, Colombo 07. 6. Mr. L.D.J. Fernando Chairman, Technical Evaluation Committee, DGM (P&D), DD4 Ceylon Electricity Board, No. 1, Fairline Road, Dehiwala 7. Mr. R.S. Wimalendra, Member, Technical Evaluation Committee, DGM (P&D), DD4 Ceylon Electricity Board, No. 1, Fairline Road, Dehiwala 8. Mr. S.R. Weerasinghe, Member, Evaluation Committee, DGM (P&D), DD4 Ceylon Electricity Board, Sri Devananda Mawatha, Piliyandala. 9. Mr. J.A. Gnanasiri, Member, Evaluation Committee, DGM (P&D), DD4 Ceylon Electricity Board, Sri Devananda Mawatha, Piliyandala. 10. Mr. R.P.D.A. Premalal, Member, Technical Evaluation Committee, Chief Finance Manager (Ministry of Power & Renewable Energy) Additional Secretary, 72, Ananda Coomarswamy Mawatha, Colombo 07. 11. Mrs. Indrani Vithanage, Senior Assistant Secretary (Tenders) Ministry of Power & Renewable Energy, 72, Ananda Coomarswamy Mawatha, Colombo 07. 12. Mrs. Champa Satharasinghe, Project Director (LECO Supply Source Enhancement Project) Deputy General Manager – (P&HM) Ceylon Electricity Board, Sri Devananda Mawatha, Piliyandala. 13. General Manager, Ceylon Electricity Board, No. 50, Sir Chittampalam Gardiner Mawatha, Colombo 02. 14. Emco Limited, N-104, MIDC Area, Mehrun, Jalgaon – 425003, Maharashtra, India 15. Queens Radio Marine Electronics (Pte) Limited, 861, Aluthmawatha Road, Colombo 01. 16. Sociate Elettromeccanica Arzignanesespe SPA, Visa L Da Vincl, 14 C.P. 50 36071 Tezze Di Arzignano (IV), Italy. 17. Crompton Greaves Ltd., CG House, 6th Floor, Dr. Annie Besant Road, Worli, Mumbai – 400 030, India. 18. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

10/10/18	SC/TAB/2A – D/2017	Vithanalage Anura Thushara De Mel 1st Accused - Appellant Srinayaka Pathiranalage Chaminda Ravi Jayanath 2nd Accused – Appellant Kowile Gedara Dissanayaka Mudiyanselage Sarath Bandara 3rd Accused - Appellant Arumadura Lawrence Romelo Duminda Silva 4th Accused -Appellant Vs. Hon. Attorney General Attorney General's Department, Colombo 12. Complainant-Respondent
10/10/18	SC Appeal No. 152/2011	1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara (being a minor, through her next friend, her father; the 2nd Defendant) 2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara (the next friend of the above mentioned Plaintiff minor) Both of 295/15, Sri Somananda Mawatha, Arukgoda, Alubomulla. PLAINTIFFS -Vs- 1. E. Chandrani alias Chandrani Epitawala, Dias Memorial Hospital (Kethumathi), Panadura. 2. Western Provincial Council, Western Provincial Council Office, Colombo. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. And others DEFENDANTS And then 1. E. Chandrani alias Chandrani Epitawala, Dias Memorial Hospital (Kethumathi), Panadura. 2. Western Provincial Council, Western Provincial Council Office, Colombo. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. DEFENDANT- APPELLANTS -Vs- 1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara 2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara Both of 295/15, Sri Somananda Mawatha, Arukgoda, Alubomulla. PLAINTIFF-RESPONDENTS And Now Between 1. E. Chandrani alias Chandrani Epitawala, Dias Memorial Hospital (Kethumathi), Panadura. 2. Western Provincial Council, Western Provincial Council Office, Colombo. 1ST AND 2ND DEFENDANT-APPELLANT- PETITIONERS -Vs- 1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara 2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara Both of 295/15, Sri Somananda Mawatha, Arukgoda, Alubomulla. PLAINTIFF-RESPONDENT- RESPONDENTS 3. Hon. Attorney General, Attorney General's Department, Colombo 12. 3RD DEFENDANT-APPELLANT- RESPONDENT And now between 1. E. Chandrani alias Chandrani Epitawala, Dias Memorial Hospital (Kethumathi), Panadura. 2. Western Provincial Council, Western Provincial Council Office, Colombo. 1ST AND 2ND DEFENDANT-PETITIONER - APPELLANTS 1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara 2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara Both of 295/15, Sri Somananda Mawatha, Arukgoda, Alubomulla. 1ST & 2ND PLAINTIFF – RESPONDENT – RESPONDENTS 3. Hon. Attorney General, Attorney General's Department, Colombo 12. 3RD DEFENDANT – APPELLANT – RESPONDENT

09/ 10/ 18	SC /FR/ Application No 507/2012	1. H.M. Ranaweera, Hitigegama, Hatton 2. W.M. Wimalaratne, Galgodehinna, Morohenegama 3. W.G. Siriyaratne, Pitakanda, Hitigegama, Hatton 4. W.A. Shriyani, Hitigegama, Hatton 5. P.W.G.S. Sunil Jayawardana, Parathalawa, Polpitiya, Pitawala Petitioners Vs, 1. S. M. Gotabhaya Jayaratna, Secretary, Ministry of Education, “Isurupaya” Pellawatte, Battaramulla. 1A. W.M. Bandusena, Secretary, Ministry of Education “Isurupaya” Pellawatte, Battaramulla. 1B. Mr. Sunil Hettiarachchi, Secretary, Ministry of Education, “Isurupaya” Pellawatte, Battaramulla. 2. M. Premawansa, Secretary, Provincial Ministry of Education, Central Provincial Council, Kandy. 3. Principal, Madeniya Maha Vidyalaya, Hitigegama, Hatton. 4. Divisional Secretary, Ambagamuwa Divisional Secretariat Division, Divisional Secretariat Office, Ginigathhena. 5. S.U. Wijeratne, Additional Secretary (Planning) Ministry of Education, “Isurupaya” Pellawatte, Battaramulla. 6. Mr. Milton Premasiri, Principal, Sir Nissankamalla Maha Vidyalaya, Hitigegama, Hatton. 7. R.S. Senaratne, Divisional Director of Education, Ambagamuwa Division, Divisional Education Office, Ginigathhena, Hatton. 7A. P.B. Wijerathne, Divisional Director of Education, Ambagamuwa Division, Divisional Education Office, Ginigathhena, Hatton. 8. Hon. the Attorney General, Attorney General’s Department, Colombo 12. Respondents
09/ 10/ 18	SC Appeal 202/2015	Wickrama Arachchi Kolambage Sanjeewa Kumara C/O D.M. Herath Banda, Thenthankuriyawa, Anamaduwa. Applicant Vs, K.A. Nandana Kuruppu, Nandana Brothers, No. 124/15, I.D.H. Mawatha, Puttalam. Respondent And K.A. Nandana Kuruppu, Nandana Brothers, No. 124/15, I.D.H. Mawatha, Puttalam. Respondent -Appellant Vs, Wickrama Arachchi Kolambage Sanjeewa Kumara C/O D.M. Herath Banda, Thenthankuriyawa, Anamaduwa. Applicant-Respondent And now between Wickrama Arachchi Kolambage Sanjeewa Kumara C/O D.M. Herath Banda, Thenthankuriyawa, Anamaduwa. Applicant-Respondent-Appellant Vs, K.A. Nandana Kuruppu, Nandana Brothers, No. 124/15, I.D.H. Mawatha, Puttalam. Respondent-Appellant- Respondent
09/ 10/ 18	SC APPEAL 89/2010	Seyyadu Mohommaduge Razik, Gallenbindunuwewa, Horowpotana. Plaintiff Vs 1. Suleiman Adam Kandu, Kivul Kade, Horowpathana. 2. Abdul Hameed Mahamad Mihilar, Fancy Textiles, Mahaveediya, Horowpathana. Defendants AND THEN Seyyadu Mohommaduge Razik, Gallenbindunuwewa, Horowpotana. Plaintiff Appellant Vs 1. Suleiman Adam Kandu, Kivul Kade, Horowpathana. 2. Abdul Hameed Mahamad Mihilar, Fancy Textiles, Mahaveediya, Horowpathana. Defendant Respondent AND NOW BETWEEN Seyyadu Mohommaduge Razik, Gallenbindunuwewa, Horowpotana. Plaintiff Appellant Appellant Vs 1. Suleiman Adam Kandu, Kivul Kade, Horowpathana. 2. Abdul Hameed Mahamad Mihilar, Fancy Textiles, Mahaveediya, Horowpathana. Defendant Respondent Respondent

07/ 10/ 18	SC Appeal No : 159/2010	Anuradhapura Nandawimala Thero, Viharadhipathi, Dolukanda Rankothhena Aranya Senasasanaya, Wedeniya, Hunupola, Nikadalupotha Defendant-Petitioner– Appellant -Vs- R M Dharamatissa Herath Hunupola, Nikadalupotha Plaintiff-Respondent- Respondent
07/ 10/ 18	SC FR No. 859/2009	W.N.D. Gunasekara 378/10/B, Rathnarama Road, Hokandara – North, Hokandara. Petitioner -Vs- 1. Police Constable Chandana (PC 25410) Grandpass Police Station, Grandpass 2. Anton Jayasinghe, Police Transport Division, Sub Garage, Kundasale. 3. N.K.Illangakoon Inspector General of Police Police Headquarters, Colombo 01 4. Hon. Attorney General Attorney General's Department Colombo 12 Respondents
04/ 10/ 18	SC APPEAL 213/2012	Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama Plaintiff Vs Jayasooriya Arachchi Patabendige Wijeratne No. 203, Tangalle Road, Hungama. Defendant AND THEN BETWEEN Jayasooriya Arachchi Patabendige Wijeratne No. 203, Tangalle Road, Hungama. Defendant Appellant Vs Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama Plaintiff Respondent AND NOW BETWEEN Jayasooriya Arachchi Patabendige Wijeratne No. 203, Tangalle Road, Hungama. Defendant Appellant Appellant Vs Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama. Plaintiff Respondent Respondent
04/ 10/ 18	SC APPEAL 147/2015	SMB Leasing PLC, (Previously Seylan Merchant Bank Ltd.) No. 110, D.S.Senanayake Mawatha, Colombo 08 Plaintiff Vs 1. Hewapathiranage Don Cletus Jeyrad Senanayake, No. 40, Epitamulla Road, Pitakotte. 2. Oliver Bennete Jayanethi, No. BIR/ 3/9, Manning Town Housing Scheme, Colombo 08. 3. Solanga Arachchige Vindya Perera, No. 299, A, Kotte Road, Nugegoda. And also of No. 40, Epitamulla Road, Pitakotte. And at the Business address: No. 62, 1/1, Park Street, Colombo 02. Defendants AND THEN BETWEEN SMB Leasing PLC, (Previously Seylan Merchant Bank Ltd.) No. 110, D.S.Senanayake Mawatha, Colombo 08 Plaintiff Judgment Creditor Vs Solanga Arachchige Vindya Perera, No. 299, A, Kotte Road, Nugegoda. And also of No. 40, Epitamulla Road, Pitakotte. And at the Business address: No. 62, 1/1, Park Street, Colombo 02. 3rd Defendant Judgment Debtor AND NOW BETWEEN SMB Leasing PLC, (Previously Seylan Merchant Bank Ltd.) No. 110, D.S.Senanayake Mawatha, Colombo 08 Plaintiff Judgment Creditor Appellant Vs Solanga Arachchige Vindya Perera, No. 299, A, Kotte Road, Nugegoda. And also of No. 42, Epitamulla Road, Pitakotte. And at the Business address: No. 62, 1/1, Park Street, Colombo 02. 3rd Defendant Judgment Debtor Respondent

03/ 10/ 18	SC.SPL. LA NO.160/2018	S.P. Morawaka Liquidator, Janatha Fertilizer Enterprise Limited, 19, Dhawalasingharama Mawatha, Colombo 15. Petitioner Vs. 1. Commissioner General of Labour, Department of Labour, Labour Secretariat, Colombo 5. 2. Assistant Commissioner of Labour (Colombo North), District Labour Office, 4th Floor, Labour Secretariat, Department of Labour, Colombo 5. 3 Labour Officer, District Labour Office, Department of Labour, Anuradhapura. 4. Assistant Commissioner of Labour, District Labour Office, Anuradhapura. 5. D.K. Wijesundara, No.741/3, Freeman Mawatha, Anuradhapura. 6. Assistant Secretary (Admission), Ministry of Agriculture, “Govijana Mandiraya”, Battaramulla. Respondents AND NOW BETWEEN D.K. Wijesundara, No.741/3, Freeman Mawatha, Anuradhapura. 5th Respondent-Petitioner Vs. S.P. Morawaka Liquidator, Janatha Fertilizer Enterprise Limited, 19, Dhawalasingharama Mawatha, Colombo 15. Petitioner-Respondent 1. Commissioner General of Labour, Department of Labour, Labour Secretariat, Colombo 5. 2. Assistant Commissioner of Labour (Colombo North), District Labour Office, 4th Floor Labour Secretariat, Department of Labour, Colombo 5. 3. Labour Officer, District Labour Office, Department of Labour, Anuradhapura. 4. Assistant Commissioner of Labour, District Labour Office, Anuradhapura. 5. Assistant Secretary (Admission), Ministry of Agriculture, “Govijana Mandiraya”, Battaramulla. 1st, 2nd , 3rd, 4th and 6th Respondents-Respondents
01/ 10/ 18	S.C.Appeal No.54A/2008	CHAMINDA ABEYKOON No. 52, Rockhouse Lane, Modera, Colombo-15 PLAINTIFF VS. H. CARALAIN PIERIS No.34/3/E, Ellie House Road, Modera, Colombo 15. DEFENDANT AND H. CARALAIN PIERIS (deceased) DEFENDANT- APPELLANT P. NICHOLAS ANTHONY FERNANDO No.34/3/E, Ellie House Road, Modera, Colombo 15. SUBSTITUTED DEFENDANT-APPELLANT VS. CHAMINDA ABEYKOON No. 52, Rockhouse Lane, Modera, Colombo-15. PLAINTIFF-RESPONDENT AND NOW BETWEEN CHAMINDA ABEYKOON No. 52, Rockhouse Lane, Modera, Colombo-15. PLAINTIFF- RESPONDENT-PETITIONER VS. P. NICHOLAS ANTHONY FERNANDO No.34/3/E, Ellie House Road, Modera, Colombo 15. SUBSTITUTED DEFENDANT- APPELLANT 1) EVONNE KUMARI FERNANDO 2) ANURUDDHIKA ROSHINI FERNANDO 3) DISNA RANJANI FERNANDO 4) DILIP FERNANDO All of 34/3E, Mowbray Lane, Colombo 15. SUBSTITUTED DEFENDANTS- APPELLANTS-RESPONDENTS

27/ 09/ 18	SC APPEAL 183/ 2016	HallewaMudiyanselage Mangalika Jayasinghe, No. 161/2, “Sanka”, Indolamulla, Dompe. Plaintiff Vs Nanayakkarawasam Gamgodage SunethraUdeniBandara Jayasinghe, No. 237/E, Weddagala, Thiththapaththara. Defendant AND BETWEEN HallewaMudiyanselage Mangalika Jayasinghe, No. 161/2, “Sanka”, Indolamulla, Dompe. Plaintiff Appellant Vs Nanayakkarawasam Gamgodage Sunethra UdeniBandara Jayasinghe, No. 237/E, Weddagala, Thiththapaththara. Defendant Respondent AND NOW BETWEEN HallewaMudiyanselage Mangalika Jayasinghe, No. 161/2, “Sanka”, Indolamulla, Dompe. Plaintiff AppellantAppellant Vs Nanayakkarawasam Gamgodage Sunethra UdeniBandara Jayasinghe, No. 237/E, Weddagala, Thiththapaththara. Defendant Respondent Respondent
27/ 09/ 18	SC FR Application 290/2014	1. JPC Trade Company Ltd East Lower Block World Trade Centre, Colombo 01 2. R. Lahiru Rakshitha, Country Manager, JPC Trade Company Ltd East Lower Block World Trade Centre, Colombo 01 Petitioners Vs, 1. Mr. Jagath P. Wijeweera, Director General of Customs, Sri Lanka Customs, No. 40, Main Street, Colombo 11. 1(a).Mr. Chulananda Perera, Director General of Customs, Sri Lanka Customs, No. 40, Main Street, Colombo 11. 1(b).Mrs. P.S.M. Charles, Director General of Customs, Sri Lanka Customs, No. 40, Main Street, Colombo 11. 2. Mr. M. Paskaran, Director of Customs (Social Protection Directorate) Sri Lanka Customs, No. 40, Main Street, Colombo 11. 2(a). Mr. Athula Lankadewa, Director of Customs (Social Protection Directorate) Sri Lanka Customs, No. 40, Main Street, Colombo 11. 3. Mr. P. Gallage, Superintendent of Customs, Sri Lanka Customs, No. 40, Main Street, Colombo 11. 4. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

20/ 09/ 18	S.C. Appeal No. 184/2017	DHILMI KASUNDA MALSHANI SURIYARACHCHI No. 42/3, Thambwiliwatha Road, Piliyandala. PETITIONER VS. 1. SRI LANKA MEDICAL COUNCIL No. 31, Norris Canal Road, Colombo 10. 2. SOUTH ASIAN INSTITUTE OF TECHNOLOGY AND MEDICINE LIMTED No. 60, Suhada Mawatha, Millenium Drive, Off Chandrika Bandaranaike Kumaratunga Mawatha, Malabe. Colombo. 3. LAKSHMAN KIRIELLA Minister of Higher Education and Highways, Ministry of Higher Education and Highways, Ward Place, Colombo 7. 4. THE SECRETARY, MINISTRY OF EDUCATION AND HIGHWAYS Ministry of Higher Education and Highways, Ward Place, Colombo 7. 5. THE UNIVERSITY GRANTS COMMISSION No. 20, Ward Place, Colombo 7. 6. DR. RAJITHA SENARATNE Minister of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, No. 385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 10. RESPONDENTS AND NOW BETWEEN SRI LANKA MEDICAL COUNCIL No. 31, Norris Canal Road, Colombo 10. 1ST RESPONDENT- PETITIONER/ APPELLANT VS. DHILMI KASUNDA MALSHANI SURIYARACHCHI No. 42/3, Thambwiliwatha Road, Piliyandala. PETITIONER-RESPONDENT 2. SOUTH ASIAN INSTITUTE OF TECHNOLOGY AND MEDICINE LIMTED No. 60, Suhada Mawatha, Millenium Drive, Off Chandrika Bandaranaike Kumaratunga Mawatha, Malabe. Colombo. 3. LAKSHMAN KIRIELLA Minister of Higher Education and Highways, Ministry of Higher Education and Highways, Ward Place, Colombo 7. 4. THE SECRETARY, MINISTRY OF EDUCATION AND HIGHWAYS Ministry of Higher Education and Highways, Ward Place, Colombo 7. 5. THE UNIVERSITY GRANTS COMMISSION No. 20, Ward Place, Colombo 7. 6. DR. RAJITHA SENARATNE Minister of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, No. 385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 2ND TO 6TH RESPONDENTS-RESPONDENTS 7. THE GOVERNMENT MEDICAL OFFICERS' ASSOCIAITON No. 275/75, Prof. Stanley Wijesundera Mawatha, Colombo 7. INTERVENIENT PETITIONER- RESPONDENT
17/ 09/ 18	S.C. Appeal 73/2015	Democratic Socialist Republic of Sri Lanka. Complainant Vs. Dissanayake Mudiyanselage Jayasiri Accused And Now Dissanayake Mudiyanselage Jayasiri Accused-Appellant Vs. The Hon. Attorney-General Attorney General's Department Colombo 12. Respondent And now Between Dissanayake Mudiyanselage Jayasiri Presently at Bogambara Prison, Kandy. Accused-Appellant-Petitioner Vs. The Hon. Attorney-General Attorney General's Department Colombo 12. Complainant-Respondend-Respondent

16/09/18	SC APPEAL 11/2014	1. Ibrahimkandu Sithy Latheefa 2. Aboobucker Jamaliya Thumma Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai. Plaintiffs Vs 1. Kalimuttu Valliammai (deceased) 2. Muttuvel Kamaladevi alias Pooranam, 3. Patrick Vincent alias Anton 4. Muttuvel Thaneledchumi All of Valluver Road, Pandirippu-1 Kalmunai. Defendants AND THEN BETWEEN 1. Muttuvel Kamaladevi alias Pooranam, 2. Patrick Vincent alias Anton 3. Muttuvel Thaneledchumi All of Valluver Road, Pandirippu-1 Kalmunai Defendant Appellants Vs 1. Ibrahimkandu Sithy Latheefa 2. Aboobucker Jamaliya Thumma Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai. Plaintiff Respondents AND NOW BETWEEN 1.Muttuvel Kamaladevi alias Pooranam, 2.Patrick Vincent alias Anton 3.Muttuvel Thaneledchumi All of Valluver Road, Pandirippu-1 Kalmunai Defendant Appellant Appellants Vs 1.Ibrahimkandu Sithy Latheefa 2.Aboobucker Jamaliya Thumma Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai. Plaintiff Respondent Respondents
11/09/18	SC Appeal 1/2014	Samarasinghe Gamage Janaka Manjula No.180A, Yaya 08, Ambagaswewa, Medirigiriya. Appearing by his Next Friend. Disabled Plaintiff-Respondent-Petitioner Jamburegoda Gamage Thakshala No.180A, Yaya 08, Ambagaswewa, Medirigiriya. (Duly appointed Next Friend in D.C. Polonnaruwa Case No.N.L.F. 11/06) Plaintiff-Respondent-Petitioner-Appellant Vs. 1. Meegaskumbure Gedera Susantha Piyatissa No. 154, Yaya 09, Maha Ambagaswewa, Medirigiriya. 2. Wasalathanthrige Don Chandana No.156, Yaya 09, Maha Ambagaswewa, Medirigiriya. 3. Meegaskumbure Gedera Samantha Piyatissa No.159, Yaya 09, Maha Ambagaswewa, Medirigiriya. 4. Werallagolle Gedera Wasantha Sarath Kumara, No. 154, Yaya 09, Maha Ambagaswewa, Medirigiriya. 5. Hewa Manage Chaminda Ruwan Kumara No. 154, Yaya 09, Maha Ambagaswewa, Medirigiriya. Defendant-Appellant-Respondent-Respondents

09/09/18	SC/CHC/Appeal/30/2006	1. C. Aloy W. Fernando, No. 43/99, Poorwarama Mawatha, Colombo 5 Plaintiff - Vs - 1. Anton Reginald Atapattu, Director, Department of Fisheries and Aquatic Resources, Maligawatta Secretariat, Colombo 10. 2. M.T.K. Nagodawithana, Acting Director, Department of Fisheries and Aquatic Resources, Maligawatta Secretariat, Colombo 10 3. Hon. Mahinda Rajapakse, Minister of Fisheries and Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10 4. Attorney General, Attorney General's Department, Colombo 12. Defendants AND NOW 2. M.T.K. Nagodawithana, Acting Director, Department of Fisheries and Aquatic Resources, Maligawatta Secretariat, Colombo 10 2nd Defendant-Appellant 2A. Mr. S. W. Pathirana, Director General, Department of Fisheries and Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10 Substituted 2A Defendant-Appellant 2B. Mr. Nimal Hettiarachchi, Director General, Department of Fisheries and Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10 Substituted 2B Defendant-Appellant 2C. Mr. M. Cristy Lal Fernando, Department of Fisheries & Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10 Substituted 2C Defendant-Appellant - Vs - C. Aloy W. Fernando No. 43/99, Poorwarama Mawatha, Colombo 05 Plaintiff-Respondent 1. Anton Reginald Atapattu, Director, Department of Fisheries and Aquatic Resources, Maligawatta Secretariat, Colombo 10. 1st Defendant-Respondent (Deceased) 3. Hon. Mahinda Rajapakse, Minister of Fisheries & Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10. 3rd Defendant-Respondent 3A. Felix Perera, Minister of Fisheries & Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10. Substituted 3A Defendant-Respondent 3A. Hon. Mahinda Amaraweera, Minister of Fisheries & Aquatic Resources, New Secretariat Building, Maligawatta, Colombo 10 Substituted 3B Defendant-Respondent 4. Hon. Attorney General, Attorney General's Department, Colombo 12. 4th Defendant-Respondent

06/ 09/ 18	SC/HC/CA/ LA No. 134/2016	1. Nawinna Kottage Dona Lalitha Padmini 2. Wellalagodage Ganga Geeth Kumara Both of No. F41, Bandaranaikapura, Rajagiriya. Plaintiffs -Vs- 1. N.K.D. Pradeepa Nishanthi Kumari No. F43, Bandaranaikapura, Rajagiriya. 2. Dammika Weerakoon, No. F43, Bandaranaikapura, Rajagiriya. 3. National Housing Development Authority Chittampalam A. Gardiner Mawatha, Colombo 02. Defendants Between 1. N.K.D. Pradeepa Nishanthi Kumari No. F43, Bandaranaikapura, Rajagiriya. 2. Dammika Weerakoon, No. F43, Bandaranaikapura, Rajagiriya. Defendant – Appellants -Vs- 1. Nawinna Kottage Dona Lalitha Padmini 2. Wellalagodage Ganga Geeth Kumara Both of No. F41, Bandaranaikapura, Rajagiriya. Plaintiff – Respondents 3. National Housing Development Authority Chittampalam A. Gardiner Mawatha, Colombo 02. 3rd Defendant – Respondent And Now Between 1. Nawinna Kottage Dona Lalitha Padmini 2. Wellalagodage Ganga Geeth Kumara Both of No. F41, Bandaranaikapura, Rajagiriya. Plaintiff – Respondent – Petitioners -Vs- 1. N.K.D. Pradeepa Nishanthi Kumari No. F43, Bandaranaikapura, Rajagiriya. 2. Dammika Weerakoon, No. F43, Bandaranaikapura, Rajagiriya. Defendant – Appellant – Respondents
06/ 09/ 18	S.C.F.R. Application 338/2012	K.W.S.P. JAYAWARDHANA No. 2b 9/R.N.H.S, Raddolugama. AND 24 OTHERS. PETITIONERS VS. 1. GOTABHAYA JAYARATNE Secretary, Ministry of Education, Isurupaya, Battaramulla, as at July 2012 and his successor, D.M.A.R.B. DISSANAYAKE, as at September 2013, 2. DR. DAYASIRI FERNANDO Chairman, Public Service Commission. AND 8 OTHER MEMBERS OF THE PUBLIC SERVICE COMMISSION AS AT JULY 2012. 11. HON. D.M.JAYARATNE Hon. Prime Minister, Colombo. AND 59 OTHER MEMBERS OF THE CABINET OF MINISTERS AS AT JULY 2012. 71. HON. ATTORNEY GENERAL Attorney General’s Department, Colombo. RESPONDENTS 1A. W.M.BANDUSENA Secretary, Ministry of Education, Isurupaya, Battaramulla. 1B. SUNIL HETTIARACHCHI Secretary, Ministry of Education, Isurupaya, Battaramulla. 2A. DHARMASENA DISSANAYAKE Chairman, Public Service Commission. , AND 8 OTHER MEMBERS OF THE PUBLIC SERVICE COMMISSION AS AT NOVEMBER 2015. 11A. HON. RANIL WICKREMASINGHE Hon. Prime Minister, Colombo. AND 39 OTHER MEMBERS OF THE CABINET OF MINISTERS AS AT MAY 2015. 11A. HON. RANIL WICKREMASINGHE Hon. Prime Minister, Colombo. AND 45 OTHER MEMBERS OF THE CABINET OF MINISTERS AS AT OCTOBER 2015. ADDED RESPONDENTS 158A. P.V.WICKREMASINGHE No. 146, Welioyagammana Road, Lolugasweva Road, Galnewa. AND 141 OTHERS INTERVENIENT PETITIONERS - ADDED RESPONDENTS

05/ 09/ 18	SC /FR/ Application No 84/2017	1. Hadunnethige Amitha Saman Yuneka 2. Adhikari Dissanayakalage Sumedha Mahesh Jayarathne Both of, No. 57/108, 2nd Lane, Vidyala Mawatha, Avissawella. Petitioners Vs, 1. B.A. Abeyrathne, Principal, Royal College, Colombo. 2. L.W.K. Silva 3. R.M.I.P. Karunaratne 4. L.K. Jayathilake 5. A.G.P.A. Gunawansa 6. T.Tennakoon All members of Interview Board for Grade One Admission 2017, Royal College, Colombo. 7. A.G.N. Jayasekara 8. G.V. Jayasuriya 9. R.M. Ratnayake 10. M.H. Sunny 11. U. Malalasekara 12. Inoka Gunn All members of Appeal Board for Grade One Admission 2017, Royal College, Colombo. 13. P.N. Illapperuma, Director, National Schools, Department of Education, Ministry of Education, 'Isurupaya' Pelawatte, Battaramulla. 14. Sunil Hettiarachchi, Secretary, Ministry of Education, 'Isurupaya' Pelawatte, Battaramulla. 15. Hon. Akila Viraj Kariyawasam, Minister of Education, Ministry of Education, 'Isurupaya' Pelawatte, Battaramulla. 16. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
05/ 09/ 18	SC FR Application 365/2012	1. Talpe Merenchige Eeasha Nanayakkara, No.139/7A, Akuregoda Road, Pelawatta, Battaramulla. Petitioner Vs, 1. Sathya Hettige, Chairman 1A. Darmasena Dissanayaka, Chairman 2. Kanthi Wijetunga Member 2A. A. Salam Abdul Waid, Member 3. S.C. Mannapperuma, Member 3A. D. Shirantha Wijayatilaka, Member 4. Ananda Seneviratne, Member 4A. Prathap Ramanujam, Member 5. N.H. Pathirana, Member 5A. V. Jegarasasingam, Member 6. S. Thillai Nadarajah, Member 6A. Santi Nihal Seneviratne, Member 7. Sunil S. Sirisena, Member 7A. S. Ranugge, Member 8. A. Mohamed Nahiya Member 8A. D.L. Mendis, Member 9. I.M. Zoysa GUnsekara, Member 9A. Sarath Jayathilaka, Member 10. T.M.L.C. Senaratne, Secretary 1st to 10th Respondents all of: The Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05 11. M.I.M. Rafeek, Secretary to the Ministry of Tourism and Sports, No. 09, Pilip Gunawardena Mawatha, Colombo 07 Also: The Acting Director General of the Department of Wildlife Conservation, No. 811/A, Jayanthipura Road, Battaramulla. 11A. R.M. D.B. Meegasmulla, Secretary, Ministry of Sustainable Development and Wildlife, 9th Floor, Sethsiripaya (Old Building), Battaramullla. 11B. Dr. Sumith Pilapitiya, Director General of Wildlife Conservation, No. 811/A, Jayanthipura Road, Battaramulla. 12. The Secretary, The Ministry of Public Administration, Independence Square, Colombo 07. 13. Director Establishments, The Ministry of Public Administration, Independence Square, Colombo 07. 14. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
05/ 09/ 18	SC APPEAL 252-2014	

04/ 09/ 18	S.C. (F.R) Application. No. 191/17	1. Rohini Manel Hettiarachchi Parathalakanda, Erathne. 2. Walimuni Senaratne Mendis, 5th Post, Batathota, Kuruwita. PETITIONERS Vs. 1. Central Environmental Authority, No. 104, ParisaraPiyasa, DenzilKobbekaduwa Mawatha, Battaramulla. 2. Sri Lanka Sustainable Energy Authority, 3G-174 A, BMICH, Bauddhaloka Mawatha, Colombo 07. 3. Mr. Anura Satharasinghe, Conservator General of Forest, Department of Forest, Rajamalwatta Road, Battaramulla. 4. A.S.J. Godellawatta, Former Divisional Secretary of Kuruwita, Presently at Provincial Commissioner of land, Sabaragamuwa Provincial Council, New town, Ratnapura. 5. Mr. Sunil Kannangara, (Former District Secretary o Ratnapura), Currently, District Secretary of Colombo, District Secretariat, Thimbirigasyaya. 6. Hon. Attorney General, (To represent His Excellency Hon. Maithripala Sirisena, Minister of Environment) Attorney General's Department, Colombo 12. 7. Kuruganga Hydro (Pvt) Ltd, No. 27-02, East Tower, World Trade Centre, Echelon Square, Colombo 01. 8. Mrs. MalaniLokupathagama, District Secretary, Ratnapura. 9. Mrs. Dilini Dharmadasa, Divisional Secretary of Kuruwita, Divisional Secretariat, Kuruwita. 10. Hon. Attorney General, Attorney General's Department, Colombo12. RESPONDENTS

04/09/18	SC Appeal 76/2010	IN THE DISTRICT COURT OF KANDY Rev. Galboda Sumangala Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, Kandy) Plaintiff Vs. Rev. Welihelathenne Somaloka Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, (Kandy) Substituted Plaintiff Vs. 1. ChandasekeraWasala Mudiyanselage George Chandrasekera of 8/4 Mawilmada, Kandy. 2. ChandasekeraWasala Mudiyanselage Anuradha Chandrasekera, alias, Arty Chandrasekera of No.82, 1st Lane, Mawilmada, Kandy. 3. Rev. Arambegama Saranankara Thero of Keda Pansala ,Asgiri Viharaya,Kandy. Defendants. _____ AND BETWEEN IN THE HIGH COURT OF Central PROVINCE 1. ChandasekeraWasala Mudiyanselage George Chandrasekera of 8/4 Mawilmada, Kandy. 2. ChandasekeraWasala Mudiyanselage Anuradha Chandrasekera, alias, Arty Chandrasekera of No.82, 1st Lane, Mawilmada, Kandy. 3. Rev. Arambegama Saranankara Thero of Keda Pansala ,Asgiri Viharaya,Kandy. Defendants-Appellants Vs. Rev. Welihelathenne Somaloka Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, (Kandy) Substituted Plaintiff-Respondent _____ AND NOW BETWEEN, IN THE SUPREME COURT IN AN APPEAL (DECEASED) 1.ChandasekeraWasala Mudiyanselage George Chandrasekera of 8/4 Mawilmada, Kandy. 1A Herath Mudiyanselage Walgampahe Gedera Podi Menike of No.8/4, Aluthgantota Road, Mawilmada, Kandy. (1A substituted Defendant Appellant Petitioner) 2. ChandasekeraWasala Mudiyanselage Anuradha Chandrasekera, alias, Arty Chandrasekera of No.82, 1st Lane, Mawilmada, Kandy. 3. Rev. Arambegama Saranankara Thero of Keda Pansala Asgiri Viharaya,Kandy. Defendant-Appellant-Petitioners Vs. Rev. Welihelathenne Somaloka Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, (Kandy) Substituted-Plaintiff-Respondent- Respondent

30/ 08/ 18	SC Appeal No. 177/2015	Rajeswari Nadaraja, 6/1, Frankfurt Place, Colombo 4. Petitioner-Petitioner -Vs- 1 (a) Hon. M. Najeeb Abdul Majeed 1 (b) Hon. Johnston Fernando 1c) Hon. Bandula Gunawardena 1(d)Hon.Gamini Jayawickrema Perera 1 (e) Hon. Rishard Badurdeen Minister of Industry and Commerce and Co-operatives Development, No. 73/1, Galle Road, Colombo 03. 2. Hon. Mahipala Herath Provincial Chief Minister, Provincial Minister of Law & Peace, Finance & Planning, Local Government, Education & Technology, Estate Welfare, Public Transport Co-Operative Development, Housing, Sports, Electricity, Cultural and Youth Affairs Sabaragamuwa Provincial Council, Secretaries Complex, New Town, Ratnapura. 3 (a) Mr. A.P.G. Kitsiri 3 (b) Mr. D.D. Upul Shantha de Alwis 3 (c) Mr. Dhammika Rajapaksa 3 (d) Mr. D. Jeewanadan Commissioner of Cooperative Development/ Registrar of Cooperative Societies No. 330, Union Place, Colombo 02. 4. Mr. Kapila Perera 4 (a) Palitha Nanayakkara Commissioner of Cooperative Development/Registrar of Cooperative Societies of Sabaragamuwa Province New Town, Ratnapura. 5.Yatiyanthota Multipurpose Cooperative Societies Limited, Main street, Yatiyanthota.
02/ 08/ 18	SC Appeal 163/2014	Ponnadura Shantha Silva Ridee Mawatha, Kalamula Kalutara. Accused-Appellant Vs. 1. Officer-In-Charge, Police Station, Kalutara South. 2. The Attorney General Attorney General's Department, Colombo 12. Complainant-Respondents And Now Between Ponnadura Shantha Silva Ridee Mawatha, Kalamulla Kalutara. (Presently in Kalutara Prison) Accused-Appellant-Petitioner Vs. 1. Officer-In-Charge, Police Station, Kalutara South. 2. The Attorney General Attorney General's Department, Colombo 12. Complainant-Respondent- Respondents

		Ileperuma Arachchige Edwin Perera Gunathilaka, Galapatha, Bahurupola. Plaintiff K.M. Perera, 111C, Wewalduwa Road, Dalugama, Kelaniya. Substituted Plaintiff Vs 1. Dona Yasawathie Weerakkodi of Karannagoda (Deceased) 1A. Nimal Lakshman Kannangara of Karannagoda. 2. Terlin Lenora Hamine of Doodangoda 3. Shanthilatha Waidyasekara of Karannagoda. 4. Dona Matilda Jayasundera 5. Agnas Edussuriya 6. Kusuma Edussuriya 7. Chandra Edussuriya 8. Richard Edussuriya 9. Gilbert Edussuriya 10. Hilton Edussuriya 11. Grasilda Edussuriya All of Galpatha, Bahurupola. 12. Don Babunsinghe Kadanarachchi Of Kandana, Horana. 13. Don Lisi Perera Gunathilaka (Deceased) 13A. M.A.D.Chandrarathne of Kalutara, Ukwatte. 14. Poththapitiyage Thilonona 15. Poththapitiyage Dhopi Nona All of Aluthgama, Bandaragama 16. Yakupitiyage Alonoa of Palpola 17. Thomas Athulathmudali of Galpatha. 18. Y.M.B.Ratnayake of Bahurupola, Galpatha. (Deceased) 19. Aslin Perera Ileperuma of Galpatha. 20. Dayawathie Abeysekera of Athurugiriya 21. Dona M. Jayawardhane of 112, Gresland Road, Havelock Town. 22. Titus Jayawardhane of 112, Gresland Road, Havelock Town. 23. M.B.Gunawardhane of 151,Old Road, Kalutara. 24. D.A.Ranasinghe of Iduruwa (Deceased) 24A. Thilaka Ranasinghe of Iduruwa. 25. Torrington Jayawardhane of Kosgoda. 26. Biatris Jayawardhane of Kuruwita Kotuwa, Veyangoda. 27. Ianis Perera of Panagoda, Galpatha. (Deceased) 27A. M.A. Sardharatne of Galpatha 28. Kopiyawaththe Podinona of Bahurupola (Deceased) 28A. K.P.Peris Singho of Bahurupola 29. Robert of Kopiyawastte (Deceased) 29A. Felix Singho of Kivitiyagala, Bahurupola 30. Edussuriyage Anis Perera (Deceased) 30A. K. Thisahami of Bahurupola 31. Kopiyawattage David Perera of (Bahurupola) (Deceased) 31A. Kevitiyagela Withanage Felix Singho, 32. Kopiyawattage Peatin of Bahurupola (Deceased) 32A. Kopiyawattage Haramanis Perera of Bahurupola 33. Poththapitiyage William of Bahurupola 34. Poththapitiyage Daisanona of Bahurupola 35. Poththapitiyage Kalo Nona of Bahurupol 36. Pindo Nona of Bahurupola 37. Lionel Senevirathne of Ayagama, Horana 38. D.L.Rajapakshe of Urbun Side, Dehiwala 39. Karalina Perera Ileperuma (Deceased) 39A. Kularathne of Ihala Warakagoda, Warakagoda. 40. Sunil Perera of Ileperuma 41. Wilfred Perera of Galpatha 42. Kopiyawatte Wisimano of Bahurupola 43. Edussuriyage Romiel of Bahurupola 44. Kongaha Kankanamge Nimalhami (Deceased) 45. Edussuriyage Aginona of Galpatha 46. K. M. Perera of Galpatha. 47. D.Edwin Edussuriya of Bahurupola 48. K. Albic Perera of Bahurupola (Deceased) 49. E.P.Emosingho of Bahurupola 50. Kongahakankanamalage Somawathie of Galpatha. 51. Poththapitiyage Aslin Nona of Galpatha. 52. Poththapitiyage Kevich Nona of Koholana. 53. Edussuriyage Rosalin of Bahurupola. 54. Ileperuma Acharige Edwin Perera Gunathilake Of Galpatha, Bahurupola. Defendants AND BETWEEN 8. Richard Alfred Edussuriya of Galpatha Bahurupola. 8th Defendant Appellant Vs Ileperuma Arachchige Edwin Perera Gunathilaka, Galapatha, Bahurupola. Plaintiff Respondent 1. Dona Yasawathie Weerakkodi of Karannagoda

02/ 08/ 18	SC APPEAL No. 41/ 2008	Vithanage Richard Perera, No. 268, Rathnarama Road, Hokandara North, Hokandara. Plaintiff Vs 1. M.P.Perera, 202/1, Hokandara North, Hokandara. (Deceased) 1A. T.Ariyawathie, 199/2, Kahantota Road, Malabe. 2. H. Nandawathie, 199/1, Kahantota Road, Malabe. 3. Meemanage Gunadasa Perera 191/1, Hokandara North, Hokandara. 4. H.E.Caldra, 229, Kanatte Road, Malabe. (Deceased) 4A. H. Sunil Caldera, 229, Kanatte Road, Malabe. Defendants AND BETWEEN 3. Meemanage Gunadasa Perera, 191/1, Hokandara North, Hokandara. 4A. H. Sunil Caldera,229,Kanatta Road, Malabe. Defendant Appellants Vs Vithanage Richard Perera, No. 268, Rathnarama Road, Hokandara North, Hokandara. Plaintiff Respondent 1A. T.Ariyawathie, 199/2, Kahantota Road, Malabe. 2. H. Nandawathie, 199/1, Kahantota Road, Malabe. Defendant Respondents AND NOW BETWEEN Vithanage Richard Perera, No. 268, Rathnarama Road, Hokandara North, Hokandara. (Deceased) Perumbulli Achchige Sopihamy, No. 268, Rathnarama Road, Hokandara North, Hokandara. Substituted Plaintiff Respondent Appellant Vs 3. Meemanagamage Gunadasa Perera, 191/1, Hokandara North, Hokandara. 4A. H. Sunil Caldera,229,Kanatta Road, Malabe. Defendant Appellant Respondents 1A. T.Ariyawathie, 199/2, Kahantota Road, Malabe. 2. H. Nandawathie, 199/1, Kahantota Road, Malabe. Defendant Respondent Respondents
30/ 07/ 18	SC APPEAL No. 132/2009	Sithamparapillai Kathieravelu, No. 217, Station Road, Vairavapuliyankulam, Vavunia. Plaintiff. Vs 1. Ramasamy Gowrinathan, No. 193, Station Road, Vavuniya. 2. Periyathamby Sivasothinathan Station Road, Vavuniya. Defendants. AND THEN BETWEEN Siethamparapzillai Kathieravealu, No. 217, Station Road, Vairavapuliyankulam, Vavunia. Plaintiff Appellant Vs 1. Ramasamy Gowrinathan, No. 193, Station Road, Vavuniya. 2. Periyathamby Sivasothinathan Station Road, Vavuniya. Defendant Respondents AND NOW BETWEEN Siethamparapzillai Kathieravealu, No. 217, Station Road, Vairavapuliyankulam, Vavuniya. Plaintiff Appellant Appellant Vs 1. Ramasamy Gowrinathan, No. 193, Station Road, Vavuniya. 2. Periyathamby Sivasothinathan Station Road, Vavuniya. Defendant Respondent Respondent
25/ 07/ 18	SC. FR. No. 56/2012	Suppiah Sivakumar No. 51/2, Pinnakatiya Watte, Ellepola, Senerathwela, Theldeniya. Petitioner Vs. 1. Sergeant 6934 Jayaratne, Theldeniya Police Station, Theldeniya. 2. Civil Security Constable Pathirana, 24324, Theldeniya Police Station, Theldeniya. 3. Civil Security Constable 12243 Abeyratne, Theldeniya Police Station, Theldeniya. 4. Office-in-Charge, Theldeniya Police Station, Theldeniya. 5. ASP. T.M.S.T. Tennakoon, Theldeniya Police Station, Theldeniya. 6. N. K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 7. Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. Respondents

25/ 07/ 18	SC Appeal 101/2014 SC Appeal 100/2014	D.M.B. Warnakulasooriya, No.113, Maligakanda Road, Colombo 10. Applicant Vs, Hotel Developers (Lanka) Ltd. Hilton Colombo, No.02, Chittampalam A. Gardiner Mw, P.O Box. 1000, Colombo. Respondent And between D.M.B. Warnakulasooriya, No.113, Maligakanda Road, Colombo 10. Applicant-Appellant Vs, Hotel Developers (Lanka) Ltd. Hilton Colombo, No.02, Chittampalam A. Gardiner Mw, P.O Box. 1000, Colombo. Respondent- Respondent And Now between D.M.B. Warnakulasooriya, No.113, Maligakanda Road, Colombo 10. Applicant-Appellant-Appellant Vs, Hotel Developers (Lanka) Ltd. Hilton Colombo, No.02, Chittampalam A. Gardiner Mw, P.O Box. 1000, Colombo. Respondent-Respondent-Respondent

25/ 07/ 18	SC / Writ Application No. 01/2011	Anoma S. Polwatte, No. 12, Kurunegala Road, Nugawela Petitioner Vs, 1. Ms. L. Jayawickrama, Director General, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. Mr. Ganesh R. Dharmawardena Director General, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 1st Substituted-Respondent Ms. Dilrukshi Dias Wickramasinghe, PC Director General, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 1st Substituted-Substituted-Respondent Mr. Sarath Jayamanne, PC Director General, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 1st Substituted-Substituted-Substituted- Respondent 2. Mr. J.A.S. Ravindra, Secretary, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. 4. Rtd. Justice A. Ismail, Chairman, Former Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 5. Rtd. Justice P. Edussuriya, Member, Former Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 6. Mr. T.I. De. Silva, Member, Former Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 6A. Rtd. Justice D.J.De. S. Balapatabendi, Chairman, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 6B. Rtd. Justice L.K. Wimalachandra, Member, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 6C. Jayantha Wickramaratna, Member, The Commission to Investigate Allegations of Bribery or Corruption, P.O. Box 1431, 36, Malalasekara Mawatha, Colombo 07. 7. Mr. P.B. Abeykoon, Secretary, Ministry of Public Administrations and Home Affairs, Independence Square, Colombo 07. 7A. Mr. J. Dadallage, Secretary, Ministry of Public Administrations and Home Affairs, Independence Square, Colombo 07. 7B. J. J. Rathnasiri, Secretary, Ministry of Public Administrations and Home Affairs, Independence Square, Colombo 07. 8. Mr. P.G. Amarakoon, Chief Secretary, Central Province, The Chief Secretary's Office, District Secretariat Building, Kandy. 9. Chief Secretary, Central Province, The Chief Secretary's Office, District Secretariat Building, Kandy. Respondents

23/ 07/ 18	S.C. Appeal 101/10	Inter Company Employees Union, No.470, Kandy Road, Peliyagoda, Kelaniya. (On behalf of H. D. N. S. Karunaratne) Applicant Vs. Asian Hotels Corporation Ltd. C/o Trans Asia Hotel, No.115, Sir Chittampalam. A Gardiner Mawatha, Colombo 2 Respondent and H. D. N. S. Karunaratne No.73/61, Saman Uyana Battaramulla. Applicant-Appellant Vs. Asian Hotels Corporation Ltd. C/o Trans Asia Hotel, No.115, Sir Chittampalam. A Gardiner Mawatha, Colombo 2 Respondent-Respondent AND NOW BETWEEN Asian Hotels and Properties PLC (Formerly known as Asian Hotels Corporation Ltd.) No. 77, Galle Road, Colombo 03. Respondent-Respondent-Petitioner Vs. H. D. N. S. Karunaratne No.73/61, SamanUyana Battaramulla. Applicant-Appellant-Respondent
22/ 07/ 18	SC/Appeal/ 134/12	Shirley Anthony Fernando 14A, 8th Lane, Borupana, Ratmalana Place of employment Colonne Filling Station, Galle Road, Ratmalana 4th Defendant - Appellant –Appellant Vs Hewa Narandeniyage Jinadasa No.164/D,1/2 De Zoysa Flats, Galle Road, Moratuwa Plaintiff – Respondent – Respondent 1. Paragahadurage Ratnapala 164/D, Galle Road, Angulana Moratuwa. 2. Nageshwari Thambiah 3. Rita Thambiah Both of No.2/40, Dunbrune Street, Hulsto, Poric, New South Wales, 2193, Sydney, Australia. 5. Pathirage Indika Anuradha Delwita Perera 14, 8th Cross Lane, Ratmalana Defendants – Respondents-Respondents
18/ 07/ 18	SC APPEAL No. 50/2016	Ceylon Petroleum Corporation 109, Rotunda Tower, Galle Road, Colombo 03 Presently; 609, Dr. Danister De Silva Mawatha, Colombo 09 Petitioner- Petitioner-Appellant -Vs- 1. Athauda Seneviratne Minister of Labour Relations and Manpower Minister of Labour Relations and Manpower, Labour Secretariat, Colombo 05 2. D.S Edirisinghe Commissioner of Labour Department of Labour Colombo 05 3. M. S. B. Ralapanawa Attorney – at- Law (Arbitrator) No.194SriJayawardenapura Mawatha Welikada, Rajagiriya 4. Inter Company Employees Union No.158/18, E.D Dabare Mawatha Colombo 05 5. Lanka IOC Private Ltd Trincomalee Oil Terminal Chinabay, Trincomalee 6. Hon. Attorney General Attorney General's Department Colombo 12 Respondent-Respondent-Respondents

17/ 07/ 18	S.C. F.R. No. 241/14	1. KARUWALAGASWEWA VIDANELAGE SWARNA MANJULA Tilakapura, Kalakarambewa. 2. NAWARATHNA HENALAGE ROSALIYA Tilakapura, Kalakarambewa. PETITIONERS VS. 1. C.I.V.P.J. PUSHPAKUMARA Officer-in- Charge,Police Station, Kekirawa. 2. RATNAYAKE Acting Officer-in- Charge, Police Station,Kekirawa. 3. BHODINARAYAN ACHARIGE SWARNASHEELI Kottalbadda,Kekirawa. 4. ANURA PRIYATHILAKA Kottalbadda,Kekirawa. 5. N.K. ILLANGAKOON Inspector General of Police, Police Head Quarters, Colombo 01. 6. HON. ATTORNEY-GENERAL Attorney-General‟s Department, Colombo 12. RESPONDENTS 5A.PUJITHA JAYASUNDERA Inspector General of Police, Police Head Quarters, Colombo 01. ADDED RESPONDENT
17/ 07/ 18	SC Appeal 140/2010	Amarasinghe Kankanamlage Appeal No. 118/10Kamal Rasika Amarasinghe Inspector of Police, High Court ColomboHCMCA 127/07Welikada. Accused-Appellant-Petitioner MC Colombo Case No. 71986/04 Vs. Officer-in-Charge Special Investigation Unit, Police Headquarters, Colombo 01. Complainant--Respondent - Respondent Hon. Attorney General Attorney General’s Department, Colombo 12 . Respondent -Respondent
17/ 07/ 18	SC Appeal 188/2011	Punchiralage Keerala Pandikaramaduwa, Parinigama Plaintiff Keeralage Parakrama Pandikaramaduwa, Parinigama Substituted Plaintiff Vs 1. W. M. Dingiribanda No. 39, Nuwaraeli Koliniya, Pandikaramaduwa, Parinigama 2. K.A. Chandralatha No.39, Nuwaraeli Koliniya Pandikaramaduwa, Parinigama Defendants AND Keeralage Parakrama Pandikaramaduwa, Parinigama Substituted Plaintiff-Appellant Vs 1. W. M. Dingiribanda No. 39, Nuwaraeli Koliniya, Pandikaramaduwa, Parinigama 2. K.A. Chandralatha No.39, Nuwaraeli Koliniya Pandikaramaduwa, Parinigama Defendant-Respondents AND NOW BEWEEN K.A. Chandralatha No.39, Nuwaraeli Koliniya Pandikaramaduwa, Parinigama 2nd Defendant-Respondent-Petitioner-Appellant & Substituted 1st Defendant-Respondent-Petitioner-Appellant Vs Keeralage Parakrama Pandikaramaduwa, Parinigama Substituted Plaintiff-Appellant- Respondent-Respondent
17/ 07/ 18	SC Appeal 177 /2013	1. Hewa Pedige Ranasingha No,30/16, Kegalla Road, Daluggala, Rambukkana. 2. Samagi Saman Widanagamage 3. Yodinge Ashoka Lakshman Eliwalatenna 4. R.K.A.D.Lalith Wasantha Ranaweera Petitioner-Petitioners Vs 1. Secretary Ministry of Agricultural Development and Agri Services Battaramulla. 2. Director General of Agriculture Department of Agriculture Peradeniya. 3. Commissioner of Examinations Department of Examinations Battaramulla. 4. Hon. Attorney General Attorney General’s Department Colombo. Respondent-Respondents

17/ 07/ 18	SC Appeal 149/2015	Piyasena Nuwarapaksha, No.434, Pita Kotte, Kotte Plaintiff Vs Singer (Sri Lanka) Ltd, No.320,Union Place, Colombo 2 Defendant AND BETWEEN Piyasena Nuwarapaksha, No.434, Pita Kotte, Kotte Plaintiff-Appellant Vs Singer (Sri Lanka) Ltd, No.320,Union Place, Colombo 2 Defendant-Respondent AND NOW BEWEEN Piyasena Nuwarapaksha, No.434, Pita Kotte, Kotte Plaintiff-Appellant-Petitioner-Appellant Vs Singer (Sri Lanka) Ltd, No.320,Union Place, Colombo 2 Defendant-Respondent-Respondent-Respondent
05/ 07/ 18	SC Appeal 31/2009 and SC Appeals 35/2009 – 78/2009	Lakshman Ravendra Watawala Chairman/ Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, World Trade Centre, Echelon Square, Colombo 01. Applicant - Vs - Chandana Karunathilake B02, Textile Factory Housing Complex, Thulhiriya. Respondent AND Chandana Karunathilake B02, Textile Factory Housing Complex, Thulhiriya. Respondent-Appellant - Vs - Lakshman Ravendra Watawala, Chairman/Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, Echelon Square, Colombo 01. Applicant-Respondent AND NOW 1. Lakshman Ravendra Watawala, Chairman/Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, Echelon Square, Colombo 01. Applicant-Respondent-Appellant 1B. Kulappuarachchige Don Dhammika Perera, Chairman/Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, World Trade Centre, Echelon Square, Colombo 01. 1C. Jayampathy Divale Bandaranayake, Chairman/ Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, World Trade Centre, Echelon Square, Colombo 01. 1D. Mahavidanalage Munidasa Charlce Ferdinando Chairman/ Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, World Trade Centre, Echelon Square, Colombo 01. 1E. Vithanage Upul Priyantha de Silva Jayasuriya, Chairman/ Director General, Board of Investment of Sri Lanka, 26th Floor, West Tower, World Trade Centre, Echelon Square, Colombo 01. 1F. Duminda Rathnayake, Chairman, Board of Investment Sri Lanka, 26th Floor, West Tower, Echelon Square, Colombo 01. Added Applicant – Respondent – Appellants - Vs - 1. Chandana Karunathilake B02, Textile Factory Housing Complex, Thulhiriya. Respondent-Appellant-Respondent

04/07/18	SC SPL LA 210/2016	Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales 2148, Sydney, Australia. By her Attorney Tutullo Richard Jansz, No. 85, Anderson Road, Kalubowila, Dehiwela. Plaintiff Vs 1. Ignatius Robin Fernandopulle, 2. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. Defendants AND BETWEEN 1. Ignatius Robin Fernandopulle, 2. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. 1ST and 2nd Defendant Petitioners Vs Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia. Plaintiff Respondent AND THEN BETWEEN 1. Ignatius Robin Fernandopulle, 2. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. 1ST and 2nd Defendant Petitioner Petitioners Vs Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia. Plaintiff Respondent Respondent AND THEREAFTER BETWEEN 3. Ignatius Robin Fernandopulle, 4. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. 1ST and 2nd Defendant Petitioner Petitioner Petitioners Vs Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia. Plaintiff Respondent Respondent Respondent AND THEREAFTER AGAIN BETWEEN 5. Ignatius Robin Fernandopulle, 6. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. 1ST and 2nd Defendant Petitioner Petitioner Petitioner Petitioners Vs Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia. Plaintiff Respondent Respondent Respondent Respondent AND THEREAFTER AGAIN BETWEEN 1. Ignatius Robin Fernandopulle, 2. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. 1ST and 2nd Defendant Petitioner Petitioner Petitioner Petitioner Petitioners Vs Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia. Plaintiff Respondent Respondent Respondent Respondent Respondent AND NOW BETWEEN 3. Ignatius Robin Fernandopulle, 4. Lucille Bernadette Leonie Fernandopulle, Both of No. 11, Railway Station Road, Negombo. 1ST and 2nd Defendant Petitioner Petitioner Petitioner Petitioner Petitioner Petitioners Vs Corinne Marvin Therese Fernandopulle, “Arunagiri”, Thoppuwa, Kochchikade. Presently at No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia. Plaintiff Respondent Respondent Respondent Respondent Respondent Respondent. 1. Herath Hitimakilage Nilanga Priyangani, Minuwangoda Road, Negombo. 2. Muhandiramge Stanley Lorence Moraes, No. 265/31, St. Joseph’s Lane, Negombo. 3.

04/ 07/ 18	SC CHC APPEAL 08/2005	Aitken Spence & Company Limited, No. 305, Vauxhall Street, Colombo 2. Petitioner vs. 1. The Garment Services Group Ltd., Swan House, 52-53 Poland Street, London WIV 3DF. 2. Dennis Day Limited, Swan House, 52-53 Poland Street, London WIV 3DF. 3. Aitken Spence Garments Ltd.,No.305,VauxhallStreet,Colombo2. 4. J.M.S. Brito, Cinnamon Garden Residencies,No. 67, Ward Place, Colombo 07. 5. R.E.V. CasieChetty,No. 50, Rosmead Place, Colombo 7. 6. E.P.A. Cooray, No. 95/15, Kalyani Mawatha, Wattala. 7. K.D.A.Lawrence, No. 41/1, Old Nawala Road, Nawala. 8. D.S.Rose, 4th Floor, Mercantile Investment Building, No. 236, GalleRoad, Colombo 3. 9. M. Rhodes, Swan House, 52-53 Poland Street, London WIV 3DF. 10. Mrs. K.R.M.Weerakoon, No. 589/8, Kandy Road, Ranmutugala, Kandy. 11. M. Gabay, No. 7, Sukhastan Gardens, Colombo 7. Respondents AND NOW 1. D D Garments Limited (formerly known as 'The Garment Services Group Ltd.') , Swan House, 52-53 Poland Street, London WIV 3DF. 2. Dennis Day Limited, Swan House, 52-53 Poland Street, London WIV 3DF. 3. D.S.Rose, 4th Floor, Mercantile Investment Building, No. 236, Galle Road, Colombo 3. 4. M. Rhodes, Swan House, 52-53 Poland Street, London WIV 3DF. 5. Mrs. K.R.M.Weerakoon, No. 589/8, Kandy Road, Ranmutugala, Kadawatha. Respondent Appellants Vs 1. Aitken Spence & Company Ltd., No. 305,Vauxhall Street, Colombo 2. Petitioner Respondent 2. Aitken Spence Garments Limited, No. 305, Vauxhall Street, Colombo 2. 3. J.M.S.Brito, Cinnamon Grand Residencies, No.67, Ward Place, Colombo 7. 4. R.V.E. Casie Chetty, No. 50, Rosmead Place, Colombo 7. 5. E.P.A.Cooray, No. 95/15, Kalyani Mawatha, Wattala. 6. K.D.A. Lawrence, No. 41/1, Old Nawala Road, Nawala. 7. M. Gabay, No. 7, Sukhastan Gardens, Colombo 7. Respondent Respondents

04/07/18	SC APPEAL 33/2010	Don Peter Ranasinghe, No. 49, Athurugiriya Road, Kottawa, Pannipitiya. Plaintiff vs. 1. P.K. Nandasekera, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 2. P. K. Sudath Premakumara, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 3. P.K. Sunil Samarasekara, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 4. Meshrek Bank PLC, Srimath Chittampalam A. Gardiner Mawatha, P.O.Box 302, Colombo 02. Defendants AND THEN BETWEEN 1. P.K.Sudath Premakumara, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 2. P.K.Sunil Samarasekera, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 2nd and 3rd Defendant Appellants Vs Don Peter Ranasinghe, No. 49, Athurugiriya Road, Kottawa, Pannipitiya. (Deceased) Plaintiff Respondent AND THEN AGAIN BETWEEN 1. P.K.Sudath Premakumara, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 2. P.K.Sunil Samarasekera, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 2nd and 3rd Defendant Appellant Petitioners Vs Jeewandarage Jayawathi Perera, No. 49, Athurugiriya Road, Kottwa, Pannipitiya. Substituted Plaintiff Respondent Respondent AND NOW BETWEEN 1. Ganemulla Gamage Suraji Ishara Therease Direkze of No. 56, Athurugiriya Road, Kottawa, Pannipitiya. 2. Pothuwila Kankanamalage Binara Harinedri Perera of No. 56, Athurugiriya Road, Kottawa, Pannipitiya. Substituted 2nd Defendant Appellant Appellants Vs P.K.Sunil Samarasekera, No. 50, Athurugiriya Road, Kottawa, Pannipitiya. 3rd Defendant Appellant Petitioner Respondent Jeewandarage Jayawathi Perera, No. 49, Athurugiriya Road, Kottawa, Pannipitiya. Substituted Plaintiff Respondent Respondent.

28/ 06/ 18	SC APPEAL 09/2011	Weragoda Arachchillage Weraj Sharm Weragoda, of No. 95, Castle Street, Colombo 8. Plaintiff Vs 1. Kullaperuma Arachchilage Kusuma- -wathie,“Sampath” Tholangamuwa. (deceased) Defendant 1a. Ganehi Achchi Vederalalage Jayasekera, 1b. Ganehi Achchi Vederalalage Sampath Priyadarshana Jayasekera 1c. Ganehi Achchi Vederalage Hasitha Dharshani Jayasekera 1d. Ganehi Achchi Vederalalage Dimuthu Priyadarshana Jayasekera 1e. Ganehi Achchi Vederalalage Jayasekera, (as Guardian ad litem Over 1c and 1d Substituted Defendants, minors), All of “Sampath”, Tholangamuwa. Substituted Defendants 2. Shridara Wasantha Rajakaruna, Madoltenne Estate, Waharaka. 2nd Defendant AND THEN BETWEEN Weragoda Arachchillage Weraj Sharm Weragoda, of No. 95, Castle Street, Colombo 8. Plaintiff Appellant Vs 1. Kullaperuma Arachchilage Kusuma- -wathie, “Sampath” Tholangamuwa. (deceased) Defendant 1a. Ganehi Achchi Vederalalage Jayasekera, 1b. Ganehi Achchi Vederalalage Sampath Priyadarshana Jayasekera 1c. Ganehi Achchi Vederalage Hasitha Dharshani Jayasekera 1d. Ganehi Achchi Vederalalage Dimuthu Priyadarshana Jayasekera 1e. Ganehi Achchi Vederalalage Jayasekera, (as Guardian ad litem Over 1c and 1d Substituted Defendants, minors), All of “Sampath”, Tholangamuwa. Substituted Defendant Respondents 2. Shridara Wasantha Rajakaruna, Madoltenne Estate, Waharaka. 2nd Defendant Respondent AND NOW BETWEEN 1a. Ganehi Achchi Vederalalage Jayasekera, 1b. Ganehi Achchi Vederalalage Sampath Priyadarshana Jayasekera 1c. Ganehi Achchi Vederalage Hasitha Dharshani Jayasekera 1d. Ganehi Achchi Vederalalage Dimuthu Priyadarshana Jayasekera 1e. Ganehi Achchi Vederalalage Jayasekera, (as Guardian ad litem Over 1c and 1d Substituted Defendants, minors), All of “Sampath”, Tholangamuwa Substituted Defendant Respondent Appellants Vs Weragoda Arachchillage Weraj Sharm Weragoda, of No. 95, Castle Street, Colombo 8. Plaintiff Appellant Respondent 2. Shridara Wasantha Rajakaruna, Madoltenne Estate, Waharaka. 2nd Defendant Respondent Respondent

28/ 06/ 18	SC APPEAL No. 95/16	1. Henda Witharana Badralatha 2. Henda Witharana Nandasiri Both at Kurunduwatte, Wathugedera Plaintiffs Vs 1. K.W.Chandra Mallika, 2. K.W.Wijesiri alias Wimalasena 3. K.K.V. Pramawathi All of Kurunduwatte, Wathugedera. Defendants AND 1.Henda Witharana Badralatha 2.Henda Witharana Nandasiri Both at Kurunduwatte, Wathugedera Plaintiff Appellants Vs 1.K.W.Chandra Mallika, 2.K.W.Wijesiri alias Wimalasena 3.K.K.V. Pramawathi All of Kurunduwatte, Wathugedera. Defendant Respondents AND NOW BETWEEN 1.Henda Witharana Badralatha 2.Henda Witharana Nandasiri Both at Kurunduwatte, Wathugedera Plaintiff Appellant Appellants Vs 1. K.W. Chandra Mallika, Kurunduwatte, Wathugedera, Presently at No. 4/13, Heegalduwa Road, Wilegoda, Ambalangoda. 2. K.W.Wijesiri alias Wimalasena, Kurunduwatte, Wathugedera. 3. K.K.V.Pramawathi, Kurunduwatte, Wathugedera, Both presently at C/o K.W.Viraji, Near Dallukanda Junction, Thalgasgoda, Ambalangoda. Defendant Respondent Respondents
27/ 06/ 18	SC (FR) Application No. 356/2016	R.P.Karunarathna Bandara No. 31, Nika Wewa Handiya, Nochchiyagama. PETITIONER V. 1.P.B.Disanayaka Governor of the North Central Province Governor’s Office, Anuradhapura. 2.S.G.M.C.K.Seniviratne Chairman 3.H.M.K.Herath Member 4.H.M.H.B.Ratnayaka Member Provincial Public Service Commission of North Central Province, Kachcheri Building, Anuradhapura. 5.Peshala Jayarathna Chief Minister of North Central Province Provincial Council Administrative Building Harischandra Mawatha, Anuradhapura. 6.E.M.N.W.Ekanayaka The Provincial Education Director, Provincial Department of Education, Anuradhapura. 7.D.M.Kumiduni Ariyawansa Zonal Education Director Anuradhapura Zonal Education Office Anuradhapura. 8.W.T.A Manel Secretary of the Ministry of Education Of the North Central Province, Provincial Council Administrative Building, Harischandra Mawatha, Anuradhapura. 9.N.M.N.R.B.Nwarathna Senior Assistant Secretary of the Ministry of Education of the North Central Province, Provincial Council Administrative Building, Harischandra Mawatha, Anuradhapura. 10.K.A.Thilakarathna Chief Secretary of the North Central Province, Chief Secretary’s Office, Anuradhapura. 11.S.M.Kusumthilak Principal, Nivaththaka Chethiya Maha Vidyalaya Anuradhapura. 12.Hon.Attorney General, Attorney General’s Department, Colombo 12.

		1. EPIC Lanka (Private) Limited, EPIC Techno Village, No.158/`/A, Kaduwela Road, Talangama, Battaramulla. 2. Dr. Nayana Darshana Prasad Dehigama, Executive Chairman & Managing Director EPIC Lanka (Private) Limited, No.158/`/A, Kaduwela Road, Talangama, lBattaramulla. PETITIONERS Vs 1. Hon. S. B. Navinna, Minister of Internal Affairs, Wayamba Development and Cultural Affairs, Ministry of Internal Affairs, Wayamba Development and Cultural Affairs, 8th Floor, Sethsiripaya, Battaramulla 2. Controller General Department of Immigration and Emigration of Sri Lanka, “Suhurupaya”, Sri Subhuthipura Road, Battaramulla. 3. Hon. Harin Fernando, Minister of Telecommunication and Digital Infrastructure and Foreign Employment. Ministry of Telecommunication and Digital Infrastructure, No.437A, Galle Road, Colombo 03 4. The Chief Executive Officer, The Information and Communication Technology Agency of Sri Lanka, No.160/24, Kirimandala Mawatha, Colombo 05. 5. The Information Technology Agency of Sri Lanka, No.160/24, Kirimandala Mawatha, Colombo 05. 6. De La Rue Lanka Currency and Security Print (Private) Limited, No.9/5, Thambaiah Avenue, Off Independence Avenue, Colombo 07. 7. Secretary, Ministry of Internal Affairs, Wayamba Development and Cultural Affairs 8th Floor, Sethsiripaya, Battaramulla. 8. Secretary, Ministry of Telecommunication and Digital Infrastructure, No.437A, Galle Road, Colombo 03. 9. Hon. Ranil Wickremasinghe, Prime Minister, Minister of National Policies and Economic Affairs, 58, Sir Earnest De Silva Mawatha Colombo 7. 10. Hon. John Amarathunga, Minister of Tourism Development and Christian Religious Affairs, 200, 53 Vauxhall Lane, Colombo 2. 11. Hon. Gamini Jayawickrema Perera, Minister of Budhasasana, No.135, Sreemath Anagarika Dharmapala Mawatha, Colombo 07. 12. Hon. Ravindra Samaraweera Minister of Sustainable Development and Wildlife, 9th Floor, Sethsiripaya Stage I Battaramulla. 13. Hon. Nimal Siripala de Silva, Minister of Transport and Civil Aviation. 7th Floor - Sethsiripaya Stage II Battaramulla. 14. Hon. Mangala Samaraweera, Minister of Finance & Mass Media The Secretariat, Colombo 1. 15. Hon. Thilak Marapana, Minister of Foreign Affairs and Development Assignments, Ministry of Foreign Affairs, Colombo 1. 16. Hon. S. B. Dissanayake, Minister of Social Empowerment, Welfare, and Kandyan Heritage, 1st Floor, Sethsiripaya, Stage II Battaramulla. 17. Hon. W. D. J. Seneviratne, Minister of Labour, Trade Union Relations and Sabaragamuwa Development 2nd Floor, Labour Secretariat, Colombo 5. 18. Hon. Kabir Hashim, Minister of Higher Education and Highways, 18, Ward Place, Colombo 7. 19. Hon. (Dr.) Sarath Amunugama, 6th Floor, Sethsiripaya, Battaramulla. 20. Hon. Rauf Hakeem, Minister of City Planning and Water Supply, 35, Lakdiya Medura New Parliament Rd., Battaramulla. 21. Hon. Anura Priyadharshana Yapa, Minister of Disaster Management Vidya Mawatha, Colombo 7. 22. Hon. Susil Premajayantha, Minister of Science, Technology & Research, 3rd Floor – Stage I Sethsiripaya, Battaramula. 23. Hon. (Dr.) Rajitha Senaratne, Minister of Health Nutrition and Indigenous Medicine, Baddegana Wimalwansa Thero Mw

24/ 06/ 18	SC FR Application 491-2011	
21/ 06/ 18	SC/ Appeal 54/2017	Archbishop of Colombo, Bishop's House, Colombo 08. Petitioner Vs, 1. Hon. Akila Viraj Kariyawasam, Minister of Education, Ministry of Education, Isurupaya, Battaramulla. 2. Mr. W.M. Bandusena, The Secretary, Ministry of Education, Isurupaya, Battaramulla. 3. Hon. Ranjith Somawansa, Provincial Minister of Education, Cultural and Art Affairs, Ranmaga Paya, Kaduwela Road, Battaramulla. 4. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents 5. Kolamba Thanthrige Janaka Pushpakumara, Secretary- School Development Society, Pamunuwila Primary School, No. 123/3, Pamunuwila, Gonawala. 6. M.L.S. Perera, Auditor School Development Society, No. 370, Bathalahena Watta, Gonawala Added Respondents And Now 1. Hon. Akila Viraj Kariyawasam, Minister of Education, Ministry of Education, Isurupaya, Battaramulla. 2. Mr. W.M. Bandusena, The Secretary, Ministry of Education, Isurupaya, Battaramulla. 3. Hon. Ranjith Somawansa, Provincial Minister of Education, Cultural and Art Affairs, Ranmaga Paya, Kaduwela Road, Battaramulla. 4. Hon. Attorney General, Attorney General's Department, Colombo 12. 5. Kolamba Thanthrige Janaka Pushpakumara, Secretary- School Development Society, Pamunuwila Primary School, No. 123/3, Pamunuwila, Gonawala. 6. M.L.S. Perera, Auditor School Development Society, No. 370, Bathalahena Watta, Gonawala Added Respondents-Appellants Archbishop of Colombo, Bishop's House, Colombo 08. Petitioner-Respondent
20/ 06/ 18	SC Appeal 149/2017	Horathal Pedi Durayalage Nimal Ranasinghe Ambagahagedera, Nagollagoda. Accused-Appellant-Appellant Vs Officer-in-Charge Police Station Hettipola Hon. Attorney General Attorney General's Department Colombo 12. Respondent-Respondents
20/ 06/ 18	SC/FR 210/2001	1. K.L.W.Perera 2. Rohini Sudasinghe 3. A.S.J.Wijayashantha 4. B.M.Chandrawathi 5. H.M.D.Kumari Herath 6. H.A.L.Wijerathna 7. A.W.P. Kulathunga 8. M.D.R.C. Dissanayake 9. P.H.Chulakanthi 10.T.D. anoma Chithrani 11. P.A. Sugathapala 12. T.D.Ranaweera 13.W.K.Lakshmi 14. N.H.K. Navarathna 15. M.S.S.Chandrasekara 16. S. Ariyarathna 17. K.L.W.Priyanyhi 18.H.P.C.S.Kumarihamy All of Sri Jayawardenapura General Hospital, Thalapathpitiya, Nugegoda. Petitioners 1. Sri Jayawardenapura General Hospital Board, Thalapathpitiya, Nugegoda. 2. G.Chandima De Silva 2(a). Dr. H.A.P.Kahandaliyanage (Chairman) 3. Dr. J.B. Peiris 4. Dr. A.L.M. Beligaswatta 4(a). Dr.V.K.P Indraratne 5. Abeysinghe 6. Dr.H.H.R. Samarasinghe 6(a) P.J.Ambawatte 7. Dr.(Mrs.) C.N. Karunarathne 7(a). Dr. Harsha Kumudini Samarasinghe 8. K.V.P.Ranjith De Silva 8(a) Mr. Chamath De Silva 9. Dr. D.L.D. Lanerolle 9(a).Dr. N.S.A. Senaratne 10. D.G.Dayarathne 10(a).Mr.S.M. Nanda Lalitha Senanayake 11. Dr. P.G.Maheepala 12. Prof. Janaka De Silva 13. Hon. Attorney General Attorney General's Department, Hulftsdorp, Colombo 12. Respondents

20/06/18	SC Appeal 197/2012	Samarasinghe Dassanayakege Babun Nona alias Dassanayakege Babun Nona Samarasinghe No.509/6, Namal Mawatha, Habarakada, Homagama. Plaintiff Vs 1. Kalyanawathi Wickramasinghe 2. Kanduboda Arachchige Rajeewa Kumara Perera No.269/3, Habarakada, Homagama. Defendants AND BETWEEN 1. Kalyanawathi Wickramasinghe 2. Kanduboda Arachchige Rajeewa Kumara Perera No.269/3, Habarakada, Homagama. Defendant-Appellants Samarasinghe Dassanayakege Babun Nona alias Dassanayakege Babun Nona Samarasinghe No.509/6, Namal Mawatha, Habarakada, Homagama. Vs Plaintiff-Respondent AND NOW BEWEEN Samarasinghe Dassanayakege Babun Nona alias Dassanayakege Babun Nona Samarasinghe No.509/6, Namal Mawatha, Habarakada, Homagama. (The Plaintiff died before the Judgment delivered in the District Court and now her son was substituted in her place) Deceased Plaintiff Upali Dayaratne Perera No.269/2, Habarakada, Homagama. Substituted Plaintiff-Respondent-Petitioner-Appellant Vs 1. Kalyanawathi Wickramasinghe 2. Kanduboda Arachchige Rajeewa Kumara Perera No.269/3, Habarakada, Homagama. Defendant-Appellant-Respondent-Respondents
20/06/18	SC Appeal 156/2015	Danthasinghe Patabendi Hangidigedera Abeyrathna No.29, Pannawa, Ganewatta. Plaintiff Vs B.G. Nimal Kumara Hemasiri of Kumbukgate Defendant And B.G. Nimal Kumara Hemasiri of Kumbukgate Defendant-Appellant Vs Danthasinghe Patabendi Hangidigedera Abeyrathna No.29, Pannawa, Ganewatta. Plaintiff-Respondent AND NOW BEWEEN B.G. Nimal Kumara Hemasiri of Kumbukgate Defendant-Appellant-Petitioner-Appellant Vs Danthasinghe Patabendi Hangidigedera Abeyrathna No.29, Pannawa, Ganewatta. (Deceased) 1a. Danthasinghe Patabendi Hangidigedera Mangalika Abeyrathna 2a. Danthasinghe Patabendi Hangidigedera Lakshman Prasad Abeyrathna Both of No.29, Pannawa, Ganewatta. Substituted Plaintiff-Respondent-Respondent-Respondents
20/06/18	SC/Spl. 19/2007	PKW Wijesinghe No. 120/A, Anura Publications, Kudugala Road, Wattaegama, Kandy. Petitioner Vs 1. Upali Chandrasiri Sub Inspector of Police, Police Station Wattegama. 2. Thilakaratne Police Sergeant Police Station Wattegama. Colombo 01. 3. Officer-in-Charge, Police Station, Wattegama. 4. DIG Central Province-West Police Headquarters, Kandy. 5. Inspector General of Police Police Head Quarters, Kandy. 6. Hon. Attorney General Attorney General"s Department, Colombo 12. Respondents
13/06/18	SC Appeal 63/16	Shirani Buffin No.7 King Charles Walk Wimbledon Park, London SW196, JA England. Presently at No.71G Polhenwatte, Housing Scheme Kelaniya PLAINTIFF- RESPONDENT- APPELLANT Vs. 1. M.A. Anthony Neville No.275/01,Old Kandy Road, Dalugama, Kelaniya 2. M. A. Rohan Dulip No.57, 6th Lane, Kotahena New address, No.47/A 9th Lane, Ethul Kotte, Kotte DEFENDANT – PETITIONER - RESPONDENTS

13/06/18	S.C. Appeal 102/2009	PALAMANDADIGE LALITHA PADMINI FERNANDO 116/4, Sevagama, Polonnaruwa. PLAINTIFF VS. CEYLON TOBACCO COMPANY LIMITED No.178, Srimath Ramanadan Mawatha, Colombo 15. DEFENDANT AND BETWEEN CEYLON TOBACCO COMPANY LIMITED No.178, Srimath Ramanadan Mawatha, Colombo 15. DEFENDANT-PETITIONER VS. PALAMANDADIGE LALITHA PADMINI FERNANDO 116/4, Sevagama, Polonnaruwa. PLAINTIFF-RESPONDENT AND NOW BETWEEN CEYLON TOBACCO COMPANY LIMITED No.178, Srimath Ramanadan Mawatha, Colombo 15. DEFENDANT-PETITIONER -PETITIONER/APPELLANT VS. PALAMANDADIGE LALITHA PADMINI FERNANDO 116/4, Sevagama, Polonnaruwa. PLAINTIFF-RESPONDENT -RESPONDENT
11/06/18	SC CHC APPEAL 52/2012	Chistobel Matilda Joshua, No. 35/1, Kawdana Road, Dehiwala. (deceased) Plaintiff John Sylvester Horatio Joshua, No. 15/1, Beach Road, Mount Lavinia. And Presently Of No. 5, Police Park Avenue, Colombo 05. Substituted Plaintiff Vs Seylan Bank PLC, CeylincoSeylan Towers, No. 90, Galle Road, Colombo 03. Defendant AND NOW BETWEEN John Sylvester Horatio Joshua, No. 15/1, Beach Road, Mount Lavinia. And Presently Of No. 5, Police Park Avenue, Colombo 05. Substituted Plaintiff Appellant Vs Seylan Bank PLC, CeylincoSeylan Towers, No. 90, Galle Road, Colombo 03. Defendant Respondent
10/06/18	SC FR 661/2012	1. A.A.Sarath, 83/15, Wijithapura Mawatha, Mahakandara Madapatha. And 23 Others Petitioners Vs 1. Commissioner General of Excise, Department of Excise, No. 34, W.A.D.Ramanayake Mawatha, Colombo 2. And 82 Others Respondents AND NOW BETWEEN 31. W.A.P.W.K. Wickramarachchi, And 45 Others 31st to 62nd and 67th to 82nd Respondents – Petitioners, All, C/O The Department of Excise, No. 34, W.A.D.Ramanayake Mawatha, Colombo 02. Respondent Petitioners Vs A.A. Sarath, 83/15, Wijithapura Mawatha, Mahakandara, Madapatha And 23 Others Petitioner Respondents 1. Commissioner General of Excise,Department of Excise, No. 34, W.A.D.Ramanayake Mawatha, Colombo 02. And 34 Others 17 th to 30th and 63rd to 66th Respondent Respondents C/o The Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. 83. The Attorney General, Attorney General's Department, Hulftsdorp Street, Colombo 12. Respondent Respondents

06/ 06/ 18	S.C. Appeal No. 123/14	GUNESHI MALLIKA GOMES [nee GUNAWARDENA] No.15/1/A, Gomes Path, Colombo 4. PLAINTIFF VS. JAMMAGALAGE RAVINDRA RATNASIRI GOMES No.15/1/A, Gomes Path, Colombo 4. DEFENDANT AND BETWEEN GUNESHI MALLIKA GOMES [nee GUNAWARDENA] No.15/1/A, Gomes Path, Colombo 4. PLAINTIFF-APPELLANT VS. JAMMAGALAGE RAVINDRA RATNASIRI GOMES No.15/1/A, Gomes Path, Colombo 4. DEFENDANT-RESPONDENT AND NOW BETWEEN GUNESHI MALLIKA GOMES [nee GUNAWARDENA] No.15/1/A, Gomes Path, Colombo 4. PLAINTIFF-APPELLANT- PETITIONER/ APPELLANT VS. JAMMAGALAGE RAVINDRA RATNASIRI GOMES No.15/1/A, Gomes Path, Colombo 4. DEFENDANT-RESPONDENT- RESPONDENT
31/ 05/ 18	SC APPLICATIO N No. SC FR 452/2008	1. Rev. Athuthudave Gunasiri Thero, Chairman, Sri Wijeyashrama Vihara Sanwardana Samithiya, No. 1080, Sri Jayawardenapura Mawatha, Bandaranayakapura, Rajagiriya. 2. Wanigasuriya Arachige Priyani, Secretary, Sri Wijeyashrama Vihara Sanwardena Samithiya, No. 1080, Sri Jayawardenapura Mawatha, Bandaranayakapura, Rajagiriya. 3. Jayakody Arachilage Jayalath Premawansa, Treasurer, Sri Wijeyashrama Vihara Sanwardena Samithiya, No. 1080, Sri Jayawardenapura Mawatha, Bandaranayakapura, Rajagiriya. PETITIONERS Vs 1. Muthuwelu Manimuththu, Former Chairman, Sri Lanka Land Reclamation and Development Corporation, No. 7/2, Liberty Plaza Colombo 3. And : 10/A. 2/1, Ward Place, Colombo 7. 2. Karunasena Hettiarachchi, Chairman,Sri Lanka Land Reclamation and Development Corporation, No. 3, Welikada, Rajagiriya. 3. Valance Guneratne, Former Managing Director, Sri Lanka Land Reclamation and Development Corporation, No. 12, Vandervert Place, Colombo 12. 4. Sri Lanka Land Reclamation and Development Corporation, No. 3, Welikada, Rajagiriya. 5. Chandrapema Gamage, Commissioner of Buddhist Affairs, Ministry of Buddhist Affairs, No. 301, T.B.Jaya Mawatha, Colombo 10. 6. Dinesh Goonewardena, Hon. Minister of Urban Development And Sacred Area Development, Ministry of Urban Development and Sacred Area Development, 3rd Floor, Sethsiripaya, Battaramulla. 7. Depanama Sugathabandu Thero (now deceased), Sri Dharmakirthiyaramaya, Polwatte Pansala, Kollupitiya, Colombo 3. 8. Hewawasamge Padmalal Wijeratne, No. 12/1, Gregory's Road, Colombo 7. 9. Lanka Orix Leasing Company Ltd., No. 100/1, 1/1, 1st Floor, Sri Jayawardenapura Mawatha, Rajagiriya. 10. Vidyaranya Winayakarma Sabawa Head Office, Sri Dharmakirthi Rajakiya Pansala, Polwatta Pansala, Kollupitiya, Colombo 3. 11. Honourable Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS Ven. Omare Kassapa Thero, Ilangagoda Purana Rajamaha Viharaya, Sapugoda, Kamburupitiya. INTERVENIENT RESPONDENT

29/ 05/ 18	S.C. [FR] Application No. 201/2017	1. K. J. A Chathumi Sehasa, 2. K. J. A Aminda Kumara, Both of 26A, Viyananda Mawatha, Weliwatta, Galle PETITIONERS -Vs- 1. Mrs. S. Irani Pathiranawasam, Principal, Southlands Balika Vidyalaya Light House Street, Fort, Galle. 2. Mr. Ranjith Tilakarathne, Principal, Aloysius College, Templers Road, Galle. 3. S. K. De Silva 4. D. L. Chitra 5. Ranga Mohotti 6. Upali Amaratunga 2nd to 6th Respondents are Members of the Appeals and Objections Investigations Board, Southlands Balika Vidyalaya, Light House Street, fort, Galle. 7. Mr. Sunil Hettiarachchi, Secretary, Ministry of Education, 3rd Floor, Isurupaya, Battaramulla. 8. Hon. Attorney General, Attorney General‟s Department, Colombo 12. RESPONDENTS
24/ 05/ 18	SC /FR/ Application No 70/2017	Kumarapperuma Arachchige Chandana Prasanna, No. 835/12, Peradeniya Road, Mulgampala, Kandy For and on behalf of: Kumarapperuma Arachchige Thinuga Sethum Petitioner Vs, 1. R.D.M.P. Weerathunga, Principal, Kingswood College, Kandy. 2. Sunil Hettiarachchi, Secretary, Ministry of Education, “Isurupaya”, Pelawatta, Battaramulla. 3. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents
22/ 05/ 18	SC Appeal 04/2013	Mohamed Thamby Lebbe Noor Mohamed (Deceased) Rajarata Furniture, Kaduruwela. PLAINTIFF V. N.M.Abdul Hameed, 1/126, Pimburana Junction, Sungawila. DEFENDANT AND BETWEEN N.M.Abdul Hameed 1/126, Pimburana Junction, Sungawila. DEFENDANT-APPELLANT V. Noor Mohamed Ahamed Saheed Rajarata Furnture, Kaduruwela. SUBSTITUTED-PLAINTIFF-RESPONDENT AND PRESENTLY BETWEEN Noor Mohamed Ahamed Saheed Rajarata Furniture, Kaduruwla. SUBSTITUTED-PLAINTIFF-RESPONDENT-PETITIONER V. N.M.Abdul Hameed, 1/126, Pimburana Junction, Sungawila. DEFENDANT-APPELLANT-RESPONDENT
21/ 05/ 18	SC /FR/ Application No 194/2013	Pankumburage Rohitha Anura Kumara, Malmeekanda, Bodhiya Asala, Opanayaka. ` Petitioner Vs, 1. H. Harisan Hettihewa, Inspector of Police, Police Station, Boralesgamuwa. 2. Lakshman Alwis, Inspector of Police, Police Station, Boralesgamuwa. 3. Jinadasa (22085) Police Sergeant Police Station, Boralesgamuwa. 4. Kariyawasam, Inspector of Police, Police Station, Opanayaka. 5. Upali, Sub-Inspector of Police, Police Station, Opanayaka. 6. W.M.M. Wickramasinghe, Senior Superintendents of Police, Nugegoda Division, Police Station, Mirihana. 7. Inspector General of Police, Police Headquarters, Colombo 01 8. Hon. Attorney General, Attorney General’s Department, Colombo 12 Respondents

17/05/18	SC APPEAL No.36/2016	Ratnayake Mudiyanselage Heen Menika of No. 246/30, Soysa Mawatha, Thewatta Road, Ragama. (deceased) Plaintiff 1a. Mallawa Arachchige Don Ananda No. 246/30, Soysa Mawatha, Thewatta Road, Ragama. 1b. Mallawa Arachchige Dona Pushpa Kumarihami, No. 27, Lankamatha Road, Ragama. 1c. Mallawa Arachchige Don Samson Pushpakumara, No. 388, Mahara, Kadawatha. 1d. Mallawa Arachchige Don Dharmakeerthi, No. 323 F, Christ King Place, Batagama North, Ja-Ela. 1e. Mallawa Arachchige Don Wijesiri R 28, Lankamatha Road, Ragama 1f. Mallawa Arachchige Don Ranjith Pathmasiri Pushpakumara, No. 664/1, Kandaliyadde Paluwa Ragama. 1g. Mallawa Arachchige Dona Sriyani Malkanthi, No. 28, Kandaliyadde Paluwa, Ragama. 1h. Mallawa Arachchige DonaRanjani Pushpakanthi, No. 28/1, Kandaliyadde Paluwa, Ragama. Substituted Plaintiffs Vs 1. Weerasuriya Arachchilage Noris Banda, No. 93, Temple Lane, Horape, Ragama. 2. Siriwardena Disanayake, Siri Niwasa, Waragoda Estate, Kelaniya. Defendants AND 1b. Mallawa Arachchige Dona Pushpa Kumarihami, No. 27, Lankamatha Road, Ragama. 1c. Mallawa Arachchige Don Samson Pushpakumara, No. 388, Mahara, Kadawatha. 1d. Mallawa Arachchige Don Dharmakeerthi, No. 323 F, Christ King Place, Batagama North, Ja-Ela. 1e. Mallawa Arachchige Don Wijesiri R 28, Lankamatha Road, Ragama 1f. Mallawa Arachchige Don Ranjith Pathmasiri Pushpakumara, No. 664/1, Kandaliyadde Paluwa Ragama. 1g. Mallawa Arachchige Dona Sriyani Malkanthi, No. 28, Kandaliyadde Paluwa, Ragama. 1h. Mallawa Arachchige DonaRanjani Pushpakanthi, No. 28/1, Kandaliyadde Paluwa, Ragama. 1b to 1h Substituted Plaintiff Petitioners Vs 1. Weerasuriya Arachchilage Noris Banda, No. 93, Temple Lane, Horape, Ragama. 2. Siriwardena Disanayake, Siri Niwasa, Waragoda Estate, Kelaniya . Defendant Respondents 1a. Mallawa Arachchige Don Ananda No. 246/30, Soysa Mawatha, Thewatta Road, Ragama. 1a Substituted Plaintiff Respondent AND THEN 1b. Mallawa Arachchige Dona Pushpa Kumarihami, No.27, Lankamatha Road, Ragama. 1c. Mallawa Arachchige Don Samson Pushpakumara, No. 388, Mahara, Kadawatha. 1d. Mallawa Arachchige Don Dharmakeerthi, No. 323 F, Christ King Place, Batagama North, Ja-Ela. 1e. Mallawa Arachchige Don Wijesiri R 28, Lankamatha Road, Ragama 1f. Mallawa Arachchige Don Ranjith Pathmasiri Pushpakumara, No. 664/1, Kandaliyadde Paluwa Ragama. 1g. Mallawa Arachchige Dona Sriyani Malkanthi, No. 28, Kandaliyadde Paluwa, Ragama. 1h. Mallawa Arachchige DonaRanjani Pushpakanthi, No. 28/1, Kandaliyadde Paluwa, Ragama. 1b to 1h Substituted Plaintiff Petitioner Petitioners Vs 1. Weerasuriya Arachchilage Noris Banda, No. 93, Temple Lane, Horape, Ragama. 2. Siriwardena Disanayake, Siri Niwasa, Waragoda Estate, Kelaniya . Defendant Respondent Respondents 1a. Mallawa Arachchige Don Ananda, No. 246/30, Soysa Mawatha, Thewatta Road, Ragama. 1a Substituted Plaintiff Respondent Respondent 1b. Mallawa Arachchige Dona Pushpa Kumarihami, No. 27, Lankamatha Road, Ragama. 1b Substituted Plaintiff Petitioner Respondent AND NOW BETWEEN 1c. Mallawa Arachchige Don Samson Pushpakumara, No. 388, Mahara,

15/ 05/ 18	SC. FR. Applicati on No. 466/2015	1. M. G. Padmaseeli No. 08-B, 63/4, National Housing Scheme, Mattegoda. 2. K. G. I. Shirani No. 191/2/D, Hubutiyawa, Nittambuwa. 3. L. A. Samanthi Gunasinghe No. 203/14, Kotagedara Road, Madapatha, Piliyandala. 4. H. G. Malani No. 55-C2, Suriya Garden, Maalapalla, Homagama. 5. W. M. V. Priyanthi Sirisuriya No. 241/1/C, 3rd Lane, Kalapaluwawa, Rajagiriya. 6. S. P. Neela Kumudini No. ¾, “Amba Sewana”, Pilikuththuwa, Buthpitiya. Petitioners Vs. 1. Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05. 2. Ramal Siriwardena Chairman, Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05. 3. P. D. Balasuriya Chief Executive Officer, Sri Lanka Transport Board, No. 200, Kirula Road, Colombo 05. 4. N. Godakanda Director General, Department of Management Services, Ministry of Finance, General Treasury, Colombo 01. 5. Hon. Attorney General Attorney General‟s Department, Colombo 12. Respondents
05/ 04/ 18	SC Appeal No.169/2 011	YASOMA CHAMPA NILMINI ABEYGUNAWARDENA No.80/5, “Nilmini”, Athurugiriya Road, Homagama. PLAINTIFF VS. SUNIL GOTABAYA LAMABADUSURIYA No. 50A, Bellantara Road, Nikape Dehiwela and /or No.50/1 Abeywickrema Avenue, Mt. Lavinia. DEFENDANT AND SUNIL GOTABAYA LAMABADUSURIYA No. 50A, Bellantara Road, Nikape Dehiwela and /or No.50/1 Abeywickrema Avenue, Mt. Lavinia. DEFENDANT- APPELLANT VS. YASOMA CHAMPA NILMINI ABEYGUNAWARDENA No.80/5, “Nilmini”, Athurugiriya Road, Homagama. PLAINTIFF- RESPONDENT AND NOW BETWEEN SUNIL GOTABAYA LAMABADUSURIYA No. 50A, Bellantara Road, Nikape Dehiwela and /or No.50/1 Abeywickrema Avenue, Mt.Lavinia DEFENDANT-APPELLANT PETITIONER/ APPELLANT VS. YASOMA CHAMPA NILMINI ABEYGUNAWARDENA No.80/5, “Nilmini”, Athurugiriya Road, Homagama. PLAINTIFF-RESPONDENT - RESPONDENT
04/ 04/ 18	SC APPEAL No. 135/2012	S.A.C.Ranawaka. No. 206, Panselgodella, Galamuna. Plaintiff Vs 1. Upali Chandrawansha, Revenue Administrator, C/O Lankapura Pradeshiya Sabha, Lankapura, Thalpotha. 2. Pradeshiya Sabha, Lankapura, Thalpotha. Defendants AND THEN Upali Chandrawansha, Revenue Administrator, C/O Lankapura Pradeshiya Sabha, Lankapura, Thalpotha. Defendant Appellant Vs S.A.C. Ranawaka, No.206, Panselgodella, Galamuna Plaintiff Respondent AND NOW BETWEEN S.A.C. Ranawaka, No.206, Panselgodella, Galamuna Plaintiff Respondent Appellant Vs Upali Chandrawansha, Revenue Administrator, C/O Lankapura Pradeshiya Sabha, Lankapura, Thalpotha Defendant Appellant Respondent

04/ 04/ 18	Supreme Court Appeal 135/2012	R.A.C. Ranawaka, No. 206, Panselgodella, Galamuna Plaintiff Vs, Upali Chandrawansha, Revenue Administrator, C/O Lankapura Pradeshiya Sabha, Lankapura, Thalpotha. Defendant And, Upali Chandrawansha, Revenue Administrator, C/O Lankapura Pradeshiya Sabha, Lankapura, Thalpotha. Defendant-Appellant Vs, R.A.C. Ranawaka, No. 206, Panselgodella, Galamuna Plaintiff-Respondent And now between R.A.C. Ranawaka, No. 206, Panselgodella, Galamuna Plaintiff-Respondent-Appellant Vs, Upali Chandrawansha, Revenue Administrator, C/O Lankapura Pradeshiya Sabha, Lankapura, Thalpotha. Defendant-Appellant-Respondent
03/ 04/ 18	SC Appeal 99/2014	Sinna Lebbe Saliya Umma of Mawana, Mawanella. PLAINTIFF -Vs- Shahul Hameed Mohammed Yaseen of No. 129/2, Courts Road, Marawa, Mawanella. DEFENDANT Between Sinna Lebbe Saliya Umma of Mawana, Mawanella. PLAINTIFF- PETITIONER -Vs- 1. Shahul Hameed Mohammed Yaseen of No. 129/2, Courts Road, Marawa, Mawanella. DEFENDANT- RESPONDENT 2. Zainul Abdeen Mohammed Naufer of No. 40A, Kandy Road, Mawanella. 3. Mohammed Saly Mohammed Musthafa of No. 74, Hemmathagama Road, Mawanella. RESPONDENTS And Between 3. Mohammed Saly Mohammed Musthafa of No. 74, Hemmathagama Road, Mawanella. 3rd RESPONDENT PETITIONER -Vs- Sinna Lebbe Saliya Umma of Mawana, Mawanella. PLAINTIFF-PETITIONER- RESPONDENT 1. Shahul Hameed Mohammed Yaseen of No. 129/2, Courts Road, Marawa, Mawanella. DEFENDANT-RESPONDENT- RESPONDENT 2. Zainul Abdeen Mohammed Naufer of No. 40A, Kandy Road, Mawanella. 2ND RESPONDENT-RESPONDENT And Now Between Sinna Lebbe Saliya Umma of Mawana, Mawanella. PLAINTIFF-PETITIONER- RESPONDENT-APPELLANT -Vs- 1. Shahul Hameed Mohammed Yaseen of No. 129/2, Courts Road, Marawa, Mawanella. DEFENDANT- RESPONDENT-RESPONDENT-RESPONDENT 2. Zainul Abdeen Mohammed Naufer of No. 40A, Kandy Road, Mawanella. 2ND RESPONDENT-RESPONDENT-RESPONDENT 3. Mohammed Saly Mohammed Musthafa of No. 74, Hemmathagama Road, Mawanella. (Deceased) 3.(a) Mohammed Musthafa Mohammed Manazeer, 3. (b) Mohammed Musthafa Fathima Nusrath, 3.(c) Mohammed Musthafa Farhan, 3. (d) Mohammed Musthafa Rasman Ahmad, All of No. 74, Hemmathagama Road, Mawanella SUBSTITUTED 3A to 3D RESPONDENT-PETITIONER-RESPONDENT

02/04/18	Case No:-SC/CHC/Appeal 04/2006	Murughasan Chandrika No.13, Perumal Kovil Street, Nagapattinam, 611001 Tamilnadu, India Carrying on a business as proprietorship Under the name style and firm Rajithi Agencies No.139, Linghi Chetty Street, Gulam Arcade, Chennai 600 001 India. PLAINTIFF V. 1.Romav Limited Bucklersbury House, 3, Queen Victoria Street, London EC4N 8EL 2.Unicorns Clearing And Forwarding (private) Limited 2nd Floor, Greenlanka Tower, No.46/46, Navam Mawatha, Colombo 2. DEFENDANTS Unicorns Clearing And Forwarding (private) Limited 2nd Floor,Greenlanka Towers, No.46/46, Navam Mawatha, Colombo 2. 2nd DEFENDANT-APPELLANT V. 1.Murughasan Chandrika No.13,Perumal Kovil Street, Nagapattinam, 611001 Tamilnadu. India.Carrying on a business as Proprietorship under the name style and firm- Rajithi Agencies, No.139, Linghi Chetty Street, Gulam Arcade, Chennai 600 001 India. PLAINTIFF-RESPONDENT 2.Romav Limited Bucklersbury House, 3, Queen Victoria Street, London EC4N 8EL 1st DEFENDANT-RESPONDENT
01/04/18	SC Appeal 04/2016	Mohamed Naleem Mohomed Ismail, No. 28, Chettiyar Road, Pandiruppu 01, Kalmunai. Plaintiff Vs, Samsulebbe Hamithu No. 426, Main Street, Maruthamuni. Defendant And between Mohamed Naleem Mohomed Ismail, No. 28, Chettiyar Road, Pandiruppu 01, Kalmunai. Plaintiff- Appellant Vs, Samsulebbe Hamithu No. 426, Main Street, Maruthamuni. Defendant-Respondent And now between Mohamed Naleem Mohomed Ismail, No. 28, Chettiyar Road, Pandiruppu 01, Kalmunai. Plaintiff -Appellant-Appellant Vs, Samsulebbe Hamithu No. 426, Main Street, Maruthamuni. Defendant - Respondent-Respondent
26/03/18	Supreme Court Case Nos. SC SPL.LA. 125/2014 SC SPL.LA: 126/2014	Hon. Attorney General Attorney General‟s Department Colombo 12 Complainant -Vs- 1. Singappuli Arachchilaege Rumesh Sameera Dasanayake alias Gaminige Kolla 2. Baduwala Wahumpurage Podinona 3. Kalanchidevage Suresh Nandana Accused. AND BETWEEN 1. Singappuli Arachchilage Rumesh Sameera Dasanayake alias Gaminige Kolla 2. Baduwala Wahumpurage Podinona 3. Kalanchidevage Suresh Nandana Accused-Appellants -VS- The Honourable Attorney General Attorney Generals‟ department, Colombo – 12 Complainant-Respondent AND NOW BETWEEN 1. Singappuli Arachchilage Rumesh Sameera Dassanayake alias Gaminige Kolla 2. Baduwala Wahumpurage Podinona Accused-Appellant-Petitioners (SC SPL LA 126/2014) Kalanchidevage Suresh Nandana 3rd Accused-Appellant-Petitioner (SC SPL LA 125/2014) -Vs- The Honourable Attorney General Attorney Generals‟ department, Colombo – 12 Complainant-Respondent- Respondent

26/ 03/ 18	SC (FR) Applicati on 97/2014	Fathima Hishana 43, Buthgamuwa Road Welikada, Rajagiriya Appearing by her Next Friend Mohamed hirzi Shahul Hameed 43, Buthgamuwa Road Welikada, Rajagiriya Petitioner -Vs- 1. Nayana Thakshila Perera Principal Janadhipathi Balika Vidyalaya, School Lane —Nawala, Rajagiriya 2. Ms. Hemamali The Vice Principal Janadhipathi Balika Vidyalaya, School Lane—Nawala, Rajagiriya 3. Mrs. P. De. S. Naotunna Class Teacher—Grade 7C Janadhipathi Balika Vidyalaya, School Lane—Nawala, Rajagiriya 4. J.M.C Jayanthi Wijethunge Provincial Secretary of Education Shrawasthi Mandiraya, 32, Marcus Fernando Mawatha, Colombo 07. 4A. M.A.B. Daya Senerath Provincial Secretary of Education Shrawasthi Mandiraya, 32, Marcus Fernando Mawatha, Colombo 07. 4B. S.G. Wijebandu Provincial Secretary of Education Shrawasthi Mandiraya, 32, Marcus Fernando Mawatha, Colombo 07. 5. Mr. P.N. Ilapperuma The Provincial Director of Education, Provincial Department of Education 76, Ananda Coomaraswamy Mawatha, Colombo 7. 5A. Mr. Wiman Gunaratne, The Provincial Director of Education, Provincial Department of Education 76, Ananda Coomaraswamy Mawatha, Colombo 7. 6. Anura Dissanayake Secretary to the Ministry of Education, —Isurupayaǁ Pelawatte- Battaramulla. 6A. Upali Marasinghe Secretary to the Ministry of Education, —Isurupayaǁ Pelawatte-Battaramulla. 6B. W.M Banduseana Secretary to the Ministry of Education, —Isurupayaǁ Pelawatte-Battaramulla. 7. Alavi Moulana The Governor of the Western Province, 98/4 Havelock Road, Colombo 5. 7A. K.C. Logeswaran The Governor of the Western Province, 98/4 Havelock Road, Colombo 5. 8. The Honourable Attorney General The Attorney General’s Department, Colombo 12. Respondents
26/ 03/ 18	SC Appeal 73/2010	1. Akurange Jayasinghe 2. Akurange Samarasinghe Both of Medagaladeniya, Udagaladeniya, Rambukkana. PLAINTIFFS Vs. Akurange Gunawathie(Deceased) (a) I. Lakshman Weerasekera Medagaladeniya, Udagaladeniya, Rambukkana. SUBSTITUTED DEFENDANT AND BETWEEN 1. Akurange Jayasinghe 2. Akurange Samarasinghe Both of Medagaladeniya, Udagaladeniya, Rambukkana. PLAINTIFF-APPELLANTS Vs. (a) I. Lakshman Weerasekera Medagaladeniya, Udagaladeniya, Rambukkana. SUBSTITUTED DEFENDANT-RESPONDENT AND NOW BETWEEN 1. Akurange Jayasinghe Medagaladeniya, Udagaladeniya, Rambukkana. 1st PLAINIFF-APPELLENT- PETITIONER 2. Akurange Samarasinghe (Now Deceased) Vs. (a) I. Lakshman Weerasekera Medagaladeniya, Udagaladeniya,Rambukkana. SUBSTITUTE DEFENDANT-RESPONDENT RESPONDENT.

25/ 03/ 18	SC FR No. 120/2017	Dr. (Mrs.) Chandini Perera, 33/3, Jambugasmulla Road, Nugegoda. Petitioner 1. Dr. J.M.W. Jayasundara Bandara, Director General of Health Services, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 1A. Dr. Anil Jasinghe, Director General of Health Services, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 2. Dr. Anil Jasinghe, Director General of Health Services, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 2A. Dr. W.K. Wickremasinghe, Acting Deputy Director General of Health, The National Hospital of Sri Lanka, Colombo 10. 3. Dr. (Mrs.) Samiddhi Samarakoon, Deputy Director, Neurotroma Accident and Orthopaidec Services, The National Hospital of Sri Lanka, Colombo 10. 4. Dr. Cyril de Silva, Deputy Director, The National Hospital of Sri Lanka, Colombo 10. 5. Hon. Dr. Rajitha Senaratne, MP, Minister of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 6. Mr. Anura Jayawickrema, Secretary, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 6A. Mr. Janaka Sugathadasa, Secretary, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 7. Dharmasena Dissanayaka, Chairman 8. Prof. Hussain Ismail, Member 9. Ms.ShiranthaWijayatilake,Member 10. Dr. Prathap Ramanujam, Member 11. Mrs. V. Jegarasasingam, Member 12. Santi Nihal Seneviratne, Member 13. S.Ranugge, Member 14. D.L.Mendis 15. Sarath Jayathilaka, Member 7th to 15th Respondents, All of the Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. 16. Dr. Dulip Perera, Consultant Plastic Surgeon, The National Hospital of Sri Lanka, Colombo 10. 17. Hon. Attorney General, Attorney General's Department. Hulftsdorp, Colombo 12. Respondents

22/03/18	SC Appeal 176/2016	Kusuma Sri Wanasinghe No.4B/6/7, Mattegoda Hosing Scheme, Mattegoda. Plaintiff Vs Princymala Abeysuriya. No.9A/79/5, Mattegoda Hosing Scheme, Mattegoda. Defendant IN THE MATTER OF AN APPLICATION UNDER SECTION 328 OF THE CIVIL PROCEDOURE CODE. Appuhannadige Kotahewage Lesly Ariyasinghe. No.125, Kirulapana Mawatha, Colombo 5. Petitioner Vs Kusuma Sri Wanasinghe No.4B/6/7, Mattegoda Hosing Scheme, Mattegoda. Plaintiff Judgment Creditor Respondent Princymala Abeysuriya. No.9A/79/5, Mattegoda Hosing Scheme, Mattegoda. Defendant Judgment Debtor Respondent AND BEWEEN Appuhannadige Kotahewage Lesly Ariyasinghe. No.125, Kirulapana Mawatha, Colombo 5. Petitioner-Petitioner Vs 1. Kusuma Sri Wanasinghe No.4B/6/7, Mattegoda Hosing Scheme, Mattegoda. Plaintiff Judgment Creditor Respondent-Respondent 2. Princymala Abeysuriya. No.9A/79/5, Mattegoda Hosing Scheme, Mattegoda. Defendant Judgment Debtor Respondent-Respondent AND NOW BEWEEN Appuhannadige Kotahewage Lesly Ariyasinghe. No.125, Kirulapana Mawatha, Colombo 5. Petitioner-Petitioner- Petitioner-Appellant. Vs 1. Kusuma Sri Wanasinghe No.4B/6/7, Mattegoda Hosing Scheme, Mattegoda. Plaintiff Judgment Creditor Respondent-Respondent- Respondent-Respondent 2. Princymala Abeysuriya. No.9A/79/5, Mattegoda Hosing Scheme, Mattegoda. Defendant Judgment Debtor Respondent-Respondent- Respondent-Respondent
21/03/18	SC Appeal No:-82/2014	M.I.S.Batcha, No.19, Lily Road, Wellawatta,Colombo 6. PLAINTIFF V. L.E.Muttiah, No.19A, Lily Road, Wellawatta, Colombo 6. DEFENDANT AND BETWEEN L.E.Muttiah, (Deceased) No.19A. Lily Road, Wellawatta, Colombo 6. DEFENDANT-APPELLANT M.S.Muttiah, No 19A, Lily Mawatha, Wellawatta, Colombo 6. SUBSTITUTED-DEFENDANT-APPELLANT V. M.I.S.Batcha, No 19, Lily Road, Wellawatta, Colombo 6. PLIANTIFF-RESPONDENT AND M.I.S.Batcha, No 19, Lily Road, Wellawatta, Colombo 6. PLAINTIFF-RESPONDENT-PETITIONER V. M.S.Muttiah, No.19A, Lily Mawatha, Wellawatta, Colombo 6. SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENT
21/03/18	SC APPEAL No:-56/2015	
20/03/18	SC CHC APPEAL 33/07	Southland Apparels (Pvt.) Ltd., No. 80, Hulftsdorp Street, Colombo 12. Plaintiff Vs Hatton National Bank Plc., HNB Tower, Darley Road, Colombo 10. Defendant AND NOW BETWEEN Hatton National Bank Plc., HNB Tower, Darley Road, Colombo 10. Defendant Appellant Vs Southland Apparels (Pvt.) Ltd., 80, Hulftsdorp Street, Colombo 12. Plaintiff Respondent

20/ 03/ 18	SC FR Applicati on No. 389/2012	1. Kalu Arachchige Amila Duminda, No. 300, Yatiyana Watta Road, Yatiyana. 2. Muditha Mihipala Kumarage, Ukwatta, Thotahoda, Akmeemana. 3. Vindana Lasantha Jayakody, No. 213/4, Thalawathugoda Road, Mirihana, Kotte. 4. D.C.Gayan Sarinda, No. 443/A, Lake Road, Akuregoda, Thalangama South, Battaramulla. 5. Rathnayake Mudiyanselage Sanka Dipsara Weerakoon, No. 147, Kumbukwewa, Maho. 6. Kamburugamuwe Loku Arachchige Chameera Sanjeewa, No. 220/2, Enderamulla, Wattala. 6. Gannoruwa Palagama Gedera Nayana Yasamali Dewasurendra, 'Yasamali', Ridigama, Kurunegala. 7. Don Kannangara Koralage Meadini Diana Kannangara, Polkotuwa, Ovitiyagala, Horana. 8. Nupe Hewage Thushanthim, No. 158/1A/1, Rajasinghe Mawatha, Ihala Imbulgoda, Imbulgoda. 9. Harshani Shamila Samarasingha, ' Jeewana', Uda Aparekka, Aparekka, Matara. 10. Balakumary Fernando (Kumaravelu), No. 82, College Street, Colombo 13. 11. Wattage Chamini Lasanthika Perera, No. 35/3, Bodhu Pedesa Road, Nunggamugoda, Kelaniya. 12. Samarakkody Dasanayakage Chamila Nilakshi Kumari, Kikolaya, Polgahawela. Petitioners Vs 1. Secretary, Ministry of Public Administration and Home Affairs, Independent Square, Colombo 7. And 42 others Respondents
14/ 03/ 18	SC. Appeal No.201/2 014	H. K. Sumanasena, Manager (Acting), Special Investigations Unit, Sri Lanka Bureau of Foreign Employment 234, Denzel Kobbekaduwa Mawatha, Battaramulla. Plaintiff -Vs- MallawarachchigeKanishka Gunawardhana Licensee, Samasa Foreign Employment Agency, 89, 3rd Floor, Super Market, Borella, Colombo 08. Accused. And In the matter of an appeal in terms of Article 154 (3) (b) of the Constitution read with section 4 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 and section 320 (1) of the Code of Criminal Procedure Act No.15 of 1979. Mallawarachchig Kanishka Gunawardhana, Licensee, Samasa Foreign Employment Agency, 89, 3rd Floor, Super Market, Borella, Colombo 08. Accused Appellant -Vs- 1 H.K.Sumanasena, Manager (Acting), Special Investigations Unit, Sri Lanka Bureau of Foreign Employment 234, Denzel Kobbekaduwa Mawatha, Battaramulla. 2. Hon. The Attorney General, Attorney General's Department Colombo 12. Respondents And now 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 read with sections 9 and 10 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990. Mallawarachchige Kanishka Gunawardhana, Licensee, Samasa Foreign Employment Agency, 89, 3rd Floor, Super Market, Borella, Colombo 08. Accused Appellant Petitioner -Vs- 1 H.K.Sumanasena, Manager (Acting), Special Investigations Unit, Sri Lanka Bureau of Foreign Employment 234, Denzel Kobbekaduwa Mawatha, Battaramulla. 2. Hon. The Attorney General, Attorney General's Department, Colombo 12. Respondent respondents

11/03/18	SC APPEAL 79/2013	Sri Lankan Airlines Limited, Level 19-22, East Tower, World Trade Centre, Echelon Square, Colombo 1. Petitioner Vs 1. Sri Lankan Airlines Aircrafts Technicians Association, No. 14, Mahawela Place, Kirulapone, Colombo 06. 2. D.S.Edirisinghe, Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 05. 3. T.Piyasoma, No. 77, Pannipitiya Road, Battaramulla. 4. Hon. Atauda Seneviratne, Minister of Labour Relations and Foreign Employment, Labour Secretariat, Colombo 05. Respondents AND NOW BETWEEN Sri Lankan Airlines Limited, Level 19-22, East Tower, World Trade Centre, Echelon Square, Colombo 1. Petitioner Petitioner Vs 1. Sri Lankan Airlines Aircrafts Technicians Association, No. 14, Mahawela Place, Kirulapone, Colombo 6. 2. D.S.Edirisinghe, Commissioner Of Labour, Labour Secretariat, Narahenpita, Colombo 5. 2A. W.J.L.U. Wijayaweera, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5. 3A. Mrs. Pearl Weerasinghe, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5. 2B. Herath Yapa, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5. 2C Mrs. M.D.C.Amarathunga, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5. 2D R.P.A.Wimalaweera, Commissioner General of Labour, Labour Secretariat, 3. T.Piyasoma, No. 77, Pannipitiya Road, Battaramulla. 4. Hon. Atauda Seneriratne, Minister Of Labour Relations and Foreign Employment, Labour Secretariat, Narahenpita, Colombo 5. 4A. Hon. Gamini Lokuge, Minister of Labour Relation and Productivity Improvement, LabourSecretariat Narahenpita, Colombo 5. 4B. Hon. Dr.Wijayadasa Rajapaksha, Minister of Justice and Labour Relations. 4C. Hon. S.B.Navinna, Minister of Labour, Labour Secretariat, Narahenpita, Colombo 5. 4D. Hon. John Seneviratne, Minister of Labour and Trade Union Relations, Labour Secretariat, Narahenpita, Colombo 5. 5. The Registrar, Industrial Court, 9th Floor, Labour Secretariat, Colombo 5. Respondents Respondents
05/03/18	SC APPEAL 96/17	Mohamed Ghouse Mohamed Sulaiman Zurfick, No. 142/4, W.A.de Silva Mawatha, Colombo 6. Plaintiff Vs M.N.Naufer, No. 43, Hulftsdorp Street, Colombo 10. And currently at, Bogambara Prison, Kandy. Defendant AND THEN BETWEEN Mohamed Ghouse Mohamed Sulaiman Zurfick, No. 142/4, W.A.de Silva Mawatha, Colombo 6. Plaintiff Petitioner Vs M.N.Naufer, No. 43, Hulftsdorp Street, Colombo 10. And currently at, Bogambara Prison, Kandy. Defendant Respondent AND THEREAFTER BETWEEN Mohamed Ghouse Mohamed Sulaiman Zurfick, No. 142/4, W.A.de Silva Mawatha, Colombo 6. Plaintiff Petitioner Appellant Vs M.N.Naufer, No. 43, Hulftsdorp Street, Colombo 10. And currently at, Bogambara Prison, Kandy. Defendant Respondent Respondent AND NOW BETWEEN M.N.Naufer, No. 43, Hulftsdorp Street, Colombo 10. And currently at, Bogambara Prison, Kandy. Defendant Respondent Respondent Appellant Vs Mohamed Ghouse Mohamed Sulaiman Zurfick, No. 142/4, W.A.de Silva Mawatha, Colombo 6. Plaintiff Petitioner Appellant Respondent

04/03/18	SC (FR) Application No.393/2008	Janaka Sampath Batawalage, P.355, Niwasipura, Ekala Ja-Ela. Petitioner Vs. 1. Inspector Prasanna Ratnayake, Police Station, Dam Street, Colombo 12. 2. Sub Inspector Seneviratne, Police Station, Dam Street, Colombo 12. 3. Sub Inspector Herath, Police Station, Dam Street, Colombo 12. 4. The Inspector General of police, Police Headquarters, Colombo 1. 5. Hon. Attorney General Attorney General‟s Department, Colombo 12. Respondents
04/03/18	SC FR Application No.825/09	Loku Hetiarachchige Sanjana Pradeep Kumara Petitioner Vs. 1. S. M. J. Samaranayake, Chief Inspector of Police, Officer in Charge Police Station, Kirindiwela. 2. Nandatissa Sambandaperuma, Home Guard, Police Station, Kirindiwela 3. Laxman Cooray, Superintendent of Police, Gampaha. Presently detained at the Terrorist Investigation Division. 4. Sarath Kumara, Senior Superintendent of Police, Senior Superintendent of Police Office, Gampaha. 5. K. P. P. Pathirana, Deputy Inspector General of Police, Western (North) Range, DIG‟s Office, Peliyagoda. 6. Inspector General of Police, Police Headquarters, Colombo 01. 7. Sarath Weerasekara, Rear Admiral, Headquarters of the Department of Civil Defence, Station Road, Colombo 04. 7A. Ananda Peris, Rear Admiral, Headquarters of the Department of Civil Defence, Station Road, Colombo 04. 8. K. P. Karunaratne, Hospital Road, Radawana. 9. Nimalsiri Wijethunge, Hospital Road, Radawana. 10. Dias Kumara Wijethunge, No.436D, Hospital Road, Radawana. 11. Yashmi Sambandaperuma, No.172, Obawatta Road, Radawana. 12. Ananda Sarathkumara, No.176, Landa, Radawana. 13. Kapila Sambandaperuma, No.188/2, Rambutangahawatta, Radawana. 14. Amitha Sambandaperuma, No.17/B, Radawana, Kirindiwela. 15. Aminda Rajapaksha, Member of Dompe Pradeahiya Sabha, Dompe Pradeshiya Sabha, Kirindiwela. 16. Dompe Pradeshiya Sabha, Kirindiwela. 17. J. A. Jayawardane, Chairman, Dompe Pradeshiya Sabha, Kirindiwela. 18. Honourable Attorney General, Department of the Attorney General, Colombo 12. Respondents
01/03/18	S.C.[FR] No.337/2015	FRIGI Engineering Services (Pvt) Ltd. M/S Dunham Bush Industries Sdn Bhd Joint Venture C/O: FRIGI Engineering Services (Pvt) Ltd. 145, Siri Dhamma Mawatha Colombo 10 Petitioner Vs. Secretary Ministry of Food Security CWE Secretariat Building No.27, Vauxhall Street Colombo 02 And 45 others Respondents

27/ 02/ 18	SC APPEAL No. 79/2010	1.A.M. Mohamed Mawjood, No. 30B, Rattota Road, Matale. 2.K. M. Mohamed Farook, No. 16, Kumbiyangoda, Matale. Plaintiffs Vs 1. Rev. Yatawatte Sumanajothi, 'Vivekaramaya', Yatawatte. 2. Herath Baron Munasinghe (deceased) 3. Edirisinghelage Shanthi 4. Herath Mudiyanselage Kanthi Munasinghe 5. Herath Mudiyanselage Geetha Munasinghe All of No.63, Dharmapala Mawatha, Matale. Defendants AND THEN BETWEEN K. M. Mohamed Farook, No. 16, Kumbiyangoda, Matale. 2nd Plaintiff Appellant Vs 1. Rev. Yatawatte Sumanajothi, 'Vivekaramaya', Yatawatte. 2. Edirisinghelage Shanthi 3. Herath Mudiyanselage Kanthi Munasinghe 4. Herath Mudiyanselage Geetha Munasinghe All of No.63, Dharmapala Mawatha, Matale. Defendant Respondents AND NOW BETWEEN K.M.Mohamed Farook,No. 16, Kumbiyangoda, Matale. 2nd Plaintiff Appellant Appellant Vs 1. Rev. Yatawatte Sumanajothi, 'Vivekaramaya', Yatawatte. 2. Edirisinghelage Shanthi 3. Herath Mudiyanselage Kanthi Munasinghe 4. Herath Mudiyanselage Geetha Munasinghe All of No.63, Dharmapala Mawatha, Matale. Defendant Respondent Respondents A.M.Mowjood, No. 31B, Rattota Road, Matale. 1st Plaintiff Respondent Respondent
25/ 02/ 18	SC. FR Applicati on No. 434/2016	Kamani Madhya Jinadasa Attorney-at-Law [for and on behalf of Citizen X, person living with the Human Immuno Virus (HIV)] Petitioner Vs. 1. SriLankan Airlines Limited Company Registration No.PB 67 Airline Centre Bandaranayaka International Airport Katunayaka 2. Dr. Anoma Jayasinghe Group Medical Officer SriLankan Airlines Limited Bandaranayaka International Airport Katunayaka 3. Nihal Somaweera Secretary Ministry of Transport and Civil Aviation 7th Floor, Sethsiripaya stage II Battaramulla. 4. Dr. Sisira Liyanage Director National STD/AIDS control Programme No.29, De Seram Place Colombo 10. 5. Hon. Attorney General Attorney General's Department Colombo 12 Respondents

21/ 02/ 18	SC APPEAL 147/2017	1. Chanaka Thilan Rodrigo, 12/5, Dutugemunu Street, Kalubowila, Dehiwala. 2. Anitha Sharmini John nee Rodrigo, 19, Lillington Road, Remuera, Auckland 1050, New Zealand. Petitioners Vs 1. Cyril Rodrigo Restaurants Ltd., No. 85, Pepiliyana Road, Nugegoda. 2. Tarini Rodrigo, 68/8A, 2nd Lane, Senanayake Avenue Nawala. 3. Ruvini Devasurendra, No. 17, Spathodea Avenue, Colombo 5. 4. Kantha de Silva, No. 5, Spathodea Avenue, Colombo 5. 5. Nexia Corporate Consultants (Pvt.) Ltd., No. 181, Nawala Road, Colombo 5 Respondents AND THEN In an application for revocation and/or variation of the ex parte interim order. 3. Ruvini Devasurendra, No.17, Spathodea Avenue, Colombo 5. 4. Kantha de Silva, No. 5, Spathodea Avenue, Colombo 5. 3rd and 4th Respondent Petitioners Vs 1.Chanaka Thilan Rodrigo, 12/5, Dutugemunu Street, Kalubowila, Dehiwala. 2. Anitha Sharmini John nee Rodrigo, 19, Lillington Road, Remuera, Auckland 1050, New Zealand. 1st and 2nd Petitioner Respondents 1. No. 85, Pepiliyana Road, Cyril Rodrigo Restaurants Ltd., Nugegoda. 2. Tarini Rodrigo, 68/8A, 2nd Lane, Senanayake Avenue, Nawala. 5. Nexia Corporate Consultants(Pvt) Ltd., No. 181, Nawala Road, Colombo 5. 1st, 2nd and 5th Respondents Respondents AND NOW BETWEEN 3.Ruvini Devasurendra, No.17, Spathodea Avenue, Colombo 5. 4.Kantha de Silva, No. 5, Spathodea Avenue, Colombo 5. 3rd and 4th Respondent Petitioner Petitioners Vs 1. Chanaka Thilan Rodrigo, 12/5, Dutugemunu Street, Kalubowila, Dehiwala. 2. Anitha Sharmini John nee Rodrigo, 19, Lillington Road, Remuera, Auckland 1050, New Zealand. 1st and 2nd Petitioner Respondent Respondents 1. Cyril Rodrigo Restaurants Ltd.,No. 85, Pepiliyana Road, Nugegoda. 2. Tarini Rodrigo, 68/8A, 2nd Lane, Senanayake Avenue, Nawala. 5. Nexia Corporate Consultants(Pvt) Ltd., No. 181, Nawala Road, Colombo 5. 1st, 2nd and 5th Respondents Respondents
19/ 02/ 18	SC Appeal 14/2016	Hon. Attorney General, Attorney General’s Department, Colombo 12. Complainant-Respondent-Petitioner Vs, Bimbirigodage Sujith Lal, Yahaladuwa Road, Baddegama. Accused-Appellant And Now Between Hon. Attorney General, Attorney General’s Department, Colombo 12. Complainant-Respondent- Appellant Vs, Bimbirigodage Sujith Lal, Yahaladuwa Road, Baddegama. Accused-Appellant-Respondent

19/ 02/ 18	SC /FR/ Application No 97/2015	1. R.M. Premil Priyalath de. Silva, 2. P.W.Reka Samanthi, 3. R.M.D.S.R.de. Silva (Minor) All at 20/1, R.E. de. Silva Mawatha, Ambalangoda. Petitioners Vs, 1. Akila Viraj Kariyawasam (M.P) Hon. Minister of Education, Ministry of Education, “Isurupaya” Battaramulla. 2. Upali Marasinghe, Secretary- Ministry of Education, “Isurupaya” Battaramulla. 3. Sumith Parakramawansha, Principal- Dharmashoka Vidyalaya, Galle Road, Ambalangoda. 4. R.N. Mallawarachchi 5. Diyagubaduge Dayarathne 6. M. Shirley Chandrasiri 7. N.S.T. de, Silva 3rd to 07th above all Members of the Interview Board (Admissions to Year 01) C/o: Dharmashoka Vidyalaya, Galle Road, Ambalangoda 8. W.T.B. Sarath 9. P.D.Pathirathne 10. K.P.Ranjith 11. Jagath Wellage 04th and 08th to 11th above all Members of the Appeal Board (Admissions to Year 01) C/o: Dharmashoka Vidyalaya, Galle Road, Ambalangoda 12. Mr. Ranjith Chandrasekara Director- National Schools, “Isurupaya” Battaramulla. 13. Hon. the Attorney General, Attorney General’s Department, Colombo 12. Respondents

18/ 02/ 18	SC. Appeal No. 121/2010	P.N. Maharajah, No. 133/5, Nawala Road, Narahenpita, Colombo 05. Deceased-Petitioner 1. Nagan Maharajah Weerasingham, 2. Muniyandi Aswath Ammal 3. Nagam Maharajah Nirmala All of, No. 133/5, Nawala Road, Narahenpita, Colombo 05. 4. Nagam Maharajah Thilagawathie 5. Nagam Maharajah Thilakaranee Both of, No. 16/10, Liyanage Mawatha, Nawala Road, Rajagiriya. Substituted-Petitioners Vs, 1. Hema Wijesekara, The Commissioner of National Housing, National Housing Department, “Sethsiripaya”Battaramulla. 2. Perumal Muniyandi Sundarammal (Deceased), No. 133/5, Nawala Road, Narahenpita, Colombo 05. 3. M.S. Jaldeen 4. H. Akurugoda 5. R.W.M.S.B. Rajapkse 6. N.T. Padmadasa All members of the Board of Review under Ceiling on Housing Property Law No. 10G, Sri Vipulasena Mawatha, Colombo 10. Respondents 7. Sunil Kannangara Director-Housing, National Housing Department, ‘Sethsiripaya’ Battaramulla. Added Respondent Now Between 1. Nagan Maharajah Weerasingham, 2. Muniyandi Aswath Ammal 3. Nagam Maharajah Nirmala All of, No. 133/5, Nawala Road, Narahenpita, Colombo 05. 4. Nagam Maharajah Thilagawathie 5. Nagam Maharajah Thilakaranee Both of, No. 16/10, Liyanage Mawatha, Nawala Road, Rajagiriya. Substituted-Petitioners-Petitioners 1. Hema Wijesekara, The Commissioner of National Housing, National Housing Department, “Sethsiripaya” Battaramulla. 2. Perumal Muniyandi Sundarammal (Deceased), No. 133/5, Nawala Road, Narahenpita, Colombo 05. 2A. Kasamuthu Singiah No. 133/6, Nawala Road, Narahenpita, Colombo 05. 2B. Kasamuthu Sinniah No. 133/5, Nawala Road, Narahenpita, Colombo 05. 3. M.S. Jaldeen 4. H. Akurugoda 5. R.W.M.S.B. Rajapkse 6. N.T. Padmadasa All members of the Board of Review under Ceiling on Housing Property Law No. 10G, Sri Vipulasena Mawatha, Colombo 10. Respondents-Respondents 7. Sunil Kannangara Director-Housing, National Housing Department, ‘Sethsiripaya” Battaramulla. 8. Raja Gunaratne The Commissioner of National Housing, National Housing Department, “Sethsiripaya” Battaramulla 9. Dr. M. Karunadasa The Commissioner of National Housing, National Housing Department, “Sethsiripaya” Battaramulla 10. S. Collure The Commissioner of National Housing, National Housing Department, “Sethsiripaya” Battaramulla Added Respondents-Respondents
18/ 02/ 18	SC CHC APPEAL No. 32/09	People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 02. Plaintiff Vs The Partnership business being carried on under the name and style of Zaid Tea. 1.Miran Naushad Jamaldeen, No. 52, Sea Beach Road, Colombo 11. 2.Siththi Ayesha Naushad, No. 52, Sea Beach Road, Colombo 11. Defendants AND NOW The Partnership business being carried on under the name and style of Zaid Tea. 1.Miran Naushad Jamaldeen, No. 52, Sea Beach Road, Colombo 11. 2.Siththi Ayesha Naushad, No. 52, Sea Beach Road, Colombo 11. Defendant Appellants Vs People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 02. Plaintiff Respondent

18/ 02/ 18	SC APPEAL No. 92/2010	Gammeddegoda Saranatissa Thero, Controlling Viharadhipathi of Sri Sudharshanaramaya, Horangalle, Thalgaswela and Saila Bimbaramaya, Indurupatwila. Plaintiff Vs Horangalle Samiddhi Thero of Sri Sudharshanaramaya, Horangalle. Horangalle. Defendant AND Gammeddegoda Saranatissa Thero, (Deceased) Controlling Viharadhipathi of Sri Sudharshanaramaya, Horangalle, Thalgaswela and Saila Bimbaramaya, Indurupatwila. Plaintiff Appellant Gammaddegoda Amarasiri Thero, Sri Mahindaramaya, K.E,Perera Mawatha, Thalwatta, Kelaniya. Substituted Plaintiff Appellant Vs Horangalle Samiddhi Thero, Sri Sudharshanaramaya, Horangalle. Defendant Respondent AND NOW BETWEEN Horangalle Samiddhi Thero, Sri Sudharshanaramaya, Horangalle. Defendant Respondent Appellant Vs Gammaddegoda Amarasiri Thero, Sri Mahindaramaya, K.E,Perera Mawatha, Thalwatta, Kelaniya. Substituted Plaintiff Appellant Respondent

18/ 02/ 18	SC (APPEAL) 134/16	1. Hettige Don Tudor, 142, Lanka Porcelain,Katuwawala,Boralesgamuwa. 2. Hettige Lakshman Sandasiri,117, Udupeella, Matale. 3. Hettige Dona Seetha Padmini Sandasiri, 142 B, Katuwawala, Borelesgamuwa. Plaintiffs Vs Hettige Don Ananda Chandrasiri, 82C,Katuwawala, Boralesgamuwa. And Others Defendants AND THEN BETWEEN 11. Hettige Dona Lalitha 12. Hettige Don Sunila, Both of, No. 142/2A, Katuwawala, Boralesgamuwa. 11th and 12th Defendant Appellants Vs 1.Hettige Don Tudor,142B, Lanka Porcelain, Katuwawala, Boralesgamuwa. 2.Hettige Lakshman Sandasiri, 117, Udupeella, Matale. 3.Hettige Dona Seetha Padmini Sandasiri, 142, Katuwawala, Boralesgamuwa. Plaintiff Respondent AND 1.Hettige Don Ananda Chandrasiri, 82C, Katuwawala, Borelesgamuwa. 2.Hettige Don Edwin alias Edman, Abhaya Niwasa, Katuwawala, Borelesgamuwa. (Deceased) 2A. Hettige Dona Lalitha, 142/2A, Katuwawala, Boralesgamuwa. 3. Hettige Dona Emanona, 220/7, Glunberg Place, (Off Dambahena Road), Maharagama. (Deceased) 3A. W.A.Nandasena, 323/6, Pelanwatta, Pannipitiya. 4.Hettige Dona Jane Nona, 220/7, Glenburg Place, Dambahena Road Maharagama. 5.D.M.D. Biyatris, 785, Etul Kotte, Kotte. 6. D.M.D. Herbert, 785, Etul Kotte, Kotte. 7. D.M.D. Clarice, 785, Etul Kotte, Kotte. 8. D.M.C. William,785, Etul Kotte, Kotte. 9. D.M.D. Sunil, 785, Etul Kotte,Kotte. 10. D.S.Rupasinghe,142B, Katuwawala, Borelesgamuwa. (Deceased) 10A.Hettige Don Ananda Chandrasiri, 82C, Katuwawala, Boralesgamuwa. Defendant Respondents AND NOW BETWEEN 1.Hettige Don Tudor,142B, Lanka Porcelain, Katuwawala, Boralesgamuwa. 2.Hettige Lakshman Sandasiri, 117, Udupeella, Matale. 3.Hettige Dona Seetha Padmini Sandasiri, 142 B, Katuwawala, Boralesgamuwa. . Plaintiff Respondent Appellants Vs 11. Hettige Dona Lalitha 12. Hettige Don Sunila, Both of, No. 142/2A, Katuwawala, Boralesgamuwa. 11th and 12th Defendant Appellant Respondents And 1.Hettige Don Ananda Chandrasiri, 82C, Katuwawala, Borelesgamuwa. 2.Hettige Don Edwin alias Edman, Abhaya Niwasa, Katuwawala, Borelesgamuwa. (Deceased) 2A. Hettige Dona Lalitha, 142/2A, Katuwawala, Boralesgamuwa. 3. Hettige Dona Emanona, 220/7, Glunberg Place, (Off Dambahena Road), Maharagama. (Deceased) 3A. W.A.Nandasena, 323/6, Pelanwatta, Pannipitiya. 4.Hettige Dona Jane Nona, 220/7, Glenburg Place, Dambahena Road Maharagama. 5.D.M.D. Biyatris, 785, Etul Kotte, Kotte. 6. D.M.D. Herbert, 785, Etul Kotte, Kotte. 7. D.M.D. Clarice, 785, Etul Kotte, Kotte. 8. D.M.C. William,785, Etul Kotte, Kotte. 9. D.M.D. Sunil, 785, Etul Kotte,Kotte. 10. D.S.Rupasinghe,142B, Katuwawala, Borelesgamuwa. (Deceased) 10A.Hettige Don Ananda Chandrasiri, 82C, Katuwawala, Boralesgamuwa. Defendant Respondent Respondents
08/ 02/ 18	SC Appeal 81/2014	Leader Publication (Pvt) Limited C/o Com- Sec Management Services (Pvt) Ltd No.41, Alfred House Gardens, Colombo3 And presently of No.24, Katukuruduwatta Road, Ratmalana. Defendant-Appellant-Petitioner-Petitioner-Appellant Vs Ronnie Peiris No.155, Notting Hill Gate, London W 113LF, United Kingdom. Plaintiff-Respondent-Respondent-Respondent-Respondent

06/ 02/ 18	SC. Appeal No.114/2 017	Edmange Sampath Amarasiri, Pahala Minuwangete, Minuwangete. Accused-Appellant-Petitioner Vs. Officer-in-Charge Police Station, Wariyapola. Complainant-Respondent-Respondent Hon. Attorney General Attorney General's Department, Colombo 12. Respondent-Respondent
04/ 02/ 18	SC Appeal 116 - 2017	Enasalmada Aluth Gedara Ariyasinghe, Malgammana, Gangeyaya, Maraka. Defendant-Respondent Petitioner VS Enasalmada Aluth Gedara Wijesinghe, No.17, Malgammana, Maraka. Plaintiff-Appellant Respondent
29/ 01/ 18	SC Spl LA No 57/2017	K.A.Shantha Udayalal Accused - Appellant-Petitioner Vs. Hon. Attorney General Attorney General's Department, Colombo 12.
23/ 01/ 18	SC Rule 03/2014	Weerasekera Arachige Dona Sddhawathie, No. 732, Sri Nanda Mawatha, Madinnagoda, Rajagiriya Complainant Vs. Hemantha Sittuge, Law Library Hulsftsdorp, Colombo12 Respondent
23/ 01/ 18	SC RULE 03 / 2014	Weerasekera Arachchige Dona Saddhawathie, No. 732, Sri Nanda Mawatha, Madinnagoda, Rajagiriya. Complainant Vs Hemantha Situge, Law Library, Hulftsdorp, Colombo 12. Respondent
21/ 01/ 18	SC Appeal 95/2017	Mahamarakkalage Mahindarathne Kudabolana, Ambalantota. Plaintiff Vs Rate Ralalage Gedera Anuradha Chathurangani No.634, Hirimbura Road, Labuduwa. Defendant AND Mahamarakkalage Mahindarathne Kudabolana, Ambalantota. Plaintiff-Appellant Vs Rate Ralalage Gedera Anuradha Chathurangani No.634, Hirimbura Road, Labuduwa. Defendant-Respondent AND NOW BEWEEN Rate Ralalage Gedera Anuradha Chathurangani No.634, Hirimbura Road, Labuduwa. Defendant-Respondent-Petitioner-Appellant Vs Mahamarakkalage Mahindarathne Kudabolana, Ambalantota. Plaintiff-Appellant-Respondent-Respondent

17/ 01/ 18	SC. Appeal No. 119/15	DANGOLLAGE KAMAL NANDASIRI Kadadara, Imbulana. PLAINTIFF VS. 1. DANGOLLAGE VINITHA NILMINI Kadadara, Imbulana. 2. KARIYAWASAM WICKRAMA ARACHCHILAGE PIYASENA Kadadara,Imbulana 3. KARIYAWASAM WICKRAMA ARACHCHILAGE THILAKARATHNA Kadadara, Imbulana. DEFENDANTS AND 2. KARIYAWASAM WICKRAMA ARACHCHILAGE PIYASENA Kadadara,Imbulana 2A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE Kadadara, Imbulana. 3. KARIYAWASAM WICKRAMA ARACHCHILAGE THILAKARATHNA Kadadara, Imbulana. 3A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE Kadadara, Imbulana. 2A AND 3A DEFENDANTS- APPELLANTS VS. DANGOLLAGE KAMAL NANDASIRI Kadadara, Imbulana. PLAINTIFF-RESPONDENT DANGOLLAGE VINITHA NILMINI Kadadara, Imbulana. 1st DEFENDANT-RESPONDENT AND NOW BETWEEN DANGOLLAGE KAMAL NANDASIRI Kadadara, Imbulana. PLAINTIFF-RESPONDENT- PETITIONER/APPELLANT VS. DANGOLLAGE VINITHA NILMINI Kadadara, Imbulana. 1st DEFENDANT-RESPONDENT- RESPONDENT 2. KARIYAWASAM WICKRAMA ARACHCHILAGE PIYASENA Kadadara,Imbulana 2A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE Kadadara, Imbulana. 3. KARIYAWASAM WICKRAMA ARACHCHILAGE THILAKARATHNA Kadadara, Imbulana. 3A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE Kadadara, Imbulana. 2A AND 3A DEFENDANTS- APPELLANTS-RESPONDENTS

17/01/18	S.C.Appeal No.59/2012	MADDUMAGE SIRISENA PERERA No. 168, Bellanwila, Boralesgamuwa. PLAINTIFF MADDUMAGE SULOCHANA PRIYANGIKA PERERA No. 107A, Sarabhoomiya, Batakeththara, Piliyandala. Presently at No. 24E, Nawakanda Road, Jaltara,Ranala. SUBSTITUTED PLAINTIFF VS. 1. MADDUMAGE NIMAL GUNASIRI PERERA No. 99, Bellanwila, Boralesgamuwa. 2. GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE 3. RANASINGHE ARACHCHIGE GAMINI 4. RANASINGHE ARACHCHIGE GEETHANI 5. RATHNAYAKE SHANTHA PATHMASIRI 6. RANASINGHE ARACHCHIGE DILANI All of No. 181, Bellanwila (near Junction), Boralesgamuwa. DEFENDANTS AND MADDUMAGE SULOCHANA PRIYANGIKA PERERA No. 107A, Sarabhoomiya, Batakeththara, Piliyandala. Presently at No. 24E, Nawakanda Road, Jaltara,Ranala. SUBSTITUTED PLAINTIFF-APPELLANT VS. 1. MADDUMAGE NIMAL GUNASIRI PERERA No. 99, Bellanwila, Boralesgamuwa. 2. GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE 3. RANASINGHE ARACHCHIGE GAMINI 4. RANASINGHE ARACHCHIGE GEETHANI 5. RATHNAYAKE SHANTHA PATHMASIRI 6. RANASINGHE ARACHCHIGE DILANI All of No. 181, Bellanwila (near Junction), Boralesgamuwa. DEFENDANTS -RESPONDENTS AND NOW BETWEEN MADDUMAGE SULOCHANA PRIYANGIKA PERERA No. 107A, Sarabhoomiya, Batakeththara, Piliyandala. Presently at No. 24E, Nawakanda Road, Jaltara,Ranala. SUBSTITUTED PLAINTIFF-APPELLANT- PETITIONER/APPELLANT VS. 1. MADDUMAGE NIMAL GUNASIRI PERERA No. 99, Bellanwila, Boralesgamuwa. 2. GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE 3. RANASINGHE ARACHCHIGE GAMINI 4. RANASINGHE ARACHCHIGE GEETHANI 5. RATHNAYAKE SHANTHA PATHMASIRI 6. RANASINGHE ARACHCHIGE DILANI All of No. 181, Bellanwila (near Junction), Boralesgamuwa. DEFENDANTS -RESPONDENTS -RESPONDENTS
17/01/18	S.C. C.H.C. Appeal No. 10/2005	THE SWADESHI INDUSTRIAL WORKS LIMITED No.57,Colombo Road, Kandana. PLAINTIFF VS. 1. DURAI VISVANATHAN RAJPRASAD C/O M/S Rani Grinding Mills, No. 219, Main Street, Matale. . 2. DIRECTOR OF INTELLECTUAL PROPERTY National Intellectual Property Office, 3rd Floor, Samagam Medura, Colombo. DEFENDANTS AND DURAI VISVANATHAN RAJPRASAD C/O M/S Rani Grinding Mills, No. 219, Main Street, Matale. 1ST DEFENDANT-APPELLANT VS. THE SWADESHI INDUSTRIAL WORKS LIMITED No.57, Colombo Road, Kandana. PLAINTIFF- RESPONDENT DIRECTOR OF INTELLECTUAL PROPERTY National Intellectual Property Office, 3rd Floor, Samagam Medura, Colombo. 2ND DEFENDANT- RESPONDENT
11/01/18	Sc SPL LA 239 - 2017	

09/01/18	SC FR Application No. 362/2017	K.H.G. Kithsiri, 477 F I, Deniyawaththa Road, Battaramulla. PETITIONER Vs. 1. Hon. Faizer Musthapha MP, Minister of Provincial Councils and Local Government, No. 206/1,Lake Drive, Colombo 08. 2. Hon. Karu Jayasuriya, Speaker of Parliament of Sri Lanka, No. 02,Amarasekera Mawatha, Colombo 05. 3. Jayantha C. Jayasuriya P.C., Hon. Attorney General, Attorney General‟s Department, Colombo 12. 4. Mahinda Deshapriya, Chairman, Election Commission. 5. N.J. Abesekere P.C. Member, Election Commission. 6. Prof. S.R.H. Hoole Member, Election Commission The 4th to 6th Respondents above named [All of the Election Secretariat, Sarana Mawatha,Rajagiriya.] RESPONDENTS

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

In the matter of an appeal

1. Maththumagala Kankanamalage Victor Alwis
2. Mallawaarachchige Nalani Chandralatha
3. Maththumagala Kankanamalage Dushantha Sanjeewa

All of No.191/29 Maladolawatta,
Ihala Biyanwala, Kadawatha

Plaintiff

SC Appeal 5/2013
SC Leave to Appeal Application
No. SC/HCCA/238/12
High Court Civil Appeal Case
No.WP/HCCA/GPH/18/2007(F)
DC Gampaha 38626/Land

Vs

Maththumagala Kankanamalage
Newton Alwis
No.589, Kandy Road, Eldeniya,
Kadawatha

Defendant

AND THEN BETWEEN

Maththumagala Kankanamalage
Newton Alwis
No.589, Kandy Road, Eldeniya,
Kadawatha

Defendant-Appellant

Vs

1. Maththumagala Kankanamalage Victor Alwis
2. Mallawaarachchige Nalani Chandralatha
3. Maththumagala Kankanamalage Dushantha Sanjeewa

All of No.191/29 Maladolawatta,
Ihala Biyanwala, Kadawatha

Plaintiff-Respondents

AND NOW BETWEEN

1. Mallawaarachchige Nalani Chandralatha
2. Maththumagala Kankanamalage Dushantha Sanjeewa

All of No.191/29 Maladolawatta,
Ihala Biyanwala, Kadawatha

Plaintiff-Respondent-Petitioner-Appellants

Vs

Maththumagala Kankanamalage
Newton Alwis
No.589, Kandy Road, Eldeniya,
Kadawatha

Defendant-Appellant-Respondent-Respondent

Before : Nalin Perera CJ
Sisira J de Abrew J
Murdu Fernando PC J

Counsel : Migara Dass for the Plaintiff-Respondent-Petitioner-Appellants

P.K. Prince Perera for the Defendant-Appellant-Respondent-Respo
Argued on : 12.6.2018

Written Submission
Tendered on : 25.1.2018 by the Plaintiff-Respondent-Petitioner-Appellants
19.1.2018 by the Defendant-Appellant-Respondent-Respondent

Decided on : 03.12.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court wherein the learned Judges of the said Court set aside the judgment of the District Court and held in favour of the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent). Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Respondent-Petitioner-Appellants (hereinafter referred to as the Plaintiff-Appellants) have appealed to this court. This court by its order dated 18.1.2013 granted leave to appeal on questions of law set out below.

1. The learned Judges of the Civil Appellate High Court have misdirected themselves in fact and in law.
2. The learned Judges of the Civil Appellate High Court have failed to consider the fact that 3rd Plaintiff though a minor at the time of execution of the Deed of Gift had in fact accepted the gift by signing the same and the Attesting Notary has certified to this fact.
3. If there was sufficient acceptance of gift by the minor whether the judgment of the Civil Appellate High Court on the question of acceptance was correct in law.

The Plaintiff-Appellants filed this case in the District Court seeking a declaration of title to the property described in the schedule of the plaint and to eject the Defendant-Respondent from the said property. The Defendant-Respondent is the brother of the 1st Plaintiff. Since the Plaintiff-Appellants have sought a declaration of title, they must prove their title to the land. In this connection I would like to consider Peiris Vs Savunahamy 54 NLR wherein this 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 Dharmadasa Vs Jayasena [1997] 3 SLR 327 this court held as follows: "In a rei vindicatio action the burden is on the plaintiff to establish the title pleaded and relied on by him."

The 1st Plaintiff by Deed No.13276 dated 24.4.1970 attested by DI Wimalaweera Notary Public became the owner of the property in dispute. The said deed was produced at the trial marked P1. Thereafter the 1st Plaintiff by Deed No.7249 dated 8.6.1991 attested by DC Gunawathi gifted the said property to his son retaining life interest of him and his wife (the 2nd Plaintiff). This deed was produced at the trial marked P2.

The Defendant-Respondent contended that deed of gift marked P2 was not valid since the gift has not been validly accepted by the 3rd Plaintiff who is the son of the 1st Plaintiff. The Defendant-Respondent contended that the 3rd Plaintiff could not have accepted the gift since he was a minor on the day of the execution of the deed of gift (P2). I now advert to this contention. It is true that the 3rd Plaintiff who is the donee in the said deed of gift was a minor at the time of execution of said deed of gift. But does it mean that the 3rd Plaintiff was not capable of accepting the gift? The 3rd Plaintiff was, at the time of execution of the deed of gift, 15 years old. This was the evidence of the mother of the 3rd Plaintiff. In this connection I would like

to consider the judgment in the case of Mohideen Hadjiar Vs Ganeshan 65 NLR 421 wherein their Lordships held as follows: "that the donee, though a minor, had sufficient understanding to accept the donation and that the evidence was sufficient to establish acceptance by him of the donation."

In Abubucker Vs Fernando [1987] 2SLR 225 this Court held as follows. A donation can be accepted by a minor provided he was of sufficient understanding. Looking after the donor in his illness can be evidence of such sufficient understanding.

Considering the above legal literature, I hold that a minor who is of sufficient understanding is capable of accepting a gift given in a deed of gift. The mother of the 3rd Plaintiff has said in evidence that the 3rd Plaintiff at the time of execution of the deed of gift was 15 years old. The Defendant-Respondent has not, during the cross-examination, suggested to her that the 3rd Plaintiff was not of sufficient understanding at the time of execution of the deed of gift. When I consider all the above matters, I hold that the 3rd Plaintiff was capable of accepting the gift given in the deed of gift by his father and he has validly accepted the Deed of Gift marked P2. Considering all the above matters, I hold that the Plaintiff-Appellants have proved that they were the owners of the property described in the schedule to the plaint.

The Defendant-Respondent took up the position that he has acquired prescriptive title to the land described in the schedule to the plaint. The learned District Judge decided that Defendant-Respondent had not acquired the prescriptive title to the said property. But the learned Judges of the Civil Appellate High Court decided that the Defendant-Respondent had acquired the prescriptive title to the land described in the schedule to the plaint. Therefore the most important question that must be decided is whether the Defendant-Respondent has

acquired the prescriptive title to the said property or not. I now advert to this question. The Defendant-Respondent has admitted in evidence that he came to occupy the said property on an invitation of his brother, the 1st Plaintiff; that he paid assessment rates to the Municipal Council in the name of the 1st Plaintiff; that he obtained electricity in the name of the 1st Plaintiff; that his name is not included in the Electoral Register; and that he occupied the property since his brother, the 1st Plaintiff gave him permission.

Learned counsel for the Defendant-Respondent tried to advance an argument that the Defendant-Respondent did an overt act since he constructed a house. But I am unable to accept the said contention since the Defendant-Respondent has occupied the property with permission of 1st Plaintiff and electricity was obtained after obtaining permission of the 1st Plaintiff. When I consider the above evidence, I hold that the Defendant-Respondent has admitted in evidence that he occupied the said property as a licensee of the 1st Plaintiff. If that is so, has he acquired the prescriptive title to the said property? Section 3 of the Prescription Ordinance reads as follows.

> *Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs.*

And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

When I consider the above section, I hold that if a person claims that he has acquired prescriptive title to a property in terms of Section 3 of the Prescription Ordinance, one of the conditions that he should prove is that his possession of the property was an adverse possession. This view is supported by the judgment in the case of Seeman Vs David [2000] 3 SLR 23 wherein His Lordship Justice Weerasuriya held as follows. "The proof of adverse possession is a condition precedent to claim prescriptive rights". In de Silva Commissioner General of Inland Revenue 80 NLR292 this court held thus: " Where property belonging to the mother is held by the son the presumption will be that it is permissive possession which is not in denial of the title of the mother and is consequently not adverse to her."

When a person possesses a property with leave and licence of the owner such a possession cannot be considered as an adverse possession. Such a person is not

entitled to acquire prescriptive title to the property in terms of Section 3 of the Prescription Ordinance. As I pointed out earlier the Defendant-Respondent has possessed the property with leave and licence of the 1st Plaintiff. Can a licensee of an owner of a property acquire prescriptive title to the property? In considering 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"

In Madunawala Vs Ekneligoda 3 NLR 213 wherein Bonser CJ held as follows:

"A person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation."

Applying the principles laid down in the above legal literature, I hold that licensee of an owner of a property cannot acquire prescriptive title to the property against the owner of the property so long as he holds the status of a licensee. I further 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 that 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.

When a person occupies a land as a licensee of the owner the land, such a person (licensee), by his own act, accepts the title of the owner. Therefore the licensee has no right to challenge the title of the owner. In such a case his duty is first to restore the property to the owner. This view is supported by the following judicial literature. Section 116 of the Evidence Ordinance reads as follows.

> *"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and*
>
> *No person who came upon any movable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."*

Ruberu Vs Wijesooriya [1998] 1 SLR 58 Justice U de Z Gunawardena held as follows:

> *"Whether it is a licensee or a lessee, the question of title is foreign to a unit in ejectment against either. The licensee (defendant - respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the plaintiff-appellant without whose permission he would not have got it. The effect of S. 116 Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-respondent is perforce an admission of the fact that the title resides in the plaintiff."*

In Gunasinghe Vs Samarasundera [2004] 3 SLR 28 Justice Dissanayake held thus:

> *"A licensee or a lessee is estopped from denying the title of the licensor or lessor. His duty in such a case is first to restore the property to licensor or the lessor and then to litigate with him as to the ownership."*

In the present case, I have earlier held that the Defendant-Respondent occupies the land as a licensee of the 1st Plaintiff. For the aforementioned reasons, I hold that the Defendant-Respondent has failed to acquire prescriptive title to the property and that he cannot be accepted as the owner of the property on the basis of prescriptive title. Considering all the above matters, I hold that the Plaintiff-Appellants are entitled to the judgment in this case; that the judgment of the learned District Judge is correct; and that the judgment of the learned Judges of the Civil Appellate High Court is wrong and contrary to the established legal principles.

In the above circumstance, I answer the 1st question of law as follows.

“The learned Judges of the Civil Appellate High Court have misdirected themselves on facts and in law.”

When the court holds that the Defendant-Respondent is not entitled to acquire prescriptive title to the property in dispute, he cannot challenge the title of the Plaintiff. Therefore the Plaintiff-Appellants are entitled to the judgment in this case. In my view the 2nd and 3rd questions of law do not arise for consideration.

For the above reasons, I affirm the judgment of the learned District Judge and set aside the judgment of the learned Judges of the Civil Appellate High Court. I allow the appeal of the Plaintiff-Appellants with costs. The Plaintiff-Appellants are entitled to costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

Nalin Perera Chief Justice

I agree.

Chief Justice

Murdu Fernando 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 action instituted in terms of section 64 (a) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 amended by Act No. 04 of 1994 and Act No.56 of 2009.

SC. Appeal No.201/2014
High Court Colombo case
No. HC/MCA/135/13
Magistrate's Court Colombo
Case No.58332/5

H. K. Sumanasena,
Manager (Acting),
Special Investigations Unit,
Sri Lanka Bureau of Foreign Employment
234, Denzel Kobbekaduwa Mawatha,
Battaramulla.

Plaintiff

-Vs-

MallawarachchigeKanishka Gunawardhana
Licensee,
Samasa Foreign Employment Agency,
89, 3rd Floor, Super Market,
Borella, Colombo 08.

Accused.

And

In the matter of an appeal in terms of Article 154 (3) (b) of the Constitution read with section 4 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 and section 320 (1) of the Code of Criminal Procedure Act No.15 of 1979.

Mallawarachchig Kanishka Gunawardhana,
Licensee,
Samasa Foreign Employment Agency,
89, 3rd Floor, Super Market,
Borella, Colombo 08.

Accused Appellant

~Vs~

1 H.K.Sumanasena,
Manager (Acting),
Special Investigations Unit,
Sri Lanka Bureau of Foreign Employment
234, Denzel Kobbekaduwa Mawatha,
Battaramulla.

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

Respondents

And now

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 read with sections 9 and 10 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Mallawarachchige Kanishka Gunawardhana,
Licensee,
Samasa Foreign Employment Agency,
89, 3rd Floor, Super Market,
Borella, Colombo 08.

Accused Appellant Petitioner

-Vs-

1 H.K.Sumanasena,
Manager (Acting),
Special Investigations Unit,
Sri Lanka Bureau of Foreign Employment
234, Denzel Kobbekaduwa Mawatha,
Battaramulla.

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

Respondent respondents

BEFORE: BUWANEKA ALUWIHARE, P.C., J
NALIN PERERA, J, &
PRASANNA S. JAYAWARDENA, PC, J.

COUNSEL: Sumedha Mahawanniarachchi with Champika Rodrigo and Amila Vithana instructed by Jayantha Senanayake for the Accused-Appellant-Appellant.
Madhawa Tennakoon, SSC for the Respondent-Respondent.

ARGUED ON: 14th September, 2016

DECIDED ON: 15th March, 2018

ALUWIHARE, PC, J:

Special leave to appeal was granted in this matter on the questions:

(1) Whether the Accused-Appellant-Petitioner-Appellant (hereinafter referred to as the Accused-Appellant) was entitled to file an appeal against the conviction, and

(2) In instances where there is no right of appeal from a conviction, whether the court is required to consider the existence of exceptional circumstance as a threshold issue in reviewing a judgment of an original court.

The facts relating to this matter are straight forward in that, the Accused-Appellant was charged before the magistrate's court under Sections 64 (a) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985, as amended.
The basis of the charge was that, the Accused-Appellant demanded and received a sum of Rs.450, 000 from one Illeperumage Dilhani Pradeepa for the purpose of securing her employment in Cyprus. I do not wish to delve into the facts of the case as they would be of no relevance in deciding the questions of law referred to. Suffice it to state that, at the conclusion of the trial, the learned Magistrate, by

his judgment dated 19th March, 2013 found the Accused-Appellant guilty and proceeded to convict the Accused-Appellant as charged.

Aggrieved by the judgment aforesaid, the Accused-Appellant challenged the conviction by lodging an appeal in the High Court. When the matter was taken up before the High Court, an objection was raised on behalf of the Attorney-General, the 2nd Respondent-Respondent to the present application.

The learned State Counsel contended that the Accused-Appellant has no right of appeal against a conviction in terms of the provisions of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 (hereinafter referred to as the Act).

The basis of the objection appears to be, that the right of appeal is a substantive right and not a matter of procedure. The learned judge of the High Court having upheld the objection raised on behalf of the state, dismissed the appeal without considering the merits of the case.

The present appeal is from the said order of the learned High Court Judge.
At the hearing of the appeal the learned counsel for the Accused-Appellant referred to Section 31 of the Judicature Act as well as to the Article154 (P) (3) (a) of the Constitution. Both these are, provisions conferring appellate powers on the Court of Appeal and the High Court. While these provisions confer appellate powers, in Martin *Vs Wijewardene 1989 2 S.L R 409* His Lordship Justice Jameel rejected the argument that these provisions impliedly confer substantive right of appeal.

The learned counsel for the Accused-Appellant also relied on Section 317 of the Code of Criminal Procedure Act No.15 of 1979. The State, based their argument on the principle that the right of appeal is neither a fundamental nor an inherent

right, but a creation of a statute. It was contended on behalf of the Attorney-General that there can be no inherent right of appeal from any judgment for determination unless an appeal is expressly provided for, by the law itself.

The issue at hand, however, can be resolved by application of the provisions of the International Covenant on Civil and Political Right Act No.56 of 2007 (hereinafter referred to as the ICCPR Act).

Sri Lanka is a state party to the International Covenant on Civil and Political Rights (ICCPR) where an inherent right of appeal is recognized against any conviction. The Covenant, which was adopted by the General Assembly of the United Nations on 16th of December, 1966, entered into force on 23rd March, 1976. Sri Lanka acceded to the aforesaid covenant in the year 1980.

Sri Lanka being a dualist state, implementation of the ICCPR requires that it be incorporated into domestic law which was accomplished in 2007 with the passage of ICCPR Act. The goal of the covenant is to define international human rights standards and to require signatory states to adopt measures to enforce those rights. The rights provided by the ICCPR are regarded as the basic human rights that should be viewed as restrictions (against derogation) on the governments of signatory states. The ICCPR is valid for its signatory states and every signatory government is obligated to observe its provisions.

Paragraph 5 of Article 14 of the Covenant lays down that "Everyone convicted of a crime shall have the right of his conviction and sentence being reviewed by a higher tribunal according to law.

Jixi Zhang in his article Fair Trial Rights in ICCPR (Journal of Politics and Law - Vol 2 No.4 2009) states that *"Article 14, paragraph 5 provides that everyone*

convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. The right to appeal is also known as the right to be reviewed. The Human Rights Committee considers that the right to appeal is absolute. The absolute nature of the right to appeal is reflected in the following three aspects: the right to appeal applies to all types of crimes, that is, not only applies to serious crimes…… "

The preamble to the Covenant exemplifies the objectives and states:

> "Considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"
>
> Recognizing that these rights derive from the inherent dignity of the human person,
>
> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,
>
> Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,……

The ICCPR Act was enacted in the discharge of Sri Lanka's obligation as a signatory to the Covenant and the main objective of the Act is to give effect to the Covenant and in my view the provisions of the Act must be referable to a jurisdiction both to that confers validity to the objectives of the ICCPR and to facilitate enforceability of the Articles of the Covenant.

Section 4 (2) of the ICCPR Act stipulates that every person convicted of a criminal offence under any matter shall have the right of appeal to a higher court against such conviction and any sentence imposed.

In instances where no right of appeal is conferred by a statute, a party aggrieved, could invoke the revisionary jurisdiction to have a decision of an original court reviewed and our courts have always recognized revisionary jurisdiction in such instances. The provision embodied in Section 4 (2) of the ICCPR Act has now expanded the scope (of jurisdiction) to appeals in the case of all criminal offences. While the expansion of the appellate jurisdiction by virtue of section 4 (2) of the ICCPR Act relates exclusively to criminal cases, concomitantly, it must be stated, that Section 4 (2) of the ICCPR Act has no application whatsoever to civil cases.

Violation of Section 64 (a) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 can be visited with penal sanctions and thus falls within the scope of "criminal offences under any written law" referred to in Section 4 (2) of the ICCPR Act and further the Act (SLBFE) does not carry a specific provision ousting the right of appeal against a conviction and a sentence imposed for a violation under the Act. Thus, I hold that the Accused-Appellant has a right of appeal against the impugned conviction.

I am also of the view that with the enactment of the ICCPR Act, Sections 317 and 320 of the Code of Criminal Procedure Act must necessarily be read with Section 4 (2) of the ICCPR Act.

I answer the first question of law in the affirmative and hold that the Accused-Appellant has a right of appeal against the conviction and sentence, to the High Court.

In view of the above findings, the necessity to answer the second question of law on which leave was granted, does not arise.

Accordingly, I set aside the order made by the learned High Court Judge on 28th July, 2014 in this matter and direct the learned High Court Judge to entertain the appeal of the Accused -Appellant and to consider the same, on its merits.

JUDGE OF THE SUPREME COURT

JUSTICE NALIN PERERA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE PRASSANNE JAYAWARDENA P.C

I agree

JUDGE OF THE SUPREME COURT

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

SC Rule 03/2014

In the matter of a Rule in terms of Section 42(2) of the JudicatureAct No.2 of 1978, against Hemantha Sittuge, Attorney-at-Law

Weerasekera Arachige Dona Sddhawathie,
No. 732, Sri Nanda Mawatha,
Madinnagoda,
Rajagiriya

Complainant

Vs.

Hemantha Sittuge,
Law Library
Hulsftsdorp,
Colombo12

Respondent

BEFORE: S. EVA WANASUNDERA PC.J

B.P. ALUWIHARE PC.J

SISIRA J. DE ABREW J.

COUNSEL; Saliya Peiris PC for the Bar Assosiation of Sri Lanka

Thusith Mudalige Deputy Solicitor General for the Hon. Attorney General.

Dr. S.F.A. Cooray for the Respondent

INQUIRY

DATES: 20-02-2014, 01-12-2014, 11-12-2014, 19-01-2015, 08-12-2015,24-03-2016, 17-06-2016-01-08-2016, 24-11-2016, 17-01-2017, 03-04-2017, 14-06-2017 06-09-2017 and 03-10-2017

DECIDED ON; 24-01-2018

Aluwihare PC.J

I have read the order made in this matter by my sister, Hon. Justice Wanasundera P.C and I would like to say with respect that I do not find myself in agreement with her.

As Hon. Justice Wanasundera P.C had dealt with the facts to some extent, I shall advert to the facts only to the extent necessary.

The complainant Saddhawathie in her evidence stated that, due to the discharge of toxic waste by the business establishment, Perera and Sons (Pvt) limited, to the drain behind her house, she along with about hundred other residents in the area faced hardships as the effluence so discharged from the said business establishment polluted the water of the two wells which were used for bathing and to obtain drinking water.

Saddhawathie, having complained to various authorities to no avail, said that the Public Health Inspector closed the well, presumably due to the water not

being fit for human consumption, and this appears to be the only solution that the authorities could provide for Saddhawathie, depriving her and the neighbours of the source of water. This lady who was in her 70s, in desperation, no doubt, had thought of seeking redress through the courts. She said a peon by the name of Premasiri introduced her to the respondent attorney, Mr Sittuge (hereinafter also referred to as the Respondent).

Saddhawathie said in her evidence that she handed over the necessary documents to the respondent and requested him to file action against Perera and Sons. The respondent had wanted Rs.10, 000 and the complainant says she paid the said amount in two instalments. After the documents were handed over, the complainant had received a letter from the respondent stating that permission was obtained to file an action, although there was no requirement to obtain permission from anyone to file action.

As nothing happened thereafter, she says she continuously came to Hulftsdorp with the intention of meeting the respondent but had not been successful. On one such occasion, she had seen the respondent near the district court and having approached him, when questioned with regard to the case, the respondent had taken to his heels. Her response was "මහත්තයා පැනලා දිව්වනෙ" . In spite of her old age the Saddhawathie had given chase but the respondent had taken cover. She added that when she ran she developed leg pains and she was assisted by some people who were nearby in a Three wheeler.

Thereafter, the complainant says, she never met the respondent and saw him only at the inquiry before the Supreme Court.

Subsequent to this event the complainant, may have been in sheer desperation, had made a complaint to the Bar Association against the Respondent. The complainant's position is that, at the time she complained to the Bar Association the respondent had not filed an action as requested by her nor were the documents returned to her.

Saddhawathie had given evidence before the disciplinary committee of the Bar Association and the respondent had been absent right throughout the inquiry. According to the Bar Association inquiry notes (P 6) number of notices had been sent to the respondent, requiring him to attend the inquiry and these notices had been sent to the same address the respondent had used for his professional communications which is reflected on documents marked as P4 and P5, a letter sent by the respondent to the Honourable Attorney General and a letter addressed to the respondent by the Honourable Attorney General respectively.

In addition, the disciplinary committee of the Bar Association had requested the respondent to attend the enquiry by email as well. Yet there had not been any response whatsoever from the respondent.

I had the benefit of observing Saddhawathie while she testified at the inquiry and considering her demeanour and the deportment, she impressed me as a truthful and a credible witness. In every sense she is a peasant and appeared to be not so literate. She unravelled the injustice that was caused to her in a typical fashion of a villager. She did not appear to have any animosity towards the respondent Attorney apart from the fact that she was visibly aggrieved by the treatment meted out to her by the Respondent, which was natural as Saddhawathie had lost the use of her natural source of water at the hands of an established business. Although Rs.10,000 she parted with as legal fees may appear meager, to a person of her standing, certainly would have been a considerable sum which she could ill afford to spend on litigation. Sadly, she did not live to see the end of this inquiry as she passed away sometime after she testified before the Supreme Court. Even on the day she testified she had come to court, four days after undergoing surgery, against medical advice, as the respondent had phoned her and had insisted that she should attend the inquiry before the Supreme Court, so much was her deference to the court. Although she was cross examined at length, her evidence remains unassailed.

Respondent Attorney- at- Law in his defence elected to give evidence. The manner in which he answered the questions in the examination in chief and cross examination gave the impression that either he was incapable of understanding the questions or was evading questions. After careful scrutiny of his evidence, I have concluded that the respondent is not a witness worthy of credit. Although there are numerous instances that can be pointed out as not truthful answers, I wish to refer to a few of them, which I feel are vital to the determination of the issues in this inquiry.

(1) In explaining the reasons as to why the respondent did not attend the inquiry before the Bar Association, he said he did not receive a single notice, including the notice sent to him on 13-11-2009. Sittuge said that he would not have received any of the notices if they were sent to the Colombo Law Library as the officials (manning the Law library) are angry with him. However, in the same year he had sent a notice to the Honourable Attorney General (P4) in terms of section 461 of the Civil Procedure Code. In the said notice the Sittuge had put down "Colombo Law library" as his address. In fact the Honourable Attorney General's response (P 5) sent to the respondent is addressed to the Colombo law library. Let alone an Attorney- at-law who is expected to act responsibly, no sane person would use an address, if it is within his knowledge, that he would not receive any correspondence to that address. I am of the opinion that the respondent lied when he said that he did not receive any of the notices sent to him by the Bar Association requiring him to attend the inquiry. His own document, V2, which had been written late as August 2009, the respondent had used "Colombo law Library" as his forwarding address. This amply demonstrates that the story, Library officials being angry with him is merely a concocted one to justify his absence at the Bar Association inquiry.

(2) Respondent testifying before the Supreme Court under oath said, that he came to know that Saddhawathie had complained against him only when he attended this court and when his name was called. This again, in my view is bereft of any truth. The Respondent in his evidence stated that the documents he had collected from Saddhawathie were handed back to the instructing attorney Mr Piyathilake. He added that he did so, as the then secretary of the Bar Association Mr. U.R De Silva requested him, over the phone, to hand over the documents to Mr. Piyathilake. According to the Respondent, on a subsequent occasion, he had met Mr. De Silva at the High Court premises and he had been informed by Mr. De Silva that after the documents were handed over, action had been filed in the District Court. If that is what exactly had taken place, it would have been natural for the Respondent to ask the Secretary of the Bar Association as to why he is giving instructions regarding the Saddhawathie's matter, as the secretary of the Bar Association had nothing to do with the professional arrangement between Saddhawathie and Sittuge. In all probability, Mr. U.R.De Silva would have put the respondent on notice that Saddhawathie had made a complaint against him and that would have been the reason, for the Bar Association to interviene in the matter. Thus I am of the opinion that the respondent lied to this court when Sittuge said that he became aware that Saddhawathie had complained against him only when his name was called before the Supreme Court.

It appears that it was only after the documents were handed over to Mr Piyathilake that some meaningful action had been taken and action was filed on 17-10-2009, which was two months after Saddhawathie complained to the Bar Association.

To address the grievance of Saddhawathie, the situation demanded, taking immediate action, to prevent Perera and Sons discharging toxic waste polluting their source of water. According to the complaint made by Saddhawathie, she had instructed the respondent to file action against

Perera and Sons on 20-11- 2008. The action however was filed almost one year later on 7-10-2009, that was also after Saddhawathie had complained to the Bar Association and after the respondent had returned the documents to Mr Piyathilake, Attorney- at- law.

Ironically the Attorney -at -law Mr. Jayakody who gave evidence on behalf of the Respondent Sittuge said that after he collected the papers (relating to Sddhawathie's case) from Mr. Piyathilaka, he filed papers in court and obtained an injunction against Perera and Sons. This amply demonstrates the delay was on the part of respondent Sittuge in discharging his professional duty.

Having considered the material placed before the inquiry, I am of the firm view that it has been clearly established a dereliction of professional duty on the part of the respondent attorney- at-law Sittuge and he had acted in a manner detrimental and prejudicial to the interest of the complainant, whom he chose to represent.

Justice Dr. A.R.B Amerasinghe in his book " Professional Ethics and Responsblities of Lawyers" commenting on the duty of diligence on the part of an Attorney state, (pg;290)

> " An attorney should advise and represent his client and render professional assistance conscientiously with scrupulous care and due diligence in reasonable time and he should not accept any professional matter unless he can so attend to it".

International Code of Ethics for lawyers, published by the International Bar Association states that; (Rule 4)… *it is improper for lawyers to accept a case unless they can handle it promptly and with due competence…..*

Having carefully considered the material placed before this court in support of the Rule as well as on behalf of the respondent Sittuge, I have

reached the conclusion that the respondent Attorney- at-law had failed to exercise due diligence expected of an attorney, in prosecuting the interest of the complainant Saddhawathie and thereby committed deceit and malpractice within the meaning of section 42 (2) of the Judicature Act. I also hold that the conduct of the respondent Attorney at Law is disgraceful and dishounorable of an Attorney-at- law of good repute and competence.

Having considered the foregoing, I hold that the respondent Attorney is guilty of the breachers referred to in paragraphs (a) to (e) of the Rule issued against him.

The next issue is to consider appropriate measures that should be taken against the respondent Sittuge, in view of his conduct referred to above.

I have referred to the facts relevant to the complaint and a reiteration of the same would not be required. It appears, however, that this is not the first instance that the respondent Sittuge had conducted himself in this manner. Mr. Harsha Soza P.C, Overall Chairman of the Professional Purposes Committee of the Bar Association who overlooked the inquiry against respondent Sittuge at the Bar Association, had remarked in his letter dated 10.02.2010 that, ***"I find that Mr. Sittuge, AAL has made a habit of charging fees and not performing his professional duties".*** Mr. Soza P.C had referred to, two other instances where complaints have been made against respondent Sittuge:

PP/1802/37/09 complaint by Ms. Nallathambi Kalaimathy against Mr. Hemantha Sittuge

PPC/1803/38/09 complaint made by Mr. K. Palitha Wijesena, against Mr. Hemantha Sittuge.

In addition the Panel A of the Bar Association Disciplinary Committee of the Bar Association had observed that the inquiry relating to Saddawathie

is the 5th case against respondent Sittuge that had come up before the Panel.

If that be the case, the conduct on the part of respondent Sittuge had been unconciousanable and cannot be condoned by any measure. The respondent had not shown any attempt to reform himself in spite of the numerous allegations made against him and having to face disciplinary inquiries before the Disciplinary Committee of the Bar Assosiation and appears to carry on regardless.

I make order suspending the Respondent from practice or any other activity connected or concerned with the legal system for a period of five years.

Judge of the Supreme Court

JUSTICE SISIRA J. DE ABREW

I agree

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

.

Supreme Court Case Nos.
SC SPL.LA.125/2014
SC SPL.LA: 126/2014
Court of Appeal Case No;
95/2011 A, B, C
High Court Avissawella
Case No.58/2006

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant

~Vs~

1. Singappuli Arachchilaege Rumesh Sameera Dasanayake alias Gaminige Kolla
2. Baduwala Wahumpurage Podinona
3. Kalanchidevage Suresh Nandana

Accused.

AND BETWEEN

1. Singappuli Arachchilage Rumesh Sameera Dasanayake alias Gaminige Kolla
2. Baduwala Wahumpurage Podinona
3. Kalanchidevage Suresh Nandana

Accused~Appellants

~VS~

The Honourable Attorney General
Attorney Generals' department,
Colombo – 12

Complainant~Respondent

AND NOW BETWEEN

1. Singappuli Arachchilage Rumesh Sameera Dassanayake alias Gaminige Kolla
2. Baduwala Wahumpurage Podinona

Accused-Appellant-Petitioners
(SC SPL LA 126/2014)

Kalanchidevage Suresh Nandana
3rd Accused-Appellant-Petitioner
(SC SPL LA 125/2014)

-Vs-

The Honourable Attorney General
Attorney Generals' department,
Colombo – 12

Complainant-Respondent-Respondent

BEFORE: BUWANEKA ALUWIHARE, PC, J,
PRIYANTHA JAYAWARDENA, P.C. J &
NALIN PERERA, J.

COUNSEL: Anil Silva, PC for Petitioner in SC SPL. LA No.125/14
Shanaka Ranasinghe,PC for Petitioners in SC SPL.LA No.126/14
Dappula De Livera P.C, ASG for AG.

ARGUED ON: 12.10.2016

DECIDED ON: 27-03-2018

ALUWIHARE P.C.J,

Both, SC/SPL/LA 125/2014 and SC/SPL/LA126/2014 are applications, seeking special leave to appeal from the Supreme Court. The Petitioner in SC/SPL/LA 125/2014 was the 3rd accused appellant in the Court of Appeal case

No.95/2011 while the Petitioners in application No SC/SPL/LA126/2014 were the 1st and 2nd Accused Appellants in the same case.

The present applications before this court relate to a matter where the petitioner in SC SPL LA 125/2014 and the Petitioners in SC SPL 126/2014 have been convicted for the offence of murder and visited with the capital punishment. The Court of Appeal did not think it fit to interfere with the findings of the High Court.

Aggrieved by the judgment delivered by the Court of Appeal dismissing the appeal of the petitioners in the said case, they had sought special leave under the case numbers referred to above. When these two applications were taken up for support, the learned Additional Solicitor General raised a preliminary objection based on noncompliance with Rule 3 of the Supreme Court Rules of 1990 on the ground that Rule 3 requires the petition to contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted and that the petition in the present application is bereft of any such facts.

He further contended that the averments of the petition contain only the offences on which the petitioner was indicted, the fact that the Petitioner was convicted by the High Court, the fact that he appealed against the said judgement to the Court of Appeal and that the Court of Appeal dismissed his appeal. As such, the learned ASG argued that this application should be dismissed *in limine* due to non-compliance of Rule 3 aforesaid by a single judge in terms of Rule 10 (1) of the said Rules. The learned ASG drew the attention of this court to Rule 10 of the Supreme Court Rules in terms of which a single judge sitting in chambers can refuse to entertain such application, among other reasons, for non-compliance with the Rules.

Although the petition, *prima facie*, appears to be defective to the extent that it does not carry a concise statement of facts as required by Rule 3, the Petition, however, does states the grounds on which special leave to appeal is sought and

the questions of law for the consideration of the Court in relation to this application, and those averments are contained in paragraphs 11and 12 of the said Petition.

The main grounds of appeal referred to in paragraph 11 are;

> Learned Judges of the Court of Appeal failed to appreciate that the entirety of the evidence led at the trial in the High Court does not justify the conviction of the Petitioners of the charges in the indictment; and
>
> The failure on the part of the court of Appeal to consider the items of evidence in favour of the Petitioners which negative his participation in the incidents.

It is also urged that the Court of Appeal misdirected itself in holding that the conviction of the Petitioners in respect of the murders of Hettiarachchige Susantha and Hettiarachchige Swarna is correct, although there is no direct or circumstantial evidence to connect the Petitioners with the said murders.

The questions of law arising from the grounds referred to above are contained in paragraph 12 of the petition.

Rule 6 provides that where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document. In the instant application the Petitioners have filed affidavits which, however, are mere repetitions of the same matters referred to in the Petitions.

The question that arises for determination in the context of the preliminary objection is whether the Petitions, seeking special leave to appeal against the impugned judgment, are in compliance with the Rules and whether such compliance is mandatory. Rule 3 is a cardinal principle in drafting the documents which should be complied. This rule is necessary to ensure that the

petitioner places sufficient facts that would facilitate the court to determine the issues raised at the threshold stage of considering granting of special leave to appeal.

In the instant application, it is evident that the petitions in themselves do not contain sufficient material for the court to deliberate on the facts nor the questions of law.

Furthermore, Rule 6 provides that where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document. In the instant application the Petitioners have filed affidavits which, however, are mere repetitions of the same matters referred to in the Petitions.

In response to the preliminary objection raised, both learned president's counsel for the petitioners in their respective submissions contended that the petitioners had, along with the petitions, filed a copy of the entire case record of the High Court inclusive of the copies of the documentary evidence produced at the trial and as such the Supreme Court has been provided with sufficient material and is not deprived to ascertain the facts and matters that would be necessary to determine the issues. Mr. Anil Silva P.C also contended that the age-old practice in the Supreme court in applications of this nature is to file the entire case record of the original court, without elaborating on facts in the petition unless a particular set of facts are directly connected to the question of law raised.

The instant applications, Mr. Anil Silva P.C submitted, is mainly based on the ground of "insufficiency of evidence to establish the charges" which the learned president's counsel submitted can only be ascertained upon consideration of the evidence led at the trial.

It is to be seen that the judgment of the Court of Appeal is annexed and pleaded as part of the appeal. With regard to the compliance of Rule 6, the entirety of the High Court case record has been annexed as a part of the petition.

As the final court of review, the petitioners are now canvassing the legality of the conviction before this court, as the last resort.

In the case of **Kiriwanthe and another v Navaratne** 1990 2 SLR page 293 the Supreme Court considering the non-compliance of Rule 46 of the then Supreme Court Rules,(Rules of 1978) held that

> *"the requirements of Rule 46 must be complied with normally at the time of filing the application, but strict or absolute compliance is not essential. It is sufficient if there is compliance, which is substantial - this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied. The Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction.* ***Dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter. The discretion should be exercised judicially.***

In the same case his lordship justice Kulatunga, observed that:

> *"In exercising its discretion the Court will bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. At the same time the court will not permit mere technicalities to stand in the way of the Court doing Justice"*

His lordship justice Mark Fernando, in the case cited remarked that;

"The weight of authority thus favours the view that while all 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 noncompliance (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 therefor, in the context of the object of the particular Rule"

His lordship went on to observe *(Ibid)* that "*in the event an applicant, 'fails to strictly, but manages to substantially comply with a Rule, and in so doing causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application."*

In the case of **Nanayakkara v Kyoko Kyuma and two others S.C. (Spl.) L.A. No. 115/2008** (S.C minutes on 01.10.2009), the Court observed that;

> *"Supreme Court Rules" too should be interpreted in a comparable manner, wherever it permits, in order to avoid the said Rules too becoming a juggernaut car on the fast tract, that would leave a litigant maimed and broken on the road which leads to justice."*

It is to be noted that in the cases cited, the Supreme Court did not consider the effect of non-compliance with Rule 3 of the SC Rules, but non-compliance with certain other Rules. The rationale of those decisions, however, in my view is relevant to the alleged non-compliance in the present case before us.

I am of the view that the assertion made on behalf of the Petitioners, that by producing the entire case record, the Petitioners could be said to have substantially met the requirements, in the context of the Rule 3, is not acceptable and cannot be condoned.

Considering the decisions of this court referred to above coupled with the facts and circumstances peculiar to this case, I am, however, of the view that the discretion of the court in this instance should be exercised in favour of the Petitioners and accordingly I overrule the preliminary objection raised by the State.

This decision is applicable to both SC/SPL/LA 125/2014 and SC/SPL/LA 126/2014

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE NALIN PERERA

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal from the Judgment dated 13-12-2011 in Appeal No. NCP/HCCA/ARP/753/10 (F) in terms of Sec. 5C (1) of the Act No.54 of 2006.

SC Appeal 1/2014

S.C.H.C. (C.A.) L.A. Application No.41/2012

Appeal No. NCP/HCCA/ARP/753/2010 (F)

D.C. Polonnaruwa Case No.11665/Damages/07

Samarasinghe Gamage Janaka Manjula
No.180A, Yaya 08,
Ambagaswewa,
Medirigiriya.

Appearing by his Next Friend.

Disabled Plaintiff-Respondent-Petitioner

Jamburegoda Gamage Thakshala
No.180A, Yaya 08,
Ambagaswewa,
Medirigiriya.

(Duly appointed Next Friend in D.C. Polonnaruwa Case No.N.L.F. 11/06)

Plaintiff-Respondent-Petitioner-Appellant

Vs.

1. Meegaskumbure Gedera Susantha Piyatissa
   No. 154, Yaya 09,
   Maha Ambagaswewa,
   Medirigiriya.

2. Wasalathanthrige Don Chandana
No.156, Yaya 09,
Maha Ambagaswewa,
Medirigiriya.

3. Meegaskumbure Gedera Samantha Piyatissa
No.159, Yaya 09,
Maha Ambagaswewa,
Medirigiriya.

4. Werallagolle Gedera Wasantha Sarath Kumara,
No. 154, Yaya 09,
Maha Ambagaswewa,
Medirigiriya.

5. Hewa Manage Chaminda Ruwan Kumara
No. 154, Yaya 09,
Maha Ambagaswewa,
Medirigiriya.

Defendant-Appellant-Respondent-Respondents

BEFORE : Sisira J de Abrew J
Prasanna Jayawardena PC J and
L.T.B. Dehideniya J

COUNSEL **:** S.N. Vijithsingh with Shantha Karunadhara for the Plaintiff-Respondent-Petitioner-Appellant.

Ranil Samarasooriya with Madhawa Wijayasiriwardena for the 1st – 5th Defendant-AppellantRespondent-Respondents.

ARGUED ON : 12.07.2018

WRITTEN SUBMISSIONS
TENDERED ON : 18.03.2014 (By the Plaintiff-Respondent-Petitioner-Appellant)

DECIDED ON : 12.09.2018

Sisira J de Abrew J.

This is an appeal against the judgment of the learned Civil Appellate High Court Judges wherein they have set aside the judgment of the learned District Judge who held in favour of the plaintiff. Being aggrieved by the said judgment of the Civil Appellate High Court Judges the plaintiff-respondent-petitioner-appellant (hereinafter referred to as the plaintiff-appellant) has appealed to this Court.

This Court by its order dated 19.12.2013 granted leave to appeal on questions of law stated in paragraphs 20 (i) and 20 (viii) of the petition of appeal dated 20.01.2012 which are set out below.

i) Did the High Court err in law in its failure to apply properly the rule "balance of probabilities" in the circumstances of this case whereas the learned District Judge had come to a finding that the plaintiff proved his case on balance of probabilities?

viii) Did the learned High Court Judges err by holding that the plaintiff has not established the fact that the injuries caused to him were the result of the attack

carried out by the defendants while accepting the fact that there was a dispute between two groups resulting in a fight and not relying upon the evidence of Yasaratne Bandara, who in his evidence referred to the names of the defendants by their fictitious names and the said item of evidence was not impugned by the defence?

The plaintiff-appellant filed action against the 5 defendant-appellant-respondents (hereinafter referred to as the defendant-respondents) for damages on the basis that they have caused injuries to the plaintiff-appellant. Plaintiff-appellant heavily relied on the evidence of Anuruddha Kumara who claims to be an eye witness to the incident. Anuruddha Kumara in his evidence, has stated that the 1st defendant assaulted the plaintiff Janaka Manjula with an iron rod. He also stated that the 2nd respondent who was armed with a club was also present at the scene. He has also stated in his evidence that the 3rd, 4th and the 5th defendant-respondents were also present at the scene of offence. The most important question that must be decided in this case is whether the evidence of said Anuruddha Kumara can be relied upon or not. In short whether the said Anuruddha Kumara is a trustworthy witness or not. Although he has stated in his evidence that the 1st defendant assaulted the injured person (Janaka Manjula), in his statement made to the police he has not stated the fact that the 1st defendant-respondent assaulted the said injured person Janaka Manjula. In his statement made to the police he has stated that when he arrived at the scene of offence the said Janaka Manjula had fallen on the ground with bleeding injuries and

the people who gathered at the scene were carrying the said injured person for the purpose of taking him to the hospital. According to his police statement, it is only after the said moment (the incident described above), the 1st defendant-respondent arrived at the scene carrying an iron rod.

When the statement made to the police by Anuruddha Kumara is examined it is very clear that he has not stated the fact that the 1st defendant assaulted the injured person. Further, he has made the statement to the police only after 7 months of the incident (26.02.2016). According to this witness, the alleged incident had taken place only on 21.07.2005. It is therefore seen that the statement made by said Anuruddha Kumara is a belated statement. When I consider all the the above matters, it is difficult to place reliance on the evidence of the said Anuruddha Kumara. In my view his evidence cannot be believed on balance of probability.

Learned District Judge has concluded that the evidence of Anuruddha Kumara has been corroborated by the evidence of Yasaratne Bandara who claims that he was present at the scene of offence. But in his cross examination at page 84 he (said Yasaratna Bandara) has admitted that he did not see the assault on Janaka Manjula. Therefore, when the learned District Judge concluded that Yasaratne Bandara had corroborated the evidence of Anuruddha Kumara it is, in my view, a wrong conclusion. Learned Judges of the Civil Appellate High Court have observed that the said conclusion reached by the learned District Judge was wrong. In my view, the said observation made by the learned Judges of the Civil Appellant High

Court is correct. I have observed earlier that the evidence of Anuruddha Kumara cannot be believed on balance of probability. Therefore, in my view the plaintiff-appellant has failed to prove his case. The learned Judges of the Civil Appellate High Court after considering the evidence have set aside the judgment of the learned District Judge. After considering all the above material, I am of the opinion that the conclusion reached by the Judges of the Civil Appellate High Court is correct. Therefore, I do not intend to interfere with the said judgment. I affirm the judgment of the Civil Appellate High Court dated 13.12.2011. Appeal of the plaintiff-appellant is dismissed. Considering the facts of this case, I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J

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 order of the Civil Appellate Provincial High Court of Anuradhapura

Mohamed Thamby Lebbe Noor Mohamed (Deceased)
Rajarata Furniture, Kaduruwela.

PLAINTIFF

SC Appeal 04/2013

SC HCCA LA No:-176/11

Anuradhapura CAHC NCP/NCCA/ARP/204/2007

Distrit Court Pollonnaruwa 8047/L/ 2000

V.

N.M.Abdul Hameed,
1/126, Pimburana Junction,
Sungawila.

DEFENDANT

AND BETWEEN

N.M.Abdul Hameed
1/126, Pimburana Junction,
Sungawila**.**

DEFENDANT-APPELLANT

V.

Noor Mohamed Ahamed Saheed

Rajarata Furnture, Kaduruwela.

SUBSTITUTED-PLAINTIFF-RESPONDENT

AND PRESENTLY BETWEEN

Noor Mohamed Ahamed Saheed

Rajarata Furniture, Kaduruwla.

SUBSTITUTED-PLAINTIFF-RESPONDENT-PETITIONER

V.

N.M.Abdul Hameed,

1/126, Pimburana Junction,

Sungawila.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE:- S.E.WANASUNDERA, PC, J.

H.N.J.PERERA, J.

PRASANNA JAYAWARDENA, PC, J.

COUNSEL:- Nizam Kariappar PC with M.I.M. Iynullah for the Substituted Plaintiff-Respondent-Appellant

Shamith Fernando for the Defendant-Appellant-Respondent

ARGUED ON:- 13.03. 2018

DECIDED ON:-23.05.2018

H.N.J.PERERA, J.

The Plaintiff-Respondent-Appellant (here-in-after referred to as the Plaintiff)Instituted action against the Defendant-Appellant-Respondent (here-in-after referred to as the Defendant) for a declaration that he is the permit holder to the land more fully described in the schedule to the plaint and for ejectment of the Defendant, his servants and dependents from the said land and for damages.

It was the Plaintiff's position that he became the owner to the land more fully described in the schedule to the plaint on a permit dated 20.09.1961 issued under the Land Development Ordinance and he was in possession of the land until about 1995 and as he fell ill, the Defendant was asked to cultivate the said land and that the Defendant agreed to vacate the said land, a paddy field, on a request of the Plaintiff. The Plaintiff further claims that thereafter the Plaintiff requested the Defendant to hand over the possession of the said land to him , the Defendant failed to do so and illegally, unlawfully and forcibly continued to possess the said land causing damages to the Plaintiff.

The Defendant filed answer and admitted the fact that the said land was handed over to him by the Plaintiff and that he was in possession of the said land since 1972 up to date. Further the Defendant claimed that after he came into occupation of the said land he improved the said land by spending money with the bona fide belief that he is the owner of the said land. The Defendant further claimed that the permit issued to the Plaintiff has being cancelled.

The District Judge held in favour of the Plaintiff and the Civil Appellate High Court set aside the judgment of the District Court and dismissed the Plaintiff's action and allowed the Defendant's appeal. On 16.01.2013 this Court granted leave to appeal on the following question of law.

"Whether the learned Judges of the Civil Appellate High Court of Anuradhapura erred in law in holding that the learned District Judge did not have jurisdiction to consider whether the license issued to the Plaintiff-Appellant has not been properly cancelled, in accordance with the procedure laid down by law under which the permit has been issued."

On a plain reading of the plaint it is very clear that the Plaintiff filed action against the Defendant on the basis that it was with the leave and license of the Plaintiff that the Defendant was in possession of the land described in the schedule to the plaint. The Defendant did not deny this position taken by the Plaintiff but claimed title to this land on the basis that he developed the land with the belief that he owned it. The Plaintiff in his prayer sought not only ejectment and damages but also a declaration of title. Therefore the question arises whether the action becomes a rei vindicatio for which strict proof of the Plaintiff's title would be required, or else is merely one for declaration (without strict proof) of a title which the Defendant is by law precluded from denying.

In a rei vindicatio action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. The scope of action by a lessor against an over holding lessee for restoration and ejectment, however is different.

Both these forms of action referred to, are no doubt designed to secure the same primary relief, namely the recovery of property. But the cause of action in one case is the violation of the Plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation. A decree for a declaration of title may, of course, be obtained by way of additional relief either in rei vindication action proper (which is in truth an action in rem) or in a lessor's action against his over holding tenant (which is an action *in personam*) . But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner. Pathirana V. Jayasundera 58 N.L.R.169.

In Ruberu and another V. Wijesooriya (1998) 1 Sri.L.R 58 it was held that:-

"Whether it is a licensee or a lessee, the question of title is **foreign** to a suit in ejectment against either. The licensee (Defendant) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the Plaintiff without whose permission he would not have got it. The effect of Section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the Plaintiff is perforce an admission of the fact that the title resides in the Plaintiff."

It was further held in that case that in an action by the person who granted the license or permission to eject a licensee, the question of title (of the Plaintiff) is wholly irrelevant is a rudiment of the law; a rule partaking of the character of a first principle. No question of title can possibly arise on the pleadings in this case, because the Defendant has stated in his answer and in his evidence that the Plaintiff handed over the possession of the said land to him and left to a village called Akurana and he thereafter developed and converted the said land into a paddy field. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the permission to occupy or possess the land or to set up want of title in that person. It is therefore quite apparent that the action as originally constituted

was not a rei vindicatio action proper in which any issue as to rights of ownership could properly arise for adjudication.

In Majubudeen and Others V Simon Perera [2003] 2 Sri.L.R 341 it was held that:-

"Privity of contract is the foundation of the right to relief in an action by a lessor against an over holding lessee for restoration and ejectment and issues as to title are irrelevant. A lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligations."

In the instant case too, the privity of contract is the foundation of the right to relief and the issues as to title are irrelevant to the proceedings. The Defendant who has entered into possession of a land with the leave and license of the Plaintiff is precluded from disputing the Plaintiff's title until he has first restored the property in fulfilment of his contractual obligation. Since the Defendant has admitted that he came into possession of the said land with the permission of the Plaintiff, the Defendant is estopped from denying the Plaintiff's title and therefore there is no burden of proof on the Plaintiff to prove his title. On the scrutiny of the plaint, I am of the view that it discloses a cause of action based on trespass. The Defendant had admitted the fact that he received the quit notice sent by the Plaintiff. By the said notice the Plaintiff had clearly cancelled the license he has given the Defendant to occupy and possess the said land. The Defendant had clearly continued to possess the said land unlawfully thereafter as a trespasser.

The evidence led in this case clearly indicate that the Defendant came into possession of this land with the leave and license of the Plaintiff and on 05.01.2000 the Plaintiff had sent a letter to the Defendant through his Attorney-at-Law calling upon the Defendant to hand over the vacant possession to him. The Defendant in his answer had admitted that he received the said letter. The Defendant failed to reply the said letter without good reason for the default.

In Reginald Fernando V. Pabilinahamy and others (substituted) (2005) 1 Sri.L.R 31 it was held that 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 Plaintiff had instituted action against the Defendant on the ground that the Defendant had entered the land described in the schedule to the plaint with the leave and

license of the Plaintiff. The Plaintiff had sent a quit notice through his Attorney-at-Law to the Defendant, informing him to hand over the vacant possession of the said land to the Plaintiff.

There is no evidence to show that the Defendant took any action to reply the Plaintiff.

In the circumstances, this Court is of the opinion that the Plaintiff as the licensor is entitled to eject the Defendant who is his licensee from the premises in question.

The Civil Appellate High Court erred in holding that this is a rei vindicatio action and there is a burden on the Plaintiff to prove his title. The learned Judges of the Civil appellate High Court also misdirected themselves in fact and in law when they held that the District Court has entered judgment in favour of the Plaintiff in the absence of sufficient evidence to prove that he was the owner of the said premises.

Therefore I answer the question of law raised in this case in the affirmative in favour of the Plaintiff. This Court is of the opinion that It was not necessary for the Learned District Judge to find out whether the Plaintiff had a valid permit issued under the Land Development Ordinance.

For the aforementioned reasons, the appeal is allowed, the judgment of the Civil Appellate High Court dated 27.04.2011 is set aside and the judgment of the District Court of Pollonnaruwa dated 11.03.2004 is affirmed. I make no order for costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

PRASANNA S. JAYAWARDENA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

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) Act No. 19 of 1990 as amended by Act No. 54 of 2006

Mohamed Naleem Mohomed Ismail,
No. 28, Chettiyar Road, Pandiruppu 01,
Kalmunai.

Plaintiff

SC Appeal 04/2016
SC/HC/CALA391/2014
EP/HCCA/Kalmunai 201A/10(F)
DC Kalmunai Case No. 2534/L

Vs,

Samsulebbe Hamithu
No. 426, Main Street,
Maruthamuni.

Defendant

And between

Mohamed Naleem Mohomed Ismail,
No. 28, Chettiyar Road, Pandiruppu 01,
Kalmunai.

Plaintiff- Appellant

Vs,

Samsulebbe Hamithu
No. 426, Main Street,
Maruthamuni.

Defendant-Respondent

And now between

Mohamed Naleem Mohomed Ismail,
No. 28, Chettiyar Road, Pandiruppu 01,
Kalmunai.

Plaintiff -Appellant-Appellant

Vs,

Samsulebbe Hamithu
No. 426, Main Street,
Maruthamuni.

Defendant - Respondent-Respondent

Before: **S.E. Wanasundera PC J**

Sisira J. De Abrew J

Vijith K. Malalgoda PC J

Counsel: H. Withanachchi for the Plaintiff -Appellant-Appellant

V. Puvitharan PC with R.R. Ushanthanie, Subhani Kalugamage and Anuya Rasanayakam for the Defendant - Respondent-Respondent

Argued on: **10.10.2017**
Decided on: **02.04.2018**

Vijith K. Malalgoda PC J

The Plaintiff-Appellant-Appellant (hereinafter referred to as the Appellant) instituted action before the District Court of Kalmunai seeking inter alia a declaration of title of the land more fully described in the schedule E to the plaint and for ejectment of the Defendant-Respondent-Respondent (hereinafter referred to as the Respondent)

When the said plaint was filed before the District Court of Kalmunai on 18.11.2004 by the Appellant, the Respondent filed his answer on 04.05.2005. The case proceeded to trial on 29 issues, of which 23 were suggested by the Appellant and 06 by the Respondent.

After trial the learned Additional District Judge Kalmunai dismissed the action of the Appellant as well as the claim in reconvention of the Respondent. Being dissatisfied by the said decision, both the Appellant as well as the Respondent preferred two appeals to the Provincial High Court of Civil Appeal of the Eastern Province.

The Provincial High Court of Civil Appeal, by its Judgment dated 02.07.2014 dismissed both Appeals and affirmed the judgment of the District Court. The Appellant preferred a leave to appeal application against the said decision of the Provincial High Court of Civil Appeal. The Supreme Court after considering the submissions made by the both parties, granted leave, on the questions of law raised in sub-paragraphs (a) to (d) and (i) of paragraph 14 of the petition dated 13.08.2014 and an additional ground of Appeal raised on behalf of the Respondent to the effect;

> "Even the document marked as P-7 is admitted in evidence, has the Plaintiff proved his title to the land in dispute in view of the transfer effected by deed No. 13486 dated 30.06.1988."

When going through the issues under which the leave was granted to the Appellant, it appears that the entire case before this court was based on the failure by the Plaintiff to lead in evidence the documents which were produced during the District Court Trial subject to proof.

The plaintiff's action before the District Court of Kalmunai was for the declaration of title, and the plaintiff had relied his title on deed No. 2119, which was marked as P-7. When establishing the title, in a *rei vindicatio* action the Plaintiff should set out his title on the basis on which he claims a declaration of title to the land and the proof required is the standard of strict proof.

The above position was discussed in a series of decisions both in the Court of Appeal and the Supreme Court including the decisions in ***Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167*** and ***Dharmadasa Vs. Jayasena [1997] 3 Sri LR 327***.

In the case of ***P.D.C. Perera Vs. K.J Perera SC Appeal 95/2003*** SC minute dated 08.12.2005 Supreme Court held,

> "Thus it would be clear that the plaintiff in a *rei vindicatio* action can base his claim for relief on either of the two alternative grounds namely

1) He can claim relief on the ground that he has a valid paper title or,

2) He can rely on the ground of simple possession and ouster

As submitted above, the Appellant relied in his title on the deed produced marked P-7 and when the said deed was produced, Respondent had objected for the said deed but, when the Plaintiff (Appellant) closed its case without calling any witness to prove P-7 before the District Court the Defendant (Respondent) did not raise any specific objection for the failure by the Appellant. In this regard the Appellant took up the position that, it was clear from the above conduct of the Respondent that, the Respondent did not intend to pursue the "*pro forma*" objections raised by him and thereby waved such objections.

However as observed above in this judgment, the appellant in this case has claimed relief purely on the basis of paper title, i.e. on the title the appellant claimed through deed No. 2119. He has a duty to prove the document as required by law for a Court of law to act upon such deed. In this regard this court is mindful of the requirement under section 68 of the Evidence Ordinance which reads as follows;

> Section 68; If a document is required by law to be attested, it should not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence

Section 70 of the Evidence Ordinance which is the only exception to the above rule, referred to an admission recorded with regard to such document as follows;

Section 70; The admission of a party to an attested document or its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested

However in the absence of any written admission recorded at the District Court Trial and an objection recorded when the document was initially produced, it is difficult for this court to ignore the provisions of section 68 of the Evidence Ordinance, even though no specific objection was raised, when the Plaintiff closed his case producing several documents including P-7.

In this regard the appellant heavily relied on the following passage by Samarakoon CJ in the case of ***Sri Lanka Ports Authority V. Jugolinija -Boal East [1981] 1 Sri LR 18***

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

As further submitted by the Appellant, the above decision was followed by the Supreme Court in the case of ***Balapitiye Gunananda Thero Vs. Thalalle Methananda Thero [1997] II Sri LR 101*** as follows;

> "When a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the *cursus curiae*."

However, none of the above cases referred to a document which required by law to be attested, and in the said circumstances, provisions in section 68 of the Evidence Ordinance has no applicability to the situations referred to in the said cases.

Section 31 of the Notaries Ordinance required a Notarially executed deed to carry an attestation with two attesting witnesses and in the said circumstances it is necessary to follow the provisions of

section 68 of the Evidence Ordinance, in the absence of an admission under section 70 of the Evidence Ordinance.

During the argument before us the Petitioner further relied on the decision in ***Samarakoon Vs. Gunasekera and Another reported in [2011] I Sri LR 149*** where Amaratunga J observed as follows;

> 3. "When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if no objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the cases.
>
> 4. On the other hand if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it."

However as observed by this court Amaratunga J was mindful of the requirement under section 68 of the Evidence Ordinance when he concluded that,

> "A deed for sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence."

When the present application was supported before this court for notices, the Respondent too had moved to add an additional ground of Appeal and the attention was drawn by the Respondent to an endorsement made on the Original Deed No. 24680 during the arguments before this court. As

observed by this court there is an endorsement made by Notary Public A.E. Saminnathan to the effect that a transfer deed bearing No. 13486 had been registered on 03.06.1988.

As further observed by this court, the said endorsement had been made by Notary Public A.E. Saminnathan acting under action section 31 (33) of the Notaries Ordinance which reads as follows;

> Section 31 (33) When a deed transferring any immovable property is executed or acknowledged before a Notary, he shall use his best endeavours to obtain the title deed, if any, of such property, and make an endorsement thereon stating the number and date of the deed executed before him and the nature of the transaction and attach his signature thereto.

During the trial before the District Court the Appellant had filed his pedigree and according to his pedigree, the Appellant relied on a Deed of Transfer by one Ahamed Lebbe Mohomad Haleethu who obtained the title form transfer deed bearing No. 24680, transferred the said property to Samsulebbe Umma Salma by Deed of Transfer No. 6342, who in turn transferred the property to the Appellant by Deed No. 2119 which was produced marked P-7 on which the Appellant had based his entire case. Appellant's pedigree is silent on deed 13486 and according to the entry made by N.P. on the Deed 24680, Deed No. 13486 was attested by him on 30.06.1988. Deed 6342, the deed on which Samsulebbe Ummu Salma, the predecessor in title to Plaintiff had claimed title was attested only on 01.03.1992.

The said deed 13486 and the endorsement on Deed 24680 was put forward to witness Haleethu who is a party to the said deed, had simply denied the same but as observed by this court the Appellant had failed to challenged the position taken up by the Respondent.

It is observed by G.P.S. de Silva CJ in the case of ***Dharmadasa Vs. Jayasena [1997] III Sri LR 327*** **at 330**,

> "But the point is that this is a *rei vindicatio* action and the burden is clearly on the Plaintiff to establish the title pleaded and relied on by him."

When considering all the matters referred to above it is clear that the appellant had failed to establish his title as required by law. In the said circumstances I answer the questions of law raised by the Appellant in negative but refrain from answering the question of law raised by the Respondent since the said challenge by the Respondent had not been properly looked into at the trial.

Appeal is accordingly dismissed but I make no order for costs.

Appeal Dismissed without cost.

Judge of the Supreme Court

S.E. Wanasundera 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

SC CHC Appeal No. 04/2017
SC HCCA LA: 174/2005 and 175/2005
HC/ JAFFNA CASE NO:
NP/ HCCA/ JAFFNA/ 02/2014/LA
DC KILLINOCHCHI CASE NO: L 325/13

John Devakumar Wilson,
No. 173/B,
Model Farm Road,
Colombo 08.

Plaintiff

Vs.

1. Rajendra Wasanthikumari

2. Sinnadurai Rajendran

   Both

   A9 Road, Paravipanchan,
   Killinochchi.

3. Masilaman Sivarasa,
   Anandapuram,
   Killinochchi.

4. Sellaiya Sendiban,
   Pungawana Junction,
   Mulativu Road,
   Killinochchi.

5. Siva Johnson,

A9 Road, Paravipanchan,
Killinochchi.

6. Suppaiya Selvendran,
No. 336, YMCA Junction,
Bharathipuram,
Killinochchi.

7. Veluraja Sekaran,
No. 414 02/02, Thirungar South,
Killinochchi.

Defendants

And now between

In the matter of an application, inter alia, under section 757 of the Civil Procedure Code and section 5A(1) and 5A(2) of the High Court of the provinces (Special Provisions) (Amendment Act No. 54 of 2006 for leave to Appeal from the Order made by the District Court of Killinochchi in case No. L/325 on 10. 03. 2014)

John Devakumar Wilson,
No. 173/B,

Model Farm Road,
Colombo 08.

Plaintiff-Petitioner

Vs.

1. Rajendra Wasanthikumari

2. Sinnadurai Rajendran

   Both

   A9 Road, Paravipanchan,
   Killinochchi.

3. Masilaman Sivarasa,
   Anandapuram,
   Killinochchi.

4. Sellaiya Sendiban,
   Pungawana Junction,
   Mulativu Road,
   Killinochchi.

5. Siva Johnson,
   A9 Road, Paravipanchan,
   Killinochchi.

6. Suppaiya Selvendran,

No. 336, YMCA Junction,
Bharathipuram,
Killinochchi.

7. Veluraja Sekaran,
No. 414 02/02, Thirungar South,
Killinochchi.

Defendant-Respondents

Now

In the matter of an Application for Leave to Appeal in terms of Section 5(C) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 127 of the Constitution.

1. Rajendra Wasanthikumari

2. Sinnadurai Rajendran

Both

A9 Road, Paravipanchan,
Killinochchi.

3. Masilaman Sivarasa,
Anandapuram,

Killinochchi.

4. Sellaiya Sendiban,
Pungawana Junction,
Mulativu Road,
Killinochchi.

5. Siva Johnson,
A9 Road, Paravipanchan,
Killinochchi.

1, 2, 3 & 5th Defendants-Respondents-Petitioners

Vs.

John Devakumar Wilson,
No. 173/B,
Model Farm Road,
Colombo 08.

Plaintiff-Petitioner-Respondent

Before: S. E. Wanasundera, PC, J

Buwaneka Aluwihare, PC., J

Vijith K. Malalgoda PC., J.

Counsel:	V. Puvitharan, PC with Jude Dinesh and Anuja Rasanyakkham for the 1st, 2nd, 3rd and 5th Defendants-Respondents-Petitioners
	Mahinda Nanayakkara with Aruna Jayathilaka for the Plaintiff-Petitioner-Respondent
Argued on:	26. 07. 2017
Decided on:	21. 11. 2018

Aluwihare PC. J.,

The Plaintiff-Petitioner-Respondent (hereinafter the "Plaintiff") filed action bearing No. L/ 325 in the Distract Court of Killinochchi by the plaint dated 02nd December 2013 against the seven Defendants-Respondent-Petitioners (Hereinafter the "Defendants"). The matter was supported for enjoining order on 09. 12. 2013. The learned District Judge issued the enjoining order, notice of interim injunction and summons returnable on 8th January 2014. When the case was called on 08th January 2014, the Court was informed that summons had not been served on the Defendants and fresh summons were issued returnable on 28th February 2014.

It is worth underlining that the Killinochchi Court was re-established around 2010 after the civil conflict. The legal practice was only gradually returning to normalcy and they were grappling with a scarcity of lawyers who regularly practice in that Court. Legal practitioners had been forced to resort to *ad hoc* arrangements in order to keep the system functioning and to address the scarcity of resources. This

factual reality savours of peculiarity. I consider it important to pay due attention to these circumstances as they are certainly not factors that can be ignored from the perspective of demand for Justice.

The Defendants received notices and summons on 24th February 2018 and appointed Mr. T. Kangatharan as their Attorney at Law. The proxy was filed on 25th February 2018—three days before the next court date. As it transpired, Mr. Kangatharan was unable to attend the Killinochchi District Court on 28th February 2018 as he had to appear in District Court of Mulaithvu for a trial. He therefore requested Mr. Sivabalasubramanium Attorney at law, who was one of the few permanent practitioners in the Killinochchi Court to appear for the Defendants and move for a date to file the statement of objections and Answers.

In a very peculiar turn of events, however, the Permanent District Judge had to take leave on 28th February 2018 and he nominated Mr. Sivabalasubramanium to be the acting District Judge for that day. This left the Defendants with no legal representation on the 28th February 2014. Nevertheless, the 1st, 2nd and 7th Defendants had been present in Court and when the case was called, Mr. Sivabalasubramanium—who was supposed to represent the Defendants on that day but had to later take up the functions of the Acting Judge—requested one Ms. Aboobucker present in the Court to make the application on behalf of the Defendants to move for a date to file statements of objections and Answer. But for unexplained reasons, the fact that such an application was made is not reflected in the Journal entry.

On the said day, the Counsel for the Plaintiff wanted to move for an *ex-parte* trial against the Defendants **who were not present on that day; namely the 3rd to 6th Defendants.**

The Acting District Judge declined to make an order fixing the case for ex-parte. Instead, he informed that the Plaintiff should make the application before the Permanent District Judge and fixed the **case for 27th March 2014.**

Soon after, on 05th March 2014, the Plaintiff filed a motion and had the case called on the same day to support for interim relief. No notice was issued to the 1st, 2nd and 7th Defendants who were present in Court on the previous day; *i.e.* 28th February 2014. The Counsel for the plaintiff, *inter alia*, also moved the Court to support an application for the *ex-parte* trial. On the said day, the learned District Judge (who was not the presiding judge on 28. 02. 2014) allowed interim relief and ordered that the case should proceed *ex-parte* against all defendants.

Upon learning of the new development, the 1st, 2nd and 7th Defendants filed a motion on 10th March 2014 to vacate the *ex-parte* order and interim relief. It was also brought to the attention of the learned District Judge that on the 28th February 2014, the Counsel for the plaintiff only sought to proceed *ex-parte* against the absent defendants, and that the Counsel for the plaintiff ought to have given notice to the 1st, 2nd and 7th Defendants before supporting it for an *ex-parte* order on 5th March 2014. The Defendants also contended that the order on the 5th of March 2014 had been made without hearing the other party, and was made *per incuriam*. After considering the submission, the learned District Judge vacated the order he made on the 5th March 2014, allowing interim relief and fixing the matter *ex-parte*.

On 27th March 2014, the day on which the case was originally fixed to be called, the Plaintiff sought permission to move the High Court of Civil Appeal by way of leave to appeal against the order. However, it was revealed that even at that point, the plaintiff had already filed the petition of appeal in the High Court. On 31st March 2015 the High Court allowed the appeal and overturned the order of the learned District Judge vacating the *ex-parte* trial on 10th March 2014.

The parties have come before this Court impugning the said High Court order.

Leave to proceed has been granted on the following questions of law;

i. Did the District Court without jurisdiction, in violation of the principles of natural justice and without considering the longstanding legal principles established by the Judgments of the Superior Courts, decide to proceed *ex-parte* against the Defendants and issued interim injunction against all the Defendants

ii. Was the Order dated 05. 03. 2014, made in breach of the principles of natural justice, without notice to the other party and without considering the Judgments of the Superior Courts and hence, the said Order is *per incuriam* order.

iii. When the *per incuriam* nature of the Order dated 05. 03. 2014 was brought to the notice of the Learned District Judge on 10. 03. 2014, did the Learned District Judge correctly reverse the said order.

Both in the High Court and in the hearing before this Court, the Plaintiff submitted that the Defendants' remedy against an *ex-parte* order lied in Section 86 (2) of the Civil Procedure Code and that the District Judge was in error when he vacated the order invoking the Court's inherent powers under Section 839 of the Civil Procedure Code. It was further submitted that the Defendant had failed to make an application under the said Section 86 (2) and that in terms of Section 86 (2A), where the *ex-parte* decree has not yet been served on the defaulting party, the Court cannot set aside the *ex-parte* order without the consent of the plaintiff.

The Plaintiff placed great reliance on the Court of Appeal decision in **Wijesekara v Wijesekara 2005 1 SLR 58,** where it has been held;

(i) Under section 86(2A) it is only if the plaintiff consents and not otherwise the court can set aside an order made fixing a case for ex-parte hearing against a defendant.

(ii) An ex-parte order made in default of appearance of a party cannot be vacated until he makes an application under section 86(2) and purges the default.

(iii) A court cannot override the express provisions of the Code.

(iv) It is only in cases where no specific rule exists the court has the power to act according to equity, justice and good conscience.

On the other hand, the defendants alleged that the order fixing the trial to be heard *ex-parte* was made *per incuriam*. They contend that on 28th February, the 1st, 2nd and 7th Defendants were present in Court and represented by Ms. Aboobakar who made an application to move for time to file answer and objections. On that day, it was only agreed that the Plaintiff would move for an *ex-parte* trial against the absent defendants, and that in any event, no Order was made by the Acting District Judge in that regard. Therefore, on 5th March 2014, when the Counsel for the plaintiff filed a motion and supported the case for interim relief and the application for an *ex-parte* trial, he ought to have given notices to the three Defendants. They further submitted that the order fixing an *ex-parte* trial against all defendants was palpably wrong as the 1st, 2nd and 7th Defendants were clearly present in Court on the said day.

In their Order, the learned High Court Judges have taken up the position that,

"However, the case record bears no evidence in proof of appearance of any attorney at law for the defendants or any application being made for the defendants to file the answer. Unfortunately, the journal entry of 28th February 2015 does not show any minute about filing of proxy in advance. These are facts which have to be elicited at a formal inquiry in order to rule out that there had not been any default on the part of defendant in terms of section 84 of the civil procedure code. Until and unless a formal inquiry is held in pursuant to an application under section 86 (2) at the appropriate forum, it cannot be prejudged on the strength of mere submissions made by Counsel for parties, whether there was in fact a default on the part of the defendants or an error was committed by the learned district judge […]"

We have before us a translation of the Journal entry for 28th February 2014. I reproduce in verbatim the said journal entry for the sake of clarity;

" *28. 02. 2014*

Plaintiff's Attorney	*Mr. Gratien Ab*
Plaintiffs	***John Deva Kumar Wilson Pt***
Defendants	***1. Rajendran Wasanthakumari Pt***
	2. Sinnadurai Ranjendiram Pt
	3. Masilaamani Sivarasa Ab
	4. Sellaih Sendeepan Ab

5. Siva Johnsen Ab

6. Suppaiya Selvendiran Ab

7. Veluraja Sekaran Pt

Attorney at Law Sunthareswara Sharma with Attorney at Law Mahinda Nanayakkara instructed by Attorney at Law M. Gratien appeared for the plaintiff. The Counsel for the Plaintiff inform the Court, ***they wish to make an application for an Ex-parte trial against the Defendants who are absent and an interim injunction before the permanent judge.***

To be called on: 27. 03. 2014

Signature

District Judge

28-02 "

Accordingly, it is clear that on 28.02.2014, three of the seven Defendants were present in Court. There is however no trace of any application being made by an attorney on behalf of the defendants. However, the journal entry also indicates that the counsel for the plaintiff has intended to make an application for an *ex-parte* trial against the "Defendants who are absent". And the case was to be called on 27th March 2014.

Two factors emanate from this journal entry:

1. The plaintiff disclosed in Court, the intention to file an *ex-parte* application only against the defendants who were absent.
2. the case was called on that day to file the Defendants' answer; *i.e.* 27th March 2014.

These two factors are important to determine the validity of the learned District Judge's order made on 05th March 2014 and 10th March 2014.

The translation of the application made by the Counsel for the plaintiff on 5th March 2014 and the order made by the learned District Judge is before us. And it appears that in his submission, the learned Counsel for the plaintiff has informed the Court that on the last occasion, the case was fixed for filing of the Defendants' answer and that summons have been served accordingly. However, in the same application, the counsel has stated "*Nevertheless, the one to seven Defendants had not made any attempt to appear before the Court when the case was called again on 28. 02. 2014 in order to make objection and to file the answer*"

It hardly needs to be stated that the above statement was palpably false. The journal entry clearly bears out that the 1st , 2nd and 7th Defendants were present on that day. And it was in their presence that the Counsel for the plaintiff informed the Court that he wished to file an *ex-parte* application against defendants who were absent on that day. In any event, no Order was made by the Acting Judge and a further one-month-time was given. The 1st, 2nd and 7th Defendants left the Court house that day on the assurance that an *ex-parte* application would not be made till the 27th of March 2014.

However, it must be noted that the learned District Judge allowed the application on 5th march 2014 made by the Plaintiff not on the basis of default of appearance of the Defendants but the failure to file the Answer and Objections. He has also

noted that contrary to what was stated by the Counsel for the Plaintiff, the 1st, 2nd and 7th Defendants had been present in Court on that day.

"*But it was reported in the proceeding that when the case was taken on 28. 02. 2014, the 1st, 2nd and 7th Defendants were present. In addition, the Court considers that all Defendants had appointed the Attorney by Attorney Appointment dated 25. 02. 2014. As well as it is mentioned in the proceedings that the 1st, 2nd and 7th Defendants were present, and 3rd, 4th , 5th and 6th Defendants were absent and no attorneys appeared on behalf of them. The plaintiff's attorney further made the application that neither the 1st, 2nd and 7th Defendants nor their Attorney made any application on behalf of them, and 3rd, 5th , 6th Defendants were absent.*"

Thus, the learned District Judge has allowed the application for an *ex-parte* trial on the basis of failure to file the answer and objection of the Defendants. He had observed that an Attorney at Law had been appointed by the Defendants and that no representation had been made on that day to get further time.

I pause at this point to state that the learned District Judge was too quick to draw an adverse inference against the Defendants who were present on that day. The proxy for the appointment of an Attorney at Law was only filed on the 25th of February 2014—three days before the summons returnable date. Barring the peculiar events that took place on the 28th February 2014, the Defendants would not have had adequate time to file statement of objections and their Answer.

In any event, under section 84 of the Civil Procedure Code, the Judge has the discretion to grant further time, to file answers.

In **Dharmasena and another v The People's Bank (2003) 1 SLR 122** the Supreme Court held that;

> "*The Code must be interpreted, as far as possible, in consonance with the principles of natural justice, and <u>the court can only be</u>*

satisfied that summons has been "duly" served where the Defendant has been given a fair opportunity of presenting his case in his answer. If not, the court has the power to give further time for answer even if the Defendant does not ask.."

It is quite clear that no order was made in respect of the *ex-parte* application on 28th February 2018. If, as contended by the Plaintiff, there was a clear failure on the part of the Defendants to file the answer, the acting District Judge would not have had any difficulty in making that order on the same day. Instead, he decided to call the case on 27th March 2018, in a months-time. Reasons for this are unknown-it could have been that the acting District Judge being privy to the peculiar circumstances granted further time; or it could be that he did not personally wish to make that order and thought it best left to the Permanent Judge. Whatever be the reasons that suggested to the acting judge, there was an order sanctioned by the court to call the case on 27th March 2017. In those circumstances, the plaintiff had the obligation to inform the 1st, 2nd and 7th Defendants when he filed the motion on 05th March 2017 and move for an *ex-parte* trial. A counsel cannot whimsically change the undertakings he gives in court for his benefit.

In ***ABN-Amro Bank v CONMIX (private) Limited (1996) 1 SLR 08*** a five judge bench determined that;

> "*section 84 requires the Court "to hear the case ex parte forthwith, or on such other day as the Court may fix". Obviously, a decision to hear the case on same day, must be taken the same day. But a decision to hear the case on some other day is not required to be taken the same day; the phrase "as the Court may fix" is not qualified by "forthwith" or other similar words. Accordingly, I am of the view that the date for ex parte trial may be fixed by the Court either on the day*

of the default, or on another day; and with respect, that Ameen v. Raji must be overruled on that point.

There are practical considerations which confirm this interpretation. On the summons returnable date it may not be known- for good reasons, such as illness or absence abroad, when the plaintiff, his Counsel or an essensial witness would be available, and the Court may therefore fix a calling date. Again, Ameen v. Raji shows that a case may come up in the roll Court and, upon the defendant's default, be sent immediately to the appropriate Court dealing with trials of that kind, to enable a trial date to be fixed; and it may happen that when the record reaches that Court, it has already adjourned for the day. Similar problems may arise when there is an impending change in the territorial jurisdiction of a Court, or a re-allocation of its work; or when a Judge is on leave or is due to go on transfer soon; or when on the day of the defendant's default, the matter comes up before a Judge who does not wish to deal with it for personal reasons."

As I remarked, the Counsel who had been retained by the Defendants had to attend another Court on the same day, and Mr. Sivabalasubramanium who was supposed to make the application on behalf of his clients, had to function as the acting District Judge for that day which left the Defendants unattended. Being apprised of the situation and after giving an undertaking that an application will only be moved against the absentees, the learned Counsel for the Plaintiff had a duty to inform the Defendants when he filed the motion on the 5th of March 2014, and supported the *ex-parte* application.

On the 5th march 2014, it was not the acting judge but the permanent judge who was presiding and save and except for the scanty journal entry, he was not personally privy to the incidents and circumstances that prevailed on 28th March 2014. Therefore, there was greater onus on the part of the plaintiff to apprise the Court of the true circumstances that transpired on the earlier day. Had the Plaintiff issued notice on the 1st, 2nd and 7th Defendants, I am certain, that the Judge would not have penalized the Defendants for purportedly failing to file the Answers as they could have brought to the attention of the learned District Judge the factors that prevented them from filing the Answer and the Objections.

This Court has in a series of cases consistently upheld that failure to observe natural justice goes to the root of the Court's jurisdiction and renders the proceedings a nullity.

In **Lokumenike v Sinduhamy 34 CLW 102** it was held;

> "*that where an ex-parte order had been made behind the back of a party by any court, such court has jurisdiction to entertain and determine an application by the party affected to vacate such order*"

In **Ittepana v Hemawathie (1981) 1 SLR 476** the Court held that;

> "*Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it; upon one who is not a party to the suit ..... upon a defendant who has never been notified of the proceedings. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non judice. A judgment*

entered by such Court is void and a mere nullity. (Black on Judgments - P.261)"

A similar line of thinking has been adopted in **Siththi Maleeha and another v Nihal Ignatius Perera and Others (1994) 3 SLR 270: (Court of Appeal) , The Ceylon Ceramics Corporation v Premadasa (1984) 2 SLR 250: (Court of Appeal).**

The principle is clear; -a fair opportunity must be given to a party before an order is given by the Court. The fair opportunity could entail a myriad of factors and in each case, it is up to the Court to decide whether any irregularity prejudicing natural justice has taken place.

In the present instance, the counsel for the Plaintiff has at first attempted to mislead the Court by stating that all defendants were absent and thereafter had reiterated that no application was made on behalf of the defendants on 28. o3. 2014. On the 5th March 2014, the counsel for the plaintiff made the particular application without notice to 1st, 2nd and 7th Defendants despite agreeing on 28th February that he will only proceed against the absentees. Had he informed the defendants present on that day, they would have been able to adduce reasons for the purported failure to move for further time to file the answers.

Accordingly, I answer the 1st and 2nd questions of law in the affirmative.

The next question for determination is whether the learned district judge erred when he vacated the *ex-parte* order invoking the inherent powers of the Court, as oppose to insisting on the procedure under section 86 (2) of the Civil Procedure Code.

The plaintiff-Respondent strenuously argued that the Defendants ought to have invoked the jurisdiction under section 86 (2) to vacate the order and that the learned District Judge erred when he vacated the order resorting to section 839 when the law has provided for a distinct procedure for that purpose.

In response, the defendants submitted that the procedure under section 86 (2) could be invoked when there is a 'default' and that there was no such 'default' by the defendants in the present instance as the Plaintiff surreptitiously obtained the *ex-parte* order. They have also cited several authorities wherein it has been stated that the Court has the inherent jurisdiction to remedy a violation of natural justice.

In **Carolis Appuhamy v Singho Appu 5 NLR 75,** the Court held that;

> "*As a rule, he has power to open or rescind his own orders made, not inter partes but ex parte. on being satisfied that the order was made to the prejudice of a party who was unable to attend in consequence of illness or other circumstances over which he had no control.*
>
> *Such power doubtless must be exercised with caution, and only on sufficient materials and within a reasonable time after the ex parte decree or order was made*"

Similarly, **Albert v Veeriahpillai (1981) 1 SLR 110** elucidates that;

> "*The authority to vacate an earlier order is attributable to the inherent jurisdiction of the Tribunal to set aside such order if it had been made without jurisdiction in as much as the breach of principles of natural justice goes to jurisdiction and renders an order or determination made in proceedings of which the person against whom the order or determination was made has had no notice, void.*"

It must be stated that in the aforesaid cases, the question about procedure did not arise. In contrast, in the present case, the plaintiff's first line of argument is that

the proper procedure for vacation of an *ex-parte* order is in section 86 (2) and that the Court could not have resorted to its inherent powers when the law provides for a procedure.

There is merit in this argument. Section 86 (2) clearly provides a remedy for Defendants to canvas against an *ex-parte* order. The wording of section 86 (2) does not specify that the procedure for vacation excludes certain types of orders— be it made in violation of natural justice or otherwise. There are no different genres of *ex-parte* orders.

> *"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"*

This was quite clearly explained by Justice Fernando in ***ABN-Amro Bank v CONMIX (private) Limited (1996) 1 SLR 08*** ;

> "*If there has been no due service of summons (or due notice), but the Court nevertheless mistakenly orders an ex-parte trial, then for that breach of natural justice, section 86 (2) provides a remedy: a defendant's default can be excused if it is established that there were reasonable grounds for such default, and one such ground would be the failure to serve summons. The consequence of non-compliance with natural justice is not that non-appearance ceases to be a "default", only that, although that lapse is a "default", yet it is a default for which there are reasonable grounds, and which therefore can be excused. I am therefore of the view that the need to comply with natural justice and "default" are*

two distinct matters; that while the audi alteram partem rule does not modify or restrict the meaning of "default", breach of that rule affords an excuse for "default"'"

Stripped to essentials, this means that there is only once procedure for vacation of *ex-parte* orders—that is to proceed under section 86 (2). This mechanism does not distinguish between orders given based on different reasons.

Section 839 provides;

"*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 the court.*"

However, this does not mean that a District Judge can disregard the procedure he is bound to follow. If the time period for the invocation of section 86 (2) procedure has lapsed or there is a defect not catered to by law, a judge may always invoke the powers under section 839 to remedy the injustice it may cause to parties. But a Judge must always be prudent not to flout the procedure he is bound to follow.

Nevertheless, the fact that the present application contains unusual circumstances cannot be overlooked. Even if the learned District Judge made an error in not insisting on the procedure, I do not believe that it resulted in any substantial prejudice or occasioned a failure of justice. The facts are clear: the initial order allowing the *ex-parte* trial should not have been made on the 5th March 2014. In those circumstances, I respectfully disagree with the learned High Court Judges decision that "***Rightly or wrongly the matter has now been fixed for ex-parte trial.*** *Correctness of the order fixing for ex-parte trial has to be decided at an inquiry to be held if an application is made at the appropriate stage.*"

The appeal before them was one that classically called for the application of the proviso to section 5A of the High Court of the Provinces (Special Provisions) Act as amended which reads;

> "*Provided that no judgment or decree of a District Court or of a Family Court, as the case may be, shall be reversed or varied by the High Court on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice*"

This principles has been approved by Superior courts in several cases; ***Sunil Jayarathna v. Attorney General*** 2011 2 Sri LR 91; ***Rev. Minuwangoda Dhammika Thero v. Rev. Galle Saradha Thero*** 2003 3 Sri LR 247; ***Madilin Nona And Others v. Ranasinghe And Others*** 2012 1 Sri LR 155; ***Vernon Boteju v. Public Trustee*** 2001 2 Sri LR 124.

Thus, only in light of the facts and circumstances of the present case, I am of the view that the learned District Judge did not occasion any failure of justice by vacating the *ex-parte* order on 10th March 2014, invoking the inherent jurisdiction of the Court.

I answer the third question of law in the affirmative.

Considering the above I set aside the order made by the High Court of Civil Appeals dated 31st March 2015. The order made by the learned District Judge on 10th March 2014, vacating the order he made on 5th March 2014 in fixing the matter *ex parte,* is hereby restored.

Before I conclude, I place on record the dissatisfaction with which I regard the conduct of the Counsel who represented the Plaintiff before the District Court. It was no less an effrontery on his part to have misled the Court—to which he owes an absolute overarching duty. By concealing facts and reneging on his

undertaking, he trampled on the rights of the other party and showed a cussed disregard for professionalism. This Court severely admonishes him for his reprehensible conduct and strongly advises that he conducts himself more ethically and responsibly in the future.

Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA PC.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal from the Civil Appellate High Court.

Weragoda Arachchillage Weraj Sharm Weragoda, of No. 95, Castle Street, Colombo 8.

Plaintiff

SC APPEAL 09/2011
SC/HCCA/LA 362/2010
WP/HCCA/AV/263/2008(F)
D.C. AVISSAWELLA 19008/L

Vs

1. Kullaperuma Arachchilage Kusuma--wathie,"Sampath" Tholangamuwa. (deceased)

Defendant

1a. Ganehi Achchi Vederalalage Jayasekera,
1b. Ganehi Achchi Vederalalage Sampath Priyadarshana Jayasekera
1c. Ganehi Achchi Vederalage Hasitha Dharshani Jayasekera
1d. Ganehi Achchi Vederalalage Dimuthu Priyadarshana Jayasekera
1e. Ganehi Achchi Vederalalage Jayasekera, (as Guardian ad litem Over 1c and 1d Substituted Defendants, minors),

All of "Sampath", Tholangamuwa.

Substituted Defendants

2. Shridara Wasantha Rajakaruna,
Madoltenne Estate, Waharaka.

2nd Defendant

AND THEN BETWEEN

Weragoda Arachchillage Weraj Sharm Weragoda, of No. 95, Castle Street, Colombo 8.

Plaintiff Appellant

Vs

1. Kullaperuma Arachchilage Kusuma--wathie,"Sampath" Tholangamuwa. (deceased)

Defendant

1a. Ganehi Achchi Vederalalage Jayasekera,
1b. Ganehi Achchi Vederalalage Sampath Priyadarshana Jayasekera
1c. Ganehi Achchi Vederalage Hasitha Dharshani Jayasekera
1d. Ganehi Achchi Vederalalage Dimuthu Priyadarshana Jayasekera
1e. Ganehi Achchi Vederalalage Jayasekera, (as Guardian ad litem Over 1c and 1d Substituted Defendants, minors),

All of "Sampath", Tholangamuwa.

Substituted Defendant Respondents

2. Shridara Wasantha Rajakaruna,
Madoltenne Estate, Waharaka.

2nd Defendant Respondent

AND NOW BETWEEN

1a. Ganehi Achchi Vederalalage
Jayasekera,
1b. Ganehi Achchi Vederalalage
Sampath Priyadarshana Jayasekera
1c. Ganehi Achchi Vederalage
Hasitha Dharshani Jayasekera
1d. Ganehi Achchi Vederalalage
Dimuthu Priyadarshana Jayasekera
1e. Ganehi Achchi Vederalalage
Jayasekera, (as Guardian ad litem
Over 1c and 1d Substituted
Defendants, minors),

All of "Sampath", Tholangamuwa

Substituted Defendant Respondent
Appellants

Vs

Weragoda Arachchillage Weraj Sharm
Weragoda, of No. 95, Castle Street,
Colombo 8.
Plaintiff Appellant Respondent

2. Shridara Wasantha Rajakaruna,
Madoltenne Estate, Waharaka.

2nd Defendant Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
L. T. B. DEHIDENIYA J. &
MURDU FERNANDO PCJ.

COUNSEL : Dr. S.F.A. Coorey for the 1a to 1e Substituted Defendant Respondent Appellants.
H. Withanachchi with Shantha Karunadhara for the Plaintiff Appellant Respondent.

ARGUED ON : 10.05.2018.

DECIDED ON : 29.06.2018.

S. EVA WANASUNDERA PCJ.

This Court has granted leave to appeal on the following questions of law, which are contained in paragraph (a) to (f) of the Petition:-

1. Did the High Court err by failing :
   (i) to appreciate that there was a dispute whether the amount paid on deed P3 was Rs. 150,000/- as suggested by issue No. 14 or was Rs. 50,000/- as suggested by issue No. 3 ?
   (ii) to consider in any manner the evidence placed by the parties before the District Court (especially the evidence of witness Punchinilame) on the said disputed amount? and
   (iii) to arrive at a decision whether the said amount was Rs. 150,000/- or was Rs. 50,000/-?
2. Did the High Court err in holding that under Sec. 83 of the Trusts Ordinance the 1st Defendant held the corpus under a constructive trust for the benefit of Appuhamy Weragoda on the transfer of the corpus to the 1st Defendant on deed P3, whereas the owner of the corpus who transferred the same to

the 1st Defendant on P3 was not Appuhamy Weragoda but the 2nd Defendant?

3. Even if the corpus was subject to a constructive trust under Sec.83 of the Trusts Ordinance under deed P1 in the hands of the 2nd Defendant, can the Plaintiff follow the said trust property into the hands of the 1st Defendant without raising the issue and proving that the purchase made by the 1st Defendant from the 2nd Defendant on deed P3 was not a bona fide purchase for consideration?
4. In any event, was there absolutely no evidence that Appuhamy Weragoda agreed to pay legal interest to the 1st Defendant on the money he was allegedly to have borrowed from the 2nd Defendant?
5. Did the High Court overlook the evidence that the 1st Defendant took no action to eject Appuhamy Weragoda after she purchased on deed P3 solely because there was an arrangement between Appuhamy Weragoda and the 1st Defendant's husband (who were relatives) that Appuhamy Weragoda was to be allowed to live in the corpus until his death?
6. Did the High Court err by holding that the Plaintiff had on 15.10.1999 deposited Rs. 50,000/- to the credit of this action?

The Plaintiff, Weragoda Arachchillage Weraj Sharm Weragoda instituted action in the District Court of Avissawella against two Defendants on 23.11.1993 praying inter alia for ;

1. a declaration that the 1st Defendant was holding the property which is the subject matter of the case, in trust for the Plaintiff
2. an order directing the 1st Defendant to convey the said property to the Plaintiff on payment of Rs. 50,000/- together with legal interest from 04.11.1990.

The 1st Defendant was Kullaperuma Arachchilage Kusumawathie living in Tholangamuwa, a village close to Basnagoda in the District of Kegalle. The 2nd Defendant was Shridara Wasantha Rajakaruna from Waharaka in the District of Kegalle. The owner of the land prior to 1990 was W.A.Rajapakse Appuhamy Weragoda, who was the father of the Plaintiff , Sharm Weragoda.

The said Appuhamy Weragoda and his wife had got divorced when the only child the son was somewhat at a young age. The child Sharm had since then lived with

the mother in Colombo at No. 95, Castle Street, Colombo 08. He was schooling in Colombo. He used to visit the father Appuhamy Weragoda who was living in the big house which was on the land which is the subject matter of this case since the father of Sharm had access to the child during the school holidays. When he grew up and got married his visits to see the father were few and far according to the evidence before court. The property was of an extent about three Acres according to the evidence led before the District Court (pg. 178 of the brief).

Appuhamy Weragoda had borrowed Rs. 35,000/- from the 2nd Defendant Rajakaruna. He had effected the Deed of Transfer No. **3207 dated 30.01.1990** in favour of Rajakaruna. They were related to each other. The beneficial interests of the property had remained with Appuhamy Weragoda. When Rajakaruna wanted the money back which was given on loan to Apphuhamy Weragoda to be repaid within one year, as Appuhamy had no money, Appuhamy and his brother Punchinilame had approached another relation of theirs , one Ganehi Achchi Vederalalage Jayasekera who was the husband of the 1st Defendant, Kullaperuma Arachchilage Kusumawathie.

A deed of transfer of the property was then executed in favour of Kusumawathie by the 2nd Defendant Rajakaruna and the consideration amount as placed in the Deed No. 3644 dated 04.12.1990 was Rs. 50,000/-. One of the witnesses to this Deed 3644 was Appuhamy Weragoda. Yet the beneficial interests of the property remained with Appuhamy Weragoda. Out of the money received from the execution of the Deed 3644, Rajakaruna was paid by Appuhamy, the due amount, i.e. Rs 35,000/- plus interest amounting to Rs. 10,000/- as promised for a whole year, even though a whole year had not passed, in front of the Notary Public who executed the Deed 3644 within the precincts of his office.

After about 11 months i.e. on 17.11.1991 the said Appuhamy Weragoda passed away. The son, the Plaintiff in this case had applied for letters of administration in Case No. 33095/T in the District Court of Colombo regarding the estate of the deceased Appuhamy Weragoda. The Plaintiff being the sole heir to the properties of the deceased Appuhamy Weragoda **filed this action** against the 1st and 2nd Defendants praying inter alia that the Plaintiff is entitled to become the owner of the property after paying up the alleged loan and interest thereon which was allegedly taken by his father from the 1st Defendant, Kusumawathie who is

alleged to be holding the property on a constructive trust on behalf of the Plaintiff's father Appuhamy Weragoda by Deed 3644. The basis of the cause of action was that the property was held **firstly** by the 2nd Defendant Sridhara Rajakaruna in trust for **his father**, the deceased Appuhamy Weragoda and **secondly** by the 1st Defendant, Kusumawathie who held again the same property **in trust for the same person** the deceased Appuhamy Weragoda.

The Plaintiff's contention is that the property was held by **the 2nd Defendant and the 1st Defendant in trust for Appuhamy Weragoda** and now that the Plaintiff is the **sole heir** of the deceased Appuhamy Weragoda, the 1st Defendant is **now** holding the property **in trust for the Plaintiff**. He prayed for a reconveyance of the property to him for the consideration of Rs. 50,000/- with interest from the date that Kusumawathie got paper title by Deed 3644.

When action was filed, the 2nd Defendant did not enter an appearance in the action but the 1st Defendant filed answer. In her answer, Kusumawathie the 2nd Defendant prayed as follows:-

(i) for dismissal of the action,
(ii) for a declaration that she is the owner of the property,
(iii) for delivery of possession of the property to her and
(iv) for recovery of Rs. 200,000/- as a counter claim.

The Plaintiff filed a replication. The action went ex parte against the 2nd Defendant but surprisingly , the 2nd Defendant gave evidence for the Plaintiff.

At the trial two admissions were recorded. They are, that **Appuhamy Weragoda was the owner of the land and the house** thereon and that **the two deeds 3207 and 3644 marked as P1 and P3 were duly executed.**

The Plaintiff had raised 11 issues and the 1st Defendant had raised 6 issues. Within the course of the trial, the 1st Defendant Kusumawathie died after undergoing surgery for a cancer and then she was substituted by the husband and three children out of whom two were minors. The widower was appointed guardian ad litem over the minor children.

On behalf of the Plaintiff, the Plaintiff and the 2nd Defendant gave evidence. On behalf of the heirs of the deceased 1st Defendant who was the only contesting Defendant in the case, the 1(a) Defendant, **the husband of the deceased 1st Defendant, Kusumawathie,** had given evidence. Thereafter, one Weragoda Arachchillage **Punchinilame**, a relation of the deceased Appuhamy Weragoda and also a relation of the husband of Kusumawathie had given evidence on behalf of the 1(a) to 1(d) Defendants.

After hearing the evidence and the written submissions were filed by both parties, the learned trial judge had delivered judgment on 16.08.2004 **dismissing the Plaint and granting the reliefs prayed for by the Defendant in her answer.**

The aggrieved **Plaintiff appealed** to the Civil Appellate High Court of Avissawella and at the end of oral arguments and after the written submissions were filed, the High Court **over turned the judgment of the District Court** and **allowed the Appeal** and declared that the Substituted Defendant Respondents, who were the husband and children on the 1st Defendant Kusumawathie, have held that property in dispute **in trust for the Plaintiff Appellant** as a constructive trust. The said judgment had further directed many other things which on record read as follows:-

1. " I direct the Plaintiff to deposit the sum of Rs. 50,000/- together with legal interest from 04.12.1990 until the date of payment'. On perusal of the case record it was revealed that the Plaintiff has deposited Rs. 50,000/- on 15.10.1999. Therefore, the Defendant Respondents 1A to 1E are entitled to the aforesaid sum of Rs. 50,000/- and also legal interest from 04,12.1990 until the date of payment".
2. On payment of the aforesaid Rs.50,000/- and the legal interest referred to above sum of money within six months of the record reaching the District Court of Homagama, if 1A to 1E substituted defendants fail to re-transfer the property in suit at the expense of the Plaintiff Appellant as mentioned, the registrar of this Court is directed to convey this property executing a deed in favour of the Plaintiff Appellant.
3. 1A to 1E Substituted Defendants are entitled to withdraw this money at the time of the execution of a conveyance by the Defendants or by registrar of the District Court.

4. The Plaintiff should bear all expences of the conveyance of the property in his favour.
5. If the Plaintiff Appellant fails to pay the sum of money due to the 1A to 1E Substituted Defendants within 6 months as aforesaid the trust hereby declared would come to an end the 1A to 1E Substituted Defendants would then be entitled to take out writ of possession.

Being aggrieved by the said Judgment of the High Court dated 27.09.2010 , the 1A to 1E Substituted Defendant Respondent Petitioners sought Leave to Appeal against the said Judgment and the Supreme Court has **granted leave to appeal on the questions of law as aforementioned** at the very beginning of this judgment.

First and foremost, with the evidence of the 2nd Defendant, S.Rajakaruna, it is **apparent** that, when Appuhamy Weragoda transferred the property to S.Rajakaruna for a petty sum of Rs. 35,000/- even at that time in the year 1990, for a house and land of three Acres, it was a **transfer to secure the loan of Rs. 35,000**/. Rajakaruna was a relation of Appuhamy Weragoda as well. It can be held that **Rajakaruna held the property on trust for Appuhamy Weragoda** from the date of Deed 3207 until the time the loan given was demanded to be returned and paid on the date that the second Deed 3644 was executed. When Appuhamy Weragoda had no money to pay back the loan, he had looked for another relation together with the help of his brother Punchinilame. Then only the 1st Defendant's husband G.A.V. Jayasekera who was again a relation was approached by Appuhamy and Punchinilame.

Then, **Rajakaruna has transferred the land and property to the 1st Defendant, Kusumawathie the wife of G.A.V. Jayasekera with the consent of Appuhamy who had even signed as a witness to Deed No. 3644.**

Appuhamy was not the transferor in the Deed 3644. He was a witness to the fact that Rajakaruna signed as the transferor of the property to Kusumawathie. Section 83 of the Trusts Ordinance does not provide that one person who holds a property as a constructive trust for another person can pass that 'holding in trust' to any other person. The 'holding in trust' is a concept in law. To prove that the said concept was prevailing at a particular transaction where the transferor on paper transferred the property to the transferee, **it has to be proven that there was no intention whatsoever in the mind of the Transferor to part with**

his property to the Transferee as a purchaser of the property. To demonstrate that there existed no intention to transfer, the attendant circumstances have to be proven.

When Rajakaruna transferred the property to Kusumawathie, on paper, it can be a genuine transfer of the property for consideration or it can be on trust that Kusumawathie would reconvey the property to Rajakaruna if the money received by Rajakaruna from Kusumawathie **was a loan taken** by Rajakaruna until he pays back the loan to Kusumawathie. In the case in hand, Rajakaruna **has never said anywhere in his evidence** that he obtained a **loan** from K**usumawathie** and Kusumawathie promised to reconvey the property to him when the loan was paid back. **Rajakaruna's evidence is that he signed the Deed P3 bearing No. 3644 knowing that he was transferring the property to Kusumawathie**.

Even supposing that it was a loan transaction, showing on the face of the Deed as a proper transfer of property, the maximum that can be presumed is that Kusumawathie held the property in trust for Rajakaruna. According to the law prevailing in this regard in this country, that property can only be identified as a property which can be regarded as 'property held in trust' by Kusumawathie, the transferee, on behalf of Rajakaruna, the transferor. It can never be identified as a property held in trust for **any other person**. How can anyone argue that the property owned by Kusumawathie according to a properly executed deed, can be held in trust by the owner Kusumawathie was in trust for a third party named Appuhamy Weragoda who has signed as a witness to the said transaction? The ground position is that the **property held by Rajakaruna in trust for Appuhamy Weragoda was transferred to a third party named Kusumawathie at the request of A. Weragoda.** The presumption of trust held in the transaction done by Deed 3207 had come to an end then and there at the time of executing the Deed 3644 by Rajakaruna placing his signature as the transferor.

On the other hand, Appuhamy Weragoda could have requested Rajakaruna to reconvey the property back to him which would have brought the trust between them to an end and thereafter transfer the property to Kusumawathie. The Notary would have definitely advised that every transaction costs a particular amount of money as stamp fees, Notary's fees etc. As such, practically to pay the loan taken from Rajakaruna within the period of one year, Appuhamy Weragoda had to get the money from another person and that person was Kusumawathie

and therefore Appuhamy Weragoda directed Rajakaruna to execute a transfer in the name of Kusumawathie. It was all done in the presence of the Notary Public who would have advised the parties with regard to unnecessary stamp fees which would have had to be spent, if the said Rajakaruna had to transfer the land to Appuhamy and then in turn Appuhamy would have had to execute the transfer to Kusumawathie.

There cannot exist a trust between Appuhamy Weragoda and Kusumawathie. The concept of trust does not pass automatically from one person to another with regard to the property and with regard to the original transferor since Section 83 of the Trusts Ordinance does not provide for such a reasoning to imply a constructive trust at all. The property can change hands but the trust created in the first deed of transfer cannot get attached to every change of hand of the property and end up with a different transferee who cannot be held in law to own the property on trust for the first transferor of the first deed in the chain of deeds executed thereafter.

Rajakaruna's evidence at page 125 of the brief is quite clear as to what had happened. It reads as follows:-

ප්‍ර. කෙසේ වෙතත් පැ.3 ඔප්පුවට අත්සන් කලේ තමන්, තමන්ට පැ.1 ඔප්පුවෙන් අයිති වුන දේපල පැ.3 ඔප්පුවේ ලැබුම්කාර කුසුමාවති කියන අයට සම්පූර්ණ වශයෙන් පැවරීමක් ලෙස ?

උ. නිවැරදියි.

ප්‍ර. ඒ පැවරීම වෙනුවෙන් මුදල් ලබා දුන්නේත් ඒ කුසුමාවතිගේ පුරුෂයා වන ජයසේකර කියන අය ?

උ. මට දුන්නේ වේරගොඩ මහතා.

ප්‍ර. තමන් ඉදිරිපිට ජයසේකරගෙන් වේරගොඩ මහතා අරගෙන තමන්ට දුන්නේ ?

උ. ඔව්.

ප්‍ර. වේරගොඩ අප්පුහාමි මහතායි ඒ ඔප්පුවේ ලැබුම්කරුවනුයි අතර තිබුන සම්බන්ධතාවය හෝ ඒ අය අතර වුන සාකච්ජාවන් පිළිබඳව තමන් විශේෂයෙන් දන්නේ නැහැ ?.

උ. විශේෂ දෙයක් දන්නේ නැහැ.

The next argument of the Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) is that the holder of title to the property at the time he filed action before the District Court , namely Kusumawathie in law was **holding the**

property in trust for his father who died and after the death of the father, **still she is holding the property in trust for the son, the Plaintiff**. To simplify the argument, may I say that, the Plaintiff **W1** , the son of the deceased **W** ,argues that if and when, in law, the person **K** was holding a property in trust for **W1's father W**, that **concept of trust should survive the father** and should be carried on to the **son W1 who is** the Plaintiff. If that argument is accepted, by any chance, if Plaintiff W1 passes away, W1's son also should be able to ask for the property back on 'constructive trust' from K. So, according to the Plaintiff's argument, **there is no end to the concept of 'constructive trust' created by Statute, the Trusts Ordinance.**

Section 83 of the Trusts Ordinance reads as follows: **Where it does not appear that transferor intended to dispose of beneficial interest.**

" Where the owner of property transfers or bequeaths it, and it cannot be 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."

According to the evidence before us, it can be seen that when Appuhamy Weragoda died, the son moved court to get letters of administration of the Testamentary case and he tried to include the land and the house where his father was living in the village of Basnagoda. He then came to know that it was transferred to Kusumawathie who was a relation. It is G.A.V. Jayasekera , Kusumawathie's husband who had set fire to the pyre at the funeral when Weragoda Appuhamy died according to the Sri Lankan custom that the nephew should do so. The son of Weragoda Appuhamy , the Plaintiff had lived in Colombo and only visited the father at different times. The Plaintiff, the son , while giving evidence kept on stating that the father had informed him that there were debts to be paid. It may be that he expected the son to offer money for any debts he had incurred to be paid. The Plaintiff in his evidence never mentioned that he gave any money to the father. He said in evidence that he presumed that the consideration amount as placed in Deed 3644 , i.e. Rs. 50000/- is the debt that the father used to talk about.

The evidence of G.A.V. Jayasekera was that when Rajakaruna signed the deed 3644 as Vendor, it is he who paid the money to Appuhamy Weragoda his uncle and in turn Appuhamy Weragoda paid Rs. 45000/- to Rajakaruna then and there. Jayasekera states that he bought the property in his wife's name because since he is a lorry driver and his life is at stake all the time and therefore he did not want to write the property bought in his name. The wife Kusumawathie was not present at the Notary's office at the time of the transaction. He claims that the transaction was an **outright purchase** of the property from Appuhamy Weragoda on one condition. That condition was that Appuhamy Weragoda would be allowed to stay in the house until he dies. That was the reason for possession not being taken by the purchaser, Kusumawathie, his wife after the property was bought for Rs. 150,000/-. At page 157 of the brief, Jayasekera has further given evidence to the effect that Weragoda Appuhamy had come with his brother Punchinilame and both of them had told Jayasekera that as Appuhamy was old , there was no one to care for him, he had no money and therefore it was suggested that Jayasekera should get a transfer of the house and property where Appuhamy was living in and let him live in the house untill he passes away some day. It is at that time that Jayasekera decided to buy the house and on 04.12.1990 he got it transferred to his wife Kusumawathie's name. He had given Rs. 150000/- altogether to Appuhamy Weragoda. The Notary had said since the consideration amount was recorded in the earlier Deed 3207 as Rs. 35000/-, that it is good enough to record as consideration, only Rs. 50000/- in the Deed 3644 even though the full amount was Rs. 150000/-. His evidence shows that it was a direct transfer and the concession given for his relation Appuhamy was for Appuhamy Weragoda to live in the house on the three Acres of land, until he dies.

After his death, when Kusumawathie and Jayasekera and family was trying to take possession of the house and property, Sharm, the Plaintiff, the son of A.Weragoda, had asked Jayasekera to sell the property back to the Plaintiff. He further divulged that as on that date of giving evidence, a person named Martin who was the helper in the house when A. Weragoda was living , was in possession and enjoying the benefits of the property. The Plaintiff had bargained on the purchase price and finally got the consent of Kusumawathie and Jayasekera to sell the same for Rs.300,000/- but on the pretext of wanting to get a loan from a Bank, the Plaintiff had written on paper a document like a letter from Kusumawathie to the Plaintiff without a date on it stating that the Plaintiff's

father had borrowed Rs. 300000/- and if it is paid that Kusumawathie is willing to transfer the property to the Plaintiff. The document is marked and produced by the Plaintiff as P9 and it is at page 260 of the brief. Only the signature is Kusumawathie's. The rest is in the handwriting of a lady who accompanied the Plaintiff when they visited Kusumawathie and Jayasekera in their house at Tholangamuwa after the death of Appuhamy Weragoda. It is only after getting that letter that the Plaintiff had made arrangements to file action against Kusumawathie in the District Court using the said letter as the basis to demonstrate that Deed 3644 was not a true transfer for proper consideration but it was against a loan that was raised by his father Appuhamy Weragoda from Kusumawathie. In P9, Kusumawathie had placed her signature over the name written by some one else on that paper as 'kusumawathie'.

The evidence of Punchinilame, the deceased A.Weragoda's brother at pages 175 to 185 confirms the position taken up by the 1st Defendant Kusumawathie on whose behalf her husband Jayasekera gave evidence as described above. There was no evidence to show that it was a loan given to A.Weragoda on transfer of the property by Deed 3644. The Plaintiff's evidence did not contain any reason to show that it was a constructive trust. No attendant circumstances with which only a constructive trust can be proved was present in the evidence of the Plaintiff and the witness Rajakaruna who gave evidence for the Plaintiff. **Kusumawathie was a bona fide purchaser who allowed the transferor to live in the house until his death**.

The minute sheets of the District Court record are available with the brief before this Court. A note for depositing money has been issued by the office of the District Court. There is no money deposited on 15.10.1999 even though the learned High Court Judge has stated so in her judgement. The High Court has made a mistake in directing the record to be sent to Homagama whereas the case was heard by the District Court of Avissawella.

I have considered the authorities referred to by the counsel for the Plaintiff Appellant Respondent to support his arguments. Yet, I hold that the matter before this Court does not attract any of the cases with regard to constructive

trusts because the reliefs sought by the Plaintiff depend on a decision **whether a constructive trust , can be claimed by the Plaintiff who was not a party to Deeds 3207 and 3644.** The transactions were between the Plaintiff's deceased father

and the 1st and 2nd Defendants before the District Court. Section 83 of the Trusts Ordinance does not attract other parties other than who were parties to the particular transfer deed. The concept of constructive trust does not survive after the death of a party and cannot be carried on like a chain after the death of the parties who signed the transfer deed. Moreover, a constructive trust can be inferred with the attendant circumstances **between only two parties**. A bona fide purchaser cannot be held not to own the property he bought on the ground that his predecessor was holding the property under a constructive trust, **specially when the person on behalf of whom he was holding the property in trust, directs him to transfer the same to another.**

I find that the learned High Court Judge has not considered the evidence of the witnesses of the 1st Defendant which specifically demonstrated that the Deed 3644 was not held by the purchaser on a constructive trust. The learned High Court Judge has disregarded the ratio decidendi in the case of ***Alwis Vs Piyasoma Fernando, 1993 1 SLR 119,*** where the Chief Justice G.P.S. De Silva states that

" It is well established that findings of primary courts ……are not to be lightly disturbed in Appeal."

The learned District Judge had seen and heard the witnesses and arrived at a conclusion on facts and then considered the law prior to arriving at a conclusion. Having gone through the evidence before the District Court, I find that the analysis of evidence done by the District Judge was correctly done on a balance of probabilities of evidence before the trial court.

I answer the questions of law in favour of the 1(a) to 1(e) Defendant Respondent Appellants and against the Plaintiff Appellant Respondent. I do hereby set aside the judgment of the Civil Appellate High Court dated 27.09.2010. I affirm the judgment of the Additional District Judge of Avissawella dated 16.08.2004.

The Plaint is dismissed with costs. The heirs of the original 1st Defendant, who are the 1(a) to 1(e) Defendant Respondent Appellants are declared to be the owners of the house and property in the Schedule to the Plaint. I hold that they are entitled to take out the writ of possession of the house and property and get peaceful possession of the same forthwith.

The Appeal is allowed with costs.

Judge of the Supreme Court

L.T.B. Dehideniya J.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 from the Civil Appellate High Court.

1. Ibrahimkandu Sithy Latheefa
2. Aboobucker Jamaliya Thumma
   Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai.

SC APPEAL 11/2014 **Plaintiffs**

SC / HC/ CA /LA 200/2013
EP/HCCA/KAL/89/2008
D.C. KALMUNAI 1459/L

Vs

1. Kalimuttu Valliammai (deceased)
2. Muttuvel Kamaladevi alias Pooranam,
3. Patrick Vincent alias Anton
4. Muttuvel Thaneledchumi
   All of Valluver Road, Pandirippu-1 Kalmunai.

Defendants

AND THEN BETWEEN

1. Muttuvel Kamaladevi alias Pooranam,
2. Patrick Vincent alias Anton
3. Muttuvel Thaneledchumi
   All of Valluver Road, Pandirippu-1 Kalmunai

Defendant Appellants

Vs

1. Ibrahimkandu Sithy Latheefa
2. Aboobucker Jamaliya Thumma
   Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai.

Plaintiff Respondents

AND NOW BETWEEN

1.Muttuvel Kamaladevi alias Pooranam,
2.Patrick Vincent alias Anton
3.Muttuvel Thaneledchumi
All of Valluver Road, Pandirippu-1
Kalmunai

Defendant Appellant Appellants

Vs

1.Ibrahimkandu Sithy Latheefa
2.Aboobucker Jamaliya Thumma
Both of Barber Road, (Valluver Road) ,
Pandirippu 1, Kalmunai.

Plaintiff Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRASANNA JAYAWARDENA PCJ. &
MURDU FERNANDO PCJ.

Counsel : V. Puvitharan PC with N. Kandeepan
Instructed by M/s Neelakandan &
Neelakandan for the Defendant Appellant
Appellants.

Hejaas Hisbullah for the Plaintiff
Respondent Respondents.

ARGUED ON : 16.07.2018.

DECIDED ON : 17. 09. 2018.

S. EVA WANASUNDERA

This Court has granted leave to appeal to the aggrieved Defendant Respondent Respondents (hereinafter referred to as the Defendants) who have appealed to this Court from a Judgment of the Civil Appellate High Court of Kalmunai which affirmed the Judgment of the District Court of Kalmunai filed by the Plaintiff Respondent Respondents (hereinafter referred to as the Plaintiffs). The subject matter is an allotment of land of an extent of 36.33 Perches according to the Plans available in the brief as I can observe, even though in the Deeds submitted by either party the extent is described in the Schedules to the Deeds, in lengths of fathoms of each side of the rectangular allotments.

Since the Plaintiffs had got judgment in their favour in the District Court, the Defendants had appealed to the Civil Appellate High Court. The Plaintiffs had obtained a writ of execution pending Appeal and the Defendants had been ejected from the land and premises. When the Appeal was concluded, again judgment was against the Defendants and as such they have come before this Court in Appeal against the judgment of the Civil Appellate High Court.

The questions of law on which leave to appeal has been granted are as follows:

1. Did the High Court of Civil Appeals err in overlooking the fact that P1 and P2 have not been duly proved?
2. Did the Plaintiff Respondents fail to identify the land in dispute as required by law?
3. Did the High Court err in law in holding that the Defendant Appellants have failed to prove their alleged prescriptive title to the land in dispute?

The Plaintiffs, I.S.Latheefa and A. Jamaliyathummah are mother and daughter. The Defendants are K. Valliammai (mother), M. Kamaladevi (daughter), Patrick Vincent (son in law) and M. Thaneledchumi (daughter). It was alleged by the Plaintiffs that the land was occupied by the Defendants who are living as one family on the land having built two dwelling houses on the land. The Plaintiffs had prayed for a **declaration of title to the property** and ejectment of the Defendants from the whole land described in the Schedule to the Plaint. The Defendants claimed that they had been occupying the land for a long time and while occupying the same, the mother, Valliammai had purchased the land on **11.08.1976** from the owner, Ahamed Jamaldeen Mohamed Ibrahim by Deed No. **5902** attested by K. Veerakuddy, Notary Public.

In the Plaint, the Plaintiffs pleaded that the 2nd Plaintiff Jamaliyathummah became the owner of the land described in the Schedule to the Plaint which is 25 fathoms x 14 fathoms , **in 1978** by purchasing the said land from her brother, Ibrahim and that she then transferred the said land to her daughter the 1st Plaintiff, Latheefa. The Defendants filed answer stating that Valliammah , the 1st Defendant is occupying the land along with the other Defendants as members of the same family on the basis of having purchased the land described in the Schedule to the Answer, from Ibrahim by Deed No. **5902** dated 11.08.**1976** as aforementioned. The Defendants also claimed that they themselves and their predecessors had been occupying the said land for well over 10 years and therefore they are claiming the land on prescription as well. I observe that the land described in Deed 5902 is 9 fathoms x 12 fathoms.

The trial commenced with 9 issues; 6 by the Plaintiffs and 3 by the Defendants. On behalf of the Plaintiffs, the 2nd Plaintiff, her brother Mohamed Aboobucker Mohamed Ibrahim and Uthumalebbe Athambawa had given evidence. On behalf of the Defendants, the 1st Defendant Valliammai , Aboobucker Abdul Hameed, Subramanium Nallathamby, Patrick Wilson, Murugappan Thavarajah and Balan Arumugam had given evidence. Documents P1 to P4 was produced by the Plaintiffs. Documents D1 to D3 was produced by the Defendants.

Deeds marked P1 and P2 were marked subject to proof but the **Plaintiff had failed to prove the same** before the end of the trial. **The 2nd Plaintiff** in her evidence had stated that when she bought the land from her brother, in 1978 by Deed P3, the 1st **Defendant Valliammai had been living there for about ten to twelve years**. She

had further stated that neither she nor her brother went into occupation of the land after she bought the land from the brother. I observe from the translated pages of evidence from Tamil language to English language, that the 2nd Plaintiff's evidence by itself stands in favour of the Defendants regarding possession of the land. I further observe that the Deed by which the Defendants' claim the land in the Schedule to the Answer is in 1976 and the Plaintiffs' claim the land in the Schedule to the Plaint only in 1978. Whatever the position is, according to the evidence placed before Court, the **Plaintiff should prove the title to the property** if he seeks a declaration of title to the property.

In the case in hand, the witnesses who had given evidence on behalf of the Defendants have clearly given evidence to the effect that Valliammai had been living in the small thatched house for a long time from around 1968. Specially the evidence of a Grama Niladari who had served the area for a very long time had affirmed that Valliammai and family were living there for many years and the period can be gathered from the evidence as from the year 1968/1969.

Even though the District Judge had issued a Commission to a Surveyor to survey the land, the Plaintiffs had failed to produce the said Plan No. 787 dated 18.06.1998 made by K. Sundaramoorthy Licensed Surveyor through the 2nd Plaintiff or through the Surveyor as he was not called upon to give evidence on behalf of the Plaintiffs. Somehow, at the last minute, when the **1rd Defendant, Valliammai** was giving evidence and the Plaintiffs' lawyer was **cross examining her**, the said Plan was marked through her, instead of properly having marked the same through one of the witnesses of the Plaintiffs. She had mentioned that she does not know anything about that Plan. I wonder whether the Plaintiffs did not call the Surveyor to give evidence on purpose or due to their negligence. Whatever it may be, I observe that the whole purpose of having issued a Commission to the Surveyor and not having made use of it by the Plaintiffs to prove the identity of the corpus is a failure on their part.

The Plaintiffs' Schedule to the Plaint describing the land from which they plead that the Defendants should be ejected from, is obviously different to the Schedule to the Answer filed by the Defendants, when one looks at the boundaries and the extent. That is the very reason why the Plaintiffs should have taken care to identify the land properly, which I find that the Plaintiffs have failed to do. Even then, the

District Judge had this Plan and the Report as part of the record and he should have had a look at them prior to deciding the issues before the District Court.

The Surveyor Sundaramoorthy in the report to the Survey done on 18.06.1998 has written in the report thus in paragraph 5 of the Report at page 225 filed on record with the Plan at page 221 of the Appeal Brief : " I investigated for any old work in and around the disputed area and found that Lots 9309, 9310, 9311 and 9312 in P.P.756 appear to abutt or fall in the disputed area." Then in paragraph 6 of the Report he states thus: " After having done in para 2 hereof, I superimposed on my survey, the plans of the above mentioned Lots (Lots 9309, 9310,9311, and 9312 in P.P.756) and fixed them with the help of available fixation data such as roads, road junctions and old landmarks. The boundaries which do not tally or exist on ground had been transferred and shown in red lines in my said Plan 787 dated 18.06.1998. Thereafter I found the following." As such, having gone through the Plan at page 221, the description of the portions of the land, their boundaries, the extents of each allotment and the Remarks made by the Surveyor on each allotment as marked in the Plan, and stated in pages 222 to 228, I observe that as a Surveyor, he has done quite a good job of the Survey with the Report on the same.

Anyway, within the other paragraphs, he states that the Plaintiffs' Schedule of the Commission submits the land in dispute as "**Lot 9310 in Title Plan 173041**" which is a Surveyor General's Plan. Yet this Surveyor Sundaramoorthy states that Lots 9309 and 9310 in T.P.173041 are falling in the disputed lands. For convenience he had allotted the disputed area as Lots 1 to 5 in his Plan 787. Out of those five Lots, the Surveyor identifies that **Lots 1 and 5 are part of Lot 9309** and Lots **2, 3, and 4 are part of Lot 9310.** Therefore I find that the allotments Lots 1 and 5 are not claimed by the Plaintiffs because these areas do not fall within the area in the Schedule to the Plaint which is Lot 9310 in T.P. 173041. It is clear on record that Lots 1 and 5 , which is of an extent of 6.83 + 9.02 = 15.85 Perches , does not fall within the land claimed by the Plaintiffs in their Schedule to the Plaint. For these matters to be clarified, the Plaintiff should have called the Surveyor to give evidence. The reason for the Plaintiffs not having called the Surveyor to give evidence , is now quite obvious. If he came before court and gave evidence, it would have made the position of the Plaintiffs worse than ever before.

The learned trial judge had totally failed to see this evidence on the document received by court from the Surveyor, on the commission issued by court to the

surveyor, which he had returned after a good survey with a good report done. Under the provisions contained in Section 432(2) of the Civil Procedure Code, the report of the Commissioner should be taken into account as evidence in the trial. Sec. 432(2) reads thus: " The Report of the Commissioner or Commissioners in each case ……and the evidence taken by a commissioner **…….shall be evidence in the action;……".**

There cannot be an Order/ Judgment of the District Court in the case in hand, to eject the Defendants at all, out of the corpus which **includes the said 15.85 Perches** which is not within the land described in the Schedule to the Plaint filed by the Plaintiffs themselves. The learned Judge had gone on a voyage on her own and decided quite wrongfully that the Schedule to the Answer does not come within the corpus according to the commissioner's report and implied that the Defendants are wrongfully occupying the Plaintiffs' land whereas **in fact** the land in the Schedule to the Answer is within the land in the Schedule to the Plaint.

It is unfortunate that the judge had failed to see **the facts on documents**. It is worse to see that the Plaintiffs had not called the surveyor to give evidence. The District Judge in page 174 of the brief in his Judgment **specifically states** thus: " Though there is a burden on the Plaintiff to identify the land in dispute, the Plaintiff has failed to submit the Plan or the Report of the Surveyor and to produce the marked documents in Court and also she has not called the Surveyor to give evidence." **Having said so** within the judgment, the Judge has come to a final finding that the Defendants should be ejected from the land described in the Schedule to the Plaint. The rationale adduced goes contrary to the conclusion arrived at by the District Judge. The identity of the corpus cannot be implied. For a declaration of title to be granted by Court, the Plaintiffs should have well established the title of the land after identifying the same first.

It is trite law substantiated by a plethora of authorities, that in a case where the party claiming a declaration of title must prove title to the corpus in dispute **having identified the corpus** in the first instance. In ***V. de Silva Vs Goonethilake 32 NLR 217,*** it was held that " To bring the action rei vindication plaintiff must have ownership actually vested in him."

In the case of ***Peeris Vs Savunahamy, 54 NLR 207,*** it was held that " 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 the same case it was held that " A finding of fact may be reversed on appeal, if the trial judge has demonstrably misjudged the position."

As I have analyzed and demonstrated earlier, even though the trial judge had concluded that the Defendants were possessing the land which belonged to the Plaintiffs, the facts pertinent to the case which was before court as evidence were not taken into account and not analyzed by the trial judge before reaching the conclusion. The trial judge had not seen the fact that the whole land claimed by the Plaintiffs included the land of the Defendants which the 1st Defendant had bought by Deed 5902 as aforementioned.

The **2nd Plaintiff** giving evidence stated as follows at different times:

(i) " I bought this land from my brother. When I bought the property the Defendants were there."
(ii) " I bought it from my brother on 04.11.1978 by Deed marked P3. At that time, the said Defendant Valliammai was living there; the said Valliammai was there for 10/12 years."
(iii) "After I bought the property I did not go into occupation."
(iv) " My brother was not there in the land when I bought the property and that all of us were in Maruthamunai at that time."

Again**, the Plaintiffs' witness** Uthumalebbe Athambawa stated in his evidence that the Defendants had built the house in the said land.

The witnesses of the Defendants , Aboobucker Abdul Hameed, and Balan Arumugam confirmed the stand taken up by the Defendants in their Answer as well as the position taken up by the 1st Defendant, Valliammai which is in summary that the Defendants had come into the land in 1969 and built two houses on the land and occupied the same without any person disturbing them after she bought the land in 1976.

In the case of ***Wanigaratne Vs Juwanis Appuhamy 65 NLR 167***, it was held that, " In an action re vindicatio, the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the Defendant's title is poor or not established." Herat J writing the judgment with Abeysundere J agreeing with him stated within the judgment thus: " It is remarkable that one of the witnesses called by the Plaintiffs, Saudiashamy, in his evidence, stated that the 1st Defendant had been in possession of the paddy field and had been taking a share of the paddy, although the evidence of Saudiashamy does not clearly establish that the 1st Defendant took the paddy or share of paddy for herself, which still shows that she is not just an accidental trespasser, but has been in occupation of some portions of the field for some considerable period of time."

I find that in the same way, in the case in hand , the 2nd Plaintiff's evidence was clearly in favour of the Defendants confirming that the Defendants had been on the land from the year 1969.The title Deed 5902 is proof of the fact that the 1st Defendant is the owner of part of the land described in the Schedule to the Plaintiff.

In the circumstances, I answer the questions of law enumerated above in favour of the Defendant Appellant Appellants and against the Plaintiff Respondent Respondents.

I do hereby set aside both the judgments, namely the judgment of the Civil Appellate High Court of Kalmunai in case No. EP/HCCA/KAL/89/2008 dated 05.04.2013 as well as the judgment of the District Court of Kalmunai in case No. 1459/L dated 25.04.2007.

The Defendant Appellant Appellants are entitled to the reliefs prayed for in the Answer filed by them in the District Court Case No. 1459/L. Furthermore as writ of execution had been done at the end of the trial before the District Court , I make order restoring possession of the part of the land and premises in suit on which

the Defendants had built two houses and had been in possession for over 10 years and holding under Deed 5902 as aforementioned , to the Defendants.

Appeal is allowed with costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 from an order of the Court of Appeal in terms of Article 128 of the Constitution.

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

Complainant-Respondent-Petitioner

SC Appeal 14/2016

SC (SPL) LA 232/14
Court of Appeal No. 38/06

Vs,

Bimbirigodage Sujith Lal,
Yahaladuwa Road,
Baddegama.

Accused-Appellant

And Now Between

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

Complainant-Respondent- Appellant

Vs,

Bimbirigodage Sujith Lal,
Yahaladuwa Road,
Baddegama.

Accused-Appellant-Respondent

Before: Eva Wanasundera PC J

B.P. Aluwihare PC J

Vijith K. Malalgoda PC J

Counsel: Chethiya Gunasekara Deputy Solicitor General for Complainant-Respondent-Appellant,

R. Arsecularatne PC, with Namal Karunaratne, Udara Muhamdiramge, Ganeshan Premakumar and Thilina Punchihewa for Accused-Appellant-Respondent,

Argued on: 21.07.2017

Decided on: **20.02.2018**

Vijith K. Malalgoda PC J

The accused-appellant-Respondent (here-in-after referred to as the Respondent) namely Bimbirigodage Sujith Lal was indicted before the High Court of Galle for the murder of one Udumalagala Gamage Punyawathy on or a about 20th July 1997 at Baddegama, an offence punishable under section 296 of the Penal Code.

The trial against the Respondent was commenced before High Court Judge of Galle without a jury and at the conclusion of the said trial, the Learned High Court Judge had convicted the Respondent, and sentenced to death.

Being dissatisfied with the said conviction and sentence, the Respondent had preferred an appeal to the Court of Appeal. When the said appeal was taken up for argument before the Court of Appeal, it had transpired that the Learned trial Judge had failed to follow the provisions of section 195 (ee) of the Code of Criminal Procedure Act.

As revealed before us, both the learned President's Counsel who represented the Respondent and the learned Deputy Solicitor General who represented the Attorney General had accepted the position that the journal entry and proceedings dated 04.11.2004 demonstrate, the compliance with subsection 195 (ee) of the Code of Criminal Procedure Act.

In this regard this court is mindful of the decision by this court in the case of ***Attorney General V. Segulebbe and Another 2008 1 Sri LR 225***, where the Supreme Court considered the Provisions in section 195 (ee) of the Code of Criminal Procedure Act as follows;

> "This amendment necessitated an introduction of a further amendment i.e. section 195 (ee) imposing a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused can elects to be tried by a jury. This is in recognition of the basic right of an accused to be tried by his peers. It is left to the discretion of the accused to decide as to who should try him.
>
> As pointed out earlier for nearly two hundred long years the jury system has been in existence in Sri Lanka with whatever the faults it had. I do not make an endeavour to discuss the merits and the demerits of the jury system. As long as it is in the statute book that the accused can elect to be tried by a jury, the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non observance of this procedure is an illegality and not a mere irregularity and proceeded to quash the conviction and sentence imposed on the accused."

However in the said case the parties agreed before the Supreme Court for a retrial before the High Court on the same Indictment.

After both parties accepted the above position, the learned Deputy Solicitor General moved court to set aside the conviction and to send the case back to the High Court of Galle for a retrial on the same indictment. At that stage, the learned President's Counsel who represented the accused-appellant in the Court of Appeal, without agreeing for the said request by the state, took a further step by addressing court and pursing his case on the footing that, justice to his client would be denied due to a long laps of time, if a fresh trial is to be held and moved that the accused-appellant should acquitted and the appeal be allowed accordingly.

As revealed before us, both parties contested their respective cases before the Court of Appeal and the Court of Appeal by its decision dated 20.10.2014 allowed the appeal by acquitting the Respondent. Being dissatisfied with the said acquittal, the Attorney General preferred the present appeal before the Supreme Court.

When the matter was supported for special leave, this court had decided to grant special leave on the question of law referred to in paragraph 18 (c) of the Petition, which reads as follows;

18 (c) "Did the Court of Appeal err in law by failing to order a retrial in this case"

As observed by this court when this matter was taken up before the Court of Appeal, the court had very correctly observed that, the material available before court clearly demonstrate that there is non-compliance with the subsection 195 (ee) of the Code of Criminal Procedure Act, the court has no option but to set aside the conviction and the sentence and send the case back to the High Court for due compliance with the said section and to commence a fresh trail (trial do novo), but finally concluded after giving consideration to a series of cases decided both by the Court of Appeal and the Supreme Court, to acquit the accused-appellant (Respondent) instead of sending the case back to the High Court for due compliance and to commence a fresh trial.

In the said decision the Court of Appeal after considering the decisions both by the Court of Appeal and Supreme Court which I will also consider at a later stage of this judgment, had finally concluded as follows;

> "A long delay to finally conclude the matter is a relevant factor to be taken in to consideration. The conviction and sentence may be so deserving. But court cannot forget the fact that when a fresh trial is ordered by the Appellate Court the accused is tried for the second time, and the process has to be undertaken all over again. The second trial if at all would be after a long lapse of time of over 17 years and after the accused by law was incarcerated and spent 8 years in prison custody. One cannot forget the fact that all this happened due to no fault of the accused party but for a procedural irregularity in the Administration of Justice itself. Good part of the blame goes to the system and not the accused who is called upon to be tried one more.
>
> A fair trial is a worldwide recognized concept to an accused and could never be denied, in our country.
>
> In this instance long delay would result in serious consequences and disorganization to the accused as well as the prosecution party and witnesses. My view as above would apply to the case in hand, and I should not be understood or misunderstood to state that this is the rule. This is a decision to be taken, having regard to all the circumstances and

consequences, and such decision can be taken only on a case by case basis. In all the above facts and circumstances we set aside the conviction and sentence, and acquit the accused-appellant."

In the said decision the Court of Appeal when decided to acquit the Respondent after setting aside the conviction and sentence, was of the view that, the long delay in the instant case would result in serious consequences and disorganization to the accused as well as the prosecution party and the witnesses but, emphasized that, it should not be understood or misunderstood to state that this is the rule and the decision to be taken having regard to all the circumstances and consequences, and such decision can be taken only on a case by case basis.

However during the argument before us, the learned Deputy Solicitor General who represented the Attorney General took up the position that, when deciding to acquit the Respondent, the Court of Appeal failed to consider the circumstances in favour of the ordering of a retrial but had only considered the circumstance in favour of acquitting the Respondent even though it was observed by Court of Appeal that the said decision to be taken having regard to all the circumstances on a case basis.

The learned Deputy Solicitor General whilst agreeing with the observation in the Court of Appeal Judgment that " it should not be understood or misunderstood to state that this is the rule and the decision to be taken having regard to all the circumstances and consequence and such decision can be taken only on a case by case basis", further submitted that the circumstances in the case in hand are as such, it warrants a decision by the court to order a retrial insted of acquitting the Respondent.

In the above context, it is important to consider the evidence led at the said trial, in order to consider whether the circumstances warrants an acquittal as against ordering a retrial as required by the provisions of the Code of Criminal Procedure Act No. 15 of 1979.

As revealed from the evidence led before the trial court, the deceased was at home with her eldest daughter who was 16 years and was studying for her G.C.E. Ordinary Level Examination. The deceased's husband had gone on an office trip with their other two children and the deceased's father had come to stay with them in the absence of the husband from home. Around 7.00 p.m. on the day in question, whilst the daughter of the deceased was studying, she had heard the front

door being opened. The lights in the house were on and somebody had opened her room door and when she looked, she had seen the Respondent peeping into her room. When she called out to her mother, she had seen the accused walking towards the kitchen.

In few seconds she heard the Respondent talking to her mother. According to the evidence of Kumudu Rasangika the daughter of the deceased, she had known the accused for a long time and also knew that he was interested in her.

The witness had been listing to the conversation between her mother and the Respondent. The witness had narrated what she heard at that time as follows (Page 29 of the High Court Brief)

ප්‍ර: තමන්ට මොනවද ඇහුනේ?

උ: "මොකද කියන්නේ " කියලා ඇහුවා. "මම මොනවා කරන්නද? තාත්ත අනික් කට්ටිය කියන්නේ නැතුව උත්තරයක් දෙන්න බැහැ කිව්වා

ප්‍ර: වෙන මොනවද කිව්වේ?

උ: අම්මා කිව්වා මම ඔය පිහියට බය නැහැ කියා කියනව ඇහුනා එහෙම කියනකොට, මම එලියට බැහැලා එනවත් එක්කම පිහියෙන් ඇනලා දිව්වා

ප්‍ර: පිහියෙන් අනිනව දැක්කද තමන්?

උ: පිහියෙන් අනිනව දැක්කේ නැහැ පිහිය අතේ තියා ගෙන දිව්වා

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ප්‍ර: තමන් මොනවද දැක්කේ?

උ: මම දැක්කා පිහියෙන් ඇනලා දුවනවා

ප්‍ර: තමන් දොරකඩගාවට ගියා නේද?

උ: ඔව්

ප්‍ර: එවිට විත්තිකරු කොහෙද හිටියෙ?

උ: කුස්සයේ දොරකඩගාව ඉඳලා දිව්වා

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ප්‍ර: තමන් පිහියක් තියෙනවා දැක්කද?

උ: පිහිය අතේ තිබුනා

ප්‍ර: සාක්ෂිකාරිය, ඔහු දුවන විට තමන් අම්මා දිහා බැලුවද?

උ: අම්මා (පපුව හා උදරය පෙදෙස පෙන්වා සිටී) අල්ලා ගෙන අමාරුවෙන් කිව්වා පිහියෙන් ඇන්නා කියා. මම ඇහුවා මොකද උනේ කියලා සූටික්කා පිහියෙන් ඇන්නා කියා කිව්වා

ප්‍ර: සූටික්කා කියන්නේ කවුද?

උ: මෙයාට ගමේ කියන්නේ සූටික්කා කියලා

ප්‍ර: කවුද සූටික්කා කියන්නේ?

උ: විත්තිකරු පෙන්වා සිටී

From the above evidence it transpires that the witness Kumudu Rasangka had not seen the stubbing but had given strong evidence with regard to the following facts,

a) That she had seen the accused few second prior to the stubbing, going towards the kitchen
b) That she overheard the conversation between her mother and the accused where she heard her mother saying that “she is not afraid of the knife”
c) That she saw the accused running away from the kitchen where her mother was, with a knife in hand
d) At that time she saw her mother holding to her chest and told her that she was stubbed
e) When inquired, mother made a dying deposition to the effect, “සූටික්කා පිහියෙන් ඇන්නා”

When the above evidence is considered along with the evidence of the father of the deceased who rushed home without going to buy some betel after hearing the cries of his grand-daughter to the effect “අම්මාට පිහියෙන් ඇන්නා සූටික්කා” saw the accused running away from the kitchen, it appears that there is a strong case based on circumstantial evidence against the Respondent for the brutal killing of the mother of witness Kumudu Rasangika.

With regard to the identify, witness Rasangika had clearly identified the Respondent (who is a neighbor) with the help of the lights burning inside the house and the kitchen. Deceased’s father

too had no difficulty in identifying the Respondent with the help of the lights burning in the kitchen since he had met the Respondent, once in the morning on the same day.

As further submitted by the learned Deputy Solicitor General the above positions taken by the two witnesses were also corroborated by the medical evidence and from the evidence of the police officers who conducted the investigations. In addition to the strong items of circumstantial evidence referred to above there is clear evidence of motive for the Respondent to commit the offence, even though there is no requirement to establish the motive in a criminal trial.

The importance in establishing motive in a criminal trial was discussed by the Supreme Court of India in the case of ***Chandra Prakash Shahi V. State of the U.P. (2000) 5SCC 152; AIR 2000 SC 1706*** as follows;

> "Motive is the moving power which impels action for a definite results or which incites or stimulates a person do an act"

and the extent to which the motive can be established in a criminal trial as discussed by the Indian Supreme Court in the case of ***Nathuni Yadav V. State of Bihar (1998) 9SCC 288 AIR 1997 AC 1808*** as follows;

> "Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many murders have been committed without known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Through, it is a second proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved."

However as submitted by the learned Deputy Solicitor General, the evidence led on behalf of the prosecution clearly established the motive for committing the offence and when the strong circumstantial evidence including the clear evidence of motive is taken together there is over whelming evidence to establish the case beyond reasonable doubt.

When considering the evidence placed before the trial court as discussed above, I agree with the Learned Deputy Solicitor General when he submitted that there was a strong *prima facia* case against the Respondent for the murder of the deceased Udumalagala Gamage Punyawathy.

Whilst referring to some of the decisions relied upon by the Court of Appeal, in coming to the conclusion of acquitting the Respondent, the learned Deputy Solicitor General submitted that the decisions in those cases cannot influenced the decision in the case in hand, since the decisions in those cases were influenced due to the nature of the evidence available in those cases. In the regard the Learned Deputy Solicitor General heavily relied on the following decision considered by the Court of Appeal in the impugned order,

> ***Seenithamby V. Jansz 47 NLR 496***
>
> Judicial notice will not be taken that a "Food Control Guard" is a public servant within the meaning of section 183 of the Penal Code or that he was duly appointed under Regulation 6 of the Defence (purchase of foodstuffs) Regulations, 1942
>
> The Court of Appeal will not order a new trial where the proceedings are so irregular that the court by according to a request for a new trial will merely encourage slackness, negligence and inexactitude on the part of prosecutions.
>
> At page 499….
>
> I have been asked to send back the case as against the first to the sixth accused on count 2 for a new trial. I do not think I shall be justified in so doing. To accede to such a request will merely encourage slackness, negligence and inexactitude on the part of prosecutors. (Mendis V. Kaithan Appu; Rosemalecocq V. Kaluwa)
>
> ***The Queen V. Jayasinghe 69 NLR at 328***
>
> It is always necessary to bear in mind that the power given to a trial judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice. Although at the commencement of the summing the learned Commissioner made some preliminary observations which were extremely appropriate to a case of this nature, and which correctly directed the jury on their proper function a judges of fact, we cannot escape the feeling that the total effect of

> his later strong expressions of opinion obliterated the good effect of the preliminary observations.
>
> Finally, we quote the following words from that judgment as they express our view of the learned Commissioner's summing-up. "The summing-up as a whole cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant(s) (have) thus been deprived of the substance of a fair trial."
>
> For these reasons we allow the appeals and quash the conviction of the appellants. We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution rests. We accordingly direct that a judgment of acquittal be entered.

However when going through the impugned judgment, this court observes that, the Court of Appeal was not only mindful of decisions where re-trials were not ordered due to lack of evidence but also mindful of decisions where re-trial was not ordered for delay only (CA 146/2010) and also directing a re-trial with specific directions to conclude the re-trial early since there was a laps over 9 years (CA 128-130/91).

I too had the opportunity of going through several other judgments, both by the Supreme Court and the Court of Appeal, where re-trials have been ordered for similar reasons ***R.M. Ranbanda V. The State SC. SPL LA 65/09***, ***Nimal Banda V. The State 1996 1 SLR 214, Rajah and Another V. Republic of Sri Lanka 1996 2 SLR 403 CA 93/2007, CA 24/2004*** but, I could not find a single case where the date of offence goes far back as 1997 for nearly 20 years. After 20 years what this court will have to now consider is not a delay but a 'long delay' in ordering a fresh trial.

As discussed above there is strong evidence against the Respondent which warrants a conviction and sentence but this court cannot simply ignore the fact that he had gone through a full trial, convicted and was in remand custody pending the appeal nearly 8 years for no fault of him but merely for a procedural irregularity in the Administration of Justice itself. Now after 20 years can this court order a fresh trial to begin against him.

As rightly observed by the Court of Appeal, it is not only the Respondent (accused in the original indictment) is disturbed from the said order, witness No 1 the daughter of the deceased who witnessed the said incident when she was only 16 years; too will be prejudiced, if she was asked to give evidence once again after 20 years. Whether she could remember everything happened 20 years before, to give evidence in a fresh trial where she will be subject to cross examination by the opponents, is also a matter to be mindful by court.

In these circumstances I observe that the Court of Appeal when deciding to acquit the Respondent has considered all the circumstances and consequences relevant to the case in hand.

In the said circumstances I answer the question of law raised by the appellant in negative and dismiss this appeal.

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 Appeal from the Civil Appellate High Court.

1.Dodampahala Gamage Gunapala
2.Dodampahala Gamage Weerasinghe
3.Dodampahala Gamage Sumaderis
All of Ambagahawatte, Kandeketiya, Ratmalwala.

Plaintiffs

SC APPEAL 20/2015
SC HCCA LA 292/2013
SP HCCA TA 32/2009(F)
DC HAMBANTHOTA 3024/M

Vs

1. K.P.Nuwan Ranjan De Silva, Helekada, Angunukolapelessa.
2. Angunukolapelessa Pradeshiya Sabhawa Angunukolapelessa

Defendants

AND THEN BETWEEN

1.K.P.Nuwan Ranjan De Silva, Helekada, Angunukolapelessa.
2.Angunukolapelessa Pradeshiya Sabhawa Angunukolapelessa

Defendant Appellants

Vs

1.Dodampahala Gamage Gunapala
2.Dodampahala Gamage Weerasinghe
3.Dodampahala Gamage Sumaderis
All of Ambagahawatte, Kandeketiya,
Ratmalwala.

Plaintiff Respondents

AND NOW BETWEEN

1.Dodampahala Gamage Gunapala
2.Dodampahala Gamage Weerasinghe
3.Dodampahala Gamage Sumaderis
All of Ambagahawatte, Kandeketiya,
Ratmalwala.

Plaintiff Respondent Appellants

Vs

1. K.P.Nuwan Ranjan De Silva,
   Helekada, Angunukolapelessa.
2. Angunukolapelessa Pradeshiya Sabhawa
   Angunukolapelessa

Defendant Appellant Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
H.N.J. PERERA J. &
VIJITH K. MALALGODA PCJ.

Counsel : Ms. L.M.C.D. Bandara instructed by Ms. M. Namali Perera for the Plantiff Respondent Appellants.
Shihan Ananda for the 1st and 2nd Defendant Appellant Respondents.

Argued on : 29.08.2018.

Decided on : 16.10.2018.

S. EVA WANASUNDERA PCJ.

Leave to Appeal was granted on 02.02.2015 , on the questions of law contained in paragraph 14(i), (ii) and (iii) of the Petition dated 16.07. 2013. They read as follows:-

1. Have their Lordships the Judges of the Civil Appellate High Court erred in law and have been misdirected in coming to the finding that, the action of the Petitioners was not an acquilian action and that it is an action based on servitudal rights?
2. Have their Lordships misdirected in law by applying the principle of "us fleminis", when the Petitioners' Action was an Action clearly based on the damages caused to them by the actions of the Respondents?
3. Have their Lordships the Judges of the Civil Appellate High Court misdirected in construing the pleadings of the Petitioners to suit to that of a case based on a servitude, where in fact the plain reading of the Plaint and the issues raised by the Petitioners clearly demonstrate the basis of an Action of Res Acqulia?

The Plaintiffs filed action on 22.06.2002 against the Pradeshiya Sabha of Angunukolapelessa and its Chief Executive Officer in the District Court of Hambantota. The Plaintiffs were the father and two sons who had been cultivating the land of about 15 Acres for a long time. There had been permanent plantations such as coconut trees, Jak trees, Mango trees, Lime trees and Orange trees. According to the Plaint the number of coconut trees of 3 years of age were 227. In addition to these permanent cultivations, there had been short term plantations as well. They were 150 Banana trees, 2000 Manioc bushes, Green Gram, Chillie Plants, Brinjal Plants, Long Beans, Cowpea, peanuts and corn.

The Plaintiffs were in possession of 15 Acres from and out of a bigger land of 30 Acres. They had explained that there was an existing partition action in the same District Court under P 1/93 and had produced the Plan No. 865 surveyed by the Licensed Surveyor Ruban Meegama dated 27.01.1995, which is at page 271 of the

brief before this court. The Plaintiffs had produced the papers relating to the handing over possession of 15 Acres out of 30 Acres to the 3rd Plaintiff, the father of the other two Plaintiffs , on 24.07.1990 by the fiscal in the Primary Court Case in the Angunakolapelessa No. 20294. The name of the land is Pallattaragoda. The fact that the Plaintiffs were cultivating the said land was not disputed by the Defendants.

The Plaintiffs complained that the road which was used by the villagers to go from one village to the other was on the Eastern Side of the border of this land in which they were cultivating. It was running parallel to the said land. The elevation of this public road which ran alongside the eastern boundary of the Plaintiffs' land by about 5 feet by the Defendants, obstructed the natural flow of water from the east to the west of the said land. The Pradeshiya Sabhawa of Angunakolapelessa representatives had brought to the site of doing this elevation of the road two concrete cylinders with a circumference of three feet to be placed across the road. Yet they failed to do so thereby causing the natural water to get collected on the Appellants' land.

Then one day it rained and continued to rain for a few more days, according to the evidence and the pleadings of the Plaintiffs. The water got collected like in a reservoir and all the plantation was damaged due to the stagnating water. The Plaintiffs could not do anything to get the water flow in the natural way that it used to, prior to the elevation of the road. The Plaintiffs claim that their crops worth of Rs. 150000/- was damaged. They are **claiming damages for the loss of the crop due to the wrongful action** of the Defendants by not having placed the concrete cylinders across and under the portion of the road which was elevated to a higher level.

The Defendants in their answer had stated that the property in the two schedules to the Plaint was a low lying land which was named as Pallattarawewa which was not cultivable. They had again pleaded that the Plaintiffs were occupying the land unlawfully. They had submitted that the land which the Plaintiffs were claiming to have cultivated is a lake and the road was the bund. The Defendants had reconstructed the bund without intending bad to anybody but for the benefit of the public using the road. In the answer they had placed a counter claim of double the sum claimed as damages by the Plaintiff, i.e. Rs. 300000/-.

The documents P1 and the Fiscal's Report regarding the land was evidence to show that the land on which the Plaintiffs had cultivated was not a lake but high land. The Plaintiffs gave evidence as to what was cultivated and how the crop was taken to the town and sold every six months or so for certain crops and at different other periods for other crops as well.

Once the Plaintiffs and the Defendants had concluded evidence, the learned District Judge had delivered judgment on 26.05. 2009 answering the issues in favour of the Plaintiffs. Yet, the relief granted was limited to paragraph 1 of the prayer to the Plaint, and damages against the Defendants were not granted. The Defendants appealed to the Civil Appellate High Court. At the end of that hearing the High Court set aside the Judgment of the District Court. Thus, the Plaintiff Respondent Appellants has come before this Court challenging the Judgment of the Civil Appellate High Court.

The analysis of the High Court of the case in hand is as follows. ' The Plaintiffs were seeking a positive order against the Defendants to construct culverts across the road. They are seeking to exercise a right outside their land and over another person's land. The Plaintiffs were trying to enforce a right to conduct rain water to the lower tenement and as such **it is a servitudal right** across the road.'

The High Court Judges have come to that conclusion having said as follows in page 4 of the Judgment: " Case of the Plaintiffs is that the natural flow of the rain water accumulated within their land was towards the eastern boundary and across the road and after raising the level of the road thus preventing the flow of water in to the road the water accumulated in plaintiffs' land and it was flooded. That is the cause of action disclosed by the plaintiffs and that is the right in the plaintiffs which was violated by the defendants- the right to conduct rainwater to the lower tenement. Therefore it is clear that the plaintiffs are claiming a servitudal right across the road. Therefore I cannot agree with the submission of the learned counsel for **the Plaintiff Respondents that this is an acquilian action".**

I have gone through the Plaint and Answer, the issues and the evidence of all who have given evidence in this case before the trial judge. Nowhere has any party complained that the main cause of action is 'the right to conduct rain water to the

lower tenement'. It is not taken as an issue. When a trial case is conducted according to the provisions of the Civil Procedure Code, the issues are raised after the admissions are recorded. Then the pleadings get behind the scene and the case is taken forward mainly on the issues. The issues are at pages 58, 59 , 60 and 61 and they are 23 in number.

Neither of the parties are placing their case on a servitude. The pleadings speak about the damages caused to the plaintiffs due to inaction of not having placed the concrete cylinders at the proper place and at the proper time. The learned High Court Judges have misunderstood the cause of action in the first instance and gone a long way trying to analyze "ius fluminis", " the dominant tenement", " praedial dominans", etc. and referred to the case of **David Vs Gunawathie 2000, 2 SLR 352** which was written by Justice F.N.D. Jayasuriya.

The case in hand was **not argued on those lines by either party** before the Civil Appellate High Court. The Judges had taken it up, on a line of argument which they had thought it fit to be carried on to arrive at a conclusion. The High Court has finally allowed the Appeal with costs in favour of the Defendants. I find that such action on the part of the **appellate court** was highly unnecessary.

The cases we judges hear , belong to the parties themselves. We have to consider their arguments since they bring forward before a court of law, the case of their clients. The trial Judges in fact cannot go beyond the issues at the trial. In the same way, the appellate court judges cannot go beyond the points of argument or take up new arguments on their own, pushing away the arguments put forward by the Counsel of the parties. In the case in hand, I find that the Civil Appellate High Court has acted in quite an incorrect manner having completely misconceived the nature of the case and the cause of action.

I answer the questions of law enumerated above in favour of the Plaintiff Respondent Appellants and against the Defendant Appellant Respondents.

I set aside the Judgment of the Civil Appellate High Court dated 20.06.2013. I affirm the Judgment of the District Court dated 26.05.2009.

The Appeal is allowed with 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 from a Judgment of the Civil Appellate High Court.

Ileperuma Arachchige Edwin Perera Gunathilaka,
Galapatha, Bahurupola.

Plaintiff

K.M. Perera, 111C, Wewalduwa Road, Dalugama,
Kelaniya.

Substituted Plaintiff

SC APPEAL 27/2011
SC HC CA LA 363/2010
HC CA (Kalutara) 25/2001(F)
D.C. Kalutara Case No. 3089/P

Vs

1. Dona Yasawathie Weerakkodi of Karannagoda
   (Deceased)
1A. Nimal Lakshman Kannangara of Karannagoda.
2. Terlin Lenora Hamine of Doodangoda
3. Shanthilatha Waidyasekara of Karannagoda.
4. Dona Matilda Jayasundera
5. Agnas Edussuriya
6. Kusuma Edussuriya
7. Chandra Edussuriya
8. Richard Edussuriya
9. Gilbert Edussuriya
10. Hilton Edussuriya
11. Grasilda Edussuriya
    All of Galpatha, Bahurupola.

12. Don Babunsinghe Kadanarachchi Of Kandana, Horana.
13. Don Lisi Perera Gunathilaka (Deceased)
13A. M.A.D.Chandrarathne of Kalutara, Ukwatte.

14. Poththapitiyage Thilonona
15. Poththapitiyage Dhopi Nona
All of Aluthgama, Bandaragama
16. Yakupitiyage Alonoa of Palpola
17. Thomas Athulathmudali of Galpatha.
18. Y.M.B.Ratnayake of Bahurupola, Galpatha. (Deceased)
19. Aslin Perera Ileperuma of Galpatha.
20. Dayawathie Abeysekera of Athurugiriya
21. Dona M. Jayawardhane of 112, Gresland Road, Havelock Town.
22. Titus Jayawardhane of 112, Gresland Road, Havelock Town.
23. M.B.Gunawardhane of 151,Old Road, Kalutara.
24. D.A.Ranasinghe of Iduruwa (Deceased)
24A. Thilaka Ranasinghe of Iduruwa.
25. Torrington Jayawardhane of Kosgoda.
26. Biatris Jayawardhane of Kuruwita Kotuwa, Veyangoda.
27. Ianis Perera of Panagoda, Galpatha. (Deceased)
27A. M.A. Sardharatne of Galpatha
28. Kopiyawaththe Podinona of Bahurupola (Deceased)
28A. K.P.Peris Singho of Bahurupola
29. Robert of Kopiyawastte (Deceased)
29A. Felix Singho of Kivitiyagala, Bahurupola
30. Edussuriyage Anis Perera (Deceased)
30A. K. Thisahami of Bahurupola
31. Kopiyawattage David Perera of (Bahurupola) (Deceased)

31A. Kevitiyagela Withanage Felix Singho,
32. Kopiyawattage Peatin of Bahurupola (Deceased)
32A. Kopiyawattage Haramanis Perera of Bahurupola
33. Poththapitiyage William of Bahurupola
34. Poththapitiyage Daisanona of Bahurupola
35. Poththapitiyage Kalo Nona of Bahurupol
36. Pindo Nona of Bahurupola
37. Lionel Senevirathne of Ayagama, Horana
38. D.L.Rajapakshe of Urbun Side, Dehiwala
39. Karalina Perera Ileperuma (Deceased)
39A. Kularathne of Ihala Warakagoda, Warakagoda.
40. Sunil Perera of Ileperuma
41. Wilfred Perera of Galpatha
42. Kopiyawatte Wisimano of Bahurupola
43. Edussuriyage Romiel of Bahurupola
44. Kongaha Kankanamge Nimalhami (Deceased)
45. Edussuriyage Aginona of Galpatha
46. K. M. Perera of Galpatha.
47. D.Edwin Edussuriya of Bahurupola
48. K. Albic Perera of Bahurupola (Deceased)
49. E.P.Emosingho of Bahurupola
50. Kongahakankanamalage Somawathie of Galpatha.
51. Poththapitiyage Aslin Nona of Galpatha.
52. Poththapitiyage Kevich Nona of Koholana.
53. Edussuriyage Rosalin of Bahurupola.
54. Ileperuma Acharige Edwin Perera Gunathilake Of Galpatha, Bahurupola.

Defendants

AND BETWEEN

8. Richard Alfred Edussuriya of Galpatha
Bahurupola.

8th Defendant Appellant

Vs

Ileperuma Arachchige Edwin Perera Gunathilaka,
Galapatha, Bahurupola.

Plaintiff Respondent

1. Dona Yasawathie Weerakkodi of Karannagoda
(Deceased)
1A. Nimal Lakshman Kannangara of Karannagoda.
2. Terlin Lenora Hamine of Doodangoda
3. Shanthilatha Waidyasekara of Karannagoda.
4. Dona Matilda Jayasundera
5. Agnas Edussuriya
6. Kusuma Edussuriya
7. Chandra Edussuriya
8.
9. Gilbert Edussuriya
10. Hilton Edussuriya
11. Grasilda Edussuriya
All of Galpatha, Bagurupola.

12. Don Babunsinghe Kadanarachchi Of Kandana,
Horana.
13. Don Lisi Perera Gunathilaka (Deceased)
13A. M.A.D.Chandrarathne of Kalutara, Ukwatte.

14. Poththapitiyage Thilonona
15. Poththapitiyage Dhopi Nona
All of Aluthgama, Bandaragama

16. Yakupitiyage Alonoa of Palpola
17. Thomas Athulathmudali of Galpatha.
18. Y.M.B.Ratnayake of Bahurupola, Galpatha. (Deceased)
19. Aslin Perera Ileperuma of Galpatha.
20. Dayawathie Abeysekera of Athurugiriya
21. Dona M. Jayawardhane of 112, Gresland Road, Havelock Town.
22. Titus Jayawardhane of 112, Gresland Road, Havelock Town.
23. M.B.Gunawardhane of 151,Old Road, Kalutara.
24. D.A.Ranasinghe of Iduruwa (Deceased)
24A. Thilaka Ranasinghe of Iduruwa.
25. Torrington Jayawardhane of Kosgoda.
26. Biatris Jayawardhane of Kuruwita Kotuwa, Veyangoda.
27. Ianis Perera of Panagoda, Galpatha. (Deceased)
27A. M.A. Sardharatne of Galpatha
28. Kopiyawaththe Podinona of Bahurupola (Deceased)
28A. K.P.Peris Singho of Bahurupola
29. Robert of Kopiyawastte (Deceased)
29A. Felix Singho of Kivitiyagala, Bahurupola
30. Edussuriyage Anis Perera (Deceased)
30A. K. Thisahami of Bahurupola
31. Kopiyawattage David Perera of (Bahurupola) (Deceased)
31A. Kevitiyagela Withanage Felix Singho,
32. Kopiyawattage Peatin of Bahurupola (Deceased)
32A. Kopiyawattage Haramanis Perera of Bahurupola
33. Poththapitiyage William of Bahurupola
34. Poththapitiyage Daisanona of Bahurupola

35. Poththapitiyage Kalo Nona of Bahurupola
36. Pindo Nona of Bahurupola
37. Lionel Senevirathne of Ayagama, Horana
38. D.L.Rajapakshe of Urbun Side, Dehiwala
39. Karalina Perera Ileperuma (Deceased)
39A. Kularathne of Ihala Warakagoda, Warakagoda
40. Sunil Perera of Ileperuma
41. Wilfred Perera of Galpatha
42. Kopiyawatte Wisimano of Bahurupola
43. Edussuriyage Romiel of Bahurupola
44. Kongaha Kankanamge Nimalhami (Deceased)
45. Edussuriyage Aginona of Galpatha
46. K. M. Perera of Galpatha.
47. D.Edwin Edussuriya of Bahurupola
48. K. Albic Perera of Bahurupola (Deceased)
49. E.P.Emosingho of Bahurupola
50. Kongahakankanamalage Somawathie of Galpatha.
51. Poththapitiyage Aslin Nona of Galpatha.
52. Poththapitiyage Kevich Nona of Koholana.
53. Edussuriyage Rosalin of Bahurupola.
54. Ileperuma Acharige Edwin Perera Gunathilake Of Galpatha, Bahurupola.

Defendant Respondents

AND NOW BETWEEN

Kopiyawattage Herman Perera of Elamodara, Galaptha.

32A Defendant Respondent Appellant

Kopiyawattage Indika Nalin Perera of Elamodara, Galpatha.

Substituted 32 A Defendant Respondent Appellant

Vs

Richard Alfred Edissuriya, Galpatha, Bahurupola.

8th Defendant Appellant Respondent

Ileperuma Arachchige Edwin Perera Gunathilaka
of Galpatha, Bahurupola.

Plaintiff Respondent Respondent

1. Dona Yasawathie Weerakkodi of Karannagoda
(Deceased)
1A. Nimal Lakshman Kannangara of Karannagoda.
2. Terlin Lenora Hamine of Doodangoda
3. Shanthilatha Waidyasekara of Karannagoda.
4. Dona Matilda Jayasundera
5. Agnas Edussuriya
6. Kusuma Edussuriya
7. Chandra Edussuriya
8.
9. Gilbert Edussuriya
10. Hilton Edussuriya
11. Grasilda Edussuriya
All of Galpatha, Bagurupola.

12. Don Babunsinghe Kadanarachchi Of Kandana,
Horana.
13. Don Lisi Perera Gunathilaka (Deceased)
13A. M.A.D.Chandrarathne of Kalutara, Ukwatte.

14. Poththapitiyage Thilonona
15. Poththapitiyage Dhopi Nona
All of Aluthgama, Bandaragama
16. Yakupitiyage Alonoa of Palpola
17. Thomas Athulathmudali of Galpatha.

18. Y.M.B.Ratnayake of Bahurupola, Galpatha. (Deceased)
19. Aslin Perera Ileperuma of Galpatha.
20. Dayawathie Abeysekera of Athurugiriya
21. Dona M. Jayawardhane of 112, Gresland Road, Havelock Town.
22. Titus Jayawardhane of 112, Gresland Road, Havelock Town.
23. M.B.Gunawardhane of 151,Old Road, Kalutara.
24. D.A.Ranasinghe of Iduruwa (Deceased)
24A. Thilaka Ranasinghe of Iduruwa.
25. Torrington Jayawardhane of Kosgoda.
26. Biatris Jayawardhane of Kuruwita Kotuwa, Veyangoda.
27. Ianis Perera of Panagoda, Galpatha. (Deceased)
27A. M.A. Sardharatne of Galpatha
28. Kopiyawaththe Podinona of Bahurupola (Deceased)
28A. K.P.Peris Singho of Bahurupola
29. Robert of Kopiyawastte (Deceased)
29A. Felix Singho of Kivitiyagala, Bahurupola
30. Edussuriyage Anis Perera (Deceased)
30A. K. Thisahami of Bahurupola
31. Kopiyawattage David Perera of (Bahurupola) (Deceased)
31A. Kevitiyagela Withanage Felix Singho,
32.

32A.

33. Poththapitiyage William of Bahurupola
34. Poththapitiyage Daisanona of Bahurupola
35. Poththapitiyage Kalo Nona of Bahurupol
36. Pindo Nona of Bahurupola
37. Lionel Senevirathne of Ayagama, Horana

38. D.L.Rajapakshe of Urbun Side, Dehiwala
39. Karalina Perera Ileperuma (Deceased)
39A. Kularathne of Ihala Warakagoda, Warakagoda
40. Sunil Perera of Ileperuma
41. Wilfred Perera of Galpatha
42. Kopiyawatte Wisimano of Bahurupola
43. Edussuriyage Romiel of Bahurupola
44. Kongaha Kankanamge Nimalhami (Deceased)
45. Edussuriyage Aginona of Galpatha
46. K. M. Perera of Galpatha.
47. D.Edwin Edussuriya of Bahurupola
48. K. Albic Perera of Bahurupola (Deceased)
49. E.P.Emosingho of Bahurupola
50. Kongahakankanamalage Somawathie of Galpatha.
51. Poththapitiyage Aslin Nona of Galpatha.
52. Poththapitiyage Kevich Nona of Koholana.
53. Edussuriyage Rosalin of Bahurupola.
54. Ileperuma Acharige Edwin Perera Gunathilake Of Galpatha, Bahurupola.

Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.,**
PRASANNA JAYAWARDENA PCJ. &
L. T. B. DEHIDENIYA J.

COUNSEL : Saliya Pieris PC with Lisitha Sachindra for the 32 A Defendant Respondent Appellant.
Ranjan Suwandaratne PC with Y.P.Mathugama for the 8th Defendant Appellant Respondent and 4th to 11th Defendant Respondent Respondents.

ARGUED ON : 25.06.2018.

DECIDED ON : 03. 08. 2018.

S. EVA WANASUNDERA PCJ.

This Appeal arises from the judgment of the Civil Appellate High Court which set aside the ' impugned order ' of the District Court in a Partition Action. This Court has granted leave to appeal on three questions of law, two of which are as suggested by the Appellant and one of which was suggested by the 8th and 4th to 11th Defendant Respondent Respondents. They read as follows:-

1. Have the learned High Court Judges failed to evaluate and address their minds as to the provisions of the Section 36 A of the Partition Law which specifically states that leave to appeal must be first had and obtained in respect of an appeal against an order relating to final partition?
2. Have the learned High Court Judges erroneously held that the Section 754 with regard to Appellate procedure is applicable to an application made under and in terms of Section 36 of the Partition Law when Section 36A of the Partition Law specifically deals with the Appellate procedure with regard to an **order** made under and in terms of Section 36?
3. Can the 32A Defendant Respondent Petitioner invoke the jurisdiction of the Supreme Court by way of leave without having participated in the case before the Civil Appellate High Court?

First and foremost the factual position has to be understood. The Plaintiff, Ileperuma Arachchige Edwin Perera Gunathilaka had filed a Partition action on 20.05.1969 against 43 Defendants to partition the land named Muruthagaha-aswedduma, Thirimawaladenibima and Godelle situated at the village Bahurupola within the Kalutara District containing in extent of 7 Acres 3 Roods and 14 Perches (A7 R3 14 P). At the trial, the corpus was identified and admitted by all the parties as depicted in the Preliminary Plan No. 486 dated 23.06.1975 prepared by Premaratne, Licensed Surveyor. Shares were allotted by the judgment of the District Court after about 15 years and **no appeal** was preferred by any party against the judgment and the interlocutory decree. The District Court then issued a Commission to the Surveyor, Seneviratne to prepare **the Final Scheme of Partition.** The final Plan No. 9014 dated 08.04.1996 and the commission report was filed in Court.

Both in the Preliminary Plan No. 486 dated 18.03.1972 prepared by Premaratne, Licensed Surveyor and in the **final Plan No. 9014 dated 08.04.1996 by Seneviratne** Licensed Surveyor, a large water hole of an extent of A 1. R 1. P 29 was shown within the land. This area is like a huge basin which contains water and was identified as Lot C in Plan No. 486 and as **Lot 3 in Plan No. 9014.** This had been created due to the removal of soil by various people for a long time for the purpose of making bricks and selling the same to outsiders.

In the Final Scheme of Partition , the said Lot 3 in Plan No. 9014 was allocated to the 4th to 11th Defendants. They objected to the final scheme on the ground that it is unreasonable to include the said water hole entirely in their allotment and moved for an **alternative plan.** Another ground alleged was that **Lot 3 had been allocated without any road access t**o the said Lot 3 in the final plan. Court issued a commission and an **alternative plan dated 21.05.1998 was prepared by Serasinghe**, Licensed Surveyor. This alternative plan bears no number on the copy filed in the brief before this Court. **It provides for an access road to the new Lot 3** and the said new Lot 3 covers only **70%** of the water hole and the **new Lot 3 also includes a portion of the high land as well.** The alternative plan has changed the boundaries to Lots 3,4, and 5 and those who got Lots 4 and 5 in the final plan, namely the 32A Defendant and '19th and 41 Defendants together' also got their proper shares as well. In this Partition action, I observe that there is Lot 16 from the high land which is of an extent of 1 A 0 R 16.3 P which was left unallotted and a common access road of 12 Perches marked as Lot 17 was allotted to those who received Lots 7, 12, 13, 14 and 15 in the final plan as well as the alternative land.

I also observe that the Plaintiff, Ileperuma Arachchige Edwin Perera Gunathilaka, had received only Lot 9 which is only 17.3 Perches in extent.

After the alternative plan was filed, the matter regarding the way the Surveyor Seneviratne, the Court Commissioner had allocated the land at the Final Scheme of Partition was fixed for inquiry. At the end of the inquiry, the learned District Judge made **Order dated 23.05.2001** rejecting the alternative plan and **confirming the final plan and entered the final decree accordingly.**

The 8th Defendant was aggrieved by that Order of the District Judge and appealed against the same on the ground that the learned District Judge had erred in his

findings on facts by not evaluating the evidence at the inquiry with regard to the Final Scheme of Partition, properly and that the learned District Judge had misled himself by misconceiving in law as well. The Plaintiff raised a preliminary objection with regard to the maintainability of the Appeal on the ground that the 8th Defendant had not obtained " leave to appeal" from the Civil Appellate High Court before he filed the Petition of Appeal. The Plaintiff had submitted that the Order of the learned District Judge was made under Section 36(1) (a) of the Partition Law after holding an inquiry regarding the reasonableness of the proposed division of the land into different allotments; that Section 36A of the Partition Law provides that any person who is dissatisfied with an Order of court made under Section 36 should prefer an Appeal against such Order to the Court of Appeal with the leave of the Court of Appeal first had and obtained; and that the 8th Defendant who had appealed, instead of first seeking leave to appeal, had therefore not followed the proper procedure which is bad in law and is misconceived in law. The Plaintiff moved for a dismissal of the Appeal.

The 4th to 11th Defendant Respondents before the Civil Appellate High Court supported the 8th Defendant Appellant's Appeal and moved Court to allow the Appeal of the Appellant. The Plaintiff Respondent, namely Ileperuma Arachchige Edwin Perera Gunathilaka filed written submissions. The 4th to 11th Defendant Respondents filed one written submission in support of the 8th Defendant Appellant. The 8th Defendant Appellant also filed written submissions as directed by Court. The learned High Court Judges considered the written submissions of the parties who filed them and delivered their judgment on 23.09.2010 , setting aside the Judgment of the District Judge and **confirming the alternative plan marked as 8D dated 21.05.1998 made by Serasinghe, Licensed Surveyor** and directed to demarcate new boundaries to Lots 3, 4, and 5 since the other allotments and the improvements allocated to them are not affected and remained unchanged from the demarcation done in the Final Scheme of Partition plan made by Seneviratne Licensed Surveyor.

Then, **the 32 A Defendant Respondent Appellant** had obtained leave to appeal from this Court, on the three questions of law as aforementioned above against the judgment of the Civil Appellate High Court.

The name of the 32A Defendant Respondent Appellant is named as Kopiyawattage Haramanis Perera of Bahurupola. He was also known as

Kopiyawattage Herman Perera. He passed away on 12. 05. 2012 while this Appeal was pending in the Supreme Court and he was substituted by his son, Kopiyawattage Indika Nalin Perera and named in the Caption as " Substituted 32A Defendant Respondent Appellant".

At the time oral submissions were made before this Court, the Counsel for the 8th Defendant Appellant Respondent alleged that the substituted 32A Defendant Respondent was not a party who contested the Appeal before the Civil Appellate High Court and that due to that reason , he cannot appeal to the Supreme Court against the judgment of the Civil Appellate High Court. The Substituted 32A Defendant Respondent Appellant brought up an argument to the effect that his client was a contesting party before the Civil Appellate High Court even though there was no such contest by him according to the Court record. He explained why he submitted that his client was a contesting party, the reason being that the said 32 A Defendant Respondent Appellant was substituted in the District Court in the room of the Plaintiff when the Plaintiff had passed away while the case was pending in the District Court and that the Plaintiff had contested the Appeal before the Civil Appellate High Court.

The Counsel for the substituted 32A Defendant Respondent Appellant drew the attention of this Court to the journal entry number 194 dated 07.07.1992 which reads as that 32A Defendant is appointed as the Substituted Plaintiff. Even then, in this new Amended Caption which is filed by the said Substituted 32A Defendant Respondent Appellant himself, also, the Plaintiff Respondent Respondent's name appears as Ileperuma Arachchige Edwin Perera Gunathilaka. Even at the time the 8th Defendant Appellant Richard Alfred Edussuriya appealed to the Civil Appellate High Court from the judgment of the District Court , in the caption , the name of any Substituted Plaintiff is not mentioned. It may be that the caption was not corrected to carry out the appointment of the substituted plaintiff mentioning the name of the 32 A Defendant Respondent, Kopiyawattage Haramanis Perera alias Kopiyawattage Herman Perera as the Substituted Plaintiff. Yet, I observe that the name of the Substituted Plaintiff in the District Court is mentioned as 'K.M.Perera' and not as 'K.H.Perera'.

I decide however that this Court sees no need to consider the argument of the Appellant's counsel, at this hour, that **he was a contesting party before the Civil Appellate High Court** as he was the substituted plaintiff in the case at that time,

since there are complications with regard to the caption of the District Court and the Civil Appellate High Court as well as observing that the caption alone before this court runs to 9 typewritten A4 size papers.

The Partition Law was amended by Act No. 17 of 1997 and the amended Section 36 and Section 36A read as follows:-

Section 36 (1) - On the date fixed under Section 35, or on any later date which the Court may fix for the purpose, **the Court may, after summary inquiry:**

(a) Confirm with or without modification the scheme of partition proposed by the surveyor and enter final decree of partition accordingly;

(b) **Order the sale of any lot**, in accordance with the provisions of this Law, at the appraised value of such lot given by the Surveyor under Section 32, where the Commissioner has reported to Court under Section 32 that the extent of such lot is less than the minimum extent required by written law relating to the subdivision of land for development purposes and **shall enter final decree of partition** subject to such alterations as may be rendered necessary by reason of such order of sale.

Section 36(2) – The provisions of Sections 41, 42, 43, 44, 45, 45A, 46, 47 and 48(2) shall mutatis mutandis apply to a sale ordered under paragraph (b) of subsection(1).

The said sections 36(1) and 36(2) are with regard to the **final decree of partition**. Section 36A is with regard to Appeals.

Section 36A reads as follows:

Any person dissatisfied with **an order of the court made under Section 36**, may prefer an appeal against such order to the Court of Appeal, **with the leave of the Court of Appeal first had and obtained.**

The 32A Defendant Respondent Appellant ***argued*** that the 8th Defendant Appellant Respondent **had not obtained leave to appeal** when he was aggrieved by the Order of the District Judge and had instead incorrectly preferred the

Appeal against the said Order, contrary to the prevailing law, i.e. Section 36A of the Partition Law.

I observe that the Civil Appellate High Court has not specifically mentioned and /or quoted Section 36A within the judgment. The learned Judges have quoted from Section 36 stating that , " Firstly it should be noted that the abovementioned contention is baseless because the Section 36 of the Partition Law envisage in the following manner." He had then placed the exact wording as it is in the amended Section 36(1)(a) and placed the same within inverted commas. The learned High Court Judges then referred to Section 754(4) and 754(5) of the Civil Procedure Code and had come to the conclusion that ' the order of the District Judge rejecting the alternative plan ought to be considered as an order having the effect of a final judgment because the said Order has dealt with not only refusal of the alternative scheme of partition but also confirmation of the final scheme of partition and entering the final decree accordingly.' The finding of the Civil Appellate High Court Judges was that there was no necessity to obtain leave to appeal from the Order of the District Judge.

In the case in hand the question in hand is whether the District Judge when delivering his conclusion in the matter after the summary inquiry**, has delivered an Order as referred to in Section 36A** of the Partition Law as amended by Act No. 17 of 1997. Even though Section 36A refers to "an Order of Court made under Section 36" , does it mean 'an order made under Section 36 (1)(a)' or 'an order made under Section 36(1)(b)' or both?

Reading Section 36A with Section 36(1) (b) , it is understood that any party who is aggrieved by the **order of a sale of any lot** in the final partition scheme, may prefer an Appeal against such order , **with the leave of the Court of Appeal first had and obtained.** However, reading Section 36A with Section 36(1)(a) ,this Court has to decide whether it can be understood that the **conclusion** reached by " Court after summary inquiry , confirming the scheme of partition proposed by the surveyor and entering final decree of partition accordingly" is equal to **an Order** as envisaged by Section 36A or whether it can be understood that such conclusion reached by the Court is **not equal to an Order** as envisaged by Section 36A.

The learned District Judge has come to a conclusion after having heard all parties and after considering the final scheme of partition done by the court commissioner and the alternative scheme of partition done again by another court commissioner with the permission of court as requested by some of the affected parties, at the end of the summary inquiry. Therefore the District Judge had come to a decision which is conclusive on merits. It is a confirmation of the scheme of partition proposed by one of the surveyors. It has brought the matter to a finality. The District Judge's conclusion is the confirmation of the final scheme of partition made under Section 36(1)(a).

There are legal authorities which have been followed at different times by our Courts with regard to' 'Orders' and 'Judgements' and 'Orders which can be categorized as a final adjudication of the matters before Court' in deciding whether litigants should file a final appeal or an appeal with leave of the Court of Appeal first had and obtained. In the case of ***Dona Padma Priyanthi Senanayake Vs H.G. Chamika Jayantha and two Others,*** **2016 BLR 74** which is contained in the 2017 Bar Association Law Journal Reports Vol XXIII at page 74 *in case number SC Appeal 41/2015 (SC Minutes of 04.08.2017)* decided by a bench of 7 Judges, Chief Justice, Priyasath Dep PC it was held that the proper approach to decide whether an order given by court has the effect of a final judgement or not, is the approach adopted by **Lord Esher in Salaman Vs Warner** [1891, 1 QBD 734] , 60 L J Q B 624 and cited with approval later by **Lord Denning** in **Salter Rex and Co. Vs Gosh** [1971, 2 All ER 865].

In ***Salaman Vs Warner,(supra) Lord Esher*** stated thus:

" 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 disposed 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 fact, the decision of the 7 Judge Bench in the case of ***Dona Padma Priyanthi Senanayake Vs H.G. Chamika Jayantha and two Others 2016 BLR 74*** **confirmed** the stand taken by the 5 Judge Bench presided by Dr. Shirani

Bandaranayake J (as she then was) in deciding the case of ***S.R. Chettiar and Others Vs S.N.Chettiar and Others 2011 BLR 25, 2011 2 SLR 70.***

In the case in hand, I find that the judgment of the District Judge of Kalutara had given an order / conclusion which finally disposed the matter in dispute because giving that order/conclusion either way, in favour of the Appellants or the Respondents, it had the effect of a finality. In other words, if the District Judge concluded the other way, granting that the alternative scheme of partition was correct instead of granting that the final scheme of partition was correct, then again the matter comes to a finality. Therefore, according to the aforementioned authorities, I am of the view that, the decision of the District Judge was an order/conclusion with a finality and therefore the party who preferred the appeal had taken the correct path of having filed a Final Appeal. It was not an interlocutory order from which a leave to appeal application would have had to be filed by the aggrieved party.

I hold that the confirmation of the final scheme of partition by the District Judge was a decision bringing the matter to a finality and it is not an Order as envisaged by Section 36A of the amended Partition Law. The argument of the 32A Defendant Respondent Appellant against the 8th Defendant Appellant Respondent fails.

The learned Judges of the Civil Appellate High Court has correctly analyzed the law and interpreted the Section 754(4) and 754(5) of the Civil Procedure Code and held thus at page 8 of their judgment:

" When this rule is applied to the facts of this case, it would appear that the order rejecting the alternative scheme of partition and plan while confirming the final partition scheme is an order which has a character of a final judgment because the rights of the 8th Defendant is completely denied by the said order."

Having said that, and then having analyzed the evidence before the inquiry with regard to the nature of the case, the Civil Appellate High Court Judges have concluded that Surveyor Seneviratne had acted in an arbitrary manner when he prepared the Final Scheme of Partition disregarding the directions given in the

interlocutory decree as regards the allotment of shares. According to this final scheme Lot 3 allotted to the Appellant has no access to the main road. No adequate access was given to any roadway from Lot 3, nor to the main road nor to the road depicted in the North Eastern side of the land. In fact the District Judge seems to have turned a blind eye to the said fact of not granting any roadway from Lot 3 to the Appellant. The water hole or the water basin is about 10 feet deep and covers a huge area. Having analyzed the evidence and the plans before the Appellate Court, the High Court has arrived at the conclusion that " on comparison with the Final Plan, the Alternative Plan is much more pragmatic and realistic". They have confirmed the demarcations marked in the alternative plan.

I answer the questions of law aforementioned in favour of the Appellant and against the Respondents. I affirm the judgment of the Civil Appellate High Court.

The Appeal is dismissed. However I do not order costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J.
I agree.

Judge of the Supreme Court

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

SC Appeal No. 29/2009
SC HCCA LA No. 142/2008
SP/HCCA/KAG No. 40/2007
D.C. Kegalle Case No. 4688/L

K.M.A. ANULAWATHIE MENIKE
Randiwala, Mawanella.
PLAINTIFF

VS.

A.H.M.J. ABEYRATNE
'Lakshmi',Yatimahana, Makehelwala
DEFENDANT

AND

K.M.A. ANULAWATHIE MENIKE
Randiwala, Mawanella.
PLAINTIFF-APPELLANT

VS.

A.H.M.J. ABEYRATNE
'Lashkmi', Yatimahana, Makehelwala
DEFENDANT-RESPONDENT

AND NOW BETWEEN

A.H.M.J. ABEYRATNE
'Lakshmi', Yatimahana, Makehelwala
DEFENDANT-RESPONDENT-PETITIONER/ APPELLANT

VS.

K.M.A. ANULAWATHIE MENIKE
Randiwala, Mawanella.
PLAINTIFF-APPELLANT-RESPONDENT

BEFORE: Sisira J. de Abrew, J.
Prasanna Jayawardena, PC, J.
Murdu Fernando, PC, J.

COUNSEL: Manohara de Silva, PC with Hirosha Munasinghe for the Substituted Defendant-Respondent-Petitioner/Appellant.
M.S.A. Saheed with A.M. Hussain for the Plaintiff-Appellant-Respondent.

WRITTEN SUBMISSIONS FILED: By the Defendant-Respondent-Petitioner/Appellant, on 13th July 2009.
By the Plaintiff-Appellant-Respondent, on 14th August 2009.

ARGUED ON: 28th March 2018.

DECIDED ON: 12th November 2018.

Prasanna Jayawardena, PC, J.

The issue before us in this appeal concerns instances where parties have entered into a settlement in a Debt Conciliation Board under and in terms of the provisions of the Debt Conciliation Ordinance No. 39 of 1941, as amended, for the payment of a "secured debt". Section 64 of that Ordinance defines a *"secured debt"* to mean *"a debt secured by a mortgage of immovable property and includes any debt in respect of which a charge on immovable property is created by a notarial instrument."*.

The question to be decided is whether the *only* course of action available to a party who wishes to institute legal proceedings to enforce such a settlement is to make an application to Court under the provisions of section 43 of that Ordinance. In other words, whether section 43 debars a party who has entered into a settlement in a Debt Conciliation Board from later instituting a hypothecary action in Court to enforce a mortgage bond which figured in that settlement or from instituting a vindicatory action to assert his title to a property which has come to him upon a conditional transfer which figured in that settlement.

Section 43 of the Debt Conciliation Ordinance reads:

"(1) Where the debtor fails to comply with the terms of any settlement under this Ordinance, any creditor may, except in a case where a deed or instrument has been executed in accordance with the provisions of section 34 for the purpose of giving effect to those terms of that settlement, apply to a court of competent jurisdiction, at any time after the expiry of three months from the date on which such settlement was countersigned by the Chairman of the Board, that a certified copy of such settlement be filed in court and that a decree be entered in his favour

in terms of such settlement. The application shall be by petition in the way of summary procedure, and the parties to the settlement, other than the petitioner shall be named respondents, and the petitioner shall aver in the petition that the debtor has failed to comply with the terms of the settlement.

(2) If the court is satisfied, after such inquiry as it may deem necessary, that the petitioner is prima facie entitled to the decree in his favour, the court shall enter a decree nisi in the petitioner's favour in terms of the settlement. The court shall also appoint a date, notice of which shall be served in the prescribed manner on the debtor, on or before which the debtor may show cause as hereinafter provided against the decree nisi being made absolute.

(3) In this section -

"court of competent jurisdiction " means any court in which the creditor could have filed action for the recovery of his debt, if the cause of action in respect of that debt had not been merged in the settlement;

"summary procedure " has the same meaning as in Chapter XXIV of the Civil Procedure Code."

To set out the factual background, the Plaintiff-Appellant-Respondent ["the plaintiff"] filed this action against the Defendant-Respondent-Petitioner/Appellant praying for a declaration of title to a half share in a paddy field named *"Adapanadeniya"* situated in Mawanella. The plaintiff's case was that, in consideration of monies paid by the plaintiff to the defendant, the defendant had transferred the aforesaid half share to her by a Conditional Transfer No. 36014 dated 19th June 1979 subject to the agreement stated therein that, if the defendant repays a sum of Rs.9,200/- to the plaintiff on or before 19th June 1981, the plaintiff shall re-transfer the half share to the defendant. It was also agreed in the Conditional Transfer that the plaintiff will have absolute title to the half share from 20th June 1981 onwards if the defendant failed to pay this sum of Rs.9,200/- to the plaintiff on or before 19th June 1981. The defendant had failed to pay the sum of Rs.9200/- to the plaintiff on or before 19th June 1981 and, therefore, the plaintiff has absolute title to the half share in the paddy field. The plaintiff also averred that the defendant had made an application to the Debt Conciliation Board seeking to effect a settlement of the aforesaid debt owed by him to the plaintiff. A settlement had been entered in the Debt Conciliation Board in terms of which the defendant undertook to pay the debt in three instalments. However, the defendant had failed to pay these monies.

A perusal of the settlement entered in the Debt Conciliation Board reveals that it does not expressly state who will have title to the paddy field in the event the defendant fails to make the agreed payments.

In his answer, the defendant denied that any cause of action had accrued to the plaintiff to sue the defendant and pleaded that the defendant had attempted to pay the monies due to the plaintiff upon the aforesaid debt but that she had refused to accept payment. Therefore, the defendant had instituted D.C. Kegalle Case No. 2591/L against the plaintiff and deposited these monies to the credit of that case to be paid to the plaintiff. On that basis, the defendant had prayed in Case No. 2591/L that he is entitled to a declaration of title to the entire paddy field.

The plaintiff filed a replication stating that the monies which the defendant claimed to have paid, were tendered to her after the agreed date for payment of the monies had passed.

When the case was taken up for trial, the parties admitted, *inter alia*, that an application had been earlier made to the Debt Conciliation Board to effect a settlement of the debt owed by the defendant to the plaintiff and that a settlement had been entered between the parties in the Debt Conciliation Board.

The plaintiff framed six issues in line with the plaint. The defendant framed seven issues in line with the answer. The plaintiff later framed two more issue based on the replication.

Issue No. [7] framed by the defendant was:

"Has the plaintiff instituted this action contrary to the provisions of the Law ?".

Both parties had agreed that this issue could be decided as a preliminary issue of law and tendered written submissions on this issue.

By his judgment dated 30th August 2001, the learned District Judge held that a party to a settlement entered in the Debt Conciliation Board can only make an application to enforce that settlement under the provisions of that Ordinance and has no right to institute a separate action in Court to assert his rights and claim reliefs. On that basis, the District Court held that the plaintiff cannot have and maintain this action and dismissed the plaintiff's action.

The plaintiff appealed to the High Court of Civil Appeal holden in Kegalle. By their judgment dated 30th September 2008, the learned judges of the High Court held that the District Court erred when it took the view that the only remedy available to a party to a settlement entered in the Debt Conciliation Board is to make an application to enforce that settlement under section 43 of that Ordinance. Accordingly, the High Court set aside the judgment of the District Court and directed that the case proceed to trial on the other issues.

The defendant sought leave to appeal from this Court and obtained leave to appeal on the following two questions of law which are reproduced *verbatim*:

(i) The learned Provincial High Court Judges have erroneously decided that after a settlement is entered into at the Debt Conciliation Board the remedy available to the creditor is to make an application under section 43 of the Debt Conciliation Ordinance for a decree in terms of that settlement is not the only remedy for him.

(ii) The learned Additional District Judge, Kegalle has correctly answered to issue No. 7 of the case.

It is seen that section 43 (1), which was set out earlier, provides that, where a settlement has been entered under the provisions of that Ordinance and the debtor defaults in complying with the terms of that settlement, the creditor *"may"* apply to Court to have a decree of Court entered in terms of the settlement. Section 43 does not express exclude other remedies the creditor may be entitled to under the ordinary law.

It is well known that the use of the word *"may"* in a statutory provision with regard to taking action under that statutory provision, means that the right given to take that action is permissive and optional and not mandatory or compulsory. Thus, Maxwell [Interpretation of Statutes 12th ed. at p. 234] states *"In ordinary usage `may' is permissive and `must' is imperative, and, in accordance with such usage, the word `may' in a statute will not generally be held to be mandatory."* In this regard, Maxwell cites COOPER vs. HALL [1968 1 WLR 360 at p.364] where Lord Parker CJ held that regulations which provided that an Authority *"may"* act in a particular manner were *"purely permissive"*. Similarly, Bindra [Interpretation of Statutes 7th ed. at p.1087] states the word *"may"* is *"prima facie enabling and permissive."*. Bindra cites Venkataramana Rao J in RAJAH of VIZIANAGARAM vs. SECRETARY OF STATE [AIR 1937 Mad. 51 at p.77] who observed *"The section says `may'. It is prima facie enabling and permissive. Generally when coupled with a duty it is construed as obligatory."*. Venkataramana Rao J cited the well-known words of Lord Cairns CJ in JULIUS vs. LORD BISHOP OF OXFORD [1880 5 AC 214 at p.222] that when words such as *"may"* and *"it shall be lawful"* are used in a statute *"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power."*.

Thus, if the word *"may"* in section 43 (1) of the Debt Conciliation Ordinance is given its ordinary meaning, the conclusion must be that the right given to a creditor to apply to Court to have a decree of Court entered in terms of the settlement, is only a right he *"may"* exercise. In other words, that he has an option of exercising that right but he is

not excluded or prohibited from choosing not to proceed under section 43 (1) and, instead, choosing to institute a regular action in court to enforce a cause of action which relates to the subject matter of the settlement.

However, it is also well known that there are some instances where the word *"may"* used in a statute should be read as having compulsory or mandatory force. As Maxwell states [at p. 234] *"In some cases, however, it has been held that expressions such as `may,' or `shall have power,'* or *`shall be lawful;' have - to say the least - a compulsory force, and so their meaning has been modified by judicial authority."* In this connection, Maxwell cites decisions such as R vs. ROBERTS [1901 2 KB 117], SHAW vs. RECKITT [1893 1 QB 779] and BARON INCHYRA vs. JENNINGS, INSPECTOR OF TAXES [1965 2 AER 714] where the word *"may"* in a statutory provision was held to have a mandatory or imperative effect in the particular circumstances of each of those cases. Similarly, Bindra [at p.1087] states *"It is no doubt true that the rule of interpretation permits the interpretation of the word `may' in certain context as `shall' and vice versa, namely, permit the interpretation of `shall' as `may.'."*. In this connection, Bindra cites SUDHIRA BALA ROY vs. STATE OF WEST BENGAL [AIR 1981 Cal. 130 at p 135] where Dutt J stated *"Normally the word `may' used in a statute should be construed as discretionary, but in the context of the statutory provision in which the word finds place, it may become necessary to interpret it as mandatory ….."*.

Accordingly, it is necessary to examine whether there is any reason why the word *"may"* used in section 43 (1) should not be given its ordinary permissive or optional meaning and, instead, should be regarded as having a mandatory or compulsive effect.

When deciding this question, the following observation made by Sir Barnes Peacock in DELHI AND LONDON BANK vs. ORCHARD [1877 4 IA 127 at p.135] gives useful guidance: *"There is no doubt that in some cases the word `must' or the word `shall' may be substituted for the word `may'; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word `may' must be taken to be used in its natural, and, therefore, in a permissive, and not in an obligatory sense."*. Further, in STATE OF U.P. vs. JOGENDRA SINGH [AIR 1963 SC 1618 at p.1620] Gajendragadkar J stated *"There is no doubt that the word `may' generally does not mean `must' or `shall'. But it is well settled that the word `may' is capable of meaning `must' or `shall' in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word `may' which denotes discretion should be construed to mean a command."*

For the purposes of this case, it will suffice to apply the tests referred to in the aforesaid two decisions and firstly examine whether the legislature intended that the word *"may"* used in section 43 (1) be given a mandatory or compulsive effect; and to also examine whether the context in which the word is used or the fact that a discretion conferred

upon a person by section 43 is coupled with an obligation, suggests that the word *"may"* used in section 43 (1) is to be given a mandatory or compulsive effect

In this regard, when one peruses section 43 and the other provisions and scheme of the Debt Conciliation Ordinance, there is nothing to suggest the legislature intended that the word *"may"* used in section 43 (1) should be given a mandatory or compulsory meaning and, thereby, exclude the rights which a person who comes before a Debt Conciliation Board would ordinarily have to institute a regular action under the ordinary law.

To the contrary, section 40 (1) Debt Conciliation Ordinance explicitly recognises the right of a party to a settlement in a Debt Conciliation Board to institute a regular action to claim his rights on the mortgage bond, charge or other lien securing the debt, Further, sections 56 and 58 implicitly recognise the right of a party to settlement before Debt Conciliation Board to institute a regular action. The only restriction is that a creditor may claim only the amount of the debt stated in the settlement.

Thus, section 40 (1) specifies that, where parties enter into a settlement in a Debt Conciliation Board, their rights upon the contract of debt become *"merged"* in the settlement. This makes it clear that the debt which was claimed becomes *"merged"* in the settlement. Consequently, the *only* debt which thereafter survives is the debt specified in the settlement. However, the *proviso* to section 40 (1) expressly states that the rights of a creditor under a mortgage, charge or lien which secures the debt which is dealt with in the settlement shall, unless otherwise expressly provided in the settlement*, "be deemed to subsist under the settlement to the extent of the amount payable thereunder in respect of such debt, until such amount has been paid or the property over which the charge, lien or mortgage was created has been sold for the satisfaction of such debt."*.

Therefore, in terms of the *proviso*, where a debt which is the subject matter of a settlement before a Debt Conciliation Board is secured by a mortgage, the creditor is entitled, unless the settlement specifies otherwise, to obtain an order for the sale of the mortgaged property which secured that debt, to recover the debt. In this regard, it hardly needs to be said that a court may enter a decree for the judicial sale of a mortgaged property to recover a monetary debt which is secured by a mortgage bond, only in execution of a hypothecary decree entered in a hypothecary action instituted under the provisions of the Mortgage Act No.6 of 1949, as amended. As Fernando CJ stated in SAWDOON UMMA vs. FERNANDO [71 NLR 217 at p. 219], *"I need state no reasons for the opinion that a Court cannot enter a decree which includes an order in terms specified in that definition* [*ie:* the definition of a hypothecary action in section 2 of the Mortgage Act] *except in a regular action maintained in compliance with Part II of the Mortgage Act."*. Further, Fernando CJ went on to observe [at p.221] that the provisions of the Debt Conciliation Ordinance do not confer jurisdiction on a court to enter a

hypothecary decree for the judicial sale of a mortgaged property other than in a hypothecary action instituted under the Mortgage Act.

Therefore, it follows that the proviso to section 40 (1) of the Debt Conciliation Ordinance explicitly recognises that a creditor who is party to a settlement in a Debt Conciliation Board in which a mortgage figures, has the right to institute a hypothecary action to enforce that mortgage bond by the judicial sale of the mortgaged property for the recovery of the amount of the debt which is stated in the settlement and is secured by that mortgage bond. Similarly, as stipulated in the proviso to section 40 (1), where such a debt is secured by a charge or a lien over property, the creditor would be entitled to institute an appropriate action in court under the provisions of the ordinary law to obtain a decree to recover that debt in terms of that charge or lien.

Next, section 56 of the Ordinance provides that a Civil Court shall not entertain any action is respect of *"(i) any matter pending before the Board; or (ii) the validity of any procedure before the Board or the legality of any settlement;"* or *"any application to execute a decree, the execution of which is suspended under section 55* [of the Ordinance]*."*. Thus, section 56 clearly points to the conclusion that, although parties who are before a Debt Conciliation Board cannot institute action in a regular court so long as the matter is *pending* before the Debt Conciliation Board, they have every right to institute a regular action in court *after* the conclusion of the proceedings before the Debt Conciliation Board by the entering of a settlement or otherwise.

Finally, section 58 of the Ordinance provides that, where an action is filed in a court for the recovery of a debt which was the subject of any proceedings in a Debt Conciliation Board, the period of time which elapsed while the matter was pending before the Debt Conciliation Board shall not count when calculating the period of prescription *"….. for the purposes of any action filed in or proceedings before a civil court for the recovery of any debt which was the subject of any proceedings under this Ordinance, ….."*. Thus, section 58 also leads to the conclusion that a party to a settlement before a Debt Conciliation Board is entitled to institute a regular action in court to assert his rights.

Thus, it is clear that the provisions of the Debt Conciliation Ordinance do not give any reason to think that the legislature intended the word *"may"* in section 43 (1) to have a mandatory or compulsory meaning which will exclude other remedies available under the ordinary law.

Further, it is evident that there is nothing in section 43 and the other provisions of the Debt Conciliation Ordinance which suggest that the *context* in which the word *"may"* is used in section 43 (1) requires that the word be given a mandatory or compulsive meaning. Further, the discretion given by section 43 to a party to a settlement in a Debt Conciliation Board to make an application under section 43 (1) is not *coupled with an*

obligation which could have the effect of suggesting that the word *"may"* used in section 43 (1) is to be given a mandatory or compulsive effect

In these circumstances, it has to be held that the word *"may"* in section 43 (1) is to be given its ordinary permissive or optional meaning. As a result, the conclusion must be that section 43 (1) only gives a party to a settlement in a Debt Conciliation Board the *option* of making an application to court by way of summary procedure to enforce that settlement under and in terms of section 43 (1). There is certainly *no* exclusion of the right of that party to resort to his ordinary remedies in law by instituting a regular action for the recovery of the amount of the debt which is stated in the settlement.

A perusal of the decisions of this Court on this issue, clearly establishes this position.

Thus, in SAWDOON UMMA vs. FERNANDO [71 NLR 217], Fernando CJ, with Sirimane J agreeing, held that a creditor who has entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, retains the right to institute a hypothecary action for the recovery of the amount of the debt stated in the settlement by the judicial sale of the mortgaged property.

It should be mentioned that in SAWDOON UMMA vs. FERNANDO, Fernando CJ referred to the earlier case of SAMARASINGHE vs. BALASURIYA [69 NLR 205] where Sansoni CJ, with Siva Supramaniam J agreeing, had taken the view that a creditor who is a party to a settlement before a Debt Conciliation Board which deals with a mortgage bond is confined to exercising his remedy under section 43 (1) of the Debt Conciliation Ordinance and has no right to institute a hypothecary action for the recovery of the amount secured by the mortgage bond. However, Fernando CJ observed [at p. 221] that the earlier decision in SAMARASINGHE vs. BALASURIYA appeared to have been reached because the creditor had, contrary to the restriction specified by section 40 (1), sued to recover the original amount of the debt and not the sum which was stated in the settlement before the Debt Conciliation Board.

In SAWDOON UMMA vs. FERNANDO, Fernando CJ went on [at p.221] to state with regard to the earlier decision in SAMARASINGHE vs. BALASURIYA , *"But certain further observations, made obiter in that judgment appear to express the opinion that the creditor's right of mortgage becomes merged in the settlement, and is therefore extinguished or wiped out. With much respect, it seems to me that the Court would not have reached that opinion, if the circumstances of that case had required full consideration of the terms of s. 40 (1) of Chapter 81. The language of the section, in particular, of its Proviso, shows that the creditor's former right under the mortgage, i.e. the right of hypothec as distinct from the right to receive payment of the debt, continue to subsist under the settlement, even though the settlement may not expressly so provide. The creditor thus retains his right over the property mortgaged to him as*

security for payment of the debt due under the settlement. A secured creditor cannot lose the benefit of his security, merely because in proceedings before the Debt Conciliation Board he agrees out of sympathy for his debtor to a settlement which only reduces the amount of a debt or the rate of interest payable upon the debt.". If I may add, it also appears that, in SAMARASINGHE vs. BALASURIYA, the attention of the Court had not been drawn to sections 56 and 58 of the Debt Conciliation Ordinance which were referred to above.

Thus, in SAWDOON UMMA vs. FERNANDO, this Court disagreed with some of the *obiter dicta in* SAMARASINGHE vs. BALASURIYA and unequivocally held that a creditor who has entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, retains the right to institute a hypothecary action for the recovery of the amount of the debt which is stated in the settlement, by the judicial sale of the mortgaged property.

Thereafter, in NONA vs. ENGALTHINAHAMY [72 NR 152], Alles J, with Pandita-Gunawardene J followed the decision in SAWDOON UMMA vs. FERNANDO. Alles J observed [p.155-156], *"The creditor is only entitled under Section 43 to obtain a decree nisi and the use of the permissive word `may' in Section 43 (1) grants him a discretion as to whether he chooses to exercise his rights under the Section or not."* and *"In my view the law grants a discretion to a creditor in the case of a secured debt to choose whether he should proceed under Section 43 or not."*.

Next, in RAJIYAH vs. ABOOBAKKER [1978-79 2 SLR 131], Soza, J, then in the Court of Appeal, followed the decisions of SAWDOON UMMA vs. FERNANDO and NONA vs. ENGALTHINAHAMY and stated [at p. 139-140] that these two decisions *"….. are authority for the proposition that where a settlement is entered before the Debt Conciliation Board in respect of a debt secured by a mortgage of immovable property, the mortgagee is entitled in respect of the settlement to enforce his legal rights in a hypothecary suit under the provisions of Part II of the Mortgage Act or follow the procedure laid down in section 43 of the Debt Conciliation Ordinance. Here we should bear in mind that the debt in respect of which the creditor is entitled to seek payment is under the settlement. While the debt is novated the old mortgage persists."*. Finally, in BASTIANPILLAI vs. GUNARATNAM [CA 649/80(F) decided on 17th November 1993], the Court of Appeal again followed the decisions of SAWDOON UMMA vs. FERNANDO, NONA vs. ENGALTHINAHAMY and RAJIYAH vs. ABOOBAKKER and upheld the right of a creditor who has entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, to institute a hypothecary action for the recovery of that debt.

Thus, in addition to the fact that a plain reading of section 43 (1) and a perusal of the other provisions of the Debt Conciliation Ordinance establish that a creditor who has

entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, is entitled to institute a hypothecary action for the recovery of that debt which is recorded in the settlement, there are several decisions of the appellate courts which have recognised and reiterated that right.

However, it has to be noted that, in the present case, the plaintiff's action was *not* a hypothecary action for the recovery of a debt which is recorded in a settlement entered in a Debt Conciliation Board. Instead, the plaintiff instituted a vindicatory action to obtain a declaration of title to the half share in paddy field which came to her under and in terms of the Conditional Transfer when the defendant failed to pay the sum of Rs.9,200/- on or before 19th June 1981. This Conditional Transfer figured in the settlement in the Debt Conciliation Board.

In paragraph [12] of the written submissions filed on behalf of the defendant, learned President's Counsel has, in the light of the aforesaid decisions, acknowledged that the plaintiff would have the right to file a hypothecary action upon a mortgage bond which figures in a settlement entered in a Debt Conciliation Board. But, he submits that the position is different in the case of conditional transfers and that section 43 of the Debt Conciliation Ordinance prohibits the institution of a vindicatory action based on a conditional transfer which figured in a settlement entered in a Debt Conciliation Board.

However, it seems to me that the reasoning used in the aforesaid decisions is equally applicable to instances where a conditional transfer figures in a settlement entered in a Debt Conciliation Board and the creditor later wishes to institute a vindicatory action based on the conditional transfer. I see no reason why a party to a settlement entered in a Debt Conciliation Board in which a conditional transfer figured, who claims that he has obtained title to the property which was subject to the conditional transfer, could be deprived of the right to file a vindicatory action to obtain a declaration of title to the property. There is certainly nothing in the provisions of section 43 (1) or the other provisions of the Debt Conciliation Ordinance which takes away that right.

That view is in line with the authority of two previous decisions of this Court. In JOHANAHAMY vs. SUSIRIPALA [70 NLR 328] a settlement had been entered in a Debt Conciliation Board for the payment of a debt in respect of which a conditional transfer of a land had been executed. Since the debtor failed to pay the debt in terms of the settlement, the creditor claimed that title had passed to him under the conditional transfer and instituted a vindicatory action claiming a declaration of title to the land. The defendant debtor took up a defence that section 43 of the Debt Conciliation Ordinance debarred the plaintiff creditor from maintaining a vindicatory action on the basis that the only remedy available to the plaintiff creditor was to make an application under section 43. These facts are similar to those which are before us.

Samerawickrame J, with Manicavasagar J agreeing, held that the plaintiff creditor had the right to institute a vindicatory action and stated [at p. 331] *" I do not see that there can be any disability for the plaintiff to bring an action upon the title he had obtained by the deed of transfer in his favour upon the footing that there had been a default resulting in the right to redeem having come to an end."*. Thereafter, in BABY NONA vs. DINES SILVA [79 II NLR 153 at p. 157-158] Rajaratnam J, with Vythialingam J and Sharvananda J agreeing, followed the decision in JOHANAHAMY vs. SUSIRIPALA and held *"It is my view that s.43 of the* [Debt Conciliation] *Ordinance does not apply to cases of conditional transfers and I follow the decision in Johanahamy vs. Susiripala."*.

Accordingly, it is clear that the provisions of section 43 of the Debt Conciliation Ordinance do not prevent a creditor who entered into a settlement in a Debt Conciliation Board in which a conditional transfer figured, from later instituting a vindicatory action claiming title based on that conditional transfer.

For the aforesaid reasons, I hold that the learned High Court Judges correctly set aside the judgment dated 30th August 2001 of the District Court and directed that the case proceeds to trial. This appeal is dismissed with costs and the judgment dated 30th September 2008 of the High Court is affirmed. The merits of the cases of the two parties have to be decided upon the evidence. The District Court is directed to proceed to trial on the issues framed in this case, other than the aforesaid issue No. [7] which has been answered in favour of the plaintiff.

Judge of the Supreme Court

Sisira J. de Abrew J
I agree.

Judge of the Supreme Court

Murdu Fernando, PC, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka pursuant to the grant of Special Leave to Appeal under and in terms of Section 9(a) of The High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC Appeal 31/2009 and
SC Appeals 35/2009 – 78/2009
SC Spl LA No. 237/2008
HC Kegalle No. 2901/Appeal
MC Warakapola No. 37925

Lakshman Ravendra Watawala
Chairman/ Director General,
Board of Investment of Sri Lanka,
26th Floor,
West Tower,
World Trade Centre,
Echelon Square, Colombo 01.

Applicant

- Vs -

Chandana Karunathilake
B02, Textile Factory Housing Complex,
Thulhiriya.

Respondent

AND

Chandana Karunathilake
B02, Textile Factory Housing Complex,
Thulhiriya.

Respondent-Appellant

- Vs -

Lakshman Ravendra Watawala,
Chairman/Director General,
Board of Investment of Sri Lanka,
26th Floor,
West Tower,
Echelon Square,
Colombo 01.

Applicant-Respondent

AND NOW

1. Lakshman Ravendra Watawala,
Chairman/Director General,
Board of Investment of Sri Lanka,
26th Floor,
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Applicant-Respondent-Appellant

1B. Kulappuarachchige Don Dhammika Perera,
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1C. Jayampathy Divale Bandaranayake,

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1D. Mahavidanalage Munidasa Charlce Ferdinando
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1E. Vithanage Upul Priyantha de Silva Jayasuriya,
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1F. Duminda Rathnayake,
Chairman,
Board of Investment Sri Lanka,
26th Floor, West Tower,
Echelon Square,
Colombo 01.

Added Applicant – Respondent – Appellants

- **Vs** -

1. Chandana Karunathilake
B02, Textile Factory Housing Complex,
Thulhiriya.

Respondent-Appellant-Respondent

Argued Before: Priyantha Jayawardena PC, J
Nalin Perera, J
Vijith Malalgoda, PC, J

Counsel: S. A. Parathalingam PC with Nishken Parathalingam for the Appellant
Sanath Singhage instructed by Varners for the Respondent- Petitioner-Respondent

Argued on: 19th September, 2017

Decided on: 6th July, 2018

Priyantha Jayawardena PC, J

This is an appeal filed against a Judgment of the High Court of the Sabaragamuwa Province holden in Kegalle setting aside an Order of Ejectment made by the Magistrate's Court of Warakapola under the provisions of the State Lands (Recovery of Possession) Act No.07 of 1979 as amended.

At the commencement of the hearing of this Appeal, the parties in SC Appeal Nos. 35/2009 to 78/2009 agreed to abide by the judgment of this appeal since the questions of law where leave was granted in this appeal and all the said appeals are identical. The grounds of appeal, *inter alia*, are as follows:

a) *Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, inter alia, of the provisions of Section 10(2) of the State Lands (Recovery of Possession) Act as amended?*
b) *Did the High Court act without jurisdiction and/or err in law by entertaining the appeal and giving Judgment thereon?*
c) *Did the High Court err in law by giving Judgment on the merits of the appeal without first considering and making an order on the aforesaid preliminary objections raised by the Appellant?*

d) *Did the High Court err by not considering the aforesaid preliminary objection raised and maintained by the Appellant and in rejecting/overruling the said objections?*

e) *Did the High Court err in law by holding that the learned Magistrate should have considered/ determined the questions of:*

   i. *Whether the Appellant was a 'Competent Authority'; and*

   ii. *Whether the land in question was 'State Land';*

   in view, inter alia, of Section 9 of the State Lands (Recovery of Possession) Act?

Factual Matrix

The Applicant instituted Application No. 37925 and another fifty applications in the Magistrate's Court of Warakapola against the Respondent and others (hereinafter collectively referred to as 'the Respondents') in terms of Section 5 of the State Lands (Recovery of Possession) Act No.07 of 1979 as amended for the ejectment of the Respondents from the lands described in the Schedule to the said applications.

The Counsel for the Respondents appearing before the Magistrate's Court raised the preliminary objection in all cases stating that the land in question was not a 'State land' and the Applicant was not a 'Competent Authority' in terms of the State Lands (Recovery of Possession) Act No. 07 of 1979 as amended.

The learned Magistrate by his Order dated 15th February, 2007 amalgamated all the applications (Nos. 32925 to 37944, 37946 to 37969, and 37980 to 37985) and overruled the said preliminary objections and granted a date for the Respondents to show cause as to why the Respondents and their dependents, if any, should not be ejected from the land.

Thereafter, the Respondents filed Petitions of Appeal on 22nd February, 2007 against the said Order of the learned Magistrate. However, these Appeals were not pursued by the Respondents.

As there was no stay order to stay the proceedings, the Magistrate's Court took up the said applications for inquiry on 1st March, 2007 and issued Orders of Ejectment as the Respondents failed to produce a valid permit or other written Authority of the State granted in accordance with any written law.

The Respondents appealed to the High Court of the Sabaragamuwa Province Holden in Kegalle against the Judgment of the learned Magistrate made on 1st March, 2007 issuing the Order of Ejectment on the Respondents. The appeals in this Court stem from these appeals.

Further, in addition to the said Appeals, the Respondents subsequently filed Revision Applications dated 13th March, 2007 praying for the revision of the Order made on 1st March, 2007 and to have the said Order set aside.

When the said Appeals were taken up for hearing before the High Court, the Applicant-Respondent raised the preliminary objection that the Respondent-Appellants had no right of appeal in terms of the State Lands (Recovery of Possession) Act.

However, the High Court by its Judgment dated 9th September, 2008 overruled the said preliminary objections and held that the Order of the learned Magistrate dated 15th February 2007 overruling the preliminary objections and the Order of Ejectment dated 1st March, 2007 were contrary to the law and set aside the said Judgment. The High Court further held that the said Judgment was applicable to the other connected Appeals.

Later, the High Court dismissed the abovementioned Applications for Revision on 23rd September, 2008 as the High Court had already entertained the appeals and set aside the Orders of the learned Magistrate.

Being aggrieved by the Judgment of the High Court dated 9th September, 2008, the Applicant-Respondent had filed the instant appeals against the said Judgment and leave was granted by this Court on the aforementioned questions of law.

Submissions of the Appellant

At the hearing, the learned President's Counsel for the Applicant-Respondent-Appellant (hereinafter 'the Appellant') submitted that as the right of appeal has been taken away by Section 10(2) of the State Lands (Recovery of Possession) Act, the only remedy available to those who are adversely affected is to institute actions against the State for vindication of title under Section 12 of the Act. In support of his submission, he cited *Farook v Gunewardene, Government Agent, Amparai* (1980) 2 SLR 243 at 247 wherein the Court of Appeal held that:

"*When the Legislature has made express provision for any person who is aggrieved that he has been wrongfully ejected from any land to obtain relief by a process described in the Act itself, it is not for this Court to grant relief on the ground that the petitioner has not been heard. Where the structure of the entire Act is to preclude investigations and inquiries and where it is expressly provided (a) the only defence that can be put forward at any stage of the proceedings under this Act can be based only upon a valid permit or written Authority of the State and (b) special provisions have been made for the aggrieved parties to obtain relief, I am of the opinion that the Act expressly precludes the need for an inquiry by the competent authority before he forms the opinion that any land is State land.*"

Submissions of the Respondent

The Counsel for the Respondent-Appellant-Respondent (hereinafter 'the Respondent') stated that the Legislature would never have intended to deprive litigants of the right of appeal with regard to Orders, particularly from Orders made by the lower courts. In support of his submission, he cited Section 31 of the Judicature Act No. 2 of 1978 which states:

"*Any party aggrieved by any <u>conviction, sentence or order</u> entered or imposed by a Magistrate Court may subject to the provisions of any law appeal therefrom to the Court of Appeal in accordance with any law, regulation or rule governing the procedure and manner for so appealing.*" [Emphasis added]

He further cited Article 154P(3) of the 1979 Constitution of the Democratic Social Republic of Sri Lanka (hereinafter referred to as 'the Constitution') which states:

"*Every such High Court shall –*

(a) …

(b) Notwithstanding *anything in Article 138 and subject to any law, exercise, <u>appellate</u> and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates' Courts and Primary Courts within the Province…*" [Emphasis added]

The Respondent further submitted that in the light of the aforementioned provisions of legislation, the Respondents were entitled to appeal to the High Court as the abovementioned legislation conferred the right of appeal against the Orders and Judgments of the Magistrate's Court.

Now I shall consider the questions of law where the leave was granted by this Court.

Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, *inter alia,* of the provisions of section 10(2) of the State Lands (Recovery of Possession) Act?

This Court is called upon to consider whether the Respondent had a right of appeal against the Orders of the learned Magistrate made on 15th February, 2007 overruling the said preliminary objections and the Order of Ejectment dated 1st of March, 2007 to eject the Respondents under the State Lands (Recovery of Possession) Act.

Is There a Right of Appeal Under the State Lands (Recovery of Possession) Act?

Section 10 of the State Lands (Recovery of Possession) Act No.7 of 1979 as amended states:

> "*(1) If after inquiry the Magistrate is not satisfied that the person showing cause is entitled to the possession or occupation of the land he shall make order directing such person and his dependents, if any, in occupation of such land to be ejected forthwith from such land.*
>
> *(2) No appeal shall lie against any order of ejectment made by a Magistrate under subsection (1).*" [Emphasis added]

Therefore, I shall now consider whether a party can file an appeal against an Order of Ejectment made by a Magistrate's Court and under Section 10 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

Restrictions on Appellate Jurisdiction

Section 10(2) of the said Act states that no appeal shall lie against an order of ejectment made by the Magistrate under Section 10(1) of the Act. Such clauses are referred to as ouster clauses.

The purpose of an ouster clause is to oust the jurisdiction of the courts. Ouster clauses can be broadly split into two types, namely:

(a) public law ouster clauses; and
(b) jurisdictional ouster clauses.

Ouster Clauses in Public Law

Public law ouster clauses are clauses that oust the supervisory jurisdiction of the courts regarding administrative decisions made by administrative bodies. These clauses preclude the judicial review of such decisions. In public law, a clause which states "shall not be called into question in any court" is known as a finality clause or an ouster clause.

In light of the doctrine of separation of powers, ousting the jurisdiction of the court undermines the principle of checks and balances as judicial review has often been considered an integral part of the democratic system. However, ouster clauses have been recognised as a necessary provision of law because such clauses offer finality. Hence, the Legislature, in its own wisdom, introduces ouster clauses in appropriate instances when enacting legislation. However, our Courts entertain Revision Applications if a grave prejudice has been caused to a litigant even if there is an ouster clause. Such instances will be considered later in this judgment.

Section 22 of the Interpretation Ordinance No. 21 of 1901 as amended enshrines an ouster clause applicable to matters of administrative law. However, the proviso to the abovementioned section enables a party to invoke the writ jurisdiction of the Court of Appeal under Article 140 and 141 of the Constitution.

Jurisdictional Ouster Clauses

I shall now consider jurisdictional ouster clauses. Jurisdictional ouster clauses partially or as a whole oust the jurisdiction of court to review an order or judgment of a lower court and make the decisions of the lower courts final.

Jurisdictional ouster clauses may be categorised into the following two categories:

(a) partial ouster clauses; and
(b) total ouster clauses.

(a) Partial Ouster Clauses

Partial ouster clauses retain the jurisdiction of courts subject to imposing certain restrictions on jurisdiction; such as by limiting the grounds of appeal or by providing a specific procedure of appeal.

More often than not, similar provisions are found in Sri Lankan legislation and some of those provisions are considered below.

Further, Section 317 of the Code of Criminal Procedure Act No. 15 of 1979 as amended states as follows:

> "*(1) An appeal shall not lie from a conviction –*
>
> > *(b) Where an accused has under section 183 made an unqualified admission of his guilt and been convicted by a Magistrate's Court.*
>
> *(2) An appeal upon a matter of law shall lie in all cases*." [Emphasis added]

The abovementioned section ousts the jurisdiction of the Appellate Courts if the accused had been convicted by a Magistrate's Court consequent to an unqualified admission of guilt.

A similar ouster clause can also be found in Section 318 of the Code of Criminal Procedure which states:

> "*An appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney-General*."

In this instance, an appeal against an acquittal can be lodged only after obtaining the sanction of the Attorney General.

Further, Section 31D of the Industrial Disputes Act No. 30 of 1950 as amended restricts the right to appeal to only on questions of law. Section 31D states:

> "*(2) Save as provided in subsection (3) an order of a labour tribunal shall be final and shall not be called in question in any court.*
>
> *(3) 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 <u>on a question of law</u>."*
> [Emphasis added]

Thus, an appeal against a Labour Tribunal Order is restricted only to a question of law arising out of a Labour Tribunal order. Similar provisions are found in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended; Section 5 of the Arbitration Act No. 11 of 1995 and Article 128(1) of the 1979 Constitution of Sri Lanka.

(b) Total Ouster Clauses

These ouster clauses completely oust the jurisdiction of the courts.

The Exercise of Revisionary Jurisdiction in the Presence of Ouster Clauses

Notwithstanding the provision of total ouster clauses, the courts exercise revisionary powers where they deem fit.

In *Sirimavo Bandaranaike v Times of Ceylon* [1995] 1 SLR 22, the Supreme Court held that Section 88(1) of the Civil Procedure Code merely excluded appeals and could not be taken to infer an exclusion of revisionary jurisdiction. Further, the Court held that the express exclusion of an appeal justified the inference that other remedies, such as revision, were permitted.

Moreover, in *Rasheed Ali v Mohamed Ali and Others* [1981] 1 SLR 262, the Supreme Court held that the removal of the right of appeal does not prevent the exercise of revisionary jurisdiction in exceptional circumstances. The Court held at 265:

> "*... the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstance. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm."* [Emphasis added]

In the early case of *Ranesinghe v Henry et al* 1 NLR 303, Chief Justice Bonser held that while there can be no appeal from a claim order, the Court can exercise its revisionary powers when the matter comes up on appeal and exercised its powers in revision to quash the order of the District Court judge.

This principal was followed in *The King v Seeman Alias Seema* 9 CLW 76 wherein the court held that where the appeal was out of time by one day, it could be treated as an Application for Revision.

Moreover, in *Nissanka v The State* [2001] 3 SLR 78, the Court of Appeal considered a Petition of Appeal that was filed out of time as an Application for Revision on the basis that the revisionary powers that had been conferred by Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 as amended is wide enough to permit the exercise of revisionary powers in this instance as it is warranted to meet the ends of justice.

Therefore, it is evident that in appropriate instances, the Court has entertained Revision Applications when there was no right to appeal.

However, in the instant appeal, the Revision Applications against the Orders of the learned Magistrate were dismissed by the High Court as the High Court had entertained the appeals and set aside the judgment. Further, the appeals before this Court arose from the judgments delivered in the appeals filed before the High Court. Thus, the above proposition of law shall not apply to the instant appeal.

Furthermore, I am of the opinion that where the right of appeal is taken away by explicit words, it is not possible to consider an appeal filed in such an instant as a Revision Application as the court has no jurisdiction to entertain such appeals.

The Nature of the Right of Appeal

There are several Acts that have conferred the right to appeal. Section 754 of the Civil Procedure Code states:

> *"(1) Any person who shall be dissatisfied with any judgment, pronounced by any original Court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.*
>
> *(2) Any person who shall be dissatisfied with any order made by an 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."*

Section 4 of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 as amended provides a general right of appeal as follows:

> "*A party aggrieved by any conviction, sentence or order, entered or imposed, by a Magistrate's Court … may, subject to the provisions of any written law applicable to the procedure and manner for appealing and the time for preferring such appeals, appeal therefrom to the High Court established by Article 154P of the Constitution for the Province within which such court or tribunal is situated …*"

In instances where the Act is silent with regard to the right of appeal, the courts have held that there can be no right of appeal as the right of appeal is a substantive right. In *Re Wijesinghe* 16 NLR 312, the Court held, *"it is a well-established principle of law that an appeal never lies to a party to a legal proceeding from an order made in it <u>unless the right is expressly given by statute</u>."* [Emphasis added]

The Supreme Court in *The Indian Bank Ltd v Sri Lanka Shipping Company Limited* 79 NLR 1 followed the judgment of Morris LJ in *Healey v Minister of Health* (1954) 3 WLR at page 821 wherein it was held, "*the Court cannot invent a right of appeal where none is given*" as there was no explicit right of appeal given to the court from the determination of the Minister and held that since there was no right to appeal under the Administration of Justice Law except in limited circumstances, a right of appeal "*can be taken away by statute either expressly or by necessary intendment*" and the Court had no power to confer upon themselves a jurisdiction that they did not possess.

However, with the subsequent enactment of other Acts which confer jurisdiction on appellate courts to hear appeals in the absence of a specific provision for appeal in the principle enactment, our courts have interpreted the law to enable such appeals to be entertained.

In the recent case of *Mallawarachchige Kanishka Gunawardhana v H K Sumanasena* SC Appeal No. 201/2014, where the Supreme Court held that although there was no right of appeal in the Sri Lankan Bureau of Foreign Employment Act No. 21 of 1985 (hereinafter the 'SLBFE') by applying Section 4(2) of the International Covenant on Civil and Political Rights Act No. 56 of 2007 which provided a general right of appeal against convictions in respect of criminal offences by the Magistrates' Courts. The court held that a right of appeal exists regarding such convictions notwithstanding the fact that the SLBFE Act has no specific provision of appeal.

The Effect of Section 10(2) of the State Lands (Recovery of Possession) Act

The preamble of the State Lands (Recovery of Possession) Act states that it is an Act to make provision for the Recovery of Possession of State Lands from person in unauthorised possession or occupation.

Since the language of Section 10(2) is plain and clear, it can be interpreted by applying the literal rule of interpretation. It is clear from a plain reading of Section 10(2) of the State Lands (Recovery of Possession) Act No. 7 of 1979 that the Legislature intended that the ouster clause should effectively remove the right of appeal in respect of Orders of Ejectment made under Section 10(1) of the State Lands (Recovery of Possession) Act.

Prior to the enactment of the State Lands (Recovery of Possession) Act in 1979, an encroachments survey was carried out in 1979 which revealed that 951,000 acres of State land were encroached by over 600,000 persons; thus, the Act was proposed to provide an expeditious procedure for the State to regain control of these lands (as referred to in the Hansard of 8th August, 1981). As ordinary civil action may result in protracted litigation, the expedited recovery process in the Magistrates' Courts were implemented. This highlighted the intention of Parliament to expedite the recovery of State land occupied by encroachers or occupation of such lands.

When the Supreme Court restricted the powers of the State under the said Act by its judgment in *Senanayake v Damunapola* (1982) 2 SLR 621, the Legislature amended the said Act by enacting Act No. 29 of 1983 to express where the Competent Authority is of the opinion that a land is State land and a person is in unauthorised possession or occupation of such land, the Competent Authority may serve a notice on such person to vacate the said land with his dependents and deliver vacant possession to the Competent Authority. Moreover, Section 1A was added to state that no person could make any representation or be entitled to a hearing regarding the abovementioned notice.

Further, by Act No. 29 of 1983, Section 5(a)(ii) and Section 5(a)(iv) of the principal enactment was amended by replacing the following words "*application is State land*" and "*application is in unauthorised possession or occupation*"; and substituting them with the words "*application is in his opinion State land*" and "*application is in his opinion in unauthorised possession or occupation*", respectively.

Thus, it was ensured that the recovery procedure is expedited. Therefore, the ouster clause which removed the right to appeal must be considered in this context.

The State Lands (Recovery of Possession) Act was enacted prior to the present Constitution and was preserved by Article 168(1) of the 1978 Constitution. Thus, when interpreting such Acts that have been preserved by the Constitution, they must be interpreted in a manner harmonious with the present Constitution and the legislation enacted under the said Constitution.

Section 10(2) specifically removes the right of appeal against the Orders of Ejectment by the Magistrates' Courts. Thus, when there is a specific ouster clause enshrined in an Act, it is not possible to read such an Act along with another Act which provides a right of appeal

against an Order or Judgment of a particular Court. Therefore, these acts have no application to the instant case.

In light of the above, I am of the opinion that the questions of law posed to the Court should be answered as follows:

(a) Did the Respondent not have a right of appeal in respect of the Order of the Magistrate overruling the preliminary objections dated 15th February, 2007 and the Order of Ejectment dated 1st March, 2007 in view, *inter alia*, of the provisions of Section 10(2) of the State Lands (Recovery of Possession) Act as amended?

Yes.

In view of the foregoing answer, the question of considering the other questions of law will not arise.

Hence, I am of the opinion that the High Court lacked jurisdiction to entertain the appeal. Accordingly, I allow the appeal and set aside the judgment of the High Court dated 9th September, 2008.

This judgment is applicable to SC Appeal Nos. 35/2009 to 78/2009 and therefore, I allow the SC Appeal Nos. 35/2009 to 78/2009.

I order no costs.

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**

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

In the matter of an Appeal from a judgment of the Court of Appeal.

1. W.G.Chandrasena,
   No. 136/1, Lake Round,
   Kurunegala.
2. W.S.Wijeratne,
   No. 38A, Siri Saranankara
   Road, Dehiwala.

Petitioners

Vs

SC APPEAL 31/2016
SC (SPL) L.A. 63/2015
CA (WRIT) 588/2011

1. Sudharma Karunaratne,
   Director General of
   Customs, Sri Lanka
   Customs, Head Office,
   Bristol Street, Colombo 1.
2. M.M.I. Marikkar,
   Superintendent of
   Customs, Sri Lanka
   Customs, Head Office,
   Bristol Street, Colombo 1.

Respondents

AND NOW BETWEEN

1. W.G.Chandrasena,No. 136/1, Lake Round,Kurunegala.
2. W.S.Wijeratne, No. 38A, Siri Saranankara Road, Dehiwala.

Petitioner Appellants

Vs

1. Dr. Neville Gunawardena, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent)

1A. R.Samasinghe, Acting Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent)

1B. Chulananda Perera, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent)

1C. Ms. P.S.M. Charles, Director General of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1. (Substituted 1st Respondent Respondent)

2. M.M.I. Marikkar, Superintendant of Customs, Sri Lanka Customs, Head Office, Bristol Street, Colombo 1.

Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
H.N.J. PERERA J. &
MURDU FERNANDO PCJ.

Counsel : Faiz Mustapha PC with Faiza Marker for the Petitioner Appellants.
Milinda Gunatilleke DSG for the Respondent Respondents.

ARGUED ON : 03.08.2018.

DECIDED ON : 19.10.2018.

S. EVA WANASUNDERA PCJ.

This Court has granted Special Leave to Appeal from the Judgment of the Court of Appeal dated 13.03.2015, on the following questions of law set out in paragraph 7 (i) to (iii) of the Petition of the two Petitioners dated 21.04.2015, as well as two more questions of law raised by both parties on the day the application was supported in Court on 10.02.2016. They read as follows:_

1. Did the Court of Appeal err in not taking cognizance of the fact that the Respondents have no power or authority to hold a fresh inquiry relating to the said vehicle after having inquired into the matter?

2. Did the Court of Appeal err in not taking cognizance of the fact that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised as held in **R Vs Home Secretary ex p. Ram 1979 1 WLR 148?**
3. Did the Court of Appeal misapply the facts of the case of **Navaratne Vs Director General of Customs CA 664/2001** to the instant case?
4. Did the statement of objections filed by the Substituted Respondents disclose any reason entitling to direct a fresh inquiry to be held?
5. Has the Petitioner failed to impugn the relevant order in the Court of Appeal on the basis that no reasons were given in ordering a fresh inquiry as per the document which was marked as P 10 in the Court of Appeal?

The subject matter of the case in hand is a Toyota Land Cruiser Jeep bearing registration number GA – 0638. The 1st Petitioner is the owner of the said Jeep. The Chassis number of the said vehicle is HDJ 101-000637. The Engine number is IHD – 0157001. The 1st Petitioner had purchased the said vehicle on 23.05.2003 and it was registered with the Department of Motor Vehicles at the time of purchase. It had been transferred to the 2nd Petitioner, according to the 1st Petitioner, for securing a loan from the Hatton National Bank on 20.12.2007 and since the 2nd Petitioner was residing in the Western Province, it had been registered as WP GA -0638. The 1st Petitioner had retained the possession of the vehicle at all times.

The 1st Petitioner was living in Kurunegala. On 06.03.2008 some custom officers had visited his home and had asked him whether he had this vehicle in his possession. Having come to know that it was with him, the custom officers had served a seizure notice dated 06.03.2008 and had taken possession of the vehicle. The 1st Petitioner had been informed that there will be an inquiry.

The inquiry was being held regarding the **modus operandi and the source of importation of the said vehicle** for the reason that registration No. GA-0638 had originally been issued for the jeep with chassis number BJ43-00485. The vehicle with chassis **number HDJ 101-0006637 and engine number IHD-101-0157001 refers to another and a totally different vehicle**. Yet, the description of the totally different vehicle had been subsequently entered into the data base of the Department of Motor Traffic by **fraudulently substituting the description into the data base of the Department of Motor Traffic**. The non-erasable data base of the Department of Motor Traffic had disclosed that the vehicle bearing registration number **GA – 0638 is a jeep with chassis number BJ43-00485.** The first owner of

the said Jeep had been **D.R.P.Perera of Malabe who had sold the same to Walpita Gamage Chandrasena, the 1st Petitioner on 26.05.2003**. The 1st Petitioner had purchased the vehicle number GA 0638 bearing chassis number BJ43-00485.
Later on, the chassis number had been changed from BJ43-00485 to HDJ 101-0006637 on 08.01.2004 in the data base of the Motor Traffic Department. **It had happened while the 1st Petitioner was the registered owner.**

The inquiry was held for many days by V.S.Sudusinghe, Inquiring Officer. This Custom Officer who had held the inquiry had arrived at the conclusion that the prosecution has failed to prove beyond reasonable doubt against the 1st Petitioner and he had made order that the vehicle which had been seized be released to the 1st Petitioner. It is marked as **P5** and annexed to the Petition and is at page 229 of the brief in this case before this court. This investigation and the inquiry was held **as a result of information received by K.A.Dharmasena**, Deputy Director of Customs.

The inquiry had commenced on 07.04.2010 and had been concluded on 03.11.2010 with the Order made by the inquiring officer, Sudusinghe. He had arrived at the conclusion that the vehicle be released to the present owner.

But the vehicle was **not released** to the 1st or 2nd Petitioner and the Chief Assistant Preventive Officer (operation) had addressed a letter dated 18.07.2011 produced as P8 to the 1st Petitioner to be present for the customs inquiry in connection with the Customs Case No. POM/ 852/2008 on 27.07.2011. As the 1st Petitioner did not come, two more letters were sent asking him to be present. He sent letters asking for the release of the vehicle as ordered by Inquiry Officer, Sudusinghe. Finally, the **1st Petitioner had written that he is not willing to come for the said inquiry** once again and had informed on 22.09.2011 that he would be filing action against Sri Lanka Customs. As such an application was made to the Court of Appeal, for a writ of **certiorari to quash the notice sent to the 1st Petitioner to attend the inquiry marked P10.**

The Customs Inquiry was held to **ascertain whether the vehicle with Chassis number HDJ 101-0006637 was legally imported.** It is on information received by the Sri Lanka Customs that the vehicle in possession of the 1st Petitioner bears a chassis number and an engine which were not legally imported , that the investigation had commenced after a seizure order.

So, I understand that the Chassis number HDJ 101-0006637 being inside the Land Cruiser Jeep as at the date of seizure is the reason for the inquiry.
The 1st Petitioner had bought the Land Cruiser Jeep No. GA 0638 which had at the time of its first registration been identified as BJ 43 - 00485. Subsequently, while vehicle GA 0638 was in **his custody**, the information on record in the Department of Motor Traffic has got changed so that the Chassis number of GA 0638 Vehicle in the records of the RMV reads as HDJ 101- 0006637. In the papers filed by the 1st Petitioner in the Court of Appeal, he had not denied at any time that his Jeep bearing No. GA 0638 bears the Chassis No. HDJ 101-0006637. He cannot deny that because in reality that is the Chassis which holds the body of his Jeep as at present. In fact, the first document annexed to his Petition in the Court of Appeal was a copy of the Registration Certificate of the said vehicle bearing number GA 0638 in which on the face of the record, the Chassis number is stated as HDJ 101-0006637. He had only **denied** that he was **responsible for the change of the record at the RMV**. He had also denied that he imported any vehicle with the Chassis No. HDJ 101-0006637**. But the fact is that the Jeep in his possession bearing registration number GA 0638 has the Chassis No. HDJ 101-0006637.**

The Order of Customs Case No. POM/852/2008 made by the inquiring officer, Sudusinghe is marked P5 and is at page 246 of the brief. The 1st and the 2nd Petitioners were the suspects in the case. The prosecution had marked P1 to P6a and five persons had given evidence at the inquiry. It is interesting to note some of the comments within the order of the inquiring officer. On the 2nd page of P5, he states that , " According to his (meaning the 1st Petitioner, Chandrasena) evidence, the reason for transferring the ownership to the current owner Mr. Sunil Wijerathna (the 2nd Petitioner), who is a relation of Mr. Chandrasena is **to avoid payment of income tax**." Again on the 3rd page of P5, the inquiring officer states, that " P6a and P6b indicates that the Chassis number and the Engine number of the vehicle **registered** under GA 0638 **are BJ43-00485 and 0613460** respectively. The model of the vehicle is Land Cruiser and the colour is Navy Blue, the year of manufacture is 1983 as at 26.05.2003."

The date 26.05.2003 is the date on which the 1st Petitioner has bought the vehicle and transferred the same in his name. The RMV records were changed in 2004 during the period of time he has been the owner of the same and in possession of the same.

The 1st Petitioner's former driver Wijayalath Pedige Amaradeva had given evidence at the inquiry explaining the circumstances under which the 1st Petitioner bought the Toyota Land Cruiser. The said evidence is at page 97 to 100 of the brief before this Court. He had stated that when the said vehicle was bought it was a vehicle, the front of which was damaged due to an accident. He had gone to get the vehicle and at that time it was on top of a towing lorry which had been arranged by the broker Herath. The vehicle had been brought to a person who repairs damaged vehicles / a mechanical 'baas' at the village Pelandeniya who repaired the same keeping the same at the repairer's own premises near his own house. Later on, the number plates and the registration book had been handed over to this driver by the broker Herath to be given to the 1st Petitioner. According to his memory the number plate was different from what was stuck on the damaged vehicle at the time it went for repairs. He further stated that the said broker Herath could not be found now.

According to the evidence, in the RMV records, changes had been effected on two **consecutive dates, i.e. on 08.11.2004 and 09.11.2004**. Year of Manufacture has been changed from 1983 to 1998. First date of registration has been changed from 27.12.1997 to 27.06.2000. Chassis number has been changed from BJ43-00485 to HDJ 101-0006637. Name of Current owner is written as Sun Beam Fabric (Pvt) Ltd. as at 08.11.2004 and it has been changed to Walpita Gamage Chandrasena (i.e. the 1st Petitioner) and on 09.11.2004, **the very next day**, it has been changed with the name of the previous owner as K.R.P. Perera to a company by the name Sun Beam Fabric (Pvt.) Ltd. Most of all, it is interesting to see that on 08.11.2004 the colour of vehicle change has been recorded as Navy Blue to White. On the very next day, i.e. on 09.11.2004 the colour of vehicle change has been recorded as Green to Metallic Brown.

So, the **inquiring officer comments** that P6a, P6b and P6c are **contradictory.** The details other than the name of the owner being changed has to be authorized by the Commissioner of Motor Traffic and to verify that, the original file has to be looked into. It was reported to be missing from the RMV office. The inquiring officer states further that "It could not be verified whether the changes to GA 0638 has been authorized properly as the main file is missing." This comment of the inquiring officer sounds dubious and it looks like that he does not want to arrive at any conclusion on the grounds shining before his eyes and resilient in his ears

but he wants to put all that evidence away on the ground that the "main file is missing."

It is obvious by the contents of P5, the order , that the inquiring officer had failed to consider the fact that changing the chassis number of the GA 0638 Land Cruiser Jeep from BJ43-00485 to HDJ 101-00637 **had taken place while the said vehicle was in the possession of the 1st Petitioner.** The inquiring officer had further failed to recognize that the 1st Petitioner had failed to discharge his legal burden of proving the **legal importation** of the vehicle which was in his possession at the time of the inquiry **bearing chassis number HDJ 101-00637**. The failure to consider such crucial facts by the Inquiring Officer renders the order nugatory. It had been a futile exercise of his powers thus making the order invalid.

However the inquiring officer had made order to release the vehicle to the present owner. Yet the Sri Lanka Customs did not release the same. The Director General wanted to inquire more into the matter and sent a **notice to come** for a further inquiry. This notice is the subject matter for the Petitioners' application to the Court of Appeal. The Court of Appeal dismissed the application made by the 1st Petitioner for a writ of certiorari to **quash the said notice**.

Section 2 of the Customs Ordinance as amended reads thus:

" There may be appointed a Director General of Customs (hereinafter referred to as the 'Director General') and other officers and servants for the management and collection of the Customs, and the performance of all duties connected therewith; on such salaries and allowances as may be provided in that behalf, and there may be required of every person now employed or who shall hereafter be employed in the service of the Customs, such securities for his good conduct as the Minister may deem necessary, **and the Director General shall , throughout Sri Lanka , have the general superintendence of all matters relating to the Customs."**

In the Court of Appeal case of ***Navaratne Vs Director General of Customs*** number **CA 664/2001 decided on 24.1.2003**, Court had held that the Director General of Customs had the power to revise any order made by the subordinate officer on legitimate grounds. Justice Wijayaratne analyzed the matter before court in this way: " The main thrust of the arguments of the counsel for the Petitioner was on the suggestion that the 1st Respondent has no power or authority of revising the

order made by the 2nd Respondent. There are no specific provisions found in the Customs Ordinance specifically authorizing or empowering the Director General of Customs to revise an order made by an inquiring officer deputizing the Director General of Customs. However , the provisions in Sec. 2 of the Customs Ordinance vested the Director General of Customs with the power of superintendence."

Later on in the said Judgment, Justice Wijayaratne states thus:
" Accordingly, this Court is of the view that the Director General of Customs has implied power and authority in the exercise of his 'superintendence' of all matters relating to the Customs to revise any order made by any deputy. Reasons dictate that for the proper management and due administration of all matters relating to customs **and specially to such abuse of power and authority by the officers of the Department ,** the Director General of Customs should be vested with such powers and authority. Consequently I hold that **the Director General of Customs had the power to revise any order made by any Deputy or subordinate officer** on legitimate grounds and or for reasons stipulated, in the direction of proper management and due administration of all matters relating to customs."

The Order of the Inquiring Officer in the case in hand does not stand to reason. The inquiry was with regard to the illegal importation of the vehicle with the chassis number HDJ 101 – 00637. The 1st Petitioner has not explained anything in this regard at all and the inquiring officer had made no comments regarding his inability to explain how he has that vehicle with a chassis number for which no customs duty had ever been paid. **The registration number GA 0638 was not issued to the vehicle with the chassis number HDJ 101 – 00637.** The possessor of the vehicle, the 1st Petitioner had not explained how it happened. All that he had stated is that " Well I did not change it." Yet, he had filed the case before the Court of Appeal with the Registration of the Vehicle with GA 0638 and Chassis Number HDJ – 00637. The Inquiring Officer had not probed into the matter which he was given the authority to hold the inquiry and find out.

The Inquiring Officer had failed to do his duty and perform the task an inquirer was expected to do after the investigations were concluded with regard to the matter. He had continuously complained against the investigating officers, in his Order.

It cannot be considered as a legitimate order. Under Sec. 2 of the Customs Ordinance, the Director General of Customs has authority to superintend the order

of the inquiring officer and consequent to that to order a further inquiry into the matter. The Petitioners' counsel has argued that due to the fact that Section 167 of the Customs Ordinance states that Director General means all other officers mentioned therein, the statutory powers vested in the Director General has already been exercised by the Inquiring Officer and therefore the power to look into the matter has been exhausted. He argued that the Director General cannot have a further inquiry / fresh inquiry.

Yet this can lead all the subordinate officers to misuse the powers assigned to them. Section 2 of the Customs Ordinance has provided for such situations. The Director General can superintend all the work of the other officers. In the case in hand , when the purpose of the inquiry had been overlooked by the inquiring officer and when he had not paid any attention to the evidence before him and the purpose of the inquiry, the Director General had come to the conclusion that a further inquiry should be done and that is the reason for having sent another notice to the 1st Petitioner to be present for the further inquiry regarding the subject matter. I hold therefore that it is the correct decision of the head of the department and the notice was issued quite correctly.

It was argued by the counsel for the Petitioners that the Court of Appeal did not take any cognizance of the law laid down in the case of ***R Vs Home Secretary ex p. Ram 1979 1 WLR 148.*** The Counsel for the 1st Petitioner argued that 'a decision once validly made, is an irrevocable legal act and cannot be recalled or revised.' It was alleged that the Court of Appeal erred thus in not taking cognizance of that case in considering the case in hand. I have read through the said case, Regina Vs Secretary of State for the Home Department, Ex parte Ram 1979 1 WLR 148 to 155 and I do not see that the said case supports the case of the Petitioners that when a decision is once made by an officer who is given power by any statute is irrevocable and cannot be recalled or revised. It could be argued, I believe, that if it is a decision which is validly made by a person in authority that it cannot be recalled or revised by another. But if it is not validly made, is it not a revocable act?

Furthermore, the President's Counsel quoted from Wade on Administrative Law, 10th Edition at page 193 which reads thus:

"In the interpretation of statutory powers and duties, there is a rule that, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires. But this gives a highly misleading view of the law where the power is a power **to decide questions affecting legal rights**. In those cases, the **courts are** strongly **inclined to hold** that the decision, once **validly** made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities."

The case of Regina Vs Secretary of State for the Home Department, Ex parte Ram 1979 1 WLR 148 to 155 was a case where an immigrant was given the right to enter and remain in the United Kingdom even though it had been stamped by the immigration officer, by mistake, with the stamp ' to remain indefinitely in the U.K.' The reasoning was that the immigrant was not an illegal entrant; the immigration officer had mistakenly stamped the passport with the stamp to remain indefinitely; and as such the applicant Ram was lawfully in the U.K. It was clear that the act of the immigration officer was a mistake and there was no fraud behind the act and order of the immigration officer. It was obvious that no fraud or dishonesty on either the immigrant or the officer. The act of stamping by the immigration officer was held to be a valid order. In this Case, Justice May had written the judgment. Justice Tudor Evans had agreed with Justice May with nothing to add. Lord Widgery, the Chief Justice had added that there was a new principle which had emerged out of the said case, namely, ' that if the immigration officer had no authority to grant the particular permission which was granted , that vitiates the permission and render the leave void.'

This case has not brought up an authoritative stance in favour of the Petitioners in the case in hand, because nowhere within the quoted case, I find the argument of the Counsel that 'once a decision is made it cannot be recalled or revised.' Since the inquiring officer's conclusion to release the Land Cruiser to the owner of the vehicle does not stand to reason when the extract of evidence before him is considered, the order of the inquiring officer cannot be taken as a valid order. The Director General has the power to superintend the other officers and as such has quite correctly decided to call the Petitioners for a further inquiry. The 1st Petitioner should have complied with the notice received by him to attend the 'further inquiry' which he had failed to do.

I have also gone through the Petition filed by the Petitioners in the Court of Appeal, the Statement of Objections of the Respondents and counter objections filed, to consider the matters which were raised at the time the questions of law were set down prior to the hearing of this matter.

I answer the questions of law enumerated at the inception of this judgment in favour of the Respondent Respondents and against the Petitioner Appellants. I hold that the Court of Appeal has not erred in the judgment delivered on 13.03.2015. I affirm the said Judgment of the Court of Appeal.

The Appeal is hereby dismissed. However I order no costs of suit in this Court.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ.
I agree.

Judge of the Supreme Court

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

In the matter of an Appeal against a Judgment of the Civil Appellate High Court of Avissawella.

Don Peter Ranasinghe,
No. 49, Athurugiriya Road,
Kottawa, Pannipitiya.

Plaintiff

SC APPEAL 33/2010
SC/ HC CA / LA 273/09
HCCA / AV / 05 / 2008
DC Homagama 03 / 2498 / L

Vs

1. P.K. Nandasekera,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.
2. P. K. Sudath Premakumara,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.
3. P.K. Sunil Samarasekara,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.
4. Meshrek Bank PLC,
   Srimath Chittampalam
   A. Gardiner Mawatha,
   P.O.Box 302, Colombo 02.

Defendants

AND THEN BETWEEN

1. P.K.Sudath Premakumara,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.
2. P.K.Sunil Samarasekera,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.

2nd and 3rd Defendant
Appellants

Vs

Don Peter Ranasinghe,
No. 49, Athurugiriya Road,
Kottawa, Pannipitiya.
(Deceased)

Plaintiff Respondent

AND THEN AGAIN BETWEEN

1. P.K.Sudath Premakumara,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.
2. P.K.Sunil Samarasekera,
   No. 50, Athurugiriya Road,
   Kottawa, Pannipitiya.

2nd and 3rd Defendant
Appellant Petitioners

Vs

Jeewandarage Jayawathi
Perera, No. 49, Athurugiriya
Road, Kottwa, Pannipitiya.

Substituted Plaintiff
Respondent Respondent

AND NOW BETWEEN

1. Ganemulla Gamage Suraji Ishara Therease Direkze of No. 56, Athurugiriya Road, Kottawa, Pannipitiya.
2. Pothuwila Kankanamalage Binara Harinedri Perera of No. 56, Athurugiriya Road, Kottawa, Pannipitiya.

Substituted 2nd Defendant Appellant Appellants

Vs

P.K.Sunil Samarasekera, No. 50, Athurugiriya Road, Kottawa, Pannipitiya.

3rd Defendant Appellant Petitioner Respondent

Jeewandarage Jayawathi Perera, No. 49, Athurugiriya Road, Kottawa, Pannipitiya.

Substituted Plaintiff Respondent Respondent.

BEFORE : S. EVA WANASUNDERA PCJ,
PRASANNA JAYAWARDENA PCJ &
L. T. B. DEHIDENIYA J.

COUNSEL : Gamini Marapana PC with Navin Marapana for the Substituted 2nd Defendant Appellant Appellants.
Rohan Sahabandu PC with Ms. D. Perera for the Substituted Plaintiff Respondent Respondent

ARGUED ON : 07.06.2018.

DECIDED ON : 05.07.2018.

S. EVA WANASUNDERA PCJ.

When the Petition of Appeal was supported for leave to appeal, the Court granted leave to appeal on the following questions of law, as prayed for in paragraph 39(1) and (2) of the Petition dated 20th October, 2009. The said **questions of law** are as follows:-

(1) Have their Lordships of the High Court erred in interpreting the provisions of Section 3 of the Prescription Ordinance together with the relevant case law in particular Bandi Naidi Vs Appu Naide et al (1923 5 C.L.Rec. 192) and Cinnatambi Vs Chanmuga et al (1909 Current Law Report 134) in the light of the facts of this case?

(2) Have their Lordships of the High Court erred in interpreting Section 21 of the Civil Procedure Code?

The Plaintiff in the District Court namely **Don Peter Ranasinghe** instituted action against **P.K. Nandasekera**, the Defendant seeking inter alia a **declaration of title** to the land described in the Schedule to the Plaint, which said land was of an extent of A0. R2. P7.5 depicted in Plan No. 112 dated 12.08.1925 made by Licensed Surveyor H.D.E.Gunatillake. The Defendant is alleged to have entered into the said land with a house thereon with the **leave and license of one Dona**

Gnanawathie Ranasinghe Wijesiriwardane who was the predecessor in title to the said property.

The position taken up by the Defendant, Nandasekera however was that , the said Dona Gnanawathie Ransasinghe Wijesiriwardane gifted a portion of the land by a **non notarially executed document marked and produced as V4** and placed him in possession thereof on 02.07.1952. Therefore he took up the position that he had possessed the property with the house on it from 02.07.1952 without acknowledging title of anybody else and by having exclusively held possession adverse to the Plaintiff and his predecessor in title, he had acquired prescriptive title to the house and property which is the subject matter of this case. Nandasekera, the Defendant had notarially executed two deeds gifting half to each of his two sons keeping life interest to himself and his wife. His wife had passed away. Nandasekera divulged these facts when answer was filed and thereafter the Plaintiff added the Defendant's two sons as the 2nd and 3rd Defendants. One of the sons had later mortgaged his half portion to the Mashreq Bank PLC and therefore the said Bank was also made a party as the 4th Defendant. When they filed answer, it was their position also that the prescriptive title of Nandasekera passed on to them. **So, the main question is whether Nandasekera acquired prescriptive title to the house and property which is the subject matter of this action.** The Defendants prayed that the Plaint be dismissed.

The **District Judge held with the Plaintiff** in his Judgment. The **Defendants** being aggrieved by the same **appealed** to the Civil Appellate High Court. The learned Judges of the High Court **dismissed the Appeal**. The learned District Judge and the learned Judges of the High Court founded their judgments on the fact that the Defendants had **failed to establish** that the 1st Defendant Nandasekera's **possession was adverse to or independent of that of the Plaintiff or his predecessor in title** as at the date of the Plaint filed **on 31.10.1985** as required by **Section 3 of the Prescription Ordinance**.

Section 3 of the Prescription Ordinance reads as follows:-

" Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands of immovable property, by a title adverse to or independent of the claimant or Plaintiff in such action (that is

to say a possession unaccompanied by payment of rent or produce or performance of service or duty, or by any other act by the possessor from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action shall entitle the Defendant to a decree in his favour with costs. And in like manner when any Plaintiff shall bring his action or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, **proof of such undisturbed and uninterrupted possession** as hereinbefore explained by such Plaintiff or Intervenient or by those under whom he claims shall entitle such Plaintiff or Intervenient to a decree in his favour with costs; saving in case of reversioners and remainder men:
Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when such parties so claiming acquire a right of possession to the property in dispute."

Section 21 of the Civil Procedure Code reads as follows:-

" Where a defendant is added, the plaint shall , unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants."

This Court has to look into the matters before Court having in mind, **the questions of law on which leave to appeal has been granted.**

The Plaint was originally filed against Nandasekera on 31.10.1985 seeking a declaration of title to the land and premises described in the Schedule to the Plaint and ejectment of Nandasekera and those holding under him. The Plaintiff had bought the land and premises by Deed 361 dated 03.11.1975 attested by S.D.P.Wijesinghe Notary Public. The said Nandasekera filed answer stating that he came into the house (which is on the land of an extent of about half an Acre) with the leave and license of Gnanawathie Ransinghe Wijesiriwardena and occupied the house on or about 02.07.1952. When the Plaintiff bought the property he had sent a notice to Nandasekera through his lawyer on 31.05.1976 demanding that he leaves the premises and hands over the vacant possession to the Plaintiff.

The Plaintiff filed amended Plaint on 29.03.1988 . In paragraphs 13 and 14 of the amended Plaint, the Plaintiff states that he has become aware of the fact that the Defendant Nandasekera had complained to the Commissioner of National Housing that ' the Plaintiff had wrongfully bought the house over the head of the tenant, while the Defendant had continuously lived in the house belonging to Gnanawathie the predecessor in title, paying to the said owner a rental of Rs. 30/- per month as the tenant'. He had claimed that it should have been offered to him before the owner sold it to any other person as he was the tenant from the year 1952. The Defendant Nandasekera in his amended answer had placed a simple denial of all the paragraphs but had not placed any specific denial. In the amended answer, the defendant had stressed that he was in possession from 1952. He had written two deeds giving his two sons half share of the land to each of them taking for granted that he had acquired prescriptive title by having been on the land for a long time. His sons intervened into the case and were made the 2nd and 3rd Defendants. The said two deeds had been written when they were minors and the gift was accepted by Nandasekera's wife as their mother and also subject to the life interest of Nandasekera and his wife.

Having gone through the evidence led in the case before the District Court , I find that the two documents marked at the trial as **P10 and P12** are very important. The Appellants submitted that these documents have not been proven by the Plaintiff at the trial. However I find that evidence has been led through official witnesses to prove the same with permission of court to prove the said documents.

Section 80 of the Evidence Ordinance provides that all official documents are presumed genuine and correct unless it is proved otherwise by adducing cogent evidence. Section 80 reads thus:

" Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the court shall presume -

(i) That the document is genuine

(ii) That any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true; and

(iii) That such evidence, statement or confession was duly taken."

P10 was an Application made by the 1st Defendant, **Nandasekera** to the Commissioner of National Housing, Mr. Karunaratne, on 11.05.1973 **stating that he was the tenant of the owner of the house on the land, namely , Gnanawathie Wijesiriwardene** and since it was an 'excess house'/ 'surplus house', according to the Ceiling on Housing Property Law which came into being at that time, he should be allowed to buy the same as he was the tenant living in the house at that time. The original document P10 was not available but a copy was produced through the witness, Jinasena who had given evidence as an assistant manager of the National Housing Development Authority. While giving evidence at the trial on 17.05.1994 he had identified the signature of the Commissioner of National Housing, Mr. Karunaratne who had issued a certified copy of the document P10. This document P10 is clear evidence that Nandasekera the 1st Defendant accepted the ownership of the house and property by the Plaintiff's predecessor in title, Gnanawathie Wijesiriwardena **as at 11.05.1973**.

The Plaintiff, Don Peter Ranasinghe had purchased the house and the property on **03.11.1975**. Since Nandasekera, the 1st Defendant was occupying the house allegedly, 'unlawfully and without any legal right to remain so therein', the Plaintiff had sent a notice through a lawyer to Nandasekera, demanding vacant possession thereof. This Notice was marked as **P13** and dated **31.05.1976**. Nandasekera in turn had sent a reply, P12, through his lawyers, Julius and Creasy, Attorneys at Law, explaining that the premises in question was a surplus house owned by Gnawathie Wijesiriwardene, and that he had already applied to the Commissioner of National Housing for permission to purchase the same since it was within the Ceiling on Housing Property Law. **P12 is dated 25.06.1976**. P12 is a letter addressed to Herman J.C Perera by the legal firm Julius & Creasy, Attorneys at law on behalf of Nandasekera the 1st Defendant, informing that their client 'Nandasekera had already applied to the Commissioner of National Housing under the Ceiling of Housing Property Law for permission to purchase the premises as the tenant thereof'. Accordingly, the **1st Defendant had admittedly claimed** to have been the **tenant** of the **Plaintiff's predecessor** in title by the date **25.06.1976.** Polhena Hewage Harrison who had been the clerk of the said legal firm had given evidence and identified the document at the trial.

The Appellants argued that the Plaint was prescribed meaning that the Plaintiff had filed action after 10 years and 4 days taking the date of the rubber stamp placed on the Plaint by Court. The Plaintiff had averred in the Plaint that after he purchased the property, he had seriously fallen sick and that due to the problems with his health, he could not come to court any earlier than he had done by way of an action to evict Nandasekera. However in the pleadings before court that was **not taken up as an objection at the trial court by the Defendants.** Anyway the question of prescription does not arise for consideration with regard to filing action against the Defendant at that time, because the **Defendant Nandasekera had been the tenant of the Plaintiff's predecessor in title, according to P10, P12 and P13.**

As I undertand, having gone through the evidence of the Plaintiff, the Defendant Nandasekera and a lot of other persons who had given evidence for both parties, Nandasekera had entered that house on the land with the leave and licence of Gnanawathie, the predecessor of the Plaintiff in title of the land and the house in the year 1952. The Defendant and his family lived there for a long time. When the Ceiling on House and Property Law came into being, the Defendant Nandasekera got the idea of applying to purchase the same divulging his position as a tenant hoping to get the ownership of the land and premises according to the said law. As such he replied to the quit notice through his lawyers informing that he was the tenant. Yet, when action was filed in the District Court by the Plaintiff, he filed answer claiming that he is the owner by prescription under Sec. 3 of the Prescription Ordinance. It is obvious that he has taken two contradictory positions, one as tenant before the Commissioner of National Housing and another as a person who had acquired prescriptive title before the District Court.

Nandasekera could not prove that he commenced prescriptive possession after an **overt act against the owner** of the house and the land. The District Judge had come to the finding that he had **not proven his prescriptive title according to law.**

In the case of ***Orloff Vs Grebbe 10 NLR 183 FB*** , it was held that when a person enters into occupation of property belonging to another with the latter's consent and permission, he cannot acquire title by prescription to such property unless he gets rid of the character in which he commenced to occupy by doing some overt act showing an intention to possess adversely to the owner.

In the case of ***Siyaneris Vs Jayasinghe 52 NLR 289***, the Privy Council held that if a person goes into possession of a land for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principle.

In the case of ***Maduwanwala Vs Ekneligoda 3 NLR 213***, Bonser CJ held that a person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in any other capacity. No secret act will avail to change the nature of his occupation. Bonser CJ in that case further said thus: " Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as the owner."

In the case of ***Naguda Marikkars Vs Mohammedu 7 NLR 91,*** it was held that in the absence of any evidence to show that a lessee got rid of his character of agent, he was not entitled to the benefit of Section 3 of the Prescription Ordinance. In this case, the tenant paid taxes, repaired the house, leased it to third parties and continued for 20 years. Still, Court held that such evidence was not sufficient to get rid of his character of agent.

In the case of ***Thilakaratne Vs Bastian 21 NLR 12***, Bertram CJ stated thus: " Where any person's possession was originally not adverse and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession."

In ***Chelliah Vs Wijenathan 54 NLR 337***, Gratien J stated thus: " Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights."

In the case of ***Hassan Vs Romanishamy 66 CLW 57***, Basnayake CJ stated thus:
" The payment of rates is by itself not proof of possession for the purpose of Section 3 of the Prescription Ordinance, for rates can be tendered by a tenant or

one occupying any premises with leave and license of the owner or by any other person."

The contention of the Appellants was that it was not necessary to specifically prove ouster because the Defendant Nandasekera's possession of the land and the house thereon, from 03.11.1975 is an admitted fact by the Plaintiff. It was also contended that the Plaintiff had filed action to evict the Defendant after another ten years lapsed and therefore it was accepted by the Plaintiff that the Defendant has got prescriptive title.

Just because Nandasekera was in possession of the house and the land for a long time from the year 1952, it cannot be concluded that he had acquired prescriptive title. Gnawathie Wijesiriwardena, the original owner had given Nandasekera leave and license to occupy the house and the land. It was an admitted fact. The question is when did Nandasekera show the owner his intention to own the property on his own and how did he do that? What was the overt act against the owner? In fact Gnawathie Wijesiriwardena had been paying rates and taxes to the local authority until the year 1975 according to the document P 14 and D.P. Ranasinghe the Plaintiff had been paying rates and taxes thereafter up to 1998 according to the document P15. If Nandasekera was holding the property from 1952 onwards with an intention to own it as his own, he could have commenced paying taxes long before 1998. In evidence for the Defendant Nandasekera, no person gave evidence to show that he had possessed the property adversely to the owner's rights thereof. Without any demonstration of any overt act against the rights of the owner, court cannot recognize Nandasekera as a person who has acted as one holding prescriptive possession against the owner who had given him leave and license to step in and live there, no matter how long he had enjoyed the property. To activate the provision of law, Section 3 of the Prescription Ordinance, demonstration of an overt act is fundamental.

The Appellants contended once again, that the sons of Nandasekera , the 2nd and 3rd Defendants who received by way of two notarially executed deeds from Nandasekera , his alleged acquired prescriptive title, had also enjoyed the house and property more than ten years and therefore that they are holding the property on prescription. I do not agree with that contention because if Nandasekera did not have prescriptive title, he could not have passed any

acquired prescriptive title to anybody. I cannot see any proof of any overt act in evidence before the trial court having been led.

The Appellants have quoted two cases, within the questions of law, namely, ***Bandi Naide Vs Appu Naide et al 1923, 5 C.L.Rec. 192 and Cinnathamby Vs Chanmugam et al 1909 Current Law Reports 134.*** In both these cases , what is discussed is the stance of the added Defendants in an action and the decision arrived at, is that 'the date of an action against an added party must be the date on which he was so added'. However, the Appellants contend that action against the 3rd and 4th Defendants can be only reckoned as having been brought against them only as from the date on which they were added as parties, i.e. 04.04.1995 and up to that time their adverse possession as from the date of their title deeds namely 18.11.1982 should ensue to their benefit. I am of the opinion that since the Appellant's father, Nandasekera did not acquire prescriptive title to the property, those who received from Nandasekera cannot get any acquired prescriptive title at all. It is seen that Nandasekera had failed to demonstrate any overt act which had been done to commence any adverse possession.

Then again, counsel for the Appellants made submissions on two more authorities, namely ***Lucihamy Vs Hamidu 26 NLR 41 and Perera Vs Fernando 1999 3 SLR 259*** both of which are more pertinent to Partition Actions and in my opinion cannot be related to the case in hand with regard to prescription.

Accordingly , I conclude that the answers to the questions of law enumerated above stand in the negative. I affirm the Judgment of the Civil Appellate High Court as well as the judgment of the District Court. The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court.

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court.

L.T.B. Dehideniya J.
I agree.

Judge of the Supreme Court.

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

In the matter of an Appeal from the Civil Appellate High Court.

Ratnayake Mudiyanselage Heen Menika of No. 246/30, Soysa Mawatha, Thewatta Road, Ragama. (deceased)

Plaintiff

SC APPEAL No.36/2016
SC/HCCA/LA No. 575/2014
WP/HCCA/GPH/12/2004(LA)
D.C.Gampaha Case No. 1228/L

1a. Mallawa Arachchige Don Ananda No. 246/30, Soysa Mawatha, Thewatta Road, Ragama.

1b. Mallawa Arachchige Dona Pushpa Kumarihami, No. 27, Lankamatha Road, Ragama.

1c. Mallawa Arachchige Don Samson Pushpakumara, No. 388, Mahara, Kadawatha.

1d. Mallawa Arachchige Don Dharmakeerthi, No. 323 F, Christ King Place, Batagama North, Ja-Ela.

1e. Mallawa Arachchige Don Wijesiri R 28, Lankamatha Road, Ragama

1f. Mallawa Arachchige Don Ranjith Pathmasiri Pushpakumara, No. 664/1, Kandaliyadde Paluwa Ragama.

1g. Mallawa Arachchige Dona Sriyani
Malkanthi, No. 28, Kandaliyadde
Paluwa, Ragama.

1h. Mallawa Arachchige DonaRanjani
Pushpakanthi, No. 28/1,
Kandaliyadde Paluwa, Ragama.

Substituted Plaintiffs

Vs

1. Weerasuriya Arachchilage Noris
Banda, No. 93, Temple Lane,
Horape, Ragama.
2. Siriwardena Disanayake,
Siri Niwasa, Waragoda Estate,
Kelaniya.

Defendants

AND

1b. Mallawa Arachchige Dona Pushpa
Kumarihami, No. 27, Lankamatha
Road, Ragama.

1c. Mallawa Arachchige Don Samson
Pushpakumara, No. 388, Mahara,
Kadawatha.

1d. Mallawa Arachchige Don
Dharmakeerthi, No. 323 F, Christ
King Place, Batagama North,
Ja-Ela.

1e. Mallawa Arachchige Don Wijesiri
R 28, Lankamatha Road, Ragama

1f. Mallawa Arachchige Don Ranjith
Pathmasiri Pushpakumara,
No. 664/1, Kandaliyadde Paluwa

Ragama.

1g. Mallawa Arachchige Dona Sriyani Malkanthi, No. 28, Kandaliyadde Paluwa, Ragama.

1h. Mallawa Arachchige DonaRanjani Pushpakanthi, No. 28/1, Kandaliyadde Paluwa, Ragama.

1b to 1h Substituted Plaintiff Petitioners

Vs

1. Weerasuriya Arachchilage Noris Banda, No. 93, Temple Lane, Horape, Ragama.
2. Siriwardena Disanayake, Siri Niwasa, Waragoda Estate, Kelaniya .

Defendant Respondents

1a. Mallawa Arachchige Don Ananda No. 246/30, Soysa Mawatha, Thewatta Road, Ragama.

1a Substituted Plaintiff Respondent

AND THEN

1b. Mallawa Arachchige Dona Pushpa Kumarihami, No.27, Lankamatha Road, Ragama.

1c. Mallawa Arachchige Don Samson

Pushpakumara, No. 388, Mahara, Kadawatha.

1d. Mallawa Arachchige Don Dharmakeerthi, No. 323 F, Christ King Place, Batagama North, Ja-Ela.

1e. Mallawa Arachchige Don Wijesiri R 28, Lankamatha Road, Ragama

1f. Mallawa Arachchige Don Ranjith Pathmasiri Pushpakumara, No. 664/1, Kandaliyadde Paluwa Ragama.

1g. Mallawa Arachchige Dona Sriyani Malkanthi, No. 28, Kandaliyadde Paluwa, Ragama.

1h. Mallawa Arachchige DonaRanjani Pushpakanthi, No. 28/1, Kandaliyadde Paluwa, Ragama.

1b to 1h Substituted Plaintiff Petitioner Petitioners

Vs

1. Weerasuriya Arachchilage Noris Banda, No. 93, Temple Lane, Horape, Ragama.
2. Siriwardena Disanayake, Siri Niwasa, Waragoda Estate, Kelaniya .

Defendant Respondent Respondents

1a. Mallawa Arachchige Don Ananda,
No. 246/30, Soysa Mawatha,
Thewatta Road, Ragama.

1a Substituted Plaintiff Respondent Respondent

1b. Mallawa Arachchige Dona Pushpa Kumarihami, No. 27, Lankamatha Road, Ragama.

1b Substituted Plaintiff Petitioner Respondent

AND NOW BETWEEN

1c. Mallawa Arachchige Don Samson Pushpakumara, No. 388, Mahara, Kadawatha.

1d. Mallawa Arachchige Don Dharmakeerthi, No. 323 F, Christ King Place, Batagama North, Ja-Ela.

1e. Mallawa Arachchige Don Wijesiri R 28, Lankamatha Road, Ragama

1f. Mallawa Arachchige Don Ranjith Pathmasiri Pushpakumara, No. 664/1, Kandaliyadde Paluwa Ragama.

1g. Mallawa Arachchige Dona Sriyani Malkanthi, No. 28, Kandaliyadde Paluwa, Ragama.

1h. Mallawa Arachchige DonaRanjani Pushpakanthi, No. 28/1, Kandaliyadde Paluwa, Ragama.

1c to 1h Substituted Plaintiff Petitioner Petitioner Appellants.

1b. Mallawa Arachchige Dona Pushpa Kumarihami, No. 27, Lankamatha Road, Ragama.

1b Substituted Plaintiff Petitioner Respondent Appellant

Vs

1. Weerasuriya Arachchilage Noris Banda, No. 93, Temple Lane, Horape, Ragama.
2. Siriwardena Disanayake, Siri Niwasa, Waragoda Estate, Kelaniya .

Defendant Respondent Respondent Respondents

1a. Mallawa Arachchige Don Ananda, No. 246/30, Soysa Mawatha, Thewatta Road, Ragama.

1a Substituted Plaintiff Respondent Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ. , PRASANNA JAYAWARDENA PCJ. & MURDU FERNANDO PCJ.**

COUNSEL : Ms. Sudarshani Cooray for the 1c to 1h Substituted Plaintiff Petitioner Petitioner Appellants and 1b Substituted Plaintiff Petitioner Respondent Appellant.

D.H.W. Kirinde for the 1st and 2nd Defendant Respondent Respondent Respondents.
S.N. Vijithsingh for the 1a Substituted Plaintiff Respondent Respondent Respondent.

ARGUED ON : 05.04.2018.

DECIDED ON : 18.05.2018.

S. EVA WANASUNDERA PCJ.

Ratnayake Mudiyanselage Heen Menike was the mother of eight children, namely Ananda, Pushpa Kumarihami, Samson Pushpakumara, Dharmakeerthi, Wijesiri, Ranjith Pathmasiri Pushpakumara, Sriyani Malkanthi and Ranjani Pushpakanthi. The said Heen Menike lived with her son Ananda, his wife and children in the house on the land which is the subject matter of this action. The extent of the land in question is 0.0259 Hectares , approximately about 15 Perches within the Municipal Council limits of Ragama in the Gampaha District. The house on the property was one in a housing scheme named Soysa Housing Scheme along Thewatta Road, Ragama.

In the year 2007 when Heen Menike filed action before the District Court of Gampaha, she had valued the land for Rs. 40 lakhs. Heen Menike has narrated in the Plaint how she had got title to the said land. A large extent of land was vested with the National Housing Development Authority under Sec. 73(a) of the National Housing Development Act No. 17 of 1979 as amended by Act No. 20 of 1988 and the said NHDA had got the Surveyor General to prepare the Plan No. 1087 dated 07.01.1987. Lot number 80 of the said Plan No. 1087 was allocated to Heen Menike and she got title to the same by Deed 1621 dated 14.07.2000 and Deed No. 2680 dated 11.12.2002 attested by Manori Olabotuwa Notary Public. There is a house on the land in which Heen Menike lived with one of his sons, namely Ananda.

In 2002 June, Ananda, the son of Heen Menike had wanted some money to go abroad for an occupation and they had a family friend named Noris Banda who offered Rs. 250,000/- at the interest of 6% per month. In addition, Heen Menike had to transfer the land and premises bearing assessment number 4 of Thewatta Road, Ragama, the property in question to the said Noris Banda and she did so, on the promise that he gave to Heen Menike that it will be re-transferred to her at her request when the money taken on loan is repaid. The interest of Rs. 15000/- per month had been paid continuously but possession had never been granted to the said Noris Banda. In 2003 November, Heen Menike requested Noris Banda to retransfer the land and premises but he had failed to do so. Thereafter, Heen Menike had found out that Noris Banda had transferred the property to Siriwardena Dissanayake by Deed number 220 dated 19.10.2005.

Heen Menike then filed action in the District Court against Noris Banda and Sirwardena Dissanayake on the cause of action that they held the property in trust under the Trusts Ordinance and as such the said property should be retransferred to Heen Menike. In the said case, it was also claimed that the Defendants were unjustly enriched and under the concept of laesio enormis the Deed of Transfer No. 3615 in favour of the 1st Defendant, Noris Banda should be held invalid.

Before the case was fixed for trial, parties had arrived at a settlement in court. The 1st and 2nd Defendants had agreed to the terms on 08.12.2009 but the **2nd Defendant had failed to sign** the court record containing the terms due to the fact that he was not present in court on that day but only represented by his lawyer. In the mean time the Plaintiff, Heen Menike had passed away. Her son, Ananda with whom Heen Menike was living in the house on the land in question had informed court about the same and requested Court to substitute all his siblings, seven in number and himself as heirs of the Plaintiff. Court had made order that all of them, the children of Heen Menike **be substituted** in the room and place of the deceased Heen Menike, in the District Court action and had named them as **1a to 1h Plaintiffs**. The caption was amended accordingly, **at the instance of the son Ananda** who was by then the **1a Plaintiff**. Court made order that **those seven heirs**, other than Ananda **be sent notice** informing them about the case.

The said case had been called in open court on 24.11.2010 and the lawyer for the 1a Plaintiff had made an application to 'lay by the case', even though the case was called on that day for notices to the other substituted Plaintiffs. The 'notices to be sent' was moved by the 1a Plaintiff, Ananda when the other Plaintiffs were duly substituted and that was due to be done by 24.11.2010. It had not been done. The case was laid by with the journal entry which read as 'take steps and move'.

On 22.05.2012, **the 2nd Defendant** had made an application to court invoking the provisions in Sec. 402 of the Civil Procedure Code. He had prayed that the case be abated due to no steps having been taken for one and a half years by the Plaintiffs. Objections were filed by the 1a Plaintiff, Ananda stating that he had been continuously sick during that period and was hospitalized at the Ragama Teaching Hospital quite often during that period and that it is due to that reason that he could not take action to send notice to the other Plaintiffs. The other Plaintiffs, the siblings of the 1a Plaintiff also came before court at that time and filed objections against the application for abatement stating that they were quite unaware of the action due to no fault of theirs and as they inherit from the deceased Plaintiff, their mother, it is quite unjust and unreasonable to allow the application of the 2nd Defendant.

However, the Additional District Judge had made order at the end of the inquiry **allowing the application for abatement.** The Plaintiffs appealed from that order and the Civil Appellate **High Court dismissed the Appeal.** Now the Appellants are before this Court **praying** that the **order for abatement of the case be set aside** so that they can proceed to get the District Court case **be heard on its merits**.

This Court has granted leave to appeal on the following questions of law:-

(a) Did the learned High err in failing to appreciate that the 1b to 1h substituted Plaintiff Petitioners were under no duty to take any steps in the District Court as they were not notified parties nor a proxy had been filed on behalf of them?
(b) Did the learned High Court err in failing to appreciate that the court cannot arrive at the presumption that 1b to 1h Substituted Plaintiff Petitioner Petitioners were aware of the pending District Court Action on the basis that they were children of the deceased original Plaintiff?

(c) Did the learned High Court err in failing to appreciate that the application to lay by the case was not made on behalf of the 1b to 1h Substituted Plaintiff Petitioner Petitioners?
(d) Did the learned High Court err in failing to appreciate that 1b to 1h Substituted Plaintiff Petitioner Petitioners did not have any step to be taken in the action in the District Court of Gampaha and that they are not guilty under Section 402 of the Civil Procedure Code?

The order challenged is one which is based on Section 402 of the Civil Procedure Code. Section 402 reads as follows:-
" If a period exceeding twelve months in the case of a District Court or Family Court, or six months in a Primary Court, elapses subsequently to the date of the last entry of an order or proceeding in the record without **the plaintiff** taking any steps to prosecute the action where any such step is necessary, the **court may** pass an order that the action shall abate."

I observe at this stage that this is a case where the mother and one child, namely Ananda, out of 8 children of the mother, lived in the house and property which is the subject matter of this action. The mother, the original Plaintiff had obtained a loan of a relatively small amount compared to the value of the house and property for Ananda to go abroad from the 1st Defendant who was a friend of the family. As security, the house and property was transferred to the 1st Defendant. When it was requested from the 1st Defendant to re transfer the property on payment of the loan , he did not do so. Later it was found that the 1st Defendant had transferred the house and property to the 2nd Defendant. It is only then that the Plaintiff filed action to get the property back. At a later stage of the case, the matter was settled. The 2nd Defendant had not signed the case record when it was settled. He had then revoked the proxy given to the lawyer and had filed a fresh proxy of his new lawyer. The Plaintiff had died by that time and the person living in the house and property, informed court about the same and got his siblings substituted in place of the Plaintiff. Yet, Ananda who got the siblings substituted in the room and place of the original Plaintiff **had not got the notices sent through court** to the substituted siblings who lived in different parts of this country.

The position at the time of making the order under Sec. 402 of the Civil Procedure Code by the District Court, was that the 1a Plaintiff, Ananda who was living with

the original Plaintiff, the mother knew about the case at all times and when the mother died, he had promptly got the deceased mother substituted by all the children who are the legal heirs of the original Plaintiff. Just the fact that their names were placed as substituted 1b to 1h Plaintiffs is not enough to enable them to be playing the role of plaintiffs because they were not properly notified by 1a Plaintiff through the proper legal process of getting notices sent through courts informing them that they are parties to the action as Plaintiffs even though 1a Plaintiff had acted promptly to get all of them entered as Plaintiffs as soon as the mother died. It may be that the children of the original Plaintiff were not in good terms with each other or not in good terms of 1a Plaintiff, the brother. We cannot assume that 1a Plaintiff has informed everybody that they are now Plaintiffs in the case. None of them had entered the case by filing proxies on their behalf. Since notices had not gone from courts to the 1b to 1h Plaintiffs they cannot be held liable for inaction in not having taken steps to prosecute the case filed by their mother, the deceased. In fact, if at all, **it is the fault of the 1a Plaintiff not to have taken steps to file notices to be sent by courts to 1b to 1h Plaintiffs**.

The 1a Plaintiff, Ananda had made an application to lay by the case on 24.11.2010. By then he had failed to send notices to the other substituted plaintiffs through courts as undertaken by him to do so when directed by court on an earlier occasion. The lawyer who had been continuously been appearing on his behalf had submitted to court that he had been ill and hospitalized. The learned trial judge had harped on the matter that no medical reports were produced at the inquiry and considered that fact as a reason for making the order for abatement under Sec. 402. Assuming that 1a Plaintiff, whose duty it was to take steps to send notices to 1b to 1h Plaintiffs through courts, has failed to do so, it is obvious that the 1b to 1h Plaintiffs had no hold in the matter. If the rights of 1b to 1h Plaintiffs are affected by the lapse on the part of only the 1a Plaintiff, it is quite unjust and unlawful and against the intentions of the legislature when Sec. 402 was included in the Civil Procedure Code when it was enacted.

The said section 402 gives the discretion to the trial judge in the wording of the section as " **the court may pass an order** that the action shall abate". It is not an order to be made as and when 'any party' does not take steps to prosecute. It is an order to be made when more than one year lapses from the last entry in the record of the case without **the Plaintiff** taking any steps to prosecute the action where any such step is necessary. In the case in hand the Plaintiff is dead. One of

the heirs , i.e. the 1a substituted Plaintiff had informed that the heirs should be substituted. As a result the trial court had legally substituted all the heirs including himself as one of the Plaintiffs. Thereafter court directed the 1a substituted Plaintiff to send notices to the other substituted Plaintiffs, namely 1b to 1h substituted Plaintiffs which he had failed to do. The 1b to 1h substituted Plaintiffs' rights are affected by the order of the learned trial judge to abate the action, due to no fault of theirs. ***It cannot be presumed*** *that all the substituted plaintiffs were aware of the case and all of them are responsible for not getting notices filed for all of them to be informed about the case through the courts.* Then it would sound absurd. The court had directed the 1a substituted Plaintiff to send notices through the court registry informing the other substituted Plaintiffs to be present before courts and/or file their proxies as usual. The trial judge had erred in having presumed that the 1b to 1h substituted Plaintiffs had been aware that they were made Plaintiffs and that they are responsible for not having taken steps to file notices to themselves in the court registry, which was the expected next step after 24.11.2010. In fact there is no order of court on record for the 1b to 1h Substituted Plaintiffs to take any steps in prosecuting the action which was filed by their deceased mother and as such their legal rights should not be thrown out of the window just because 1a substituted Plaintiff had failed to file the notices which were due to be dispatched to them by courts.

In the case of **Selamma Achie Vs Palavasam 41 NLR 186,** the Supreme Court held that " A court has no power to enter an order of abatement under Section 402 of the Civil Procedure Code where the failure to prosecute the action for twelve months after the last order was due to the death of the plaintiff within that period".

In the case in hand also the Plaintiff had died at an unexpected juncture when the parties had agreed for terms of settlement. The son, the 1a Substituted Plaintiff who was living with the Plaintiff had come before court and done his duty of substituting all his seven other siblings in place of the deceased Plaintiff. The Attorney at Law who had appeared for the original Plaintiff had taken steps to do the substitution at the instance of one of the heirs who had sought the services of the lawyer to get that step done for the purpose of prosecuting the action. The only step which he had not been able to get done, is filing the notices to the other substituted heirs for a period of over one year.

I am of the view that the trial court should not look at the small picture of 'steps not being taken for over one year' and act rapidly in making an order for abatement at the instance of the defendants. The instance of the Plaintiff passing away is something unexpected. The next step of substituting the heirs also had been done in this instance. But the heirs were to be notified through court. The court should also have considered whether, the said step not done , is a step rendered necessary by the law to prosecute the action to be done by the Plaintiff. There was no Plaintiff. The Plaintiff mother was dead and gone. It was a step undertaken to court by one of the heirs. One of the heirs does not mean the Plaintiff. At this occasion, all the heirs did not have a role to play. The notices had to be lodged by one of the heirs to be sent to the other heirs at the registry of the trial court. All the heirs cannot be penalized for the lapse on the part of only one of the heirs.

I have gone through the submissions made by the counsel for the 1st and 2nd Defendant Respondent Respondent Respondents and considered them. I have considered the submissions of the counsel for the 1b to 1h Substituted Plaintiff Petitioner Petitioner Appellants as well as the counsel for the 1a Substituted Plaintiff Respondent Respondent Respondent.

I am of the opinion that the District Court and the High Court have erred in failing to appreciate firstly that the application to lay by the the District Court case was not made on behalf of the 1b to 1h Substituted Plaintiff Petitioner Petitioner Appellants and secondly, as such , they did not have any step to be taken in the District Court action and therefore they cannot be found fault with under Section 402 of the Civil Procedure Code. The High Court has erred in not having considered that 'the District Court **cannot arrive at the presumption** that the Appellants were aware of the pending District Court action on the basis that they were children of the deceased original Plaintiff', when it was apparent that they were not notified through court that they were substituted as heirs at the instance of the 1a substituted Plaintiff in the District Court.

I have answered the questions of law in the affirmative in favour of the Appellants. The judgment of the Civil Appellate High Court of Gampaha dated 22.09.2014 is hereby set aside. The Order of the Additional District Judge dated 07.02.2014 is also hereby set aside. The 1a to 1h Plaintiffs who are the heirs of the original Plaintiff in the District Court of Gampaha are allowed to proceed with the action in the District Court Case of Gampaha Case No. 1228/L.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 from the Judgment of the Court of Appeal.

Vithanage Richard Perera,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.

Plaintiff

SC APPEAL No. 41/ 2008
SC / SPL/ LA No. 61/2008
Court of Appeal No. 1096/96 (F)
D.C.Homagama No. 235/P

Vs

1. M.P.Perera, 202/1, Hokandara North, Hokandara. (Deceased)
1A. T.Ariyawathie, 199/2, Kahantota Road, Malabe.
2. H. Nandawathie, 199/1, Kahantota Road, Malabe.
3. Meemanage Gunadasa Perera 191/1, Hokandara North, Hokandara.
4. H.E.Caldra, 229, Kanatte Road, Malabe. (Deceased)
4A. H. Sunil Caldera, 229, Kanatte Road, Malabe.

Defendants

AND BETWEEN

3. Meemanage Gunadasa Perera,
191/1, Hokandara North,
Hokandara.

4A. H. Sunil Caldera,229,Kanatta
Road, Malabe.

Defendant Appellants

Vs

Vithanage Richard Perera,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.

Plaintiff Respondent

1A. T.Ariyawathie, 199/2,
Kahantota Road, Malabe.

2. H. Nandawathie, 199/1,
Kahantota Road, Malabe.

Defendant Respondents

AND NOW BETWEEN

Vithanage Richard Perera,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.
(Deceased)

Perumbulli Achchige Sopihamy,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.

Substituted Plaintiff Respondent Appellant

Vs

3. Meemanagamage Gunadasa Perera,
191/1, Hokandara North,
Hokandara.
4A. H. Sunil Caldera,229,Kanatta
Road, Malabe.

Defendant Appellant Respondents

1A. T.Ariyawathie, 199/2,
Kahantota Road, Malabe.
2. H. Nandawathie, 199/1,
Kahantota Road, Malabe.

Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
VIJITH K. MALALGODA PCJ. &
MURDU FERNANDO PCJ.

COUNSEL : Nihal Jayamanne PC with Dilhan de Silva for the Substituted Plaintiff Respondent Appellant.

Edward Ahangama for the 1A Defendant Respondent Respondent.

Dr. S.F.A. Cooray for the 3rd and 4A Defendant Appellant Respondents.

ARGUED ON : 02.07.2018.

DECIDED ON : 03.08.2018.

S. EVA WANASUNDERA PCJ.

This appeal arises out of a judgment of a Partition case before the District Court. The District Judge delivered the judgment as prayed for by the Plaintiff. Then being aggrieved by the said judgment the 3rd and 4A Defendants appealed to the Court of Appeal. The Court of Appeal delivered judgment setting aside the Judgment of the District Judge and directing that the case be sent back for trial de novo. The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) is now before this Court having obtained Special Leave to Appeal from this Court on 09.05.2008 on one question of law which was formulated before this court which reads as follows:

" Whether a party who fails to tender to Court the documents marked by him at the trial is entitled to assail the findings of the trial judge on the basis that such party's documents had not been considered?"

The Appeal was argued before this Court and the written submissions also have been filed by the contesting parties.

The Plaintiff filed action to partition a land in the Schedule to the Plaint. This Schedule contains three schedules to be taken together for partition. The first schedule does not refer to a survey plan but explains the extent as " a land with a length of 186 feet and with a with of 75 feet". The second schedule refers to a land of an extent of 09.03 Perches marked as Lot 1 of Plan 1801 dated 13.11.1982 made by E.A.Wijesuriya Licensed Surveyor. The third schedule refers to a land of an extent of 18.2 Perches marked as Lot 2 in Plan No. 25 dated 21.08.1984 made by D.S.S. Kuruppu Licensed Surveyor. Court issued a commission on a court commissioner surveyor and a Preliminary Plan was done.

The said Preliminary Plan is at page 64 of the Appeal brief. It is Plan No. H/4/ 87 dated 30.03.1987 and made by S.M.Bernard Joseph. The report of the surveyor is also annexed. This Plan was marked as X at the trial. Plan X comprises of three Lots marked as A, B and C. Lots A and B were claimed by the 1st and 2nd Defendants and Lot C was claimed by the Plaintiff. Lot A was 18.00 Perches, Lot B was 09.65 Perches and Lot C was 28.50 Perches. The whole land , which is the subject matter of the action was therefore of an extent of One Rood and 16.15 Perches. In Lots A and B,

there are two dwelling houses of the 1st and 2nd Defendants. When the case was taken up for trial parties had raised seven issues on which the District Judge had to determine the Partition action. The Plaintiff gave evidence and marked documents P1 to P7 and the wife of the 1st Defendant, the wife of the 3rd Defendant, the 4th Defendant H.E.Caldera himself as well as the Surveyor Wijesooriya gave evidence on behalf of the Defendants and altogether documents V1 to V5 were produced at the trial. The trial Judge ordered that Written Submissions of the Parties and Marked Documents should be filed by 25.01.1994.

The parties kept on moving for dates to file them and court also had granted time. The Court was informed of the death of the 4th Defendant and the substitution was done on 12.01.1995. The judge who heard the trial had been transferred. The same judge was appointed by the Judicial Service Commission on 09.07.1996 to write the judgment.

The **Defendants had filed written submissions *without the documents* on 09.01.1996** according to the Journal Entry No. 47. The **Plaintiff had filed written submissions *with the documents* P1 to P7** on 12.03.1996 according to the journal entry No. 49. The court record of the case was sent to the Judge to write the judgment.

The Judgment of the District Judge was pronounced in open Court on 10.10.1996. The Judge had granted relief as prayed for by the Plaintiff, namely an undivided ½ share to the Plaintiff, an undivided 9.3 Perches to the 1st Defendant and an undivided portion of an extent of " ½ share minus 9.3 Perches" to the 2nd Defendant. The dwelling houses should be included into the share on which they are situated. The Judge directed that decree be entered in that manner.

Within the body of the written judgment of the District Judge, the learned Judge had mentioned that **she had not considered the documents of the Defendants because they have failed to submit the same with the written submissions**.

The 3rd and 4A Defendants who did not get any shares in the judgment of the District Judge made an Appeal to the Court of Appeal submitting that the District Judge had not given due consideration to the evidence led by the Defendants and that the Judgment had been delivered in the absence of the documents of the

Defendants. It was the position of the Appellants before the Court of Appeal that the **Judge had failed to call for the Defendants' documents.**

When the Judge of the Court of Appeal who wrote the Judgment in the Court of Appeal had perused the record, he had found that the learned trial judge had not considered the points of contest before the District Court and had failed to answer them at all which is a breach of Section 187 of the Civil Procedure Code.

Section 187 of the Civil Procedure Code reads:

'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.'

Accordingly, a trial judge **should answer the issues** raised. In the case in hand there had been 7 issues raised by both the Plaintiff and the Defendants, **none of which was specifically considered and** answered by the trial judge in her judgment.

In the case of ***Warnakula Vs Ramani Jayawardena 1990 1 SLR 206*** , it was held that "Bare answers to issues without reasons are not in compliance with the requirements of Section 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**." In the case of ***Jamaldeen Abdul Latheef Vs Abdul Majeed Mohamed Mansoor 2010 2 SLR 333*** also, the same matters were further stressed on.

Even though the Appellants had not argued this point of the trial Judge not having answered the issues raised by both parties, any Court in Appeal cannot turn a blind eye to that fact. It is the very basic point in writing a judgment. It is so important that it is the accepted procedure that when **issues are raised**, the pleadings go to the background and the case is heard based on the points of contest meaning the issues raised by parties after putting down the admissions. It is a mandatory provision.

However, the trial judge in her judgment had stated that because of the fact that the Defendants had not tendered the documents marked at the trial through the witnesses of the Defendants with the written submissions filed in Court , she has had no opportunity to consider them and as such those documents have not been considered by her. It was argued before the Court of Appeal that it is the duty of the trial judge to call for the said documents. I am of the view that documents are the essential part of the evidence for any party to a case due to the reason that any genuine document proven at the trial speaks much more than the oral evidence. If and when the judge herself has stated that she has not considered the documents for whatever the reason adduced for acting in that manner, such a judgment has to be taken as flawed.

In the case of ***Podiralahamy Vs Ranbanda 1993 2 SLR 20***, it was held that;
" There is a duty on Court to take the documents tendered and marked at the trial to its custody and keep them filed of record. Documents marked in evidence become part of the record."

Section 154(1) of the Civil Procedure Code reads:

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

Thus it is clear that the moment the witness speaks about the document, it should be marked and tendered by that party to Court. Thereafter it is part of the court record. Yet, in the recent past, the practice of court is that after marking the document through the witness, the marked document is then and there signed by the Judge and then given back to the Counsel/Attorney at Law who marks the document through the witness, to be submitted to Court later with the written submissions. That is what has happened in the present case.

Thereafter the Defendants lawyer tendered the written submissions without the documents. Yet, the judge should have acted according to the provisions of the Civil Procedure Code and should have recognized and kept in mind that the marked documents are held in law to be part and parcel of the record.

The trial Judge should have called for the Documents marked by the Defendants when she noticed that they had not been tendered to Court with the written submissions. If the trial Judge demanded the same from the Defendants or their Attorney at Law on record, the documents would have reached the Judge in no time. It is a lapse on the part of the Defendants but it is curable before the commencement of writing the judgment. It is in the hands of the trial Judge. Even though, in this instance, the Judge was physically away from the Court in which the trial in this case was heard, having had to work in another station on transfer, the Judge should have called for the Documents from the Defendants lawyer on record through the Registrar of the Court. I find that the Judge had not correctly recognized the position and had not made any effort to get down what the court was in law entitled to receive. She had failed in her duty.

Even though the parties are before Court with regard to problems regarding their private legal entitlements under the law, when any action is before Court, the Judge has to take charge of the matter and act according to procedural provisions as well as substantial law. The final word is held by the Judge and she had to get herself equipped with what was necessary to write the judgment. Unfortunately, the trial Judge had taken it as a lapse on the part of the Defendants and not considered the Documents which were not tendered and held against them as well.

The Defendants who were the Appellants before the Court of Appeal had even suggested to the Appellate Court to consider the documents which they had later tendered when the Appeal was filed. The Appellate Court cannot act as a trial court and therefore these documents have to be looked into by a trial judge. That is the correct reason for the Court of Appeal Judges to have ordered trial de novo.

The Defendants who had failed to tender the marked documents of theirs with the written submissions to Court for whatever reasons are yet entitled to assail the findings of the trial Judge for not having considered the documents marked by and on behalf of them before the trial Judge because the said documents had become part and parcel of the court record which the Judge should have taken care of from the day they were marked in Court. The Judge had failed to demand from the Defendants to submit them to Court at whatever stage before she launched to write the Judgment.

I answer the question of law aforementioned **against** the Substituted Plaintiff Respondent **Appellant** and in favour of the 3rd and 4A Defendant Appellant Respondents and 1A and 2nd Defendant Respondent Respondents. I affirm the judgment of the Court of Appeal.

The Appeal is dismissed . However I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC APPEAL No. 50/2016

SC (Special) LA 75/2015 &76/2015)

CA WRIT APPLICATION No. 652/2009

Ceylon Petroleum Corporation
109, Rotunda Tower, Galle Road,
Colombo 03
Presently;
609,
Dr. Danister De Silva Mawatha,
Colombo 09

Petitioner- Petitioner-Appellant

-Vs-

1. Athauda Seneviratne
   Minister of Labour Relations and Manpower
   Minister of Labour Relations and Manpower, Labour Secretariat,
   Colombo 05

2. D.S Edirisinghe
   Commissioner of Labour
   Department of Labour
   Colombo 05

3. M. S. B. Ralapanawa
   Attorney – at- Law (Arbitrator)
   No.194SriJayawardenapura
   Mawatha
   Welikada, Rajagiriya

4. Inter Company Employees Union
   No.158/18, E.D Dabare Mawatha
   Colombo 05

5. Lanka IOC Private Ltd
   Trincomalee Oil Terminal
   Chinabay, Trincomalee

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

Respondent-Respondent-Respondents

Before	:	Hon. Priyasath Dep PC, CJ
		Hon. B.P. Aluwihare PC, J and
		Hon. L.T.B. Dehideniya, J
Counsel	:	P. Radhakrishnana for the Petitioner- Appellant
		Ms. Chaya Sri Nammuni for the 1st, 2nd, 3rd and 6th Respondents
Argued on	:	23rd March 2018
Decided on	:	19th July 2018

Priyasath Dep PC, CJ

This is an appeal preferred against the judgment of the Court of Appeal dated 20th March 2015 which refused the Writ of Certiorari Applications filed by the Petitioner- Petitioner-Appellant, Ceylon Petroleum Corporation (Hereinafter referred to as the 'CPC' or 'Appellant') to quash the reference to Arbitration made by the Minister (1st Respondent) under Sec. 4 (1) of the Industrial Disputes Act and also to quash the award of the Arbitrator.

The Appellant is a State owned Statutory body established under and by virtue of the Ceylon Petroleum Corporation Act No.28 of 1961. By virtue of a policy decision of the Government, on 7th of February 2003, the China Bay Oil Storage Installation situated in Trincomalee which was then under the management of the Appellant Corporation was leased out by Agreement marked P1 to the 5th Respondent, namely the Lanka Indian Oil Company (Private) Limited (hereinafter referred to as the LIOC). It was a tri- party Agreement entered and signed between the Secretary to the Treasury (on behalf of the Government of Sri Lanka), the Appellant Corporation and the said LIOC. Clause 5 of the said Agreement regulates the employment of the employees attached to the Appellant Corporation which is as follows;

Clause 5 – Employees

5.1. LIOC shall offer to employ through new appointments, all employees attached to the CPC China Bay Installation on no less favourable terms than those enjoyed by them as at present with the CPC. Identification for such appointments shall be as per the connected CPC payroll for January 2003. In the event any of such employees opt to remain as an employee of the CPC, the CPC shall take suitable steps to ensure continuity of employment of such employees with the CPC.

5.2. CPC and LIOC hereby agree that despite the arrangement set out in Clause 5.1 to recruit such employees as employees of LIOC, their service with the

CPC shall be taken into account as continuous service for the purpose of computation of Gratuity. The liability of the CPC shall be based on the salary drawn by such employees pertaining to their period of service with the CPC up to end January 2003 shall be the liability of the CPC.

5.3. The LIOC shall pay according to law all terminal benefits to employees employed by the LIOC as and when such payments fall due and claim reimbursement of such sums from the CPC as per Clause 5.2.

5.4. Any liability which may have accrued to the CPC prior to the date of this agreement in relation to the China Bay Installation shall remain to be a liability of the CPC.

In addition, in order to settle matters pertaining to employment of employees then attached to the Appellant Corporation a Memorandum of Understanding (MOU) marked P2 was entered and signed between the Appellant Corporation, the Lanka Indian Oil Company and two Trade Unions representing the employees of the Corporation namely Jathika Sevaka Sangamaya and Sri Lanka Nidahas Sevaka Sangamaya.

By virtue of Clause 5.1 of P1 Agreement and Clause 2 of the said MOU, the employees were given the option either to join the employment of the LIOC or remain with the Appellant Corporation. Thereafter, 26 employees of the Appellant Corporation who were employed on annually renewable contract basis opted to join the employment of the LIOC. The said employees accepted fresh letters of appointment and joined the employment of LIOC with effect from 8th of May 2003**.**

By virtue of a Cabinet Memorandum dated 4th June 2004 marked P3, and the Cabinet decision dated 18-06-2004 marked P4, the existing employees of the Appellant Corporation who were serving on annually renewable contract basis were made permanent employees of the Appellant Corporation. In view of this decision the employees who remained in the Appellant Corporation received salary arrears and other allowances. Twenty Six (26) employees of the Appellant Corporation who joined LIOC with effect from 8th of May 2003did not receive salary arrears and other allowances. These employees claimed salary arrears and allowances for the period they served in the CPC. CPC rejected the claims on the basis that they are no longer employees of CPC.

The 4th Respondent Trade Union acting on behalf of the said 26 employees by its letter dated 4th of June 2006 marked 2R1 complained to the Commissioner of Labour that they should also be granted the benefit of the Cabinet decision and be considered as permanent employees of the Appellant Corporation and should be paid arrears of salary paid to the present employees of the Appellant Corporation. The Commissioner of Labour had recommended to the Minister of Labour that the said dispute should be referred to arbitration. The Minister of Labour had thereafter referred the dispute for settlement by arbitration under Section 4 (1) of the Industrial Dispute Act on the basis that an "Industrial Dispute" exists between the Appellant Corporation and the 4th Respondent Trade Union which represented 26 former employees.

The matter in dispute is stated by the Commissioner of Labour as " whether the Ceylon Petroleum Corporation is obliged to grant arrears of salary and other allowances to the twenty six (26) employees referred to in the attached schedule as so paid to other employees by treating the 26 employees as being in the permanent service of the Corporation with effect from 01.09.2001 – 14.02.2003 as provided in the aforesaid Cabinet paper and if so obliged to what relief each of the employees is entitled".

The Arbitrator held the inquiry and made an award. The CPC (Appellant) which is a party to the dispute participated at the inquiry.

The CPC filed a Writ of Certiorari Application to quash the reference to Arbitration made under Sec. 4 (1) of the Industrial Disputes Act and also to quash the award of the Arbitrator.

The Court of Appeal by its judgment dated 20th March 2015 refused to issue a Writ of Certiorari to quash both the reference to arbitration and the arbitral award. Being aggrieved by the judgment of the Court of Appeal, CPC the Petitioner- -Petitioner- Appellant filed a Special Leave to Appeal Application and obtained leave on following question of law:

" Has the Court of Appeal substantially erred by misinterpreting the provisions of the Industrial Dispute Act and its amendments and the specific definitions contained therein as to what is an Industrial dispute?"

It was the contention of the Appellant that an "Industrial Dispute" cannot arise between the Appellant Corporation and the 4th Respondent Trade Union given that there was no existing employer-employee relationship between the two parties at the time of reference to Arbitration was made. The 26 employees represented by the 4th Respondent Trade Union ceased to be employees of the Appellant Corporation on the 8th of May 2003, whereas the reference to Arbitration was on the 7th of October 2008.

The Appellant submitted that in terms of Section 4 (1) of the Industrial Dispute Act, the Minister is vested with the power to refer only an Industrial Dispute for settlement by arbitration and not any other dispute.

It is at this stage relevant to refer to the definition of an "Industrial Dispute' as set out in Section 48 of the Industrial Disputes Act in order to ascertain whether industrial dispute exist between the parties or not. Section 48 of the Industrial Dispute read as follows:

> " 'industrial dispute' means any dispute or difference between an employer and workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment or the terms of employment, or with the conditions of labour or the termination of the services, or the reinstatement in service of any person and for the purpose of this definition "workmen" includes a trade union consisting of workmen".

In the case of *Ceylon Printers Limited and Another Vs Goonawardena and another (*1990) 2 SLR 310 cited by the Appellant, it was held that the definition in the said Section comprises of three ingredients which are namely;

1. Any dispute or difference
2. Between parties of the following description

- An employer and workman
- Employers and workmen
- Workmen and workmen

3. The dispute or difference should be connected with
   - The employment or non-employment of any person
   - The terms of employment of any person
   - The conditions of labour of any person
   - The reinstatement in service of any person.

I will refer to the main submissions of the Appellant. The Appellant submitted that since the 26 employees ceased to be employees of the Appellant Corporation with effect from 8th of May 2003 the said employees do not come under item (2) mentioned above. Therefore, no "Industrial Dispute" has arisen in terms of Section 48 and the Minister has acted in excess of the powers lawfully vested on him under Section 4 (1) by referring a dispute between an ex-employer and ex-employees for arbitration. To support the same line of argument, the Appellant has cited the judgment in the case of *State Bank of India V. Sundaralingam* (73 NLR 514) where Alles J held that:

" An Arbitrator appointed by the Minister under section 4(1) of the Industrial Disputes Act has no jurisdiction to entertain an alleged industrial dispute between an employer and an ex-employee who has already retired from the services of the employer and thus ceased to be an employee. Such a case is one of the cessation of employment and not one of termination or re-instatement, and therefore, is not an "industrial dispute".

This judgment was followed in *ANZ Grindlays Bank Vs Minister of Labour and* Others (1995) 2 SLR 5*3* where court held that a dispute can be referred for settlement only if the dispute arose while the relationship of employer – workman subsists.

Appellant has further submitted that in Section 16,17,18,19 of the Industrial Disputes Act which provides for settlement by arbitration has incorporated the term 'Industrial Dispute'as such by implication the existence of an employer- employee relationship is imperative. Moreover Section 19 goes on to state regarding the award of an arbitrator that "*…the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award*." indicating that there should be an existing contract between the employer and the workmen. Therefore the Appellant submits that the reference to arbitration is bad in law and needs to be quashed.

The Appellant has further submitted that by giving validity to Clause 14 of the MOU (P2) Court of Appeal has erred in law. Clause 14 reads as follows;

"පාර්ශවයන් අතර පැන නැගිය හැකි රැකියා හා සම්බන්ධ ආරවුල් සාකච්ඡා මගින් විසඳා ගැනීමට එම පාර්ශවයන් උත්සාහ දැරිය යුතු වේ. සාකච්ඡා මගින් යම් ආරවුලක් නිරාකරණය කර ගැනීමට අපොහොසත් වුවහොත් කාර්මික ආරවුල් පනත හෝ වෙනත් අදාල නීති සහ රෙගුලාසි යටතේ සුදුසු ක්‍රියාමාර්ගයක් ගැනීම සඳහා ඕනෑම පාර්ශවයක් විසින් අදාළ කරුණ කම්කරු කොමසාරිස්තුමා හෝ අදාළ විනිශ්චය මණ්ඩලයක් වෙත ඉදිරිපත් කල යුතු වේ."

As per Clause 14 of P2 parties can resolve their disputes under the Industrial Disputes Act or under any other applicable law or Regulation and may complain to the Labour Commissioner if necessary. However it is the contention of the Appellant that extending the statutory and judicial interpretation of the term "Industrial Dispute" is contrary to general principles of law that private

persons cannot contract outside statutory provisions and thereby import terms in a private contract to the interpretation of the Industrial Disputes Act.

It is true that at the time the dispute was referred to arbitration the 26 employees have joined LIOC and became employees of the LIOC. The question that arise is whether they have severed employer-employee relationship completely or not. For that purpose it is necessary to consider the tri party agreement entered between Government of Sri Lanka Ceylon Petroleum Corporation (Appellant) Lanka Indian Oil Company (LIOC the 5th Respondent) dated 7th February 2003. Clause 5.2, 5.3 and 5.4 of the agreement is relevant for this purpose. It reads thus :

> 5.2. CPC and LIOC hereby agree that despite the arrangement set out in Clause 5.1 to recruit such employees as employees of LIOC, their service with the CPC shall be taken into account as continuous service for the purpose of computation of Gratuity. The liability of the CPC shall be based on the salary drawn by such employees pertaining to their period of service with the CPC up to end January 2003 shall be the liability of the CPC.
>
> 5.3. The LIOC shall pay according to law all terminal benefits to employees employed by the LIOC as and when such payments fall due and claim reimbursement of such sums from the CPC as per Clause 5.2.
>
> 5.4. Any liability which may have accrued to the CPC prior to the date of this agreement in relation to the China Bay Installation shall remain to be a liability of the CPC.

The memorandum of understanding entered into by LIOC, CPC and two Trade Unions representing the employees are relevant. In view of this agreement and MOU there is no complete severance of employer-workmen ties between the Appellant and the employees. The agreement and the MOU deals with provisions regarding employment and non-employment, terms of employment and conditions of labour and comes within section 48 of the Industrial Disputes Act. In view of the Cabinet decision dated 18.06 2004 these 26 employees are entitled to relief during the period there were employed by the Appellant. The 26 employees are entitled to arrears of salary, allowances, statutory dues and gratuity in terms of the agreement marked P1, MOU marked P2 during the period they served in the Appellant Corporation like any other employee who remained in the Appellant Corporation . Their entitlement could not be denied. The Appellant Corporation being a state entity is required to comply with the decision of the Cabinet.

As the Appellant Corporation refused to pay the amount, a dispute arose between 26 employees and the CPC (Appellant). The 4th Respondent Union in terms of the Memorandum of Understanding made a complaint to the Commissioner of Labour. who referred this dispute to the 1st Respondent who acting under section 4 (1) of the Industrial Dispute Act referred the dispute to arbitration. It is the submission of the Appellant Corporation that at the time of the reference to arbitration there was no industrial dispute between employer and employees and the dispute if at all is between ex- employer and ex employees and due to that reason Minister has no power to act under section 4 (1) of the Industrial Dispute Act. Therefore reference to

arbitration and arbitral award both are a nullity. It is the contention of the Appellant that the proper remedy is an action for breach of contract or to file an application in the Labour Tribunal.

I have considered clause 5 of the tri party agreement between Government of Sri Lanka ,CPC(Appellant) and LIOC (5th Respondent) and clause 14 of the Memorandum of Understanding and I am of the view that the reference to arbitration and Arbitral award is in accordance with the law. There was no complete severance of Employer - Employee relationship between the Appellant and the 26 employees and continue to exist in terms of Clause 5 of the Agreement and under the Memorandum of Understanding in relation to matters specified in the Agreement. Therefore, I agree with the findings of the Court of Appeal and I dismiss the Appeal.

The Appellant to pay Rs. 25,000/= each to twenty six employees whose names are referred to in the annexure to the reference made under section 4(1) of the Industrial Disputes Act by the Minister (1st Respondent) to the Arbitrator (3rd Respondent).

Chief Justice

B.P.Aluvihare, P.C. J.

I agree.

Judge of the Supreme Court

L.T.B.Dehideniya, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Special Leave to appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

Archbishop of Colombo,
Bishop's House,
Colombo 08.

Petitioner

SC/ Appeal 54/2017
SC/ Appeal 54A/2017
SC SPL LA 06/2017 / SC SPL LA 07/2017
CA (WRIT) APPLICATION No. 1413/2006

Vs,

1. Hon. Akila Viraj Kariyawasam,
   Minister of Education,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

2. Mr. W.M. Bandusena,
   The Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

3. Hon. Ranjith Somawansa,
   Provincial Minister of Education,
   Cultural and Art Affairs,
   Ranmaga Paya,
   Kaduwela Road,
   Battaramulla.

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

Respondents

5. Kolamba Thanthrige Janaka Pushpakumara,
   Secretary- School Development Society,
   Pamunuwila Primary School,
   No. 123/3, Pamunuwila,
   Gonawala.

6. M.L.S. Perera,
   Auditor School Development Society,
   No. 370, Bathalahena Watta,
   Gonawala

Added Respondents

And Now

1. Hon. Akila Viraj Kariyawasam,
   Minister of Education,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

2. Mr. W.M. Bandusena,
   The Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

3. Hon. Ranjith Somawansa,
   Provincial Minister of Education,
   Cultural and Art Affairs,
   Ranmaga Paya,
   Kaduwela Road,
   Battaramulla.

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

Respondents- Appellants

5. Kolamba Thanthrige Janaka Pushpakumara,
   Secretary- School Development Society,
   Pamunuwila Primary School,
   No. 123/3, Pamunuwila,
   Gonawala.

6. M.L.S. Perera,
   Auditor School Development Society,
   No. 370, Bathalahena Watta,
   Gonawala

Added Respondents-Appellants

Archbishop of Colombo,
Bishop's House,
Colombo 08.

Petitioner-Respondent

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

Vijith K. Malalgoda PC J &

Murdu N.B. Fernando PC J

Counsel: Sanjaya Rajaratnam PC ASG for 1st to the 4th Respondents-Appellants

S.N. Vijithsingh with S. Rajapakse and T. Edirithilaka for 5th and 6th Added Respondents-Appellants

Ikram Mohamed PC with R. Hettiarachchi for Petitioner-Respondent instructed by Mallawarachchi Associates

Argued on: 02.05.2018

Decided on: 22.06.2018

Vijith K. Malalgoda PC J

The Hon. Attorney General and the 5th and 6th Added Respondents-Appellants have preferred the present appeals before this court challenging the decision of the Court of Appeal in Writ Application No. 1413/2006.

As revealed before us, the Petitioner in the said Writ application namely the Archbishop of Colombo had challenged the decision of the 1st Respondent which was produced marked P-11, in the said Writ application. When the said application was pending before the Court of Appeal, the 5th and the 6th Added Respondents moved the said court to be add them as parties to the said application and accordingly Kolamba Thanthrige Janaka Pushpakumara Secretary- School Development Society of Pamunuwila Primary School and M.L.S. Perera Auditor, School Development Society of Pamunuwila Primary School were added to the said application as the 5th and 6th Added Respondents.

The Court of Appeal by its decision dated 25th November 2016 granted relief as prayed in paragraphs (b) and (c) to the Petition which reads as follows,

b) Grant and issue a mandate in the nature of a Writ of Prohibition, Prohibiting the 1st Respondent from cancelling and/or revoking and/or annulling the divesting order published in the Government Gazette marked P-11 and/or from publishing and/or causing the publication of any such order revoking/cancelling/annulling the said divesting order marked P-11

c) Grant and issue a mandate in the nature of a Writ of Mandamus directing the 1st, 2nd and/or 3rd Respondents to deliver vacant possession of the property so divested by the said divesting order published in the Government Gazette marked P-11 to the Petitioner

When the two appeals preferred by the Hon. Attorney General (SC/SPL/LA/07/2017) and by the 5th and 6th Added Respondents-Petitioners (SC/SPL/LA/06/2017) were supported before the Supreme Court, this court after considering the material placed, had decided to grant leave on the questions of law set out in paragraphs 11(ii), 11(iii) and 11(iv) of the Petition in SC/SPL/LA 07/2017 which reads as follows,

11(ii) Did the Court of appeal err in law and in fact by holding that section 18 of the interpretation Ordinance does not permit the revocation of the order made to revoke the Gazette notification dated 17.02.2006 marked P-11?

11(iii) Did the Court of Appeal err in law by holding that section 18 of the Interpretation Ordinance does not permit the revocation of the order made to revoke the Gazette notification dated 17.02.2006 marked P-11?

11(iv) Did the Court of Appeal err in fact by holding that section 18 of the Interpretation Ordinance does not permit the revocation of the order made to revoke the Gazette notification dated 17.02.2006 marked P-11?

At the time the leave was granted the parties further agreed to argue both appeals together and to abide by one single judgment.

During the arguments before this court all the parties referred to above were represented and as observed by me the entire argument of the two petitioners were based on the applicability of section 18 of the Interpretation Ordinance in order to revoke the divesting order published in the Gazette notification produced marked P-11.

Whilst deciding the above matter as against the arguments raised by the Respondents in both these application, it is important to consider the factual matrix of the matter before us.

The Petitioner-Respondent was the lawful owner of the land called “Kongahawatta” alias “Kahatagahawatte” situated in the village of “Pamunuwila” containing in extent 1 Acre 2 Roods and 4 Perches and a school by the name Pamunuwila Roman Catholic Sinhalese Mix School was functioning in the said premises.

The said school was vested in the state under and by virtue of the provisions of the Assisted Schools and Training Colleges (Special Provisions) Act No 5 of 1960 read with Assisted Schools and Training Colleges (Supplementary Provisions) Act No 08 of 1961 by order published in the Government Gazette dated 15th December 1961. Since then the said land was utilized to conduct the said school namely Pamunuwila Roman Catholic Sinhalese Mixed School and was later renamed as Kelaniya Pamunuwila Primary School.

In 1978 the Government acquired another land containing an extent of 8 Acres, 1 mile away from the Pamunuwila Primary School in order to construct a Maha Vidyalaya. In 1994 steps were taken to establish the new school and entire upper classes of the Kelaniya Pamunuwila Primary School namely the classes from year six shifted to Pamunuwila Maha Vidyalaya.

During this period the Petitioner-Respondent made several requests to the Minister of Education to divest the unutilized part of the property acquired in the year 1961.

Accordingly the then Minister of Education divested 0.0658 hectares of the land and buildings by divesting order published in the Government Gazette dated 14th December 2001.

Petitioner-Respondent made a further request to divest the remainder of the premises so vested in the Government.

The then Minister of Education by Divesting order published in the Government Gazette dated 17th February 2006 divested with effect from 30th January 2006 0.0539 hectares of the land vested by order published in Gazette bearing No. 12826 dated 15th December 1961 (P-11)

The then Minister of Education who made the divesting order under section 10 (1) of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961 had decided to revoke and cancel the said divesting order on 18th August 2006 and requested the Government Printer to publish an order to that effect (R-11) but the publication of the said request was prevented by an interim order issued by the Court of Appeal during the pendency of the Writ Application referred to above.

As revealed before us the said decision by the then Minister of Education who was the 1st Respondent before the Court of Appeal to revoke the divesting order was reached after careful consideration of the material placed before the said minister to the effect that,

a) At the time the said divesting order was made, Kalaniya Pamunuwila Primary School was functioning in the premises in question with 99 children studying in three grades namely grade 3, 4 and 5.
b) Several civil organizations including the School Development Society and Pasal Surekeeme Sangamaya had confirmed the above position
c) Under section 10 (1) (a) of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No 08.of 1961 the Minister is empowered to divest a property, comes under the said act only,

> "If such property ceases to be used or is not needed for the purpose of a school conducted and maintained by the Director for and on behalf of the crown,"

Whilst relying on the above position taken up by the Minister the learned Additional Solicitor General who represented the 1st- 4th Respondents-Appellants in SC Appeal 54A/2017 submitted that, the divesting order marked P-11 was made without jurisdiction by the 1st Respondent-Appellant as he was misled at the time he made the said order.

When questioned by this court, all parties including the Petitioner-Respondent admitted that three grades of Kalaniya Pamunuwila Primary School are still operating in the premises in question and therefore one cannot argue that the premises in question ceases to be used or is not needed for the purpose of a school.

Even though the Appellants in both appeals before us took up the position that the divesting order referred to in P-11 was made contrary to the provisions in section 10 (1) (a) of the said act, and therefore it was made without jurisdiction, the counsel admitted that there was no specific statutory provision available in the said act to rectify such error or to revoke and/or cancel any order made under section 10 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No 08.of 1961.

In the said backdrop the Respondents in the Writ application No. 1413/2006 before the Court of Appeal had relied on section 18 of the Interpretation Ordinance which reads as follows,

Section 18; Where any enactment, whether passes before or after the commencement of this Ordinance, confers power on any authority to issue any proclamation, or make any order or notification, any proclamation, order or notification so issued or made may be at any time amended, varied, rescinded or revoked by the same authority and in the same manner and subject to the like consent and conditions if any by or in which or subject to which such proclamation, order or notification may be issued or made.

When going through the provisions of the above section it appears to me that the provisions of section 18 apply when the enabling statute contains the power to issue a proclamation or to make any order or notification without a corresponding power to amend, vary, rescind or revoke them. In the said circumstances it is understood that, in the statute, the power to revoke or amend is expressly provided, thus section 18 of the Interpretation Ordinance has no application.

In support of the above contention both the Petitioners heavily relied or two decisions, one by the Court of Appeal and the other before the Supreme Court.

In the case of ***James Perera V. Government Agent of Kandy 46 NLR 287*** *Jayathilake J* observed that,

> "The Petitioners contend that the Respondent had no power under the Village Communities Ordinance (chap.198) to cancel the notice issued by him on November 7, 1944 I think a very short and simple answer to that contention is to be found in section 15 of the Interpretation Ordinance" (presently section 18)

Basnayake CJ in the case of ***Silva V. Attorney General 60 NLR 145*** had observed that,

> "In the instant case, as stated above the Public Service Commission was free to revoke its delegation by order published in the Government Gazette by virtue of section 15 of the Interpretation Ordinance (present section 18) although the empowering section itself, as in the case of the English Statute referred to in the case of *Huth V. Clark* (supra), does not confer a power to revoke a delegation once made"

I see no reason to reject the above position taken up by the Petitioners but observe that the provisions of section 18 of the Interpretation Ordinance will only apply when the enabling statute contains the power to issue a proclamation or to make any order or notification without a corresponding power to amend, vary, rescind or revoke them.

As already discussed in this judgment the Minister had made the divesting order under section 10 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No.08 of 1961 which reads as follows,

Section 10

1) Notwithstanding that any property used for the purpose of any school to which this Act applies has been vested on the Crown by virtue of a Vesting Order, the Minister, by subsequent Order published in the Gazette (in this Act referred to as a 'Divesting Order')

a. Shall, if such property ceases to be used, or is not needed for the purpose of a school conducted and maintained by the Director for an on behalf of the Crown, revoke that Vesting Order in so far as it relates to such property with effect from the date on which such property so ceases to be used or was not so needed; or

b. Shall, if the Director ceases to be manager of that school by virtue of the operation of any Order made under the principal Act, revoke that Vesting Order with effect from the date on which the Director so ceases to be the manager; or

c. Shall, if a determination is made on a reference to arbitration under this Act that any property in respect of which that Vesting Order was made is not property liable to vesting, revoke that Vesting Order in so far as it relates to such property with effect from the date on which that Vesting Order took effect

2) Where a Vesting Order in respect of any property is revoked by a Divesting Order in whole or in part, the property in respect of which the Divesting Order is made shall be deemed never to have vested in the Crown by virtue of that Vesting Order, and any question which might arise as to any right, title or interest in or over that property shall be determined accordingly

When going through the provisions in the above section (especially sub-section 1) it appears that the provisions of the above section will only apply to properties which were already being vested with the Crown and nothing else. In the said circumstances it is important to consider the intention of the legislation before this court.

In the case of ***Aldin V. Sannasgala 48 NLR 236*** *Dias J* quoting the observation by *Sampayo J* in *529-531 MC Badulla 8612* (1912 1 Times of Ceylon 213) stated that, “the preamble of an Ordinance is a good means to find out it’s meaning, and may legitimately be consulted for the purpose for solving any ambiguity; but it cannot control or restrict the actual provisions when they are clear and not open to doubt”

The preamble of Act No. 8 of 1961 explains purpose for which the said Act is enacted as follows;

> "An Act to provide for vesting in the Crown, without compensation, the property to assisted schools of which the Director of Education is or becomes, the manager under the assisted schools and training colleges (Special Provisions) Act No. 5 of 1960, to provide for such Director for and on behalf of the Crown to conduct and maintain schools on such property, to provide for the imposition of penalties on persons who offer resistance or obstruction to the entry of such Director to such school and to the taking of possession of property vested in the Crown, to provide for Government making good or repairing any loss or damage caused to the property of assisted schools and for the recovery of the cost thereof by the Government from the persons responsible for such loss or damage in a summary manner and to regulate the establishment of schools on or after the date of the commencement of this Act."

and it's understood that one of the intention of the above legislation, is to make provisions to vest the assisted schools of which the Director of Education is or becomes the manager under the provisions of Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960.

As further observed by me the provisions of the said Act had provided for the Minister to make the said vesting orders and other matters relating to administrative steps in taking over such schools.

When going through the above provisions along with the provisions I have already referred to in section 10 of the said Act it is clear that section 4 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961 had provided the Minister to make order vesting properties comes within the purview of Act No. 5 of 1960 and section 10 had provided divesting any property already vested under section 4 if such property comes within section 10 (1) (a) of the same Act.

In the said circumstances, it appears that the provisions of section 18 of the Interpretation Ordinance, will not apply to any order made by the Minister under section 4 of the said Act since there are provisions identified under section 10 of the same Act to divest such property. It is further observed by this court that the provisions of section 18 of the Interpretation Ordinance had not made any provisions beyond this point or in other words provisions of section 18 apply when the enabling statute contains the power to issue a proclamation or to make any order or notification

without a corresponding power to amend, vary, rescind or revoke them and in the said circumstances the above provisions cannot be made use for amend, varied, rescind or revoke divesting order issued under section 10 of the said Act since the intention of the said legislation is for vesting of property comes within the purview of the provisions of Act No. 5 of 1960. Thus once the power to vest and subsequent power to divest is exercised by the Minister, section 18 has no application in respect of a further step (revoke to revocation) taken by the Minister which has not been identified under the provisions of section 18 of the Interpretation Ordinance.

In this regard I am further mindful of the decision by *S.N. Silva CJ* in the case of ***Patrick Lowe V. Commercial Bank of Ceylon 2000 (1) Sri LR 280 at 284*** where his Lordship recognized the principle of "authority exercising powers cannot exceed the express statutory provisions" in following terms,

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide Ashbury) *Railway Carriage and Iron Co. Ltd., Vs. Hector Riche* and the *Attorney General Vs. the Great Eastern Railway*. It follows that what is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by court as being in excess of authority."

When considering the matters already discussed in this judgment, I see no merit in the arguments placed before me by the Petitioners in both the appeals. In the said circumstances, I answer the questions of law raised in appeals in favour of the Petitioner-Respondent and affirm the order made by the Court of Appeal in Writ Application No. 1413/2006.

Judge of the Supreme Court

K. Sisira J. de. Abrew J

I agree,

Judge of the Supreme Court

Murdu N.B. Fernando 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.

CHAMINDA ABEYKOON
No. 52, Rockhouse Lane,
Modera, Colombo-15
PLAINTIFF

S.C.Appeal No.54A/2008
S.C. (Spl.LA)No.213/2007
C.A.Appeal No. 418/98(F)
D.C. Colombo Case No.15465/L

VS.

H. CARALAIN PIERIS
No.34/3/E, Ellie House Road,
Modera, Colombo 15.
DEFENDANT

AND

H. CARALAIN PIERIS (deceased)
DEFENDANT- APPELLANT

P. NICHOLAS ANTHONY FERNANDO
No.34/3/E, Ellie House Road,
Modera, Colombo 15.
SUBSTITUTED DEFENDANT-APPELLANT

VS.

CHAMINDA ABEYKOON
No. 52, Rockhouse Lane,
Modera, Colombo-15.
PLAINTIFF-RESPONDENT

AND NOW BETWEEN

CHAMINDA ABEYKOON
No. 52, Rockhouse Lane,
Modera, Colombo-15.
PLAINTIFF- RESPONDENT-PETITIONER

VS.

P. NICHOLAS ANTHONY FERNANDO
No.34/3/E, Ellie House Road,
Modera, Colombo 15.
SUBSTITUTED DEFENDANT-APPELLANT

1) **EVONNE KUMARI FERNANDO**
2) **ANURUDDHIKA ROSHINI FERNANDO**
3) **DISNA RANJANI FERNANDO**
4) **DILIP FERNANDO**

All of 34/3E, Mowbray Lane, Colombo 15.
SUBSTITUTED DEFENDANTS-APPELLANTS- RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
Vijith K. Malalgoda, PC, J.
L.T.B. Dehideniya, J.

COUNSEL: Faisz Mustapha, PC with Keerthi Tillekaratne and Randika de Silva for the Plaintiff-Respondent-Appellant-Appellant.
Rohan Sahabandu, PC with Hasitha Amarasinghe for the Substituted Defendant-Appellant- Respondent.

ARGUED ON: 19th March 2018

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Respondent-Appellant on 01st August 2008.
By the Defendant-Appellant-Respondent on 20th October 2008 and 12th July 2018.

DECIDED ON: 02nd October 2018

Prasanna Jayawardena, PC, J.

The land and premises which are the subject matter of this dispute are located at No. 34/3 E, Ellie House Road, Colombo 15. The land is about 19 perches in extent. The land and premises will be referred to as "the property" in this judgment.

On 26th February 1992, the Plaintiff-Respondent-Appellant ["the plaintiff"] instituted action in the District Court of Colombo against the original Defendant seeking a

declaration of title to the property, the ejectment of the defendant from the property and recovery of damages at the rate of Rs. 1000/- *per mensem* from 01st April 1991 until the date of the ejectment of the defendant from the property.

The plaintiff's case, as pleaded in the plaint, was that: (i) the original owner of the property was one Wijekulasuriya Patabendige Milliner Fernando; (ii) upon his death, Liyanage Mary Margaret Perera was appointed the Executrix of his Estate under and in terms of Milliner Fernando's Last Will no. 2174 dated 19th August 1971; (iii) probate was issued to the said Executrix in D.C. Colombo Case No. 26821; (iv) subsequently, the said Executrix of the Estate of the deceased Milliner Fernando conveyed the property to the plaintiff's father - Abeykoon Joseph Anthony - by Executor's Conveyance no. 2239 dated 31st August 1978; (v) thereafter, the plaintiff's father gifted the property to the plaintiff by Deed of Gift no. 410 dated 27th October 1981; (vi) at the time of execution of this Deed of Gift, the plaintiff was a minor; (vii) upon reaching the age of majority, the plaintiff's Attorneys-at-Law addressed a letter dated 05th February 1991 to the defendant informing the defendant that the plaintiff was the owner of the property; (viii) however, the defendant refused to accept the plaintiff's title to the property; (ix) in these circumstances, the plaintiff's Attorneys-at-Law sent the defendant a notice dated 01st March 1991 requiring the defendant to quit and vacate the property on or before 31st March 1991; (x) despite this notice, the defendant remained in unlawful occupation of the property and, therefore, the plaintiff is entitled to the reliefs mentioned in the preceding paragraph.

The defendant filed answer admitting only receipt of the letter dated 05th February 1991 and notice dated 01st March 1991. The defendant denied that the plaintiff has title to the property and denied the other averments in the plaint. The defendant stated that she was entitled to the property by prescription. She further pleaded that the plaintiff could not have and maintain the said action by reason of the principle of *res judicata* in view of the dismissal of D.C. Colombo Case No. 6938/RE which had been instituted in respect of the same property. However, despite the defendant stating in her answer that she had prescriptive title to the property, the defendant did not make a claim in reconvention on the basis that she had title to property by prescription and did not pray for a declaration that she was the owner of the property.

When the trial commenced in the District Court on 04th March 1994, the defendant admitted receipt of the plaintiff's letter dated 05th February 1991 and the notice dated 01st March 1991. Thereafter, the plaintiff framed four issues based on the averments in the plaint. The defendant framed three issues which asked whether the plaintiff had no cause of action, whether the plaintiff could not have and maintain the said action by reason of the principle of *res judicata* in view of the dismissal of D.C. Colombo Case No. 6938/RE and whether, if either of these issues were answered in the affirmative, the plaintiff's action should be dismissed. On that day, the defendant

did not frame any issues on whether the defendant had acquired title to the property by prescription.

At the time the trial commenced on 04th March 1994, the plaintiff's attorney gave evidence. The evidence-in-chief of this witness was concluded on that day. During the course of his evidence-in-chief, this witness produced the following documents marked "පැ 1" to "පැ 8": (i) the Power of Attorney granted by the plaintiff to the witness, marked "පැ 1"; (ii) the Deed of Gift no.410 in favour of the plaintiff, marked "පැ 2"; (iii) the Executor's Conveyance no. 2239 in favour of the plaintiff's father, marked "පැ 3"; (iv) the plaintiff's birth certificate, marked "පැ 4"; (v) the letter dated 05th February 1991 sent by the plaintiff's Attorney-at-Law to the defendant, marked "පැ 5"; (vi) the reply thereto dated 08th February 1991 sent by the defendant's Attorney-at-Law, marked "පැ 6"; (vii) the notice dated 01st March 1991 sent by the plaintiff's Attorney-at-Law to the defendant, marked "පැ 7"; and (viii) the reply thereto dated 14th March 1991 sent by the defendant's Attorney-at-Law, marked "පැ 8";

The plaintiff's attorney stated, *inter alia*, that he was the plaintiff's uncle and that the plaintiff was abroad. He said the plaintiff had obtained title to the property by Deed of Gift no.410 marked "පැ 2" executed in the plaintiff's favour by the plaintiff's father and, at that time, the plaintiff was nine years of age. The plaintiff's father had earlier obtained title to the property by Executor's Conveyance no. 2239 marked "පැ 3".

On the next date of trial, before the evidence commenced, the defendant framed two more issues asking whether the defendant had acquired title to the property by prescription and, if so, whether the plaintiff's action should be dismissed. The plaintiff framed a further issue asking whether no prescriptive title could be acquired against the plaintiff while he was a minor.

In cross examination, the plaintiff's attorney stated that he had first come to know of the property in or about the year 1983 after the plaintiff's father [who was the brother of the witness] had gifted the property to the plaintiff by Deed of Gift marked "පැ 2". The witness said that, in 1983, the property was a bare land. The witness said the defendant had commenced occupying the property after 1983. When learned counsel for the defendant showed the witness an extract from an Electoral Register for the year 1965 which recorded the defendant as being a resident of the property in 1965, the witness only acknowledged that this document stated that the defendant was a resident of the property in 1965 and said he did not know whether the defendant had been residing on the property after 1965. That extract from the Electoral Register was marked "වි 1". Thereafter, learned counsel for the defendant showed the witness the judgment in D.C. Colombo Case No. 6938/RE, which was marked "වි 2". The witness acknowledged that the plaintiff named in the judgment was his sister and that the defendant named in the judgment is the defendant in the present case. The witness stated that he was unaware of that action and that his

sister had not mentioned to him that she had filed a case. The witness also stated that he became aware of the documents marked "පැ 2" to "පැ 8" when he came to testify in the present case. When learned counsel for the defendant put to the witness that the defendant had been in occupation of the property for thirty years, the witness stated that he was not aware that the defendant had occupied the property for that claimed period of time.

The plaintiff also led the evidence of an officer from the Record Room of the District Court of Colombo who produced the case record in D.C. Colombo Case No. 26821/T. Finally, Mr. Herman Perera, Attorney-at-Law and Notary Public testified and stated that he had attested the Executor's Conveyance marked "පැ 3".

Thereafter, the plaintiff's case was closed leading in evidence the documents marked "පැ 1" to "පැ 8". As evident from Journal Entry No. 27, the defendant did not require further proof of any of these documents.

The defendant gave evidence and, in her evidence-in-chief, stated that the owner of the property - who she referred to as 'Mr. Calvin' - had permitted her to reside on the property *["අයිතිකාරයා කැල්වින් මහතා තමයි දුන්නෙ"]* and that, at the time she gave evidence on 04th July 1996, she had resided there for thirty-five years. She said her son had lived with her from the time she entered the property and now her son's family also resides there. The defendant later clarified that the person she referred to as "Mr. Calvin" was the aforesaid Milliner Fernando [who the plaintiff claimed as his predecessor in title] - *vide:* the following evidence of the defendant:

Q: තමා කියා සිටියා තමාට මේ දේපොලේ පදිංචි වීමට අවසර දුන්නෙ කැල්වින් මහත්තයා කියල, හරිද ?

A: කැල්වින් මහත්තයා.

Q: කැල්වින් මහත්තයා කියන්නේ කැල්වින් මිලින විජේකුලසූරිය ?

A: ඔව්.

When her counsel asked her in which year she had entered the property, the defendant stated she could not remember the year. The proceedings show that, upon a considerable amount of prompting and suggestion by counsel, the defendant stated that it could be about the year 1959. The proceedings also show that, thereafter, the defendant agreed to a suggestion put to her by counsel for the defendant that, at the time the Deed of Gift marked "පැ 2" was executed in 1981, the defendant had resided on the property for 22 years. The defendant then stated she was the owner of the property.

In cross examination, the defendant again stated that she had entered the property with the permission of Milliner Fernando - *vide:* the following evidence of the defendant:

Q: විජේකුලසූරිය යන අයගේ අවසරය මත ආවා කිව්වා ?

A: කැල්වින් මහතාගේ අවසර මත. කැලය සුද්ද කරල. ගෙයක් හදා ගන්න.

Next, the defendant's son gave evidence and stated that his father and mother and the witness had entered the property in or about the year 1957 and that they had built a house on the property and resided in it ever since. The witness said that, during this time, no person had claimed a right to the property or a right to possess the property or disturbed his mother's possession of the property. He said that when the letter dated 05th February 1991 marked "පැ 5" was received, the defendant and his mother rejected the plaintiff's claim that he was the owner of the property. The witness stated that his mother was the owner of the property.

In cross examination, the defendant's son too stated that the original owner [*"මුල් අයිතිකරු"*] was "Mr. Calvin" - *ie:* the aforesaid Milliner Fernando - and that Milliner Fernando permitted the defendant and her family to live on the property - *vide:* the following evidence of the defendant's son:

Q: කැල්වින් මහත්තයට මේ ඉඩම අයිතිව තිබුණු බව දන්නවද ?

A: නාත්න එක්ක ගිහින් කතා කරල. මේ ඉඩම කැලෑවක් තිබුනේ. පරම්පරාවට ඉන්න කීව.

Q: ලිපියක් හෝ ඔප්පුවක් තිබෙනවද ?

A: නැහැ.

Q: තමා පිළිගන්නවා කැල්වින් මහත්තයගේ ඉඩම කියා ?

A: ඔව්. කැල්වින් මහතා අවසර දුන්න.

In cross examination, the witness denied that his mother had paid rent to the plaintiff's mother. Thereafter, the defendant's case was closed leading in evidence the documents marked "වි 1" and "වි 2"

In her judgment, the learned District Judge outlined the cases of the two parties. Thereafter, the learned judge observed that, on the one hand, the plaintiff claims title to the property under and in terms of the Deeds marked "පැ 2" and "පැ 3" and, on the other hand, the defendant's position is that, the plaintiff has no title to the property because the defendant had acquired prescriptive title to the property.

The learned District Judge held that the plaintiff had established his title to the property. The learned judge observed that, although the defendant had claimed in her answer that she had prescriptive title to the property, that claim will fail because the defendant had not stated a definite date on which she came into possession of the property and had not stated the date on which she commenced possessing the

property adverse to the plaintiff. The learned judge held that, in any event, the documents marked "වී 1" and "වී 2" did not establish the defendant's claim to have acquired prescriptive title to the property. Accordingly, the learned District Judge entered judgment for the plaintiff as prayed for in the plaint.

The defendant appealed to the Court of Appeal. During the pendency of that appeal, the defendant died and her son - Nicholas Anthony Fernando - was substituted as the defendant-appellant.

A single judge of the Court of Appeal has, with the agreement of the parties, heard and decided this appeal. The learned Judge of the Court of Appeal did not examine the determination by the District Court that the plaintiff had `paper title' to the property. Instead, the learned Judge only considered the defendant's claim and held that the defendant had proved, *"on civil standards"*, that she had acquired prescriptive title. In reaching this view, the learned judge appears to have considered that the testimony of the defendant that she had *"long and undisturbed possession of the land"* for about thirty five years, had been *"corroborated by"* the evidence of her son and that this oral evidence together with the extract from the Electoral Register marked "වී 1" was sufficient for the Court of Appeal to determine the defendant had acquired prescriptive title to the property. The Court of Appeal also took the view that the District Court erred when it held the defendant had failed to prove the date from which the defendant claimed to have acquired prescriptive title and the learned Judge of the Court of Appeal held *"A party is also not required to state in the answer the date and the amount of years the prescriptive right was enjoyed. It is sufficient if the party states that he is relying under the Prescription Ordinance."*. Finally, the learned Judge stated *"Long undisturbed and uninterrupted possession amounted to adverse possession against the plaintiff-respondent. This has been proved by the Defendant-appellants."*. On the aforesaid basis, the Court of Appeal set aside the judgment of the District Court and dismissed the plaintiff's action.

The plaintiff sought special leave to appeal from this Court. The plaintiff has annexed to the petition, marked "Y4", a copy of a letter said to have been issued by the Rent Department of the Colombo Municipal Council stating that the defendant had deposited rent payable to the plaintiff's mother for the period September 1978 to December 1985.

This Court granted special leave to appeal on the following questions of law which are reproduced *verbatim*:

(i) Did the Court of Appeal misdirect itself by the conclusion that the long and undisturbed possession of the original Respondent conferred prescriptive title to her ?

(ii) Did the Court of Appeal err in law with regard to the burden and quantum of proof regarding prescriptive possession inasmuch as the paper title of the Appellant remained unchallenged ?

(iii) Did the Court of Appeal misdirect itself with regard to the nature of possession by the original Respondent which commenced in the character of license ?

(iv) Whether the original Respondent had established change of his subordinate character by an overt act ?

(v) Whether the Court of Appeal justified in coming to a finding of prescriptive title on insufficient evidence ?

(vi) Whether Y4 could be legally admissible before this court ?

During the pendency of the present appeal in this Court, the Substituted Defendant-Appellant-Respondent [*ie:* the defendant's son] died and his children have been substituted in his place as the 1st to 4th Substituted Defendants-Appellants-Respondents.

Before considering the questions of law, it should be stated here that the plaintiff's action is in the nature of a *rei vindicatio*. Thus, the burden on the plaintiff was to establish the identity of the corpus of the property and to establish that he had title to the property. On the other hand, the defendant does not claim that she has 'paper title' to the property on a rival chain of title. In her bid to have the plaintiff's action dismissed, the defendant relies solely on her claim that she had acquired prescriptive title.

With regard to the plaintiff's case, it is clear that there is no dispute regarding the identity of the *corpus* of the property. Next, the fact that Milliner Fernando was the original owner of the property is not in dispute. Thereafter, the Executors' Conveyance marked "පැ 3" was proved by the evidence of Mr. Herman Perera, who attested that deed. Finally, the Deed of Gift marked "පැ 2" by which the plaintiff received title to the property was produced by the plaintiff's attorney and was not challenged when that witness was cross examined. Further, although both deeds marked "පැ 2"and "පැ 3" were marked 'subject to proof', neither deed was objected to when the plaintiff's case was closed and neither the defendant nor her son disputed the authenticity of these deeds when they gave evidence. In these circumstances, the plaintiff proved that he had 'paper title' to the property. Thus, the plaintiff appears to have satisfied the requirements necessary to succeed in this action, which is in the nature of a *rei vindicatio*.

Consequently, in order to defeat the plaintiff's action, the burden was cast firmly on the defendant to prove that she had acquired title to the property by prescription. If

the defendant failed to do so, the plaintiff was entitled to succeed in this action - *vide:* sections 101, 102 and 103 of the Evidence Ordinance. In similar circumstances, Siva Supramaniam J stated in PERERA vs. PREMAWATHIE [74 NLR 302 at p. 306] *"Since the legal title to the disputed 1/4 share was in the appellants by reason of the due and prior registration of 4D7, the onus was on the respondents to prove that Joronis and his successors in title had acquired prescriptive title to that share. In the absence of such proof, the appellants were entitled to succeed."*.

The first five questions of law all raise issues which are connected to and are part of the question of whether the Court of Appeal was correct when it held that the defendant had proved that she had prescriptive title to the property. These five questions of law are facets of that central question. Therefore, they can be considered together.

It hardly needs to be said that, in order for the defendant to prove that she acquired title to the property by prescription, the defendant had to establish the requisites stipulated in section 3 of the Prescription Ordinance No. 22 of 1871, as amended. Thus, as stated in section 3, the defendant had to prove that: she had undisturbed and uninterrupted possession of the property for a minimum of ten years *and* that such possession and use of the property by the defendant has been adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property during those ten years.

In this regard, both the defendant and her son unequivocally admitted that they entered the property with the permission of Milliner Fernando, who was the original owner of the property. Thus, it has been admitted that the defendant commenced possessing the property as the licensee of Milliner Fernando.

It is a well-established principle of law that, so long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some "overt act" which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give [or deem to give] notice to the owner that his erstwhile licensee or agent is no longer holding the property in the capacity of a licensee or agent and is, from that time onwards, claiming to possess the property adverse to or independent of the owner. The overt act makes the owner aware [or is deemed to make him aware] that he runs the risk of losing title to the property if the licensee or agent complete ten years of such adverse or independent possession and acquires prescriptive title to the property. Thus, as far back as in 1898, Bonser CJ stated in MADUANWELA vs. EKNELIGODA [3 NLR 213 at p.215] *"A person who is let into occupation of property as a tenant or as a licensee must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his*

occupation.". Similarly, in NAGUDA MARIKAR vs. MOHAMMADU [7 NLR 91] the Privy Council held that, in the absence of any evidence to show that the plaintiff had got rid of his character of agent, he was not entitled to the benefit of section 3 of the Prescription Ordinance. The requirement for such an overt act has similarly been upheld in ORLOFF vs. GREBE [10 NLR 183], LEBBE MARIKAR vs. SAINU [10 NLR 339], THE GOVERNMENT AGENT, WESTERN PROVINCE vs. ISMAIL LEBBE [1908 2 Weer. 29], THE GOVERNMENT AGENT, WESTERN PROVINCE vs. PERERA [11 NLR 337], NAVARATNE vs. JAYATUNGE [44 NLR 517], DE SOYSA vs. FONSEKA [58 NLR 501] and SEEMAN vs. DAVID [2000 3 SLR 23].

As Bertram CJ stated in TILLEKERATNE vs. BASTIAN [21 NLR 12 at p 19] *"…where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove ?* ***He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom sets up his possession****."*. [emphasis mine]. Similarly, in SIYANERIS vs. JAYASINGHE UDENIS DE SILVA [52 NLR 289 at p.292], the Privy Council emphasised that *"…if a person goes into possession of land in Ceylon as an agent for another* ***time does not begin to run until he has made it manifest that he is holding adversely to his principal****."* [emphasis mine]. In JAYANERIS vs. SOMAWATHIE [76 NLR 206 at p.207-0208], Weeramantry J stated "*The adverse aspect of his possession cannot in other words remain a mere concept in the recesses of the agent's mind but must so manifest itself that those against whom it is urged may see in it a challenge to their claims. Even as possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner, so also is possession through an agent incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent."*. Thereafter, in DE SILVA vs. COMMISSIONER OF INLAND REVENUE [80 NLR 292 at p. 295-296], Sharvananda J, as His Lordship then was, lucidly enunciated the applicable principles and the rationale that lay behind these principles and, thereafter, held *"Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse."*. In SEEMAN vs. DAVID [at p.26], Weerasooriya J, then in the Court of Appeal, held that *"It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster."*

Learned President's Counsel for the defendant has submitted that the requirement of an overt act applies only in the case of claims of prescription between co-owners as in the celebrated case of COREA vs. APUHAMY [15 NLR 65] and that an overt act is not required where a *"complete outsider"* claims to have prescribed to a property. However, in the present case, the defendant was by no means a *"complete outsider"*. Instead, the defendant admits that she commenced her possession of the property as a licensee of Milliner Fernando and, as stated earlier, it is established law that the defendant had to commit an overt act in order to cast aside the character of a licensee and start the running of prescription against Milliner Fernando.

In any event, as evident from the decisions cited above, the requirement that the possession of one co-owner is the possession of the other co-owners and that an overt act in the nature of ouster must occur to demonstrate a change of the character of that possession and start the running of prescription in favour of one co-owner; applies with equal force to instances where a licensee or an agent possesses a property in a subordinate character. In such instances, an overt act must occur to demonstrate change in the character of that possession and start the running of prescription in favour of the erstwhile licensee or agent.

Learned President's Counsel for the defendant has also submitted that a 'presumption of ouster' can be drawn where there has been *"long continued and uninterrupted possession"* and he cited the decision in APPUHAMY vs. RAN NAIDE [1915 1 CWR 92] in support of this contention. However, a perusal of the facts in that decision show that, quite apart from a long period of possession, the defendant had always possessed the property as the sole owner without any knowledge of a rival claimant to the property. In ALWIS vs. PERERA [21 NLR 321], Bertram CJ held that, where a party's possession of land admittedly commenced in a subordinate character, the possession of the land by that party for a *"very considerable length of time"* may justify a Court in drawing a `presumption of ouster' *provided* the other circumstances of the case justified doing so. In this connection, the learned Chief Justice said [at p.324] *"….. where it is shown that people have been in possession of land for a very considerable length of time, that fact,* ***taken in conjunction with the other circumstances of the case****, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession"*. [emphasis mine].The circumstances which led Bertram CJ to consider that there had been adverse possession included the parties who claimed prescriptive title remaining in possession of the land for over sixty years *after* transferring the property to the opposing party's predecessor in title and also one of the parties who claimed prescriptive title successfully asserting title to the land and resisting a seizure of the land in execution of a writ against one of the opposing parties. In the later case of HAMIDU LEBBE vs. GANITHA [27 NLR 33 at p.39], Dalton J observed that *"In the result it seems to me that the law of this Colony on this point is clearly laid down in Tillekeratne v. Bastian (supra). It is a question of fact where ever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."*. Similarly, in RAN NAIDE vs. PUNCHI BANDA [31 NLR 478 at p.480] Jayewardene AJ held that *"It is open to the Court from lapse of time* ***in conjunction with other circumstances*** *to presume that a possession, originally permissive, has since then become adverse."* [emphasis mine].

Thus, it is clear that *"long continued and uninterrupted possession"* [to use the words of learned President's Counsel] does not, *by itself*, permit the drawing of a 'presumption of ouster' at some point during this period. Instead, there must be, in addition to such lengthy possession, some event or circumstances which justify the

Court taking a view that the possession had become adverse to the owner during this period. Thus, in ABDUL MAJEED vs. UMMU ZANEERA [61 NLR 361 at p. 381], H.N.G.Fernando J, as he then was, stated *"It is significant that, in these and other cases, there was almost invariably reliance, even by unsuccessful possessors, upon some circumstance additional to the mere fact of long and undisturbed and uninterrupted possession, and that proof of some such additional circumstance has been regarded in our Courts as a sine qua non where a co-owner sought to invoke the presumption of ouster."*.

In the same case, K.D. De Silva J observed [at p. 373] that one of the reasons for drawing a 'presumption of ouster' where there has been exclusive possession by one co-owner for a very long time, is the likely absence of living witnesses who could speak to when there was denial of the rights of the other co-owners. In this regard, His Lordship stated *"The presumption of ouster is drawn, in certain circumstances, when the exclusive possession has been so long-continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time, in the distant past, there was in fact a denial of the rights of the other co-owners. The duration of exclusive possession being so long it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the case comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster."* This approach was also followed by Wimalaratne J in WALPITA vs. DHARMASENA [1980 2 SLR 183]. However, it is clear that, such a `presumption of ouster' cannot be drawn in the present case for the simple reason that both the defendant and her son testified and were in a position to state the basis on which the defendant claims to have commenced possessing the property adverse to and independent of the owner of the property.

The defendant has also placed much reliance on the decision of the Court of Appeal in SIRIYAWATHIE vs. ALWIS [2002 2 SLR 384] where Dissanayake J, then in the Court of Appeal, held that the defendant who had entered possession of the property as a licensee of the original owner had successfully prescribed to the property against a successor to that original owner. The defendant relies on Dissanayake J's citation of the statement by Withers J in ANTHONISZ vs. CANNON [3 CLR 65 at p. 67] that *"Once given exclusive power to deal with immovable property, if that power is continuously exercised without disturbance and interruption and without any act of acknowledgement of another's title for ten years previous to action brought, the animus possidendi shall be imputed to him who has so exclusively exercised that power, if he chooses to claim the property for himself, and a decree shall be awarded him accordingly."*. However, this statement by Withers J must be read as being qualified by the principle established in the line of decisions commencing from MADUANWALA vs. EKNELIGODA that an overt act is required to shed the character of subordinate possession by a licensee or an agent and start the running of prescription. In fact, in SIRIYAWATHIE vs. ALWIS, Dissanayake J stated [at p.388]

"…*it is necessary to bear in mind, that a person who has commenced possession in a subordinate and a dependent character, cannot claim to be adverse user of the property, until by ouster he changes his subordinate or dependent character."*. It should also be mentioned that the decision in SIRIYAWATHIE vs. ALWIS was based on a series of overt acts committed by the defendant including the defendant paying the rates and taxes to the Town Council and building extensive extensions to the original owner's house.

In the light of the established principle of law set out above - *ie:* that a licensee or agent or other person who commences possession of a land in a subordinate capacity must establish an overt act which commences the running of prescription in his favour - the learned Judge of the Court of Appeal erred when she held that *"Long undisturbed and uninterrupted possession" per se* constituted adverse possession against the plaintiff. The learned Judge has completely overlooked the fact that the defendant admits she entered possession as a licensee of Milliner Fernando.

Learned President's Counsel for the defendant has also submitted that the Court of Appeal was correct when it took the view that a party who relies on a defence of prescriptive title is not required to state in the answer the period over which prescriptive title was acquired. I cannot agree with this contention since it is settled law that, where a defendant raises a defence of prescriptive title in an action where the plaintiff claims a declaration of title to immovable property, the defendant must give, in his answer, sufficient details of the period over which such prescriptive title was acquired including the starting point from which adverse possession is claimed. This requirement is imposed because the plaintiff must be given notice of the nature of the claim of prescriptive title so that he can seek to meet it at the trial. The requirement that these details must be given in the answer is an application of the principle stipulated in section 40 (d) of the Civil Procedure Code that a plaint shall set out where and when a cause of action arose read with section 70 (e) of the Civil Procedure Code which imposes a similar requirement when a defendant makes a claim in reconvention in the answer.

Thus, in CHELLIAH vs. WIJENATHAN [54 NLR 337 at p. 342], Gratien J held *"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 fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognised by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years."*. In SIRAJUDEEN vs. ABBAS [1994 2 SLR 365 at p.370], De Silva CJ cited the aforesaid statement by Gratien J with

approval and went on to observe that, in the case before him, *" ….. the 1st defendant has failed to establish a starting point for his acquisition of prescriptive title. This too is another important lacuna in the 1st defendant's case."*.

Since it is settled law that a defendant who relies on a defence of prescriptive title in a *rei vindicatio,* is required to state, in his answer, the period over which prescriptive title was acquired, including the starting point from which adverse possession is claimed, the learned Judge of the Court of Appeal erred when she took the view that the defendant was not required to state the date on which she claims adverse possession commenced.

In the light of the aforesaid principles of law and since the defendant categorically admits that she entered possession as the licensee of Milliner Fernando, it is first necessary to examine the evidence to ascertain whether the defendant has proved that, by committing an overt act, she shed her character of a licensee and commenced adverse possession during the lifetime of Milliner Fernando or during the time his Estate was being administered prior to the Executrix of the Estate transferring the property to the plaintiff's father by "පැ 2" on 31st August 1978.

In this regard, the defendant and her son only say that, in or about the year 1957 or 1959, they entered the property and built a house thereon with the permission of Milliner Fernando and lived in the property with his permission. They go on to say that, from then onwards, no person has disturbed their possession of the property or claimed a right to the property or claimed a right to possess the property. However, neither the defendant nor her son say that they committed any overt act or made any statement to Milliner Fernando or the Executrix of his Estate which would have demonstrated to either of them that the defendant has cast aside the character of a licensee and, from then on, was possessing the property adverse to and independent of Milliner Fernando and his Estate. As mentioned earlier, no *"secret act"* by the defendant or secretly held intention in the mind of the defendant to acquire prescriptive title to the property, would have sufficed to start the running of prescription against Milliner Fernando and his Estate. As Bonser CJ stated in MADUANWALA vs. EKNELIGODA [at p.215] *"No secret act will avail to change the nature of his occupation."* and as Wigneswaran J held in FERNANDO vs. FERNANDO [1997 2 SLR 356 at p. 361] *"…an overt act is considered necessary to prove ouster since any secret intention to prescribe may not amount to ouster."*.

Thus, it is clear that the evidence of the defendant and her son is not at odds with the defendant's continued possession of the property in the character of the licensee of Milliner Fernando and his Estate. To the contrary, so long as the defendant preserved the *status quo* and appeared to possess the property as licensee and did not commit any overt act to demonstrate that she had shed the character of a licensee, Milliner Fernando and his Estate would not have any cause to disturb the defendant's possession or occupation of the property. To apply the words of Bertram CJ in TILLEKERATNE vs. BASTIAN, the defendant had not demonstrated to Milliner

Fernando and his Estate that the defendant had *"an intention on his [her] part to possess adversely"* and had not demonstrated *"a manifestation of that intention"* to Milliner Fernando and his Estate. On an examination of the facts of the present case, I also do not consider that the case before us is one in which a `presumption of ouster' can be correctly drawn due to very long and undisturbed possession since there is a total absence of any event or circumstances which would justify this Court taking a view that the defendant's possession of the property had become adverse to Milliner Fernando and his Estate at any point of time.

In these circumstances, the defendant cannot claim to have prescribed to the property during the lifetime of Milliner Fernando or while his Estate was being administered. It is also seen from the text of the Executor's Conveyance marked "පැ 2" that Milliner Fernando's Estate was being administered up to the time Executor's Conveyance marked "පැ 2" was executed on 31st August 1978.

Therefore, it follows that the defendant cannot claim to have prescribed to the property up to 31st August 1978 when the Executor's Conveyance marked "පැ 2" transferred the property to the plaintiff's father.

Next, it seen from the facts narrated earlier that, on 31st August 1978, the plaintiff's father has purchased the property with the defendant being the incumbent licensee. Therefore, as far as the plaintiff's father was concerned, the defendant was holding the property as his licensee when he acquired title to the property. The plaintiff's father had taken no action to terminate that license or to request the defendant to leave the property and it can be reasonably presumed that the plaintiff's father was happy to permit the *status quo* to continue and to allow the defendant to continue in occupation of the property as his licensee.

In these circumstances, if the defendant wished to transform her possession from that of a licensee to possession adverse to or independent of the title of the plaintiff's father, the defendant was mandatorily obliged to commit some overt act which served to demonstrate to the plaintiff's father that she did not acknowledge any right he had to the property and that she was possessing the property adverse to and independent of the plaintiff's father. As stated earlier, a *"secret act"* or a *"secret intention"* on the part of the defendant would not suffice to render the defendant's possession of the land adverse to or independent of the title of the plaintiff's father.

In JAYANERIS vs. SOMAWATHIE, Weeramantry J stated [at p. 207-208] that *"clear and cogent evidence"* and a *"high order of proof"* is required to establish adverse possession where an agent or a licensee claims prescriptive title against the owner who placed him in possession of the property. In GUNASEKERA vs. TISSERA [1994 3 SLR 245 at p.257], Fernando J referred to a rule that *"stronger evidence would be required"* to establish adverse possession among co-heirs. In SIRAJUDEEN vs ABBAS [at p.371], De Silva CJ cited, with approval, a passage from Walter Pereira's

Laws of Ceylon, which states *"As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by court. Peynis v. Pedro [3 SCC 125]. In the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the 1st defendant to a decree in his favour in terms of section 3 of the Prescription Ordinance.".* In KIRIAMMA vs. PODIBANDA [2005 BLJ Vol.XI 9 at p.11], Udalagama J observed that *"…considerable circumspection is necessary to recognise prescriptive title as undoubtedly it deprives the ownership of the party having paper title."*. His Lordship referred [at p.13 and at p.14] to the need for *"assertive evidence of adverse possession as against mere evidence of occupation"* and *"assertive and cogent evidence*" to prove the acquisition of prescriptive title.

When these standards are applied to the present case, it is seen that the defendant was required to adduce adequate and reliable evidence to establish, on a balance of probability, that she had committed some overt act or acts which demonstrated to the plaintiff's father that she did not acknowledge that he had any right to the property and that she was possessing the property adverse to and independent of his title to the property.

However, the evidence of the defendant and her son does not suggest that they did any such thing. In this connection, the defendant does not claim that she made any statement to the plaintiff's father that she does not accept his title. The defendant does not claim that, after the plaintiff's father obtained title, she made any alterations to the property or paid the rates and taxes in respect of the property in her name or obtained electricity and water connections in her name. The defendant has not led the evidence of the Grama Sevaka or her neighbours to suggest that she was considered to be holding the property in her own right after the property was transferred to the plaintiff's father in 1978.

It can be reasonably assumed that, if the defendant did have evidence on the aforesaid lines which supported a claim that she possessed the property adverse to and independent of the plaintiff's father, she would have produced such evidence. The very fact that she did not do so or could not do so, raises the inference that the defendant had not changed the character of her possession from that of a licensee after the plaintiff's father obtained title on 31st August 1978. This is a fit case to draw the presumption set out in Illustration (*f*) to section 114 of the Evidence Ordinance *"that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it."*.

Further, the judgment in D.C. Colombo Case No.6938/RE marked "වී 2" reveals that, some years after the plaintiff's father gifted the property to the plaintiff, the plaintiff's mother instituted that action against the defendant praying for a declaration of title to the property and the ejectment of the defendant and that the plaintiff's mother's action was dismissed solely because she had no title to the property. Thus, this judgment has no adverse impact on the plaintiff's case which is before us. It is also seen that the defendant has not produced the plaint, her answer or the proceedings in D.C. Colombo Case No.6938/RE to support her claim in the present case. Here too, it can be presumed that presenting this evidence would have been unfavourable to the defendant's claim [in the case before us] that she has prescribed to the property.

Thus, the defendant has failed to discharge the burden placed on her to prove that she committed some overt act or acts which demonstrated that she did not acknowledge the plaintiff's father's title to the property and that she was possessing the property adverse to and independent of the plaintiff's father. To again apply the words of Bertram CJ in in TILLEKERATNE vs. BASTIAN, the defendant has not demonstrated to the plaintiff's father that the defendant had *"an intention on his [her] part to possess adversely"* and had not demonstrated *"a manifestation of that intention"* to the plaintiff's father.

Instead, in the aforesaid circumstances, it is evident that the defendant continued to hold the property as a licensee *after* the plaintiff's father acquired title on 31st August 1978 by the Executor's Conveyance marked "ඇ 2" and that the defendant did nothing to change that *status quo* until the plaintiff's father gifted the property to the plaintiff on 27th October 1981 by the Deed of Gift marked "ඇ 2".

Next, prescription could not *commence* to run against the plaintiff *after* he obtained title to the property on 27th October 1981 by the Deed of Gift marked "ඇ 2" since it has been established that the plaintiff was a minor at that time. That is because section 13 of the Prescription Ordinance stipulates that prescription could not begin to run against the plaintiff so long as he remains a minor.

It is seen from the plaintiff's birth certificate marked "ඇ 4" that the plaintiff attained majority on 20th January 1990. Therefore, at best, prescription could commence to run in the defendant's favour against the plaintiff only from 20th January 1990 onwards. However, this action has been instituted by the plaintiff on 26th February 1992 – *i.e.:* a mere two years and a month after prescription could have, at the earliest, commenced to run against the plaintiff.

Thus, it is clear that the defendant has not possessed the property adverse to and independent of the plaintiff for a period of ten years as required by section 3 of the

Prescription Ordinance and that, therefore, the defendant cannot succeed in her claim that she holds prescriptive title to the property.

The learned Judge of the Court of Appeal erred when she held that the defendant had acquired prescriptive title and set aside the judgment of the District Court granting the plaintiff the reliefs prayed for in the plaint. The learned Judge of the Court of Appeal failed to realise that the defendant had placed before Court only the flimsiest of evidence and that the defendant had not adduced any reliable evidence to prove she had acquired prescriptive title after, admittedly, commencing possession of the property as a licensee.

Accordingly, questions of law no.s (i) to (v) are answered in favour of the plaintiff. In view of this conclusion, it is not necessary to consider question of law no. (vi).

This appeal is allowed and the judgment dated 20th June 2007 of the Court of Appeal is set aside. The judgment of the District Court is affirmed. In the circumstances of the case, the parties will bear their own costs.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree

Judge of the Supreme Court

L.T.B. Dehideniya J.
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.

SC APPEAL No. 55/2013
SC/HCCA/LA/No. 492/2012
SP/HCCA/KEG/No. 829/11
D.C.Kegalle No. 5276/L

Kambapolegedara Sumith Jayalath,
Walgama, Yatagama, Rambukkana.

Plaintiff

Vs

Athaudagedara Siriyawathie,
Walgama, Yatagama, Rambukkana.

Defendant

AND

Kambapolegedara Sumith Jayalath,
Walgama, Yatagama, Rambukkana.

Plaintiff Appellant

Vs

Athaudagedara Siriyawathie,
Walgama, Yatagama, Rambukkana.

Defendant Respondent

AND NOW BETWEEN

Athaudagedara Siriyawathie,
Walgama, Yatagama, Rambukkana.

Defendant Respondent Appellant

Vs

Kambapolegedara Sumith Jayalath,
Walgama, Yatagama, Rambukkana.

Plaintiff Appellant Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRIYANTHA JAYAWARDENA PCJ. &
L. T. B. DEHIDENIYA J.

COUNSEL : Rasika Dissanayake with Chandrasiri Wanigapura for the Defendant Respondent Appellant.
Dr. Sunil Cooray with Sudarshani Cooray For the Plaintiff Appellant Respondent.

ARGUED ON : 23. 10. 2018.

DECIDED ON : 21. 11. 2018.

S. EVA WANASUNDERA PCJ.

This Court had granted leave to appeal on the questions of law pleaded by the Defendant Respondent Appellant (hereinafter referred to as the Defendant) in the Petition dated 09.11.2012 in paragraph 12(a) to (g) which read as follows:-

(a) Whether the judgment dated 02.10.2012 of the **Civil Appellate High Court of Kegalle is contrary to law** and/or against the materials placed before Court?

(b) Whether the Civil Appellate High Court has erred in law by failing to appreciate the fact that the Petitioner has duly **established her right of way** over the Respondent's land?

(c) Whether the Civil Appellate High Court has erred in law by disregarding the correct findings of the District Judge of Kegalle as to the fact that the Petitioner has acquired **the prescriptive title to the access road in dispute?**

(d) Whether the Civil Appellate High Court has erred in law by failing to appreciate the fact that the **Respondent as well as the surveyor** who prepared the plan marked as **Pe 8** have admitted that there is **no alternative road way** to have access to the Petitioner's land and therefore the Petitioner is entitled to use the said access road as a way of necessity?

(e) Whether the Civil Appellate High Court has erred in law by disregarding the fact that the **dispute arose** due the fact that the Respondent **obstructed** the Petitioner's **one and only access road** by erecting a fence?

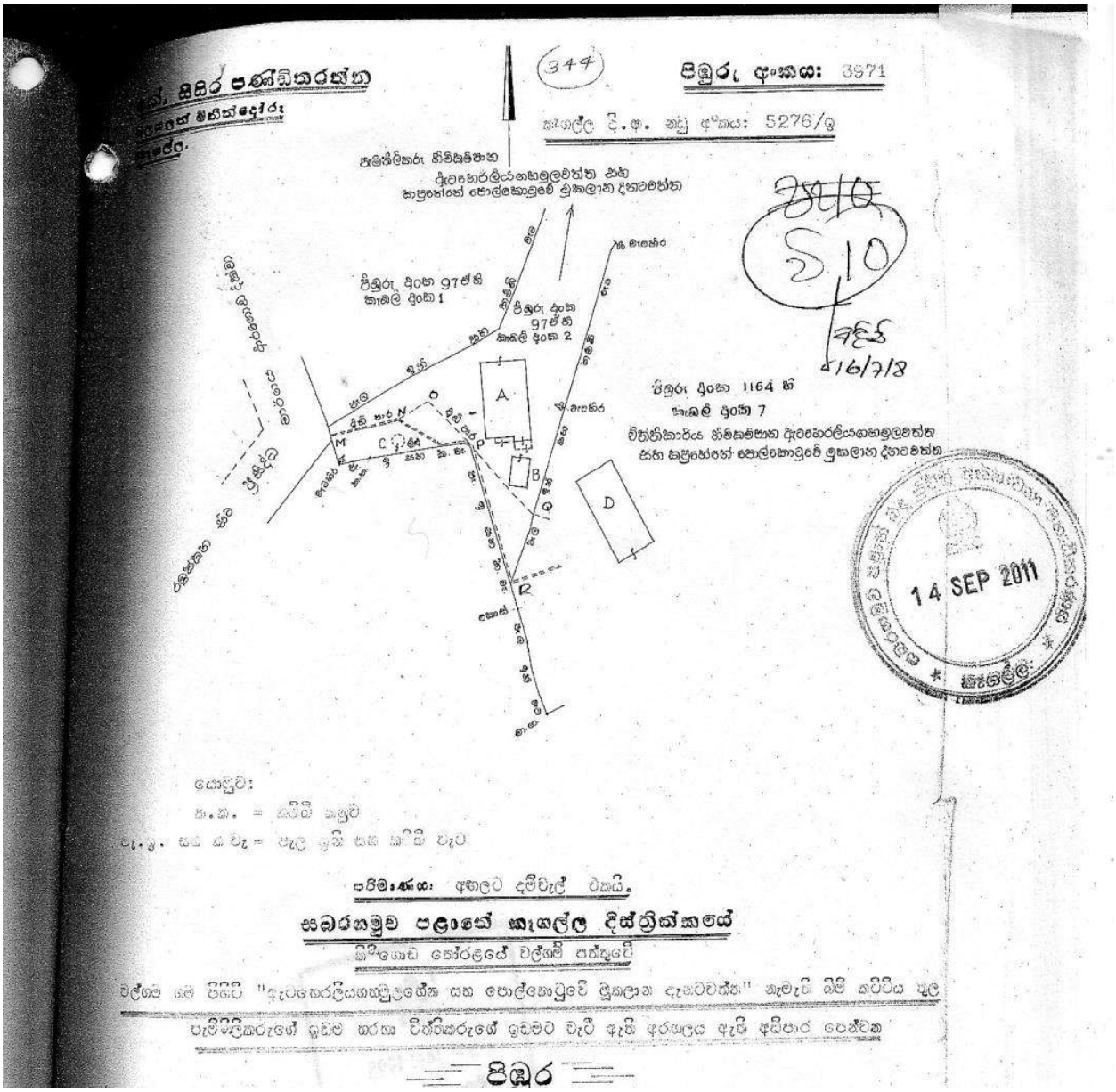
(f) Whether the Civil Appellate High Court has erred in law by disregarding the fact that the Respondent has **not rebutted the evidence of the Petitioner** in any manner?

(g) Whether the Civil Appellate High Court has erred in law by **failing** to appreciate the fact that there is **no valid reason** whatsoever to **interfere with the judgment of the District Judge?**

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) Jayalath and the Defendant Siriyawathie have been neighbours living in the houses built on the allotments of land **adjacent to each other**. Both of them have quite good legal title to the said allotments of land, namely Lot 2 of Plan No. 97A made by T.M.T.O. Tennekone Licensed Surveyor and Lot 7 of Plan No. 1164 made by J. Aluwihare Licensed Surveyor. Those allotments are indicated **in the same way** by the Court Commissioner in the present case in **Plan No. 3971 dated 31.10.1994** done by the Court Commissioner, Licensed Surveyor K. Sisira Panditaratne who did the survey on a Commission issued by the District Court. This Plan has been marked in evidence before the District Court of Kegalle **as V10 as at page 344** of the brief before this Court. The extent of the land of Jayalath is,

1 Rood and 18.4 Perches. The extent of the land of Siriyawathie is, 3 Roods and 18 .7 Perches.

The report of the Commissioner is annexed to the Plan No. 3971. It states that the Defendant Siriyawathie claims that she earlier went to her house marked D on her land through the dotted line marked as M ->N ->O ->P ->Q in this Plan 3971 but **now she walks** on the foot path marked as **M->N->P->R as a dotted line**. I would like to reproduce the said Plan as follows:-



Siriyawathie lived in the house in Lot 7 as indicated in the Plan above and Jayalath lived in the house on Lot 2 as indicated in the Plan above. The descriptions of the said allotments are specifically described in the Commission Papers filed of record. Siriyawathie's last title deed No. 3950 is dated **27.09.1988** and attested by K. Wijayasundera Notary Public. The land was transferred by the Vendor,Muhandiram Rallage **Bandara Menike to Siriyawathie** subject to the life interest of Athauda Gedera Tikiribanda for a consideration of Rs. 10000/- paid to the Vendor by both of them. It is marked as **V7** in evidence at the trial. The Plaintiff Jayalath had bought the land by Deed No. 6686 dated **30.07.1990** attested by H.L.A. Don Henry Seneviratne Notary Public. It is marked as **P6** before the trial court. So, it is obvious that Jayalath became the owner of that land after Siriyawathie had bought and built a house thereon, according to her capability without electricity and water service etc.

According to Siriyawathie's evidence, she had been on her land from 1983 when Bandara Menike had given her permission to be in possession of the land. She had got married and then only she got title to the said land, by way of the deed of transfer. She had built the house on the land and in her evidence, she says that the material to build was taken by putting them on the head and walking on this three feet wide walking path up to the place where the house was built. She states that she has been using the roadway which is the subject matter of this action from the year 1983. She had lost her husband when the children were very young and now lives in this house with her two children.

The Plaintiff had bought the adjacent land in 1990 and had lived in a small hut on the land which is shown marked as B, even in the Plan which was made by the Court Commissioner. Later on, he had built a new house marked as A and after that only the Plaintiff had not liked the Defendant using the path running close to the back side of the new house. The water well marked C on the Plan does not have any water in it and it is not used to draw water from, by any person. It is an empty well. I observe according to the Plan 3971 that Siriyawatie's access path runs mostly along the boundary of the Plaintiff's land. It is at the commencement of the foot path that Siriyawathie enters through the middle of the boundary of the Plaintiff's land.

The width of the foot path according to Siriyawathie is three feet. A small portion of the Eastern side of the Plaintiff Jayalath's land opens to the public road from Rambukkana to Aragoda. **The said land is on a higher level than the road.** The evidence before the trial court shows that the Defendant Siriyawathie had gone down, stepping out of the Plaintiff Jayalath's land on to this public road **over two or three coconut tree trunks placed downward** at an angle from the high land to the flat road on a declining foot path. It can be imagined as a man-made ditch sloping down, on the soil, running downwards with coconut tree trunks to walk on, for convenience from the higher elevation to the road on the flat lower elevation.

The Police had filed a case under Section 66 of the Primary Courts' Procedure Act in the Magistrate's Court even during the former years, under case number 15012/94 when the person named Abeywardena the predecessor in title to the said land prior to the Plaintiff got title obstructed this path. He had closed the path by putting up a fence blocking the path to the Defendant's house. At that time, the then Magistrate had granted Siriyawathie the right to use the said road way leading to her land and the house. From then onwards for certain and prior to that time, she had been using the said roadway.

The Plaintiff **did not close the roadway** with a fence until the time he himself built a new house. After he built the new house, on or around **18.10.1993**, the Plaintiff had put up a **fence obstructing the roadway** to the house of the Defendant. Siriyawathie had complained to the Police on that very day, i.e. on 18.10.1993 . The Police Officer who visited the place on the next day, i.e. on 19.10.1993, had returned to the Police and entered his observations in the Information Book that **the obstruction was done with barbed wire and drawn a sketch as well**. These two entries in the IB has been marked as **V2** and **V8**. On the next day, i.e. on 01.11.1993, the Plaintiff had **denied** in his statement to the Police at the inquiry held by the Police, **that there is a road way** over his land. The Police Officer had seen the specific roadway and the obstruction and noted it down in his notes with a sketch of the same.

The stance taken up by the Plaintiff Jayalath is that there is **another roadway** from some other side to reach Siriyawathie's house.

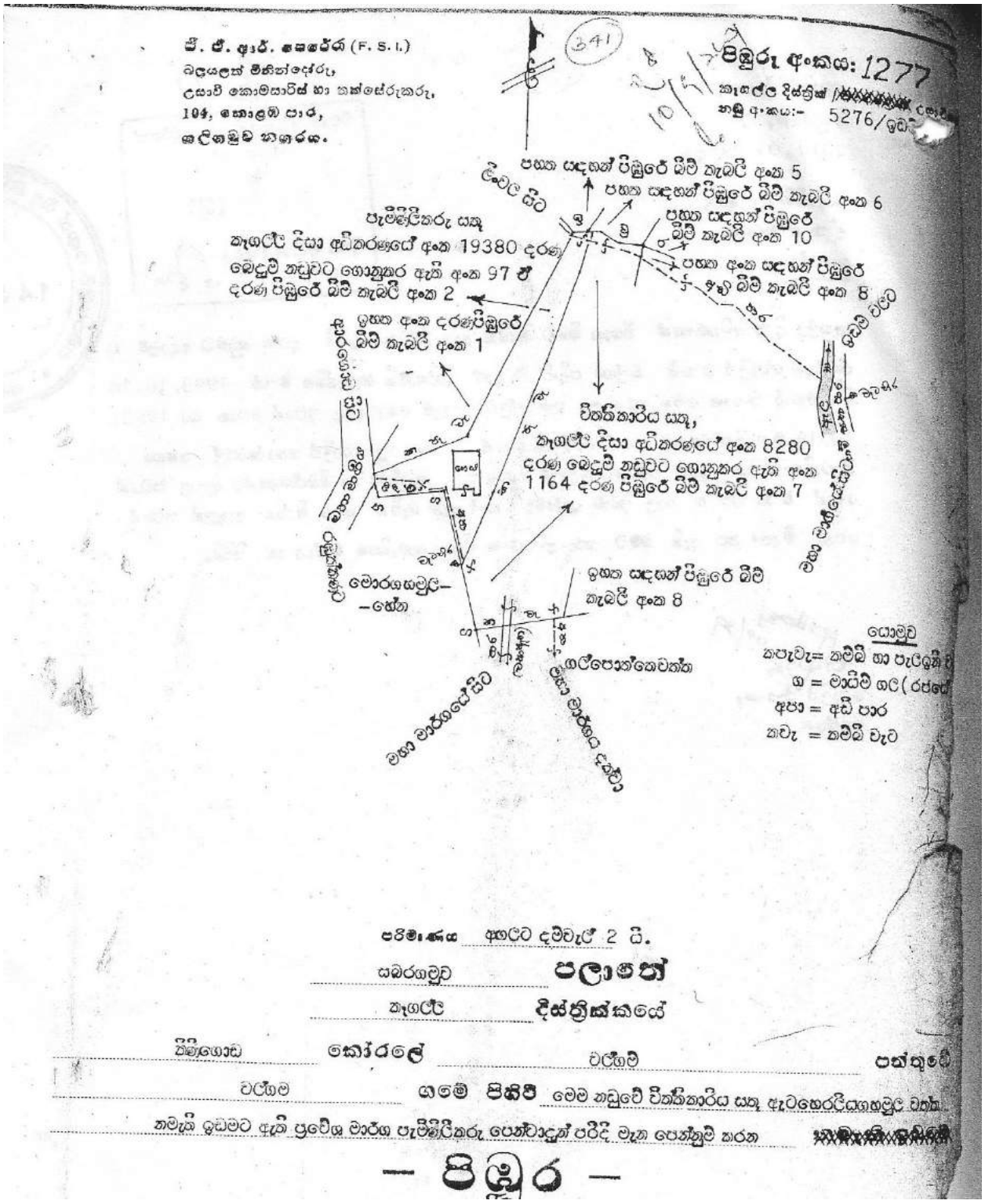
However the Plaintiff had moved Court to grant another Commission to another Surveyor to demonstrate that there is some other access road to the Defendant's land. The trial Judge had allowed that application and on 16.07.1994, the second Court Commissioner and Licensed Surveyor G.A.R.Perera had drawn Plan No**. 1277 dated 23.07.1994**. In that document, the Court Commissioner specifically states that **it is drawn as shown to him by the Plaintiff.** On the face of the said Plan there is **no showing of a specific clear roadway reaching the house and land of the Defendant**.

This Plan was marked and produced as **Pe 8.** This Surveyor G.R.Perera had given evidence on 10.05.2004 and his evidence commences in page 148 of the brief. In cross examination at page 154 , the Surveyor who had drawn Pe8 had stated that "in Pe8, the **house of the Defendant is not shown**"; " the roads shown on that plan are **not shown to be connected to public roads" etc.** The evidence of the said surveyor **does not show at all that there exists another roadway** connecting the Defendant's house and land to any other main public road. He accepts that he has not seen or does not know any other road **but stresses that he had drawn the Plan 1277 according to what the Plaintiff had told him.**

The Plaintiff had got down a driver of a tractor to give evidence on his behalf and his evidence was that he brought bricks, cement etc. in the tractor which belonged to some other person. He was employed to be the driver of the tractor by the owner of the tractor. His evidence was to the effect that he brought the tractor over a broad motorable path over some land from the Gamsabha road which is towards the east of the Plaintiff's land , with material **to build the house of the Plaintiff.** He does not say that he brought anything for the Defendant Siriyawathie. His evidence does not show any other road to Siriyawathie's house. He only confirmed that Siriyawathie lives next door to the Plaintiff and that he has seen Siriyawathie living in the house nearby, when he came in the tractor with the building materials for the Plaintiff.

However, I observe that the Plaintiff has tried to impress upon the Court that there is another access but I feel that this alleged access road if at all is over many many blocks of land with many other names such as Galpottawatta and Kapuhene Polkotuwe Mukalana etc. Those lands belong to many other persons.

Anyway, I would like to reproduce the said Plan No. 1277 marked as Pe 8 as follows:



It is only the Plaintiff who believes and suggests that there is an existing road over which even motor vehicles and tractors can be driven on but the Plaintiff has failed to prove or show any such road even through the Plan drawn by the Commissioner who had surveyed the area, that there exists any other access road from any public road up to the Defendant's house.

It is observed by me that the Surveyor Perera has not shown any road to reach the Defendant Siriyawathie's house and land. Even in the said Surveyor's evidence he specifically states that there was a *visible roadway/path on the ground* over **some land** but **does not say** over whose land or over what land etc. It looks like such a pathway had been there over **other people's lands, if at all** and even though the Surveyor himself has said so in evidence, **he has not done his duty in marking the roadway/path from any public road to the Defendant's house** through and over any other person's lands. He has not done what the Court has directed him to do so by the commission which was allowed at the request of the Plaintiff.

The Defendant has asked for this foot path of 3 feet wide as " a roadway of necessity" which allegedly she has gained by way of having used the same from 1983.

The Defendant Siriyawathie was cross examined by the Counsel for the Plaintiff and I observe that her only 'problem' was trying to save the 'foot path' she has been using to reach her house from the public road. She stated that she is only asking for the foot path she has been using to reach her house. When cross examined she was asked whether there are other 'roads' or 'paths' anyone can use to reach her land. At page 223 of the brief her answer to that is given. She says;
" there is a pathway that people use, i. e. through and over Walgama estate, and thereafter over A.R.Karunaratne's land, and then over Kulatunga Bandara's land and even thereafter over Galpotta land which is occupied by a lot of people who live in several allotments of Galpotta land. It is a long time ago that such a foot path existed."
At page 213 of the brief, the Defendant states that " there is **no other path** or **roadway at all** to reach my house. I am in need of the road **for that reason alone**."

She is not asking for a wide roadway but **only a foot path of 3 feet wide**. The walking distance over the foot path from the main public road to the land of Siriyawathie is only about 125 feet, according to the evidence before the trial court.

A retired Grama Seveka of 76 years of age had given evidence on 03.12.2008. He had been the Grama Seveka for about 13 years in charge of an area which included the houses and lands of the parties. His evidence commences at page 233 of the brief.

At page 234 he states as follows:-

ප්‍ර. කොහෙන්ද ඒ අඩිපාර වැටිලා තිබුනේ. ප්‍රධාන පාරට සම්බන්ධ වෙන්නේ කොහොමද ?
උ. ප්‍රධාන පාරේ ඉඳලා වැට අයිනෙන් වගේ පැනලා යන්න පොල් කොට දාලා තිබුනා.
ප්‍ර. කාලේ ඉඩමට යන්නද පොල්කොට දාලා තිබුනේ ?
උ. ජයතිලක සහ සිරියාවතීගේ වත්තට යන්න.
ප්‍ර. සුමිත් ජයතිලක මහතා ?
උ. ඔව්.

At page 236 he states as follows:-

ප්‍ර. අරගොඩ පාරේ තමා කියන හැටියට පැමිනිලිකරුගේ ඉඩමට පොල්කොට දාලා තිබුනු පාර හැර වෙනත් පාරක් විත්තිකාරියට යන්න තිබුනාද ?
උ. නැහැ.
ප. ඔය ග්‍රාම නිලධාරී වසමේ තමුන් දිර්ඝ කාලයක් සේවය කර තිබෙනවා ?
උ. ඔව්.

At page 238 he states as follows:-

ප්‍ර. තමා කියන්නේ විත්තිකාරියට සුමිත් ජයතිලක යන අයගේ පාරෙන් විතරද යන්න තියෙන්නේ ?
උ. ඔව්. වෙන පාරක් නැහැ.

According to this Grama Seveka's evidence, it is clear that this foot path had been used by the Plaintiff and the Defendant to reach their lands which are adjacent to

each other and that the Defendant has no other access other than this foot path to her land and house thereon.

It is obvious that the Plaintiff has tried to present to Court the idea that the Defendant can use another way to reach her land without using the foot path which she is claiming. Yet , the surveyor has not shown that path at all in his plan on the commission issued to him. It seems a very awkward suggestion to say that the Defendant can walk over many person's lands and reach her house rather than use the foot path which she has been using even prior to herself building her house. I find that the Plaintiff has failed to prove that there is another alternative road for the Defendant to reach her house.

The learned High Court Judges of the Civil Appellate High Court has failed to analyze the evidence before the trial court in the proper way. The big picture created by the evidence of all the witnesses before the trial court has to be seen with eyes wide open and the essence has to be drawn thereafter, before deciding the matter in issue. It is the wrong analysis of the evidence by the High Court Judges which has ended with the conclusion that the Defendant has an alternative road to reach her house.

In the case of ***Alwis Vs PiyasomaFernando 1993, 1 SLR 119***, Chief Justice G.P.S. de Silva has stated that, " It is well established that the findings of primary courts are not to be lightly disturbed in Appeal."

Yet, the Civil Appellate High Court has gone against the factual findings of the District Judge who had seen and heard the evidence in the case and had weighed the demeanor of the witnesses prior to concluding that the foot path over the Plaintiff's land along the boundary of the said land was the only access to the Defendant's house. The High Court has erred in arriving at the conclusion that there is another access road, when the weight of the evidence showed otherwise.

The Counsel for the Plaintiff **argued** that the ratio decidendi in the case of ***Suppu Namasivayam vs Kanapathipillai 32 NLR 44*** is quite appropriate to the case in hand and on the same line of reasoning, the Defendant is not entitled to the right of way sought on necessity. In the said case it was held that " An owner of land, **who by his own act deprives himself to a road**, is not entitled to claim a way of

necessity to the road over the land of another." In this particular case , Justice Maartensz had analyzed the evidence and found out that , the Plaintiffs in that case who had sought to a 'roadway of necessity', had by themselves gifted Lot A which belonged to them over which they quite well **had the right of way** to their land and **thereafter sought to get a right of way of necessity over another outsider's land.** It was held that they were not entitled to use that roadway out of necessity.

In the case in hand, Siriyawathie is supposed to have walked over very many lands belonging to others and the Plaintiff Jayalath is of the view that Siriyawathie should walk over all those lands and reach her house as she had used to do a long time ago. The Plaintiff makes accusations against Siriyawathie pointing out that she had fallen out with one of the owners of one of the lands and that is the reason she is now not using that roadway and asking for the roadway across the Plaintiff's land. I am of the view that the facts of the case in ***Suppu Navasivayam Vs Kanapathipillai (supra***) is different from the case in hand and as such, the Defendant Siriyawathie's need for the right of way she had been continuously using cannot be compared to the prayer for such a right in the reported case.

In ***MohottiAppu Vs Wijewardena 60 NLR 46*** it was held that " 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 ***Fernando Vs De Silva 1928, 30 NLR 56*** it was held that " The owner of a land which has access to the high road by a path cannot claim a cart way unless the actual necessity of the case demands it."

On a balance of probabilities of the evidence of many witnesses before the trial judge as well as the documentary evidence brought out by the two commissions issued to two licensed surveyors by the trial court, it is amply proven that the Defendant has been using the path from around the year 1983 and that it has been used as a roadway of necessity by the Defendant. There does not exist any other roadway to her house and land.

I have considered the questions of law as enumerated above arising out of the Judgment of the learned Civil Appellate High Court Judges. I answer the questions of law in favour of the Defendant Respondent Appellant and against the Plaintiff Appellant Respondent.

I hold that the High Court Judges have erred in their judgment. I do hereby set aside the Judgment of the Civil Appellate High Court of Kegalle dated 02.10.2012 and I affirm the judgment of the learned District Judge of Kegalle dated 20.01.2011.

The Appeal is allowed with costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J.
I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under Section 5C Of the High Court of the Provinces (Special Provisions) Amended by Act N0.54 of 2006.

SC APPEAL No:-56/2015

SC (HC) CALA No:- 326/2012

WP/HCCA/MT 103/2008(F)

D.C.Mt.Lavinia 2068//05/L

BEFORE:- PRIYASATH DEP,PC,CJ.

SISIRA J. DE ABREW, J.

H.N.J.PERERA, J.

COUNSEL:- Manohara de Silva, PC with Boopathy Kahathuduwa

For the Plaintiff-Appellant-Appellants

M.R.M.Fazeem instructed by K.Farook for the Defendant-Respondent-Respondent

ARGUED ON:- 15.01.2018

DECIDED ON:- 22.03.2018

H.N.J.PERERA, J.

The Plaintiff-Appellant-Appellants (here-in-after referred to as Plaintiffs) instituted this action against the Defendant-Respondent-Respondent (here-in-after referred to as Defendant) in the District Court of Mt.Lavinia seeking inter alia for a declaration that the Plaintiffs are the lawful owners of the property described in the 2nd schedule to the plaint, to eject the Defendant and all those persons holding under her from the said premises and also to recover damages.

It was the position of the Plaintiffs that the said premises in suit was originally rented out by one S.M.Sisilin Gunawardene in 1978 to A.C.M.Hussain, who lived with his family including the Defendant. Further the Plaintiffs claim that the said Hussain defaulted the payment of monthly rent to Sisilin Gunawardene and the said Sisilin Gunawardene consequently by quit Notice dated 25.07.2003 terminated the said tenancy but the said Hussain continued to be in occupation and thereafter the Plaintiffs on 21.02.2005 sent another Quit Notice and demanded the said Hussain to vacate the said premises in question on or before 31st May 2005 and to hand over vacant possession of the same to the Plaintiffs. It was the position of the Plaintiffs that this was not a tenancy action at all, but a rei vindication action based on the ground that the Defendant was a trespasser for the reason that there was no tenancy agreement with the Defendant at all.

The Defendant's position was that the original tenant Hussain who was her father died on 07.03.2005 and on the death of her father she became the statutory tenant of the premises thereafter. It was the position of the Defendant that on her father's death as the lawful heir of her father she requested the 1st Plaintiff to accept her as their tenant and sent a money order for Rs 200/- being the rent for the month of April 2005. The Defendant further claimed that the Plaintiffs in response to the said

request failed to attorn the Defendant as their tenant and even denied the fact that the Hussain (original tenant) was their tenant by letter dated 16.05.2005. After trial the learned trial Judge delivered his judgment on 29.08.2008 dismissing the plaintiffs' action with cost and held that the Defendant has succeeded as statutory tenant in relation to the premises in question. The finding of the trial Judge was that the above action cannot be for a Declaration of title as the original defendant (Hussain) had come to the premises as a tenant and after the death of the original tenant the Defendant became the statutory tenant of the Plaintiffs.

Being aggrieved by the said judgment of the learned trial Judge the Plaintiffs appealed to the Civil Appellate High Court of Mt.Lavinia and the said Court too dismissed the appeal of the Plaintiffs holding that the Learned trial Judge has arrived at a correct conclusion that the proper cause of action for the plaintiffs would have been an action in terms of the Rent Act. Being aggrieved by the said judgment of the Civil Appellate High Court of Mt.Lavinia the Plaintiffs 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 12 (b), (c), (d), (e), (f),(g), (h), (i), and (j) of the Petition dated 09.08.2012.

12(b) the learned judges of the High Court erred inholding that the Plaintiff cannot maintain this action for a declaration of title and that the action should have been filed under the Rent Act.

12(c) the learned judges of the High Court and the District Court erred by holding that the Defendant has succeeded to the tenancy of A.C.M.Hussain in terms of the provision of Section 36 (2) of the Rent Act as amended and in the circumstances the Plaintiffs ought to have taken steps under the Rent Act to eject the Defendant.

12(d) the learned judges of the High Court failed to appreciate and/or consier the fact that the deceased A.C.M.Hussain and/or all those claiming under him including the Defendant had completely acted contrary to and/or in violation of the contract of tenancy by failing and/or neglecting to pay monthly rent from on or about January 2000 and by denying the Plaintiffs title.

12(e) the learned judges of the High Court failed to appreciate and/or consider the fact that the contract of tenancy between Sisilin Gunawardene and A.C.M.Hussain had terminated by A.C.M.Hussain's conduct upon failing and/or neglecting to pay monthly rent and thereby fulfil his obligations as tenant,

12(f) the learned judges of the High Court failed to appreciate and/or consider the fact that the deceased A.C.M.Hussain and/or all those claiming under him including the Defendant are estopped from claiming tenancy when they disputed and/or denied the title of the Plaintiffs,

12(g) the learned judges of the High Court erred by mistakenly holding that the A.C.M.Hussain was the original Defendant and the present Defendant is the substituted Defendant. No action was filed against A.C.M.Hussain. Action was filed only against A.C.M.Hussain's daughter who was in unlawful occupation of the premises in suit.

12(h) the learned judges of the High Court erred in law and in fact by holding that the Defendant is a lawful tenant of the premises in suit,

12(i) the learned judges of the High Court erred in law and in fact by holding that the Defendant is a lawful tenant of the premises in suit when (a) the Defendant's father failed and/or neglected to pay monthly rent and breached and/or terminated the contract of tenancy and (b) the Defendant denies the title of the Plaintiffs,

12(j) the learned judges of the High Court erred in failing to consider that the answer to issue No.28 was wrong in as much as the Defendant denied the Plaintiffs title in paragraph 04 of the answer and thereby failed to appreciate that the Plaintiffs were entitled to judgment in their favour.

Although the general rule is that a contract cannot bind a person who is not a party to it, a person may by contract not only bind himself but may bind his heirs, executors and administrators. (Kuruneru V.Alim Hadjiar 61 N.L.R 277.)

Basnayake, C.J. in Abdul Hafeel V.Muttu Bathool (1957(58 N.L.R. 409 set out the principle in the words of Van Leeuwen:-

(Van Leeuwen in Censura forensic, Pt.1BK.IV ch.111s.3-Barber's translation, P 12)

"We covenant for ourselves and for our heirs; not for others, unless either it is to the interest of the covenantor; or it is a contract with regard to restoring to a third party his rightful property, or with regard to giving up his own property to another; or unless the covenantor in under the *patria potestas* of the man for whom he covenants."

Even where there is no express stipulation in a contract of letting and hiring-

" At the death of either of the parties the contract of letting or hiring is not terminated, but passes to the heirs both of the lessor and the lessee until the time fixed arrives and this is so everywhere."

Thus it is very clear that **generally the death** of the **landlord** or the **tenant** does not terminate a contract of monthly tenancy.

It is common ground that the occupation of the premises in suit in this case commenced and continued as a monthly tenancy. It is not disputed

that the Defendant's father Hussain was the original tenant of one Sicilin Gunawardena. The said Hussain died on 2005. It is the position of the Defendant that her father continued to be the tenant of the said Sisilin Gunawardene until the time of his death. The plaintiffs had taken up the position that although the said Hussain was sicilin Gunawardena's tenant, he failed to pay rent and Sisilin Gunawardene thereafter terminated the said lease prior to the death of Hussain in the year 2003. The Defendant denies the fact that her father failed to pay the rent to Sisilin Gunawardena or that the said agreement was terminated before her father's (Hussain's) death.

In this case the original tenant Hussain died on 07.03.2005. The plaintiffs in their plaint took up the position that at the time of the death of the said Hussain he was not in occupation of the said premises in suit as a lawful tenant of Sisilin Gunawardene and therefore contended that the Defendant has no legal basis to be in occupation of the premises in suit.

It is not in dispute that Sisilin Gunawardene was the original landlord of the said premises in suit. It is the plaintiffs position that thereafter heirs of Violet Perera Chandrasiri Thero, K.Sunil Perera and K. Anura perera became the owners of the said premises and from them by deed of Gift bearing No 98 dated 10.05.2003 the Plaintiffs became the owners of the said premises. The plaintiffs admit the fact that said Hussain came to occupy the said premises in the suit as a tenant of Sisilin Gunawardene. Therefore it is manifestly clear that the Plaintiffs as new owners of the said premises had issued a Quit Notice on 21.02.2005 before the death of Hussain in March 2005. By the said quit notice the plaintiffs given time till the 31.05.2005 for Hussain to vacate and handover the vacant possession to the plaintiffs. Before the expiry of the said period of time Hussain had died. The present Defendant the daughter of Hussain had thereafter requested the Plaintiffs to accept her as their new tenant.

It is quite clear the plaintiffs had refused to accept the Defendant as their tenant. The plaintiffs had very clearly by the letter dated 16.05.2005 through their lawyer informed the Defendant that they do not accept the Defendant as their tenant and had returned the said money orders sent by the defendant to them, back to the defendant by registered post.

It is common ground that the occupation of the premises in suit in this case commenced and continued by the original tenant Hussain, as a monthly tenant. Therefore under the Roman Dutch law the general rule was that death of either party does not automatically terminate the lease.

But in Sellamuttu V. Medonza 1986 C.A.L.R.318 it was held that:-

"Where a tenancy is created by a person who has a **limited right** or **interest less than ownership** in the property, it will be effective for the period of his own contract but not beyond it.

Where a tenancy is created by a person who had **absolute title** to the property subsequent successors in title are bound by the tenancy."

"The absolute owner of property has obviously sufficient title to grant a lease of such property for any period. ….A person who has a real right in property less than ownership, that is, a jus in re aliena, but which comprises the use and occupation of the property, has, as a rule, sufficient title to grant a lease of the property which will be effective for the period of his own right but not beyond it. (George Wille, Landlord and Tenant, 4th ed. Pages.15, 17,18)

In Somaskandan Shivaraman Sellamuttu and another V. Titus Medonza C.A.L.R. , G.P.S.De Silva, J. re-affirmed this position by stating:-

"Where a tenancy is created by a person who has a **limited right or interest less than ownership**, in the property, it will be effective for the period of his own right but not beyond it.

Where a tenancy is created by a person who had absolute title to the property subsequent successors in title are bound by the tenancy."

Futher in Imbuldeniya V. D. De Silva [1987] 1 Sri.L.R. 367, it was held that:-

"A contract of letting is a contract whereby one party agrees to give another the use of a thing and the other party agrees to pay him a price (rent) in return. In order to grant a valid and effective tenancy a landlord must have sufficient legal title in the property to give to the tenant the right agreed upon. A person without any title to a particular piece of property may grant a tenancy thereof to another person. Such a tenancy is valid between the landlord and tenant but is not binding on the true owner.

Where the father of the plaintiff let out the premises to the defendant for his own benefit at a time when the plaintiff was not aware she was the owner and without her authority and not as her agent and the plaintiff neither acquiesced in nor adopted the letting, the defendant cannot claim the protection of S.22 (2) of the rent Act against the plaintiff.

It would be quite wrong to include within the definition of "landlord" any person **other than original lessor** or **someone who derives the title from the original lessor**. The term "landlord" is defined as the person for the time being entitled to receive the rent under the contract of tenancy. (Section 48 of the Rent Act) Such person need not necessarily be the true owner."

In Mohamed V. Public Trustee (1978-79) 1 Sri.L.R.at pg 4- Samarakoon, C.J., expounded the principle thus:-

"Under the Roman Dutch Law the general rule was that death of either party does not automatically terminate the lease. If the tenant or lessor

dies during the continuance of the lease, his heirs must carry out the contract. Except in the case of encumbered or other property, which the lessor does not possess in full ownership in which event the lease expires with the death of the lessor for when the right of the lessor comes to an end, the right of the lessee is also terminated since no one can transfer a greater right to another than he himself possess."

From the averments in the plaint it is clear that the said **Sisilin Gunawardene** who was the landlord of Hussain was **not the owner** of the said premises in suit. She has been the wife of one of the co-owners of this premises one Edmond Perera and had looked after the children of deceased Violet Perera and had merely looked after children and managed the affairs of the family. Therefore Sisilin Gunawardene who managed the affairs of the said children of deceased Violet Perera had rented out the said premises to Hussain the father of the Defendant who continued to occupy the said premises until his death. Before the death of the said Hussain, Sisilin Gunawardene in the year 2003 **terminated** the said contract by the Quit Notice dated 25.07.1003. It is the position of the Plaintiffs that the said Hussain failed to pay the rent from the year 2000 and the said letter was sent in 2003 by Sisilin Gunawardene terminating the said contract of tenancy.

The plaintiffs' position is that the said Sisilin Gunawardene has terminated the said contract of tenancy on 25.07.2003 and Hussain remained in occupation of the said premises as a **trespasser**. In the said Quit Notice marked P9 it is clearly stated that Hussain has failed to pay the rent for a number of years and that therefore he has no right to stay in the said premises and therefore to hand over the said premises to the new owners of the said premises, the Plaintiffs in this case. Although the Defendant has stated that her father paid rent regularly to Sisilin Gunawardene, no receipts were marked and tendered or any other document produced by the Defendant to show that her father had in fact

made any payments as rent to the Landlord Sisilin Gunawardene. In Jayawardena V. Wanigasekera and others [1985] 1 Sri.L.R 125 it was held that the best test for establishing a tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts.

At the time of the death of Hussain the Plaintiffs were the owners of the said premises and they have by the Quit Notice marked P 10 on 21.02.2005 given notice to Hussain to vacate the said premises before 31st May 2005. The tenant Hussain has died on 21.05.1005 few days prior to 31.05.2005.

Sisilin Gunawarene the landlord was not the owner of the said premises at the time she leased out the said premises to Hussain. Therefore it is very clear that the new owners, the **plaintiffs** were **not her heirs** who derive title to the said premises. Hussain had continued to occupy the said premises even after Sisilin Gunawardene had terminated the contract by the Quit Notice marked P9. There is nothing to show that Hussain had at any stage prior to his death has **requested the Plaintiffs to treat him** as their **tenant**. In the said Quit Notice marked P9 Hussain was not requested to pay the rent to the new owners but to quit the premises and hand over the said premises to the new owners. Hussain had merely continued to occupy the said premises until his death **without paying rent** to anyone.

According to Pothier's Treatise on the Contract of Letting and Hiring:-

"A lease is not dissolved by the death of one of the parties: but, in accordance with a rule common to all contracts, the rights and obligations arising from the lease pass to the person of his heirs, or to that of his Vacua Successio."

He gives two exceptions to this general rule, which is accepted by the writers on Roman Dutch Law, that:-

(1)Where the lessor's title was one for his life only, such as fiduciary interest or life interest , the death of lessor terminates the lease, and

(2)Where the lease is at the will of the lessor, or lessee, death of the lessor or lessee, as the case may be, terminates the lease. See Fernando V. De Silva (1966) 69 N.L.R 164-at pg 165)

The rule is subjected to the second exception, namely, in cases where the lease has not been made for a definite period, but for as long as the lessor may please. Such a lease is terminated by the lessor's death: For the same reason, where the lease was for as long as the lessee pleased, it ought to be said that it would be terminated by the death of the lessee.

In this case the said lease had been made for an indefinite period and the said lease was terminated by the original landlord Sisilin Gunawardene in the year 2003. By the said Quit Notice marked P9 Hussain was asked to hand over the premises to the new owners, the Plaintiffs. There is no evidence to show that Hussain had ever requested the Plaintiffs to accept him as their tenant. The evidence led in this case clearly establish that Hussain had simply continued to occupy the said premises without paying rent to anyone. He has died after receiving the Quit Notice marked P10 sent by the Plaintiffs in the year 2005. The contract between the landlord Sisilin Gunawardene and Hussain had come to an end after P9 in the year 2003. **Even if** one holds that the said lease agreement has not come to an end after the Quit Notice marked P9, as this is a contract between the Landlord Sisilin Gunawardene and the tenant Hussain for an indefinite period, the said lease will automatically expire after the death of Hussain in the year 2005. In the instant case there was no rights or obligations arising from the lease to pass to the heirs of Hussain (tenant).

In Imbuldeniya V. De Silva [1987] 1 Sri.L.R. 367, it was held that it is well settled law that a person may let to another, property without having

any right or title in it, and without any authority from the true owner. Such a letting is valid as between the landlord and the tenant. However the owner of the property is not bound by the letting of such property which is made without his authority or consent or subsequent ratification.

Wessels , J ., in Glatthaar V Hussan (1912 T.P.D.127) said-

“It is true that I may lease to you another’s land and if I do so you cannot question my title nor can I deny to you the right to holding the land against me., but this in no way prejudices the right of the true owner.”

The true owner is entitled to have the letting declared null and void and to an order evicting the person in occupation who claims to be the tenant. But, between the parties to the letting, the lease is binding, and they acquire the rights and become subject to obligations of landlord and tenant respectively.

According to common law as enunciated above, the tenancy which Sisilin Gunawardene granted to the defendant’s father Hussain will not bind the plaintiffs the true owners of the premises; the plaintiffs would be entitled to an order evicting the defendant who is a trespasser as against them.

One cannot say that there was privity of contract between Hussain and the Plaintiffs in this case. There is nothing to indicate that the Plaintiffs had ever indicated their willingness to elect Hussain as their tenant. In these circumstances, no question arose: the tenant’ occupation of the premises, after Quit Notice P9, was not as tenant under the new owners (Plaintiffs) but as a trespasser. No rent has been accepted by the Plaintiffs from Hussain at any time and they have all along refused to recognize Hussain as their tenant. The Defendant in her answer denying the title of the Plaintiffs stated that A.C.M.Hussain is her father and he

was in occupation of premises in suit bearing No.5 and he died on 7th March, 2005 and claimed succession to the tenancy under the provisions of Rent Act No.7 of 1972.

“There is no indication in the Rent Act that the legislature intended to overthrow fundamental principles of the common law.”

“In my opinion the provisions of the Rent Act apply only to those who are parties to the contract of tenancy and to those who derive title from them respectively” Sharvananda, C.J. –Imbuldeniya V. De Silva-[1987] 1 Sri.L.R 367 at page 373.

In Abdul Hafeel V. Muttu Bathool (1957) 58 N.L.R 409 Basnayake C.J. held that, on the death of a monthly tenant, the contract of tenancy terminates at the end of the month in which the tenant dies, and that the heirs or executors of the deceased tenant are not entitled to occupy the premises thereafter except on a fresh contract with the landlord or unless they can avail themselves of the provisions contained, respectively, in section 18 of the Rent Act and section 36 of the Rent Act.

In the present case there was no admission recorded by parties at the commencement of the case that the said premises is governed by the provisions of the Rent Act of 1972. The Defendant in paragraph 5 of her answer has taken up the position that the provisions of the Rent Act applies for the said premises and accordingly had raised an issue No.16 regarding the same at the trial.

The Defendant in this case seeks the protection of the Rent Act and if a person seeks the protection of the Rent Act, the burden is on that party to prove the necessary ingredients as prescribed by the said Act. When there is no admission by the parties to the case that the provisions of the Rent Act applies to the said premises, it is incumbent on the Defendant to lead evidence and prove that the said premises is situated in an area

where the provisions of the Rent Act applies. The Defendant has not even stated in evidence that he was a tenant protected under the Rent Act. The Plaintiff has not instituted the action on the basis that the Rent Act applies to the said premises. The plaintiffs have filed action on the basis that they are the owners of the said premises and that the Defendant is in unlawful occupation of the same as a trespasser.

On perusal of the evidence that had been led in this case it is seen that no questions has been put to the Plaintiffs by the Defendant's Counsel on that basis. The Defendant has in her evidence stated that she continued to reside at the said premises after her father's death and that the said premises are situated in Mt.Lavinia. The judgment dated 2008.08.29, when perused clearly shows that the learned District Judge has failed to analize and consider the oral and documentary evidence in the correct perspective before he dismissed the plaintiff's case. The learned District Judge was in grave error in coming to a finding that the Defendant comes within the definition of a statutory tenant under the Rent Act and therefore the plaintiffs had no right as owners to institute the present action on the basis that they are the owners and for the eviction of the Defendant who is a trespasser from the said premises. I am in entire agreement with the submissions of Learned Presidents Counsel for the Plaintiff-Appellants. I am of the opinion, in the circumstances, the Defendant's claim to protection under the Rent Act has no merit and must fail.

In my view the learned Judges of the Civil Appellate High Court had misdirected themselves in holding that the parties are governed by the provisions of the Rent Act. The inferences drawn by the Civil Appellate High Court are not supported by evidence.

Therefore I answer all the questions of law raised in this case in the affirmative in favour of the Plaintiffs-Appellants. Accordingly I set aside

the judgment of the Civil Appellate High Court dated 28.06.2012, and the judgment of the District Court of Mt.Lavinia dated 29.08.2008 in this case. Judgment is entered in favour of the Plaintiff-Appellants for the ejectment of the Defendant-Respondent from the premises, and for the recovery of damages as prayed for in the plaint. I allow the appeal of the Plaintiff-Appellants. The Plaintiff-Appellants will be entitled to costs in this Court and in the Civil Appellate High Court and the District Court.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PC CJ.

I agree.

CHIEF JUSTICE

SISIRA DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal after obtaining Leave to Appeal.

MADDUMAGE SIRISENA PERERA
No. 168, Bellanwila, Boralesgamuwa.
PLAINTIFF

MADDUMAGE SULOCHANA PRIYANGIKA PERERA
No. 107A, Sarabhoomiya,
Batakeththara, Piliyandala.
Presently at No. 24E, Nawakanda Road,
Jaltara,Ranala.
SUBSTITUTED PLAINTIFF

S.C.Appeal No.59/2012
S.C. HCCA Application No. 97/2011
WP/HCCA/Mt.Lav. Appeal No.40/2007/F
D.C.Mt. Lavinia Case No. 1218/99/L

VS.

1. **MADDUMAGE NIMAL GUNASIRI PERERA**
   No. 99, Bellanwila, Boralesgamuwa.
2. **GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE**
3. **RANASINGHE ARACHCHIGE GAMINI**
4. **RANASINGHE ARACHCHIGE GEETHANI**
5. **RATHNAYAKE SHANTHA PATHMASIRI**
6. **RANASINGHE ARACHCHIGE DILANI**
   All of No. 181, Bellanwila (near Junction), Boralesgamuwa.

DEFENDANTS

AND

MADDUMAGE SULOCHANA PRIYANGIKA PERERA
No. 107A, Sarabhoomiya,
Bataketh thara, Piliyandala.
Presently at No. 24E, Nawakanda Road,
Jaltara,Ranala.

SUBSTITUTED PLAINTIFF-APPELLANT

VS.

1. **MADDUMAGE NIMAL GUNASIRI PERERA**
   No. 99, Bellanwila, Boralesgamuwa.
2. **GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE**
3. **RANASINGHE ARACHCHIGE GAMINI**
4. **RANASINGHE ARACHCHIGE GEETHANI**
5. **RATHNAYAKE SHANTHA PATHMASIRI**
6. **RANASINGHE ARACHCHIGE DILANI**
   All of No. 181, Bellanwila (near Junction), Boralesgamuwa.

DEFENDANTS -RESPONDENTS

AND NOW BETWEEN

MADDUMAGE SULOCHANA PRIYANGIKA PERERA
No. 107A, Sarabhoomiya,
Bataketh thara, Piliyandala.
Presently at No. 24E, Nawakanda Road,
Jaltara,Ranala.

SUBSTITUTED PLAINTIFF-APPELLANT-PETITIONER/APPELLANT

VS.

1. **MADDUMAGE NIMAL GUNASIRI PERERA**
   No. 99, Bellanwila, Boralesgamuwa.
2. **GODAWELA WAHUMPURAGE LEELAWATHIE ALIAS MANIKE**
3. **RANASINGHE ARACHCHIGE GAMINI**
4. **RANASINGHE ARACHCHIGE GEETHANI**
5. **RATHNAYAKE SHANTHA PATHMASIRI**
6. **RANASINGHE ARACHCHIGE DILANI**
   All of No. 181, Bellanwila (near Junction), Boralesgamuwa.

DEFENDANTS -RESPONDENTS -RESPONDENTS

BEFORE: S.Eva Wanasundera, PC, J.
Anil Gooneratne J.
Prasanna Jayawardena, PC, J.

COUNSEL: Rohan Sahabandu, PC with Hasitha Amarasinghe for the Substituted Plaintiff-Appellant-Petitioner/Appellant.
Parakrama Agalawatte with Aruni De Silva for the 1st Defendant-Respondent-Respondent.

WRITTEN SUBMISSIONS FILED: By the Substituted Plaintiff-Appellant-Petitioner/Appellant on 09th May 2012 and 15th December 2016.
By the 1st Defendant-Respondent-Respondent on 01st June 2012 and 05th December 2016.

ARGUED ON: 24th November 2016.

DELIVERED ON: 18th January 2018.

Prasanna Jayawardena, PC, J.

The Plaintiff-Appellant-Petitioner/Appellant ["the plaintiff"] and the 1st Defendant-Respondent-Respondent ["the 1st defendant"] each own adjoining allotments of land situated in Bellantara, which is within the Dehiwela-Mt. Lavinia Municipal Council limits. The common boundary shared by the plaintiff's land and the 1st defendant's land is about 3.75 metres, which is a little over 12 feet, in length. The 1st defendant's land is to the north of this common boundary and the plaintiff's land is to the south of this common boundary. The plaintiff says he has no access to a public road from his land. One of the other boundaries of the 1st defendant's land is the Dehiwela-Maharagama road, which is on the north of the 1st defendant's land. The plaintiff wants a right of way across the 1st defendant's land, to the Dehiwela-Maharagama road.

The plaintiff filed action in the District Court of Mt. Lavinia claiming a right of way over the 1st defendant's land. The District Court dismissed his case. The plaintiff appealed to the Provincial High Court of Civil Appeal holden in Mt.Lavinia. The appeal was dismissed. The plaintiff then made an application to this Court seeking leave to appeal from the judgment of the High Court. He obtained leave to appeal on the five questions of law which are set out later on in this judgment.

The action was filed on 29th September 1999, in the District Court, against the 1st defendant and the 2nd to 5th Defendants-Respondents-Respondents ["the 2nd to 5th defendants"]. By his plaint, the plaintiff claimed a right of way over the 1st defendant's land, to enable the plaintiff to access the Dehiwela-Maharagama road over the 1st defendant's land. The plaintiff claimed this right of way on a twofold basis - *ie: firstly*, by prescription and, *secondly*, as a right of way of necessity. Neither the plaintiff nor the 1st defendant reside on their allotments of land. The 2nd to 5th defendants are members of a family who occupy the 1st defendant's land. They are, admittedly, encroachers.

The **plaintiff's allotment of land** is described in the First Schedule to the plaint and is shown as Lot 1 in plan no. 50/99 dated 03rd September 1999 prepared by V. Chandradasa, Licensed Surveyor, which was produced at the trial marked **"පැ1"**. This land is A:0 R:2 P:33 in extent. As set out in this plan no. 50/99 marked **"පැ1"**, Lot 1 - *ie:* the plaintiff's land - is a long and narrow rectangular shaped allotment of land called *"Digana Kumbura".* Approximately one quarter of this (about 28 perches) at the northern end is described as *"Garden"* and is high land. The remaining three quarters of the plaintiff's land (approximately 85 perches) is described as an *"Abandoned Paddy Field"*. The southern boundary of the plaintiff's land is a Canal named *"Depa Ela"*. This southern boundary has been earlier described as *"Maha Niyara"*. The northern boundary of the plaintiff's land consists of three separate allotments of land - *ie:* as

mentioned earlier, approximately 3.75 metres of the northern boundary of the plaintiff's land is the 1st defendant's land. The remainder of the northern boundary consists of a land claimed by one T.A.Sunil and part of another land claimed by one Nandawathie Walisundera. The eastern boundary of the plaintiff's land is another part of the land claimed by Nandawathie Walisundera. The western boundary of the plaintiff's land is another part of the land claimed by the 1st defendant. As can be seen from the boundaries described above, the plaintiff's Lot 1 does not have road frontage or direct access to a road.

The **1st defendant's allotment of land** (over which the plaintiff claims a right of way) is described in the First Schedule to the 1st defendant's answer and has been depicted as Lot No.s 1 and 2 in plan no. 302 dated 30th August 2000 prepared by R.Mahendran, Licensed Surveyor, which was produced at the trial marked **"පැ1"**. As depicted in this plan no. 302 marked **"පැ1"**, the 1st defendant's land is a rectangular shaped allotment of land which has a total extent of A:0 R:0 P:12.9. There is a small house, more like a shack, on the 1st defendant's land. The 2nd to 5th defendants live in it. There are many trees on the 1st defendant's land. As mentioned earlier, an approximately 3.75 metre section of the southern boundary of the 1st defendant's land, is the plaintiff's land. The remainder of the southern boundary of the 1st defendant's land is another and separate allotment of land belonging to the 1st defendant which extends also along the western boundary of the 1st defendant's land too. The eastern boundary of the 1st defendant's land is T.A.Sunil's land which, as mentioned earlier, forms a section of the northern boundary of the plaintiff's land. As stated earlier, the northern boundary of the 1st defendant's land is the Dehiwela-Maharagama road.

As set out in the amended plaint, the plaintiff's action, in brief is that: that the plaintiff owns and is entitled to the aforesaid allotment of land described in the First Schedule to the plaint which is described as Lot 1 in plan no. 50/99 marked **"පැ8"**; the 1st defendant owns the allotment of land which is part of the northern boundary of the plaintiff's land; the northern boundary of the 1st defendant's land is the Dehiwela-Maharagama road; the only and closest access to a road from the plaintiff's land is over the 1st defendant's land to the Dehiwela-Maharagama road; for over 30 years, the plaintiff and his predecessors in title have used and enjoyed a right of way over the 1st defendant's land, to access the Dehiwela-Maharagama road from the plaintiff's land; the 2nd to 5th defendants are in occupation of this area of the 1st defendant's land over which the plaintiff has a right of way and they have obstructed this right of way, in the month of August 1999, by constructing a lavatory and a sewage pit, by using a movable boutique within this right of way and by erecting a fence at the boundary of the plaintiff's land; in these circumstances, the plaintiff prayed for a declaration that, he has prescribed to the

aforesaid right of way, upon a First Cause of Action; and prayed for a declaration that he has a right of way of necessity, upon a Second Cause of Action.

The right of way claimed by the plaintiff over the 1st defendant's land is described in the Second Schedule to the plaint as the 12 foot wide and 40 foot long [This is a mistake. It should have read 80 foot long] strip within the 1st defendant's land and having the following boundaries: the plaintiff's land to the South, T.A.Sunil's land to the East, the Dehiwela-Maharagama road to the North and the rest of the 1st defendant's land to West. It is depicted as Lot No. 1 in plan no. 302 marked **"ඉ1"** and is A:0 R:0 P:3.60 in extent.

The 1st defendant filed answer denying the existence of any right of way over the 1st defendant's land and denying that the plaintiff or his predecessors in title had used or enjoyed any right of way over the 1st defendant's land. The 1st defendant also denied that the plaintiff was entitled to any right of way of necessity. The 2nd to 5th defendants filed answer denying that the plaintiff was entitled to a right of way. The 2nd to 5th defendants admitted that the 1st defendant was the owner of the land which they occupied and claimed that they were lawful tenants.

The District Court first issued a Commission to Mr. R.Mahendran, Licensed Surveyor to survey the relevant allotments of land and prepare a plan and submit his report. In pursuance of this Commission, Surveyor, Mahendran prepared the aforesaid plan no. 302 marked **"ඉ1"**.

At the trial, it was admitted that the 1st defendant has title to the allotment of land over which the plaintiff claims a right of way and that the 2nd to 5th defendants had constructed a lavatory and sewage pit and commenced using a movable boutique on the land over which the plaintiff claimed a right of way. These admissions were subject to an express denial that any right of way existed over the 1st defendant's land or was used by the plaintiff. Thereafter, the parties framed issues based on their pleadings.

The plaintiff gave evidence and also led the evidence of Surveyor, Mahendran and Surveyor, Chandradasa. The plaintiff and his witnesses produced the documents marked **"ඉ1"** to **"ඉ8"** in evidence. After the plaintiff closed his case, the 1st defendant gave evidence and produced the documents marked **"1වී 1"** to **"1වී 6"**. The 4th defendant also gave evidence. While the defendants were presenting their case, the plaintiff died and his daughter was substituted in his place.

In his judgment, the learned District Judge held that, the evidence of the 1st defendant, Surveyor,Mahendran and Surveyor,Chandradasa established that, there had been no

use of a right of way over the 12 foot wide and 80 foot long strip within the 1st defendant's land which is the alleged right of way claimed by the plaintiff. The learned trial judge held that, apart from the plaintiff's verbal claim that he and his predecessors had a right of way over the 1st defendant's land, the plaintiff has failed to adduce any other evidence in support this claim. The learned judge also observed that, the title deeds marked **"පැ6"** and **"පැ7"** under which the plaintiff claims title to his land, do not show the existence of any right of way over the 1st defendant's land. In these circumstances, the learned District Judge held that, the plaintiff had failed to prove any entitlement, by prescription, to a right of way over the 1st defendant's land.

With regard to the plaintiff's claim that he was entitled to a right of way of necessity, the learned trial judge observed that, although a Commission had issued to Surveyor, Mahendran to survey the plaintiff's land and 1st defendant's land and submit a report, the Surveyor had not been required to report on whether the plaintiff has no means of access to his land other than over the 1st defendant's land. Further, Surveyor, Mahendran's plan no. 302 marked **"පැ1"** has shown *only* a part of the plaintiff's land and did *not* show its entirety and this Surveyor had stated, in his evidence, that he could not ascertain from which direction the plaintiff's land could be accessed. The learned judge observed that, the plaintiff had failed to apply for a Commission to ascertain and report on whether there was no means of access to the plaintiff's land other than over the 1st defendant's land. The learned District Judge held that, in these circumstances, the plaintiff had failed to prove that he was entitled to a right of way of necessity, over the 1st defendant's land.

Having determined that, the plaintiff had failed to prove any entitlement to a right of way over the 1st defendant's land either by prescription or by way of necessity, the learned District Judge dismissed the plaintiff's action, with costs. In the course of his judgment, the learned District Judge also appears to have taken the view that, the plaintiff's cause of action claiming a prescriptive right of way and the plaintiff's cause of action claiming a right of way of necessity, were contradictory and could not be maintained in one action. In this connection, the learned judge comments ['එනම් පැමිණිල්ලේ සඳහන් නඩු නිමිති දෙක අතර පරස්පරතාවයක් තිබෙන බව අධිකරණයට පෙනී යයි']

The plaintiff appealed to the High Court. The learned High Court judges affirmed the judgment of the District Court and dismissed the plaintiff's appeal, with costs. The plaintiff then made an application to this Court seeking leave to appeal. This Court has given the plaintiff leave to appeal on the following five questions of law, which are reproduced *verbatim*:

(i) Was there evidence before Court to establish the fact that the plaintiff has no right of access to enter his land ?

(ii) In the circumstances of the case is the right of access claimed by the plaintiff over the land of the 1st defendant shortest and most convenient right of access to enter Dehiwela-Maharagama high road ?

(iii) Could the plaintiff plead a right of access by way of prescription and right of access by way of necessity as alternate cause of action in one case ?

(iv) If so is the plaintiff entitled to obtain right of access to his land over the land of the 1st defendant either by way of prescription and or by way necessity ?

(v) When the original plaintiff in his evidence and also by the evidence of the surveyor has stated that, the plaintiff has no other right of access to enter to his land isn't there a duty cast on the defendants show that there is an alternate right of access to enter the land of the plaintiff ?

It will be convenient to first deal with question of law no. (iii). When considering this question of law, it is useful to keep in mind that, in our law, a right of way across a land of another can be created by three main methods of creation: (*a*) a grant or testamentary disposition embodied in a notarially attested deed; or (*b*) by prescription; or (*c*) by a decree of Court declaring the existence of a right of way of necessity. For purposes of completeness, it should be mentioned that, there may also be other circumstances in which a right of way exists as a result of usage from time immemorial [*vetustas* or antiquity] or by dedication to the public made in terms of a deed executed by the owner of the land [*vide:* SANDRASEGRA vs. SINNATAMBY (25 NLR 139)] or by an order of Court in a partition action or other proceedings or by an order of a legislative or local authority which has the statutory authority to make such an order - *vide:* Maarsdorp's Institutes of Cape Law, Book 2 at p. 212-222.

Question of law no. (iii) relates to the second and third methods of creation of a right of way set out above and asks whether a plaintiff can, in one action, claim that he has prescribed to a right of way over the defendant's land *and also* make an alternate or separate claim that, in any event, he is entitled to a right of way of necessity over the defendant's land. The correct answer to this question can be found, when one considers the nature of these two claims.

With regard to a claim of a right of way by prescription, it has to be noted that, as Withers J stated in TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], the effect of the

Prescription Ordinance No. 22 of 1871 was *"to sweep all the Roman-Dutch law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown. Hence, the only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of the Ordinance, No. 22 of 1871. That section determines the acquisition of a prescriptive title"*. Similar views were stated in several later decisions such as PERERA vs. RANATUNGE [66 NLR 337 at p.339] where Basnayake CJ observed, *"It is common ground that the Roman-Dutch Law of acquisitive prescription ceased to be in force after Regulation 13 of 1882 and that the rights of parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of adverse prescription is no longer in force except as respects the Crown."*. Next, since section 2 of the Prescription Ordinance defines 'immovable property' as including *"rights, easements, and servitudes thereunto belonging or appertaining"* to immovable property, the provisions of the Prescription Ordinance will govern the determination of a claim by a plaintiff that he has acquired a right of way by prescription. Thus, in KANDIAH vs. SEENITAMBY [17 NLR 29 at p.31] De Sampayo J observed, *"In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance ….."*.

Therefore, a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, the plaintiff had to prove that: he has had undisturbed and uninterrupted possession and use of the right of way for a minimum of ten years and that such possession and user of the right of way has been adverse to or independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way.

However, **with regard to a claim of a right of way of necessity**, the claimant is not required to prove possession or user of the right of way. Instead, a claimant who seeks a declaration from Court that he is entitled to a right of way of necessity over the land of another, must satisfy the Court that: the situation of the claimant's land is such that, the *only* route which can be used from the claimant's land [without having to undergo unreasonable inconvenience or difficulty] to access a public road or other roadway from which a public road can be accessed, is by traversing over the land of another person and that, therefore, by reason of necessity, he is entitled to a declaration from Court that he is entitled to a right of way of necessity over that person's land to access the public road or roadway, subject, usually, to the payment of appropriate compensation to the owner of the servient land.

In such circumstances, the Court grants a declaration of a right of way of necessity since the Roman-Dutch Law will not allow a *blokland* - *ie:* a land which cannot be entered or exited from. Thus, in FERNANDO vs. SILVA [30 NLR 56 at p.58], Drieberg J observed that, *"The Roman-Dutch law proceeded on a general maxim that there could be no blokland….."*. Similarly, Maarsdorp comments [Institutes of Cape Law, Book 2 at p. 191], a declaration of a right of way of necessity is granted by the Court because there is *"….. a right which every owner of land has to communication with the world at large outside his ground, and, with this object in view (whenever no definite path or road has been allotted to him by way of grant or acquired by his land by prescription), to claim some means of access to the public roads of the country without which his land would be useless to him. This means of access is spoken of as a way of necessity or necessary way, which is the right of a landowner, in the absence of any express servitude, to cross over all properties intervening between his ground and the nearest public road."*.

Hall and Kellaway, describing a right of way of necessity, state [Servitudes, 1942 at p. 65-66] *"A way of necessity (via necessitatis, or noodweg) is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to and egress from the former property to some place with which it must of necessity have a communicating link. It may be a permanent way to enable access to a public road (Grotius 2.35.8 and 11), for all lands which do not adjoin a highway or neighbour's road are entitled to the necessary access to these roads. (Wilhelm v. Norton 1935 E.D.L., p.152) ….. It can be claimed from the neighbouring owner as of right when circumstances warrant it (Voet 8.3.4) but the claim is restricted to the actual necessity of the case (Peacock v. Hodges 6. Buch., p.69)."*. It may be also mentioned, for purposes of completeness, that there could be limited circumstances where a right of way of necessity may be claimed to connect two lands owned by the claimant instead of to connect a land and a road – *vide:* MOHOTTI APPU vs. WIJEWARDENE [60 NLR 46] and Hall and Kellaway [p.66] who, citing Grotius [2.35.7], mention that there could be a right of way of necessity from cornfields to the dominant land.

Since the granting of a right of way of necessity over the land of another, curtails the right of ownership of the owner of the servient land, our Courts have consistently refused to grant a right of way of necessity unless the Court is satisfied that the right of way is, in fact, *a necessity*. As Drieberg J observed in FERNANDO vs. SILVA [at p.58] quoting De Villiers CJ in the well-known case of PEACOCK vs. HODGES [6 Buch. Reports 69], *"…..this road by necessity can be claimed no further than the actual necessity of the case demands."*.

If there is an alternative route available, the claimant, usually, will not be entitled to a right of way of necessity over the land of another unless the Court is satisfied that the alternative route is so inconvenient or difficult to use that it is unreasonable to expect the claimant to use that alternative route. Where the plaintiff has an alternative route, the fact that this alternative route is longer or inconvenient or even arduous will not entitle the plaintiff to obtain a shorter and more convenient right of way over the land of another unless, as mentioned earlier, the Court is satisfied that, the alternative route is unreasonably inconvenient or difficult to use. In MOHOTTI APPU vs. WIJEWARDENE [at p.48] CHANDRASIRI vs. WICKREMASINGHE [70 NLR 15] and SOMARATNE vs. MUNASINGHE [74 NLR 14], this Court has cited, with approval, the statement in LENTZ vs. MULLIN [1921 EDL 268 at p. 270] that, if the plaintiff who claims a right of way of necessity *"had an alternative route to the one claimed, although such route may be less convenient and involve a longer and more arduous journey, so long as the existing road gives him reasonable access to a public road, he must be content, and cannot insist upon a more direct approach over his neighbour's property".* In this regard, Hall and Kellaway state [at p.68], *"A person is entitled to a reasonable and sufficient means of access to a public road from his property. He is consequently not entitled to claim the best and nearest outlet on the ground of necessity if he has another although less convenient road (Gray v. Gray and Estcourt, 1907 28 N.L.R., p.154; Wilhelm v. Norton, 1935 E.D.L., p.169), nor a route which shortens the distance and enables him to avoid a bad portion of the road (Ellman v. Werth, 16 S.C., at p. 173; Carter v. Driemeyer and Another 1913 .N.P.D. 1). Nor may a person claim a road ex necessitate over his neighbour's land on the ground that this property alone intervenes between his land and a public road, whereas he has the use of a road giving access to another public road, but one which passes over a number of intervening properties whose owners may in the future object to his using it (Lentz v. Mullin, 1921 E.D.L. 268). ….. . "*. An example of a case where the Court held that a right of way of necessity should be granted because the alternative route which was available was unreasonably inconvenient or difficult, is ROSALIND FERNANDO vs. ALWIS [61 NLR 302] where this Court held that a right of way of necessity should be granted because the alternative route involved the dangerous exercise of walking 143 yards along a sea shore which was buffeted by a *"notoriously turbulent"* sea during the Monsoon season. Then in the South African case of ILLING vs. WOODHOUSE [1923 Natal LR 168], a right of way of necessity was granted because the alternative route which was available was 11 ½ miles long and required crossing a deep ravine [*kloof*] while in NEILSON vs. MAHOUD [1925 EDL 26], a right of way of necessity was granted because the alternative route which was available was along a sheer cliff [*krantz]* and was dangerous. In VAN SCHALKWIJK V. DU PLESSIS [1900 17 SC 464] De Villiers CJ went as far as to suggest that, the alternative route should be *"so difficult and inconvenient as to be practically impossible"* to use, if a claimant was to succeed in obtaining a right of way of necessity over the

land of another when an alternative route was available to the claimant. However, in our law, the decisions suggest that a claimant has to discharge the lesser burden of satisfying the Court that, the alternative route is so inconvenient or difficult to use that it is unreasonable to expect the claimant to use that alternative route. Each case has to be decided on its own facts.

It is clear from the aforesaid descriptions that, the basis on which a plaintiff may claim a Cause of Action for a right of way by prescription is quite *different* to the basis on which a plaintiff may claim a Cause of Action for a right of way of necessity. The first claim is founded on undisturbed and uninterrupted possession and use which is adverse to and independent of the rights of the owner of the servient tenement. The latter claim is based only on necessity and does not require any prior possession and use of the right of way.

Consequently, there is no reason why both these claims cannot be joined as separate causes of action in one action provided the other requirements to justify joinder of claims are met. In fact, there are several decisions of this Court, such as FERNANDO vs. FERNANDO [31 NLR 107], FERNANDO vs. DE LIVERA [49 NLR 250], CORNELIS vs. FERNANDO [65 NLR 93], CHANDRASIRI vs. WICKRAMASINGHE and SOMARATNE vs. MUNASINGHE, which have recognized that, the two claims may be joined, as separate causes of action, in one action and have separately considered the maintainability of each claim. In fact, in SOMARATNE vs. MUNASINGHE, Siva Supramaniam J stated [at p.16],*"The failure of the plaintiff to establish his claim based on prescriptive user will not necessarily disentitle him to a cartway of necessity. That question has to be considered on different grounds."*.

Accordingly, question of law no. (iii) is answered in the affirmative. A cause of action claiming a prescriptive right of way and a cause of action claiming a right of way of necessity may be properly joined in one action provided the other requirements to justify the joinder of claims, are met. The learned judges in both the District Court and High Court erred when they took the view that the two Causes of Action could not be joined in one action.

Next, the remaining questions of law no.s (i), (ii), (iv) and (v) can be considered together since they all raise issues connected to whether the learned judges, in both the District Court and High Court, erred when they held that, the plaintiff had failed to prove that he was entitled to a right of way over the defendant's land.

I will first consider whether the evidence established that, the plaintiff had proved that he had a right of way **by prescription**. I am required to do so because the manner in which

question of law no. (iv) is framed also poses the question of whether the plaintiff is entitled to a right of way of prescription.

As stated earlier, in order to establish a right of way by prescription, the plaintiff had to prove the requisites stipulated in section 3 of the Prescription Ordinance. In his written submissions, learned President's Counsel for the plaintiff has also cited and placed reliance on the principles of the Roman Dutch Law relating to the acquisition of a right of way by prescription. Since these submissions have been made, a brief consideration of the relevant principles of the Roman Dutch Law would be appropriate. In this regard, Hall and Kellaway [at p.29] go back to the Roman Law essentials of *"nec vi, nec clam, nec precario"* and state with regard to the requirements to establish a claim to a right of way by prescription under the Roman Dutch Law, *"Title to a servitude may be acquired by prescription. If the occupation or use of something over which a right is asserted has been exercised nec vi, nec clam, nec precario for a period of 30 years, prescription is proved; See Voet 8.4.4, and SCHULTZ v. SOMERSET EAST MUNICIPALITY (1931 E.D.L.., P.41). The occupation or use must be peaceable (nec vi), for if it be in the face of opposition and the opposition be on good grounds the party endeavouring the establish prescription will be in the same position at the end as he was at the beginning of his enjoyment (Gale, pp. 204 and 205). It must be openly exercised (nec clam) and during the entire period of 30 years the person asserting the right must have suffered no interference at the hands of the true owner, nor must he by any act have acknowledged anyone as the owner (Paarl Municipality v. Colonial Govt., 23 S.C., pp.527 and 528). Finally, the occupation or use must take place without the consent of the true owner (nec precario); it must not be by leave and license or on sufferance and thus liable to cancellation at any time (Uitenhage Divisional Council v. Bowen 1907 E.D.C.,p.80; S.A.Hotels v. Cape Town City Council, 1932 C.P.D., p.236). It must be adverse, i.e., the exercise of a right contrary to the owner's rights of ownership."*.

It seems to me that, the aforesaid requirements of use *nec vi*, *nec clam* and *nec precario* of the Roman Dutch Law, when taken in their totality, can be related to the requirements under section 3 of the Prescription Ordinance of undisturbed and uninterrupted use which is adverse to or independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way. It is perhaps that thinking which led Basnayake CJ to state in FERNANDO vs. DE LIVERA [49 NLR 350 at p.352] that, a plaintiff who claims a right of way by prescription must establish use of the right of way *nec vi*, *nec clam* and *nec precario* and to cite the aforesaid view of Voet [8.4.4], without expressly referring to section 3 of the Prescription Ordinance, which stipulates the requirements to be established, under our law, by a plaintiff who claims a right of way by prescription.

It may be also mentioned here that, another requirement of our law is that, a plaintiff who seeks to prove a right of way by prescription in the manner contemplated by section 3 of the Prescription Ordinance, must establish that, the possession and user of the right of way was of a course or track or path over a defined and identifiable area of the servient land. This requirement, which has been read into the requirement of possession and user stipulated in section 3 of the Prescription Ordinance, has been recognised and enforced in a *cursus curiae* commencing in the first decade of the last century - *vide:* In 1912, Lascelles CJ stated in KARUNARATNE vs. GABRIEL APPUHAMY [15 NLR 257 at p.259] *"In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined."* and, in the next year, in KANDIAH vs. SEENITAMBY [at p.31], De Sampayo J, quoting Wendt J in an earlier judgment, stated, *" the evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient."*.

Thus, if the plaintiff in the present case was to prove that he was entitled to a right of way by prescription over the defendant's land, he had to establish that, the plaintiff had possessed and used a right of way over the specific and defined area of land described in the Second Schedule to the plaint, for a minimum period of ten years, in the manner stipulated in section 3 of the Prescription Ordinance. The burden of proving this, was cast on the plaintiff.

When the evidence is examined, it is seen that, the only evidence the plaintiff placed before the Court in support of his claim to have prescribed to a right of way, were the plaintiff's statements that he used a right of way over the 12 foot wide and 80 foot long strip within the 1st defendant's land, which is described in the Second Schedule to the plaint. The 1st and 4th defendants denied that the plaintiff had used any such right of way. If the plaintiff did use the right of way, the probabilities are that, neighbours or the grama niladhari could have testified to such use. However, the plaintiff was unable to lead the evidence of such a witness. Surveyor,Chandradasa who surveyed the plaintiff's land three weeks before the institution of the action to prepare plan no. 50/99 marked **"පැ8"**, has not referred to or shown a right of way from the plaintiff's land over the defendant's land. When Surveyor,Chandradasa gave evidence, the plaintiff did not obtain any testimony from him which would suggest that there was evidence to show the *use* of a right of way over the defendant's land. Surveyor,Mahendran who surveyed both the plaintiff's land and the defendant's land, a year later, when he was preparing Plan No. 302 marked **"පැ1"**, has also not stated in his report marked **"පැ2"**, that there was evidence of use of a right of way over the defendant's land. In fact, when he was

cross examined, he stated that, he could not say that there was evidence of use of the alleged right of way. The evidence of Surveyor,Mahendran and his plan no. 302 marked **"පැ1"** also establishes that, there was a large 25-30 year old mango tree with a diameter of a little less than two feet in the middle of the 12 foot wide right of way which the plaintiff claims to have used. That would leave only about 5 feet on either side of this tree if a right of way had been used. In addition, there is a 15-20 year old Thelambu tree in the middle of the alleged right of way where it borders the Dehiwela-Maharagama road. There is also another tree within the alleged right of way. Surveyor, Mahendran states that, because of these trees, even a hand tractor can be driven on this alleged right of way, only with great difficulty ['ඩොහොම අමාරුවෙන්']. It is unlikely that these trees would be standing on the alleged right of way, *if* the plaintiff had, in fact, being using the alleged right of way for agricultural purposes as he claims. Finally, the plaintiff's deed marked **"පැ6"** and **"පැ7"** make no mention of a right of way over the defendant's land.

In the light of this evidence, the learned trial judge held that, the plaintiff had failed to establish the use of a right of way and rejected the plaintiff's claim to a right of way, by prescription. The High Court affirmed this determination. I cannot see how, in the light of the aforesaid evidence, the learned judges could have correctly held otherwise.

I will now proceed to consider the issues raised in questions of law no.s (i), (ii), (iv) and (v) with regard to whether the plaintiff had established that, he was entitled to a right of way of necessity.

With regard to the manner in which a right of way of necessity or *via necessitatis* is created, Hall and Kellaway state [at p.66] that, *"A via necessitatis must be constituted like other rights of way by grant, prescription or order of Court."*. The circumstances in which a Court will order or declare that the owner of a land is entitled to a right of way of necessity over the land of another, have been referred to earlier.

The onus of proving the existence of such circumstances lies on the person who claims the way of necessity. Thus, Hall and Kellaway state [at p.67] *"In a claim for a via necessitatis the onus of proving the necessity is upon the person alleging it."* and in DE VAAS vs. MENDIS [49 NLR 525 at p.527], Basnayake CJ observed, *" In a claim for a via necessitas the onus of proving the necessity is upon the person alleging it."*. Hall and Kellaway also observe [at p. 66] that, when a Court decides whether a right of way of necessity should be granted, *"The word 'necessity' is interpreted very strictly …."* This statement echoes Van Leeuwen [Roman Dutch Law 2.21.12] who commented that, when deciding whether a person was entitled to claim a way of necessity, the word *"necessity"* should be interpreted with extreme strictness. Thus, in DE VAAS vs.

MENDIS [at p.527], Basnayake CJ stated *"The comments of Voet, Van Leeuwen and Grotius indicate that the word `necessity' in this context should be very strictly construed."*. This rigorous standard is placed because the granting of a right of way prejudices the rights of the owner of the servient land.

In the present case, the plaintiff had to discharge the burden of proving that, the right of way he claimed was, in fact, a *necessity*. As mentioned earlier, this required the plaintiff to establish that he had no means of access, which he could be reasonably expected to use, from his land to a public road or other usable roadway, other than by traversing the defendant's land. As mentioned earlier, it is inherent in this requirement that, the plaintiff must satisfy the Court that, using any alternative route which may be available, would cause unreasonable inconvenience or difficulty.

In this regard, plan no. 50/99 **"පැ8"** describes the southern section of the plaintiff's land as an *"Abandoned Paddy Field"* and, in fact, the plaintiff's land bears the name *"Digana kumbura"*. Although Surveyor, Mahendran has described this section as *"thorny and muddy"*, there is no reason to suppose that an usable path did not exist or could not be made across this section. In any event, there is no evidence to suggest that this section was impassable. Therefore, it is reasonable to conclude that, the plaintiff could reach the southern boundary of the plaintiff's land, which is the canal named *"Depa Ela"*, earlier named *"Maha Niyara"*. The use of the term *"Maha Niyara"*, suggests that, the canal bank is of traversable size. In this connection, as learned counsel for the defendant has submitted, it is well known that, paddy fields are often accessed across a *"Niyara"* or along a canal bank. Next, the sketch annexed to the plaint marked **"පැ3"** shows that the Ratmalana-Attidiya road [the B389] runs parallel to the plaintiff's land in a southward direction. It appears from the scale of the sketch that, the distance from the plaintiff's land, along the Dehiwela-Maharagama road, to the Ratmalana-Attidiya road, is about 100 metres. Further, it appears that, the distance from the western boundary of the aforesaid southern section of the plaintiff's land to the Ratmalana-Attidiya road, is also about the same distance. In these circumstances, there could well have been a usable route to the Ratmalana-Attidiya road from the plaintiff's land. In fact, in his evidence, the 1st defendant said so when he said ''අත්තිඩිය පාරෙන් යන්න පුළුවන්''. In these circumstances, the plaintiff was required to discharge the burden of leading evidence to establish that he had no means of accessing the Ratmalana-Attidiya road (or some other roadway) from the southern boundary or western boundary of his land or, for that matter, from the eastern boundary of his land. The plaintiff could have easily sought to do so by applying for a Commission to issue to a Court Commissioner to survey the entirety of the plaintiff's land and report to the Court on whether the plaintiff has no usable alternative means of entering and exiting his land from the southern, western or eastern boundaries of his land. However, the plaintiff did not do so. A

perusal of the evidence of Surveyor,Mahendran, and Surveyor, Chandradasa, shows that neither witness was able to give clear evidence as to whether or not the plaintiff had an alternative means of entering and exiting his land from the southern, western or eastern boundaries of his land. In fact, when Surveyor Mahendran, was asked whether he could say the *only* access to the plaintiff's land was by the right of way sought over the defendant's land, he replied that he could not say so.

In these circumstances, I am of the view that, the plaintiff failed to discharge the burden of proof placed on him to establish that he had no alternative means of entering and exiting his land other than by traversing the defendant's land. In this connection, it is apt to recall Basnayake's CJ's comments in DE VAAS vs. MENDIS [at p.528] that, *"The plaintiff has made no endeavour to discharge the onus that rests on him. He expects to succeed in his claim on his bare word. He has not even called the surveyors who made the plans to explain them and assist the Court. A servitude will not be created by judicial decree for the mere asking. The person seeking such a decree must discharge the onus that rests on him."*.

In these circumstances, the District Judge and High Court have correctly held that, the plaintiff failed to discharge the burden of satisfying the Court that he had no alternative route to enter or exit from his land. Therefore, the questions of law no.s (i) and (iv), are answered in the negative.

Question of law no. (ii) is also answered in the negative since, as set out above, the mere fact that, the right of way sought is the *"shortest and most convenient"* does not entitle the plaintiff to the right of way prayed for in the plaint on the grounds of necessity.

Finally, with regard to question of law no. (v), learned President's Counsel for the plaintiff has submitted that, the defendants did not take up a position in the District Court that, there was an alternative route available to the plaintiff and that, therefore, this Court should not consider the possibility that there was an alternative route. I am unable to agree with this submission since the 1st defendant specifically stated that, the plaintiff had alternative routes available to him [*ie:* the 1st defendant stated: *"*තවත් කොට මාර්ග තිබෙනවා*"*; *"*වෙනත් කොට මාර්ග තිබෙනවා*"*; "නමුත් වෙන පාරක් තිබෙනවා*"* ,*"*මා කිව්වා හැම කුඹුරටම යන්න තිබෙන ඇළ වේලි පාර කියා කිව්වා'' and ''අත්තිඩිය පාරෙන් යන්න පුළුවන්''].

In any event, when the defendants had denied that the plaintiff was entitled to a right of way of necessity, the burden was firmly placed on the plaintiff to prove, *inter alia*, that he had no alternative route available to him. Unless and until the plaintiff led evidence to establish a *prima facie* case that he had no alternative route which could be used, there was no burden placed on the defendant to demonstrate that the plaintiff did have an

alternative route. However, as set out above, the plaintiff failed to establish a *prima facie* case that he had no alternative route. In fact, that is the basis on which the learned trial judge held that the plaintiff failed to prove that he was entitled to a right of way of necessity.

Accordingly, question of law no. (v) is also answered in the negative.

For the aforesaid reasons, the judgment of the High Court is affirmed and this appeal is dismissed, with costs.

Judge of the Supreme Court

S. Eva Wanasundera, PC, J.
I agree

Judge of the Supreme Court

Anil Gooneratne J.
I agree

Judge of the Supreme Court

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

Shirani Buffin

No.7 King Charles Walk

Wimbledon Park,

London SW196, JA

England.

Presently at No.71G

Polhenwatte, Housing Scheme

Kelaniya

SC Appeal 63/16

SC(HC)CALA/308/2014

WP/HCCA/COL/22/2011/LA

DC Colombo Case No. 16493/L

PLAINTIFF- RESPONDENT-APPELLANT

Vs.

1. M.A. Anthony Neville

   No.275/01,Old Kandy Road,
   Dalugama, Kelaniya

2. M. A. Rohan Dulip
   No.57, 6th Lane, Kotahena
   New address,
   No.47/A 9th Lane,
   Ethul Kotte, Kotte

DEFENDANT – PETITIONER - RESPONDENTS

Before : Priyasath Dep, PC.CJ
B.P. Aluwihare, PC, J
Vijith K. Malalgoda PC, J

Counsel : Ikram Mohamed, PC with Farhath Hussain for the Plaintiff – Respondent – Appellant

M.U.M. Ali Sabry, PC with Nuwan Bopage and Naamiq Natash for the Defendant – Petitioner – Respondent

Argued on : 20.11.2017

Decided on : 14.06.2018

Priyasath Dep, PC. CJ

The Plaintiff – Respondent – Appellant (Hereinafter sometimes referred to as the " Plaintiff - Appellant") instituted action against the Defendant – Petitioner – Respondents (Hereinafter sometimes referred to as the "Defendants -Respondents") in the District Court of Colombo in Case No. 16493/L.

The Plaintiff (Plaintiff -Respondent -Appellant) in her Plaint dated 23rd November 1993 sought the following reliefs:

1. Declaration of title to the two allotments of land described morefully in the 1st and 2nd schedule to the Plaint.
2. Ejectment of the Defendants from the said land on the ground that the 1st Defendant unknown to the Plaintiff had executed a forged deed of transfer in favour of the 1st Defendant purporting to be a transfer from the Plaintiff while the Plaintiff was abroad and thereafter transferring the same to the 2nd and 3rd Defendants.
3. Damages in a sum of Rs.900,000/= and Rs. 25,000/= per month from 1991 upto the date of handing over peaceful possession.

The District Court thereafter made order for the service of summons on the Defendants. However the Fiscal had reported that the Defendants had sold the land and had left the address and the Court ordered the Plaintiff to take steps to serve summons to the present address returnable on 5th October 1994. According to Journal entry No. 4 dated 05/10/1994, the Plaintiff has not taken any steps, the Court ordered the case to be laid by. Thereafter Plaintiff had filed a motion dated 01/12/1994 moving that the earlier proxy be revoked and Court has accordingly made order revoking the same.

After a lapse of almost 16 years, on 2/09/2009, the Plaintiff filed a fresh proxy with a motion moving Court for permission to proceed only against the 2nd and 3rd Defendants since the 1st Defendant has died and had transferred all his purported rights to the 2nd and 3rd Defendants. The Court considered the applicability of Section 402 of the Civil Procedure Code in view of the fact that a period of 16 years have lapsed in terms of the last journal entry dated 01/12/1994 and ordered summons be issued to the Defendants enabling them to be heard before an order for abatement of action is made.

The learned District Judge having considered the written submissions of the Plaintiff and objections filed by the Defendants refused to enter an order of abatement and held that the Appellant is entitled to proceed with the case.

The Defendants being aggrieved by the said order, made an appeal to the Civil Appellate High Court holden in Colombo and the learned judges of the High Court set aside the order of the learned District Judge and held that the case should be abated.

The Plaintiff- Appellants sought Leave to Appeal to the Supreme Court against the said order of the High Court and obtained leave on following questions of law;

1. Is the said order wrong in law and contrary to provisions of Section 402 of the Civil Procedure Code in view of the motion filed by the Petitioners[Plaintiff-Appellants] dated 01/09/2009 and subsequent proceedings held in District Court of Colombo.

The learned President Counsel for the Defendant-Respondents with the permission of the Court raised the following question of law.

2. For the purpose of application of Section 402 of the Civil Procedure Code should the order or proceedings made in journal entry No. 4 dated 05/10/1994 be considered as a material fact?

The learned President Counsel for the Plaintiff- Appellant with the permission of Court in addition to the question No.1, raised the following question of law.

3. For the purpose of making an order under Section 402 of the Civil Procedure Code should an application be made by a party or should the court *ex mero motu* make an order under the said section.

The Section 402 of the Civil Procedure Code in terms of which an order of abatement could be made is as follows;

"*If a period exceeding twelve months in the case of a District Court or Family Court, or six months in a Primary Court, elapses subsequently to the date of the last entry of an order or proceeding in the record without the Plaintiff taking any steps to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate*"

The Plaintiff-Appellant submitted that under Section 402 of the Civil Procedure Code entering an order of abatement is not mandatory but discretionary and that the period required to elapse is a period exceeding 12 months and the said period should have lapsed from the date of the last entry made in the record without the Plaintiff taking any steps to prosecute the action where any such step is necessary.

The Plaintiff-Appellant submitted that the last journal entry prior to question of abatement was raised by Court is the Journal entry No.06 dated 02/09/2009 whereby the Plaintiff-Appellant filed a motion with a new proxy moving to issue summons to the 2nd and 3rd Defendant-Respondents. Moreover, before Defendant-Respondents moved for abatement of the action several entries have been made in the record including tendering of written

submissions by the Plaintiff-Appellant, Court making order to hear the 2nd and 3rd Defendant-Respondents. Therefore Plaintiff- Appellant's contention is that 12 months haven't lapsed from the last entry in the record for the purpose of Section 402.

The Plaintiff- Appellant submitted that the entry made on 05/10/1994 cannot be taken as the last entry as no application has been made by any party or any step taken by court to abate the Plaintiff- Appellant's action beforePlaintiff- Appellant took steps on 02/09/2009 to proceed only against the 2nd and 3rd Respondents.

Plaintiff-Appellant further submitted that journal entry No. 4 dated 05/09/1994 does not make any order for steps to be taken by the Plaintiff-Appellant as the Court has ordered to lay by the case. [This submission is incorrect . The Court on 05/09/1994 ordered the Plaintiff to take steps].

In view of the submissions made by the Learned President Counsel for the Plaintiff-Appellant, this the Court has to consider the following matters.

(a) what is the date of the last entry of an order or proceeding in the record
(b) did the plaintiff fail to take necessary steps to prosecute the action
(c) whether a period of twelve months has lapsed after the date of the last entry of the order or the proceeding in the record

The Learned Counsel for the Plaintiff-Appellant vehemently argued that the last date to be considered is 02/09/2009 and not 05/10/ 1994. It is necessary to examine the proceedings prior to 05/10/1994 to decide this question. According to the journal entry dated 10/08/94 the fiscal had reported that the present occupants of the premises informed him that the defendants had sold the premises and left the place. The Court had directed the Plaintiff to take steps. When the case was mentioned on 05/10/1994 it was recorded that no steps were taken by the Plaintiff. On 01/12/94 a motion was filed to revoke the proxy which was allowed. (Journal entry No. 5). On 02/09 2009 nearly 16 years after the order directing the Plaintiff to take steps, the Plaintiff filed a fresh proxy and move to issue summons on the 2nd and 3rd Defendants since the 1st Defendant is dead. At this stage the learned District Judge having realized that long period had lapsed after the date given for steps, noticed the parties to decide the question as to whether the action was abated or not. After considering the submissions of parties, the learned District Judge held that the action was not abated. The 2nd and 3rd Defendants appealed against the order and the High Court (Civil Appellate) set aside the order and against that order the Plaintiff- Respondent-Appellant filed a Leave to Appeal application and obtained leave.

The Plaintiff-Appellant submitted that the period in excess of 12 months relevant for the application of Section 402 of the Civil Procedure Code should necessarily be from the last entry of the record prior to the application for the abatement is made or prior to the 1st date on which the court ex mero motu considered the question of abatement. In this case

the court ex mero motu considered the question of abatement only on 10/09/2009 prior to which the last journal entry was on 02/09/2009, whereby the Plaintiff- Appellant took steps by filing a motion to proceed only against the 2nd and 3rd Defendant-Respondents which was 8 days before the question of abatement was raised by Court for the first time.

The Plaintiff- Appellant further submitted that Defendant-Respondents' application for abatement was made by their objection dated 22/07/2010 and prior to that date there have been several journal entries whereby Plaintiff-Appellant has taken numerous steps.

It is the contention of the Plaintiff-Appellant that the fact that the Plaintiff-Appellant had not taken any steps from 05/10/1994 cannot form the basis for abatement since that particular entry does not make any order for the Plaintiff Appellant to take the steps.

The 2nd and 3rd Defendant-Respondents stated that the journal entry No.4 dated 05/10/1994 should be considered as a material date for the purpose of Section 402 of the Civil Procedure Code.

In the journal entry No. 3 dated 10.08.1994, the Court had directed the Plaintiff-Appellant to take steps to issue summons as the fiscal was unable to serve summons as the Defendants were not at the given addresses as they had left the premises. Once again on 05/10/1994 the Court had directed the Plaintiff-Appellant to take steps (Journal Entry No.4)

Thereafter no action has been taken by the Plaintiff-Appellant to facilitate the service of summons and prosecute the action till 02/09/2009 which establishes the fact that Plaintiff-Appellant has not taken steps required by law to proceed with the action.

Having considered the submissions, I am of the view that the date given to take steps was 05/10/1994.This is the relevant date to consider whether the action was abated or not.

The next question is whether the Plaintiff failed to take a necessary step to prosecute the action. Both parties have submitted comprehensive written submissions and cited relevant authorities. We have to consider whether the step that was required to be taken is by the Court or by the Plaintiff. If it is by the Plaintiff whether the step is a necessary step to prosecute the action.

I will refer to the authorities submitted by the parties.

In Lorensu Appuhamy v.Paaris 11 NLR 202- 204 (reversing the order of the District Judge) the Supreme Court held *"that the order of abatement was wrongly made, as the plaintiffs had not failed to take any necessary step in the action, and the said order should be vacated"*

In this case the defendants had filed their answers. The next step is to fix the date for trial. It was held that *' In the present case the appellants had done all that the law required of*

them. The duty of fixing the day of trial rested, under section 80 of the Civil Procedure Code, on the court''

It was held that the word necessary means "*rendered necessary by some positive requirement of the law. We ought not to interpret it as if the section ran without taking any steps to prosecute the action which a prudent man will take under the circumstances*."

It was further held that the Court could act ex mero motu to abate a case as there is no fetter imposed by section 402 of the Civil Procedure Code to prevent the Court making an order ex mero motu.

In Suppramaniam Vs Symons 18 NLR 229 the case was struck off the roll as parties were negotiating for a settlement. It was held that it was necessary for the plaintiff to get the case restored to the roll before there was any further obligation on the Court

Further it was held that the *" A Court has the power under section 402 of the Civil Procedure Code to make an order of abatement ex mero motu".*

In *Associated Newspapers Limited Vs Kadirgama* (1934) 36 NLR 108 Wood Renton J at page 204 stated

"*The Appellants had within the meaning of Section 402 taken every step incumbent upon them with a view to the prosecution of the action. I think that when that section uses the word 'necessary' it means rendered necessary by some positive requirement of the law'. We ought not to interpret it as if the section ran without taking any steps to prosecute the action which a prudent man would take under the circumstances'. In the present case, the Appellant had done all that the law required of them*

In *Chittambaram Chettiar Vs Fernando* 49 NLR 49 Thambiah J held that:

"both on principle and authority it seems to us that unless the Plaintiff has failed to take steps rendering necessary by the law to prosecute his action an order of abatement should not be made under Section 402 of the Civil Procedure Code."

The Plaintiff- Appellant had cited the case of *Samsudeen Vs Eagle Star Insurance* 64 NLR 372 in support of his position.

It was held by the Supreme Court that :

"the order of the Court laying by the case cast no duty on the Plaintiff to restore it to the roll and therefore the order of abatement wrongly made. The duty of fixing the day of the trial rested on the Court. Unless the plaintiff had failed to take a step rendered

necessary by the law to prosecute his action, an order of abatement could not be made under section 402 of the Civil Procedure Code".

The Court further held that:

"the long line of decisions reviewed favours the view that an order of abatement could be made under Section 402 of the Civil Procedure Code only if the Plaintiff has failed to take a step rendered necessary by law.

Therefore it is the contention of the Plaintiff- Appellant that unless the Plaintiff is mandated by law to take steps required, non-prosecution for a period in excess of 12 months from the last entry does not entitle a court to enter an order of abatement.

In *Bank of Ceylon Vs Liverpool Marine & General Insurance Co. Ltd* 66 NLR 472 his Lordship Justice L.B. De Silva having considered the conflicting views adopted in previous cases and referring to the judgment in of *Samsudeen Vs Eagle Star Insurance* 64 NLR 372 stated:

"We see no reason to depart from the view taken in that case. We hold that the order of abatement was wrongly entered by the District Judge in this case as there was no step that was necessary to prosecute the action, which the Plaintiff was required to take."

It is the submission of the Defendant-Respondents that Journal entry 3 and 4 imposes a 'positive' requirement in terms of the law on the Plaintiff to take steps to serve summons and proceed with the action. The Defendant-Respondents referred to Journal entries No.3 & 4 both state as follows:

"පැමිණිල්ලේ පියවර"

Therefore it is the contention of the Defendant-Respondents that this case could be clearly distinguished from instances where the Court has failed to take steps to serve summons.

It was submitted by the Defendant-Respondents that since the Journal entry No. 5 dated 01/12/1994 whereby the Plaintiff-Appellant filed a motion to revoke the proxy which was subsequently granted, no steps were taken by the Plaintiff-Appellant to prosecute the action until 01/09/2009'. The question that has to be considered is whether the next step should be taken by Court or by the Plaintiff. It is the position of the Respondents that Plaintiff should have filed a new proxy to proceed with the action and in the circumstances the case could not have proceeded without a step on the part of the Plaintiff-Appellant.

The Respondents further submitted that the Appellant had also failed to act vigilantly to prosecute the action. "Vigiliantibus non dormientibus acquitas subvenir; equity aids the vigilant, not the ones who sleep over their rights"

In this case, the order of abatement made by the Court is not an order made ex mero motu. The court had given an opportunity for both the Plaintiff-Appellant and the Defendant-Respondents to make their submissions and thereafter made an order.

Therefore the question of Court making an order ex mero motu will not arise in this case. However it was held in series of cases that the Court could make an order ex mero motu though it is desirable that the Court should issue notice on the parties and after hearing an order for abatement is made.

In this case the last journal entry that has to be considered is 05/10/1994. Thereafter the Plaintiff- Appellant had failed to take steps until 01/09/2009. Prior to 05/10/1994 fiscal had reported that the Defendants had sold the land and left the premises. In order to proceed with the action the Plaintiff is required to ascertain the present addresses of the Defendants and file papers and move for summons which step the Plaintiff failed to take until 2009 which is almost after the lapse of 16 years. This step is an essential and a necessary step to be taken by the Plaintiff. The Plaintiff had failed to take a necessary step to prosecute her case before a lapse of 12 months from 05/10/1994. Therefore her action was liable to be abated and the District Judge should have made an order to the effect that the action was abated. The judgment of the High Court (Civil Appeals) holding that the Plaintiff's action was abated under section 402 of the Civil Procedure Code is in accordance with the law.

We uphold the order of abatement made by the High Court (Civil Appeals) and dismiss the Appeal. No Costs.

Chief Justice.

B.P.Aluwihare, 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

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

S.C. Appeal 73/2015
SC (SPL) LA ApplicationNo.318/2013
CA Appeal No. CA331/2007
High Court Kurunegala No.230/2001

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

Dissanayake Mudiyanselage Jayasiri

Accused

And Now

Dissanayake Mudiyanselage Jayasiri

Accused-Appellant

Vs.

The Hon. Attorney-General
Attorney General's Department
Colombo 12.

Respondent

And now Between

Dissanayake Mudiyanselage Jayasiri

Presently at
Bogambara Prison,
Kandy.

Accused-Appellant-Petitioner

Vs.

The Hon. Attorney-General
Attorney General's Department
Colombo 12.

Complainant-Respondend-Respondent

BEFORE:	Priyasath Dep, PC., C.J. Buwaneka Aluwihare, PC., J & Vijith K. Malalgoda, PC., J.
COUNSEL:	Amila Palliyage for the Accused-Appellant-Appellant. Ms. Harippriya Jayasundera, DSG, for the A.G.
ARGUED ON:	07.12.2017
DECIDED ON:	18.09.2018

ALUWIHARE, PC.,J:

The Accused-Appellant-Petitioner-Appellant (hereinafter referred to as the Accused-Appellant) was indicted before the High Court of Kurunegala, for committing the offence of murder. After trial by Judge, the Accused-Appellant was found guilty as indicted and accordingly was sentenced to death.

Aggrieved by the conviction and the sentence aforesaid, the Accused-Appellant appealed to the Court of Appeal and their Lordships by their judgment dated 14th November, 2013 affirmed the conviction and the sentence imposed by the Learned High Court Judge.

The accused-appellant moved this court by way of Special Leave to Appeal and Special Leave was granted on the following questions of law:

Whether the Court of Appeal erred in law and/or of fact;

(i) By failing to consider that the learned trial judge had misdirected himself in evaluating the dock statement made by the accused appellant.

(ii) By failing to appreciate that the proviso to Section 334 of the Code of Criminal Procedure Act has no application to the instant case.

(Subparagraph (iv) and (vi) of Paragraph 13 of the Petition of the Petitioner).
It was the contention of the learned counsel for the accused-appellant that a substantial miscarriage of justice resulted, due to the errors alleged.

The facts, albeit briefly, can be narrated as follows:

The deceased Shiromala on the day in question, around 10 in the morning, had proceeded to a location of about 10 fathoms away from her house to fetch a pitcher of water, accompanied by her younger brother Premalal who testified at the trial. According to his evidence they (the deceased and the witness) had to pass the house of the accused en route which was by the side of the road.

According to witness Premalal, his sister having collected water was on her way home, while witness Premalal was leading the way, approximately 10 feet in front of his deceased sister, Shiromala. On the return journey, the accused appellant who happened to be a relative of theirs was seen standing by the stile leading to his house, and witness Premalal had walked passed him. All of a sudden he had heard the cries of his sister to the effect "what is this" (" මේ මොකද"). When the witness paid attention in that direction, he had seen the accused-appellant attacking the deceased with a knife, which the witness had described as a "fish knife". Witness had also added that he saw several blows being dealt to his sister. On seeing the attack, the witness had raised cries and had run. The witness had also testified to the effect that he was given chase by the accused-appellant and as such he ran home and closed the door. Soon after, the witness had heard the accused attacking the front door of their house. This has been corroborated by the evidence of the Investigation Officer who had observed the damage on the door. Due to the commotion, the villagers had gathered and had overpowered the accused-appellant. The witness had also referred to an incident where one of his sisters (a younger sister) was involved with an intimacy with a friend of the accused-appellant, over which a police complaint had been lodged. Although evidence given on this matter appears to be very scanty, it appears that younger sister had eloped with the friend of the accused-appellant and subsequently she had been handed back to the family through the Probation Office. This incident, according to witness Premalal, had taken place a couple of days before the attack on her deceased sister, and the accused-appellant had been angry with them over this incident. The motive for the attack on his sister, according to Premalal is the animosity entertained by the accused-appellant over this incident. I have scrutinized the evidence given by the witness Premalal and apart from minor discrepancies, his testimony has stood the test of cross examination and I see no cogent reason to discredit or reject the testimony of Premalal. The accused-appellant on the other hand, is a close relative of Premalal, he is the husband of

Premalal's mother's sister. The medical evidence reveals a number of cut injuries inclusive of an injury on the back of the neck which had severed the spinal cord, an injury which the Judicial Medical Officer had described as necessarily fatal, a blow which had brought about the deceased's death within 4 to 5 minutes of her sustaining the injury.

Although the law does not cast any burden whatsoever on the accused-appellant to prove his innocence, he had elected to make a dock statement which has now been a part of the evidence in the case. Although he had commenced his dock statement by stating that he is "not guilty", had admitted the incident and his presence at the scene.

The two questions of law on which leave was granted relate to the alleged failure to evaluate the dock statement by the learned trial judge, the dock statement in verbatim is reproduced below:

"ස්වාමිනි, මේ නඩුව සම්බන්ධයෙන් නිවැරදිකරු කියා සිටිනවා. එදා මරනකාරියත්, ජගත් ප්‍රේමලාල් කියන අයත්, මම වැට කප කපා ඉන්නවිට පාරේ අයිනෙන් යන විට නොපි ඔක්කොම මරණවා කියා, පුතාගේ බෙල්ල මිරිකන්න කියා ආව අවස්ථාවේ තමා මේ සිද්ධිය වුනේ. ඒ අවස්ථාවේ ප්‍රේමලාල් සාක්ෂිකරු පොල්ලෙන් පහර දුන්නා. ඒ නිසා ස්වාමිනි මම නිවැරදිකරු කියා සිටිනවා."

I shall now proceed to consider the issues raised on behalf of the accused-appellant.

In the course of the arguments, learned counsel for the accused-appellant contended that the failure on the part of the learned trial judge to consider the special exception of grave and sudden provocation emanating from the dock statement has caused grave prejudice to the accused-appellant.

At the outset, it must be noted that, this was not a ground of appeal urged in the Petition of this application nor a ground on which leave was granted. Nowhere in the Petition (filed before this court) this ground is referred to. At least at the stage of granting special leave, the counsel could have invited the court to consider granting special leave on this issue if it was the position of the accused-appellant that he ought to have benefitted from the special exception to section 294 of the Penal Code of grave and sudden provocation.

Rule 3 of the Supreme Court Rules relating to Special Leave to appeal clearly stipulates in mandatory terms that,

*"Every application……. **shall** contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted, including **the questions of law** in respect of which special leave to appeal is sought……"* (emphasis added)

The Petition filed in the instant case carries a repetition of grounds of appeal in paragraphs 10 and 13 but is bereft of the very argument placed before this court. This court needs to take cognizance of the fact that the Respondent is required to meet the questions raised by the Petitioner and the questions on which special leave was granted and not questions of law that are totally alien to the Petition filed for special leave or the questions of law on which special leave was not granted.

I find the two questions of law on which special leave was granted, are interwoven to some extent.

The crux of the argument of the learned counsel for the accused-appellant was that the manner in which the learned trial judge evaluated the dock statement was erroneous in that the learned trial judge had made use of the 'statutory statement' made by the accused-appellant at the conclusion of the non-summary inquiry, as a factor to reject the dock statement as one not credible to act upon. Their Lordships in the Court of Appeal had acknowledged the fact that the trial judge had misdirected himself on this aspect, however, their Lordships were of the view that no substantial miscarriage of justice had been caused to the accused-appellant resulting from the misdirection and was of the view that there is no reason to set aside the judgment of the learned trial judge.

Firstly, the argument of the learned counsel for the accused-appellant was that the misdirection was sufficiently grave and therefore it is not safe to sustain the conviction for murder (the1st question of law) and secondly, due to the gravity of the misdirection referred to, their Lordships ought not to have applied the proviso to Section 334 of the Code of Criminal Procedure Act which is applicable exclusively to jury trials and not to cases tried by a judge sitting alone, as in the instant case. (The 2nd question of law)

As far as the 1st question of law is concerned, it was argued that if not for the misdirection referred to, the learned judge in all probability would have accepted the dock statement. It was also contended that sufficient material emanates from the dock statement to come to a finding that the accused appellant acted under sudden and grave provocation, and as such the finding ought to have been one of culpable homicide not amounting to murder and not one of murder.

I am in agreement with the view expressed by their Lordships of the Court of Appeal, that the learned trial judge had misdirected himself as to the manner in which the learned trial judge had taken into consideration the statement made by

the accused-appellant at the conclusion of the non-summary inquiry, which is commonly referred to as "statutory statements" which are recorded in compliance with Section 151 (1) and 151 (2) of the Code of Criminal Procedure Act.

Statutorily, if an accused had said anything in response to the charge at the conclusion of the non-summary inquiry, that statement must be led in evidence at the trial, thus it becomes a part of the record. As such, making use of such material cannot be said obnoxious to any evidentiary principle, however, the trial judge is required to ensure that the statement is used in the context in which it was made.

The learned trial judge, in my view, cannot be said to have acted on inadmissible or irrelevant evidence, but the inference he drew from the statement does not appear to be the only irresistible inference that could be drawn from the statement; to that extent the learned High Court Judge appears to have misdirected himself.

This court is now called upon to decide as to whether, if the learned High Court Judge had not made that error, would he have accepted the dock statement and found the accused guilty only of a lessor culpability, namely culpable homicide not amounting to murder on the basis of grave and sudden provocation.

The learned trial judge having carefully considered the evidence given by the witness Premalal, the medical evidence which is consistent with the eyewitness version and the evidence of the police officer who investigated the incident, had come to the finding that the prosecution had established the charge beyond reasonable doubt. Even at the hearing of this appeal, although the learned counsel for the accused-appellant drew the attention of this court to the two contradictions marked, V1 and V2, there was no serious challenge to the credibility of the

testimony of the eyewitness. His submission was that the version of the accused-appellant, as to how the attack on the deceased took place, is more probable.

Before I consider the version of the accused-appellant, I wish to deal with the legal position with regard to the legal burden in establishing a special exception under Section 294 of the Penal Code.

In fairness to the learned trial judge, he had dealt with the aspect of the burden of proof with regard to a special exception pleaded by an accused and correctly had referred to Section 105 of the Evidence Ordinance (Pages 27 to 29 of the judgment). Although in the judgment, he had made no specific reference to the fact that the burden is cast on the accused to establish a special exception on a balance of probability, it is quite evident from the judgment that the learned trial judge had been very much alive to the burden of proof envisaged in the Evidence Ordinance.

Section 105 of the Evidence Ordinance clearly stipulates that;

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Illustration (b) to Section 105 is a clear example of that situation:

> "A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A."

In the case of **THE KING v. JAMES CHANDRASEKERA. 44NLR pg. 97**, Howard CJ held; (at page 100)

"In regard to section 105, the expression " burden of proving " is used in the sense of burden of introducing evidence and not burden of establishing a case, for the latter remains throughout the trial on the prosecution. The burden of proof in section 105 is an evidentiary provision. All that the section says is that the duty of making a general or special exception a fact in issue is on the accused. I adopt the interpretation given to section 105 and to the word " proved " in section 3 by the four out of the seven Judges in Parbhoo v. Emperor1 [(1941) A. I. R. All. 402], particularly the reasoning of the Chief Justice. There is nothing in section 105 or in the definition of " proved" inconsistent with the recognition and acceptance of the fundamental principle of law enunciated in Woolmington's case [(1935) A. C. 462.] In the words of Iqbal Ahmad C.J., in Parbhoo v. Emperor (supra): " The concluding portion of section 105 means no more than this: that, in considering the evidence for the defence relating to an ' exception' or ' proviso' pleaded by the accused, the Court must start with the assumption that circumstances bringing the case within the exception or proviso do not exist. It must then decide whether the burden of proof has or has not been discharged by the accused. If it answers the question in the affirmative it must give effect to its conclusion by acquitting the accused or punishing him for the lesser offence. **If, on the other hand, it holds that the burden has not been discharged, it cannot from that conclusion jump to the further conclusion that the existence of circumstances bringing the case within the exception or proviso has been disproved. All that it can do in such a case is to hold that those circumstances are ' not proved'.** It would be noted that section 3 draws distinction between the words ' proved ', ' disproved' and ' not proved '. It enacts that ' a fact is said not to be proved when it is neither proved nor disproved'. **The burden of bringing his case within an exception or proviso is put on the accused by section 105….." (**Emphasis added)

As far as the first question of law on which special leave was granted, what is required to be considered is whether the accused-appellant had discharged the burden referred to above, in establishing that his case comes within the special exception of grave and sudden provocation under Section 294 of the Penal code.

The dock statement is to the effect that; Both the deceased and witness Premalal while going on the road by his house, threatened them with death and approached his son to throttle him, ("නොපි ඔක්කොම මරණවා කියා පුතාගේ බෙල්ල මිරිකන්න කියා ආව අවස්ථාවේ තමා මේ සිද්දිය වුනේ. …") when the incident happened. He had added that witness Premalal attacked with a club.

It is uncontroverted that this incident happened on the return journey of the deceased and witness Premalal, who had gone to fetch water. It is also in evidence that the deceased was carrying a water pot full of water. This had been corroborated by the investigating officer who had observed the fallen aluminium pot near the place where the body of the deceased was seen fallen and had noted that water had flown out from it (Page 105 of the brief)

If what the accused had said was correct, then it would have been only witness Premalal who was capable of approaching the accused's son to throttle the child as claimed by the accused, as the deceased was carrying a pot of water and it is highly improbable for a young woman of early 20's to leave the pot of water she was carrying and challenge the deceased, who was armed with a knife. The accused had admitted that he was pruning the hedge at the time.

On the issue of provocation, the accused does not say who uttered the words "නොපි ඔක්කොම මරණවා..", which is significant. As such there is no clear evidence who made the provocative utterance, assuming it was made, as the act that caused the death, must be of the person who gave him the provocation if he is to benefit from the exception. On the other hand, for the court to consider as to whether the situation demanded the accused to act in the defence of his son, the dock statement refers only to an attempted attack, again by witness Premalal.

When one considers the untested and unsworn statement the accused appellant made from the dock, it is not clear as to 'who' made the alleged provocative statement and on the other hand, the dock statement does not contain anything to suggest that the situation warranted the accused to act in the exercise of the right given to him by law to defend his son, against the deceased.

In the circumstances, I am of the view that the accused-appellant had failed to discharge the burden of establishing that, either the special exception 1, (provocation) or exception 2, (private defence) is applicable to him, within the meaning of Section 105 of the Evidence Ordinance. Having regard to the overwhelming case against the accused appellant and the cogent evidence placed before the court by the prosecution, the trial judge was justified in rejecting the dock statement of the accused-appellant and I answer the first question of law in the negative.

Special leave was also granted on the question, as to whether the Court of Appeal erred in applying the proviso to the Section 334 of the Code of Criminal Procedure Act.

It was contended on behalf of the accused-appellant that, on one hand Section 334 is a provision applicable exclusively to jury trials as such the Court of Appeal erred when the provision was applied to the instant case which was heard by a judge sitting alone. The learned counsel also pointed out that there is a separate set of provisions in the Code of Criminal Procedure Act applicable to non-jury cases such as the instant case. The learned counsel for the Accused Appellant argued that the misdirection on the part of the trial judge cannot be cured by the application of the proviso and the benefit of the misdirection on the part of the trial judge should enure to benefit of the accused-appellant and the proper conviction ought to be one of culpable homicide and not one of murder.

I have already referred to the alleged misdirection earlier in the judgment and had expressed the view that it is of a trivial nature and does not affect the root of the findings.

Application of the proviso to Section 334 of the Code of Criminal Procedure Act to non-jury trials, nevertheless is a cause for concern; especially when distinct sets of provisions govern the conduct of jury trials and non-jury trials.

In my view, with all due deference to their Lordships, the Court of Appeal did err in applying the proviso referred to above to the instant case.

In fact, the applicable provision is the proviso to sub-article (1) of Article 138 of the Constitution which was promulgated in 1978. Article 138 whilst vesting appellate jurisdiction on the Court of Appeal, the proviso to the said Article [138 (1)] states:

> *"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".* (Emphasis is mine)

It is to be observed that in jury trials there is no "judgment, decree or order" but only a "verdict" returned by the jurors. As such the curative provision embodied in the constitutional proviso referred to above would have no application to a jury trial.

The Legislature in its wisdom, in order to overcome this lacuna, when enacting the Code of Criminal Procedure Code in 1979 made provision for a 'curative

provision' by way of a proviso to Section 339 of the Code of Criminal Procedure Code.

For ease of reference the proviso to Section 334 of the Code of Criminal Procedure Act is reproduced below:

> "Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that **no substantial miscarriage of justice has actually occurred**".

It is to be observed that although the two provisions are couched in different words, however, in substance carry the same meaning/effect.

Thus, the issue before us is whether the accused stand to benefit due to the wrong application of the proviso by the Court of Appeal and I think not.

The principle laid down in the case of **Peiris Vs. The Commissioner of Inland Revenue 65 NLR 457,** in my view is applicable to the instant situation.

In the said case, Justice Sansoni held:

> " It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. **This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power. "**

If an incorrect provision has been cited as the authority for doing of a particular act, but in fact if there is another provision that gives validity for that act, then the act ought to be considered a valid one. As such I see no merit in the argument of

the learned counsel for the Appellant on the second question of law on which leave was granted.

For the reasons set out above, I answer the second question of law on which special leave was granted, also in the negative.

I see no reason to disturb the findings of the learned trial judge or their Lordships of the Court of Appeal and accordingly the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYASATH DEP, PC.

I Agree

CHIEF JUSTICE

JUSTICE VIJITH K. MALALGODA, PC.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act read with Article 127 of the Constitution of the Republic.

SC Appeal 73/2010
SC HCCALA No.218/2009
SP/HCCA/KAG/50/2007 (F)
DC Kegalle Case No.3971/L

1. Akurange Jayasinghe
2. Akurange Samarasinghe

Both of Medagaladeniya,
Udagaladeniya,
Rambukkana.

PLAINTIFFS

Vs.

Akurange Gunawathie(Deceased)

(a) I. Lakshman Weerasekera
Medagaladeniya,
Udagaladeniya,
Rambukkana.

SUBSTITUTED DEFENDANT

AND BETWEEN

1. Akurange Jayasinghe
2. Akurange Samarasinghe
Both of Medagaladeniya,
Udagaladeniya,
Rambukkana.

PLAINTIFF-APPELLANTS

Vs.

(a) I. Lakshman
Weerasekera
Medagaladeniya,
Udagaladeniya,
Rambukkana.

SUBSTITUTED
DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. Akurange Jayasinghe
Medagaladeniya,
Udagaladeniya,
Rambukkana.
1st PLAINIFF-APPELLENT-
PETITIONER

2. Akurange Samarasinghe
(Now Deceased)

Vs.

(a) I. Lakshman Weerasekera
Medagaladeniya,
Udagaladeniya,Rambukkana.
SUBSTITUTE DEFENDANT-RESPONDENT
RESPONDENT.

BEFORE: BUWANEKA ALUWIHARE, PC, J,
PRIYANTHA JAYAWARDENA,PC, J &
K.T.CHITRASIRI, J.

COUNSEL: Shantha Jayawardena for the 1st Plaintiff-Appellant-Appellant.
Amrit Rajapakse with Oliver Jayasuriya for the substituted-Defendant-Respondent-Respondent.

ARGUED ON: 12.01.2016

DECIDED ON: 27-03-2018

ALUWIHARE, PC. J:
Leave to appeal was granted in this matter on the question of law set out in paragraph 11 (a) of the Petition of the Petitioner dated 7.09.2009.

The question raised is as follows:-
"Did the Provincial High Court exercising its civil appellate jurisdiction err in law, when it held that the defendant has acquired the right of way over the Plaintiff's land by prescription?"

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court seeking a declaration that the Plaintiff is the owner of the land referred to in the schedule to the plaint, free of any servitude appertaining to the said land and for a declaration that the Defendant (the substituted Defendant-Respondent-Respondent as far as the present case is concerned) has no right of way or any such servitude over the land in question.

In her considered judgment the learned District Judge did hold that the Plaintiff has title to the impugned land, but held that his title is subject to a servitudal right of the Defendant. The learned District Judge in answering an issue raised by the defendant held that the defendant having used the disputed roadway for a period of over 10 years had gained prescriptive rights for the use of the roadway over the land of the plaintiff.

The Plaintiff aggrieved by the said judgment of the District Court had appealed to the High Court of Civil Appeals and the learned Judges having considered the matter, affirmed the judgment of the learned District Judge stating that they see no reasons to interfere with the findings of the learned trial Judge. The learned District Judge had based her finding on the primary facts and as such it would be necessary to consider the facts in order to determine as to whether the learned District Judge had misdirected herself in applying the applicable law to the facts.

The learned District Judge, as referred to above, held that the Defendant had acquired prescriptive rights to use the disputed road way. As such the only issue the court is called upon to decide is the correctness of the findings of the learned District Judge on the issue of prescription.

Justice Gratiaen considered the requisites to acquire right of way by prescription in the case of ***Thambapillai, vs. Nagamanipillai*** ,52 N.L R 225 and held that *"It is a prerequisite to the acquisition of a right of way by prescription that a well-defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years"*-and Justice Gratiaen in delivering the

judgement in the case referred to, cited with approval the decision in the case of ***Karunaratne v. Gabriel Appuhamy*** (*15 N. L. R. 257*) wherein Chief justice Lascelles held: *"In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined."*

In a subsequent judgement of ***Ranasinghe V Somawathie And Others (2004 2 Sri. L. R 154)***: the Supreme Court considered the matters that are required to be established to claim a right of way by prescription

Their lordships held:

" it has to be established by proof of the existence of the following necessary ingredients inter alia that are necessary to conclude the existence of such a right:- a) adverse possession. b) uninterrupted and independent user for at least 10 years to the exclusion of all others. (section 3 of the Prescription Ordinance) (cap.81) The above matters are all questions of fact and they have to be established by cogent evidence."

In view of the pronouncements referred to above, consideration of the facts would be necessary to arrive at the decision as to whether the defendant had, by placing evidence before court, established the requisite ingredients to secure a right of way by prescription.

The facts are as follows:

At the commencement of the trial before the learned District Judge, the plaintiff moved for a commission to have the corpus surveyed which was allowed. The survey plan and the report prepared by the surveyor consequent to the commission had been marked and produced at the trial as P1 and P2, respectively. (Plan No.3217 of 01.09.1990 prepared by T. N. Cader, Licensed Surveyor). The Plan depicts the land owned by

the Plaintiff (Lot 2) which is to the East of the land of the Defendant (Lot1). The disputed road way is depicted as 'A-B' in the said plan and the said road way connects the main road and Lot 1 which is owned by the Defendant. This disputed roadway traverses over another block of land owned by the Plaintiff which is shown as "Wedagewatta" in the said plan which is to the south west of Lots 1 and 2 referred to above. It is to be noted that the southern and southwestern boundaries of Lots 1 and 2 is a ditch which the surveyor had demarcated as a "dead stream". The disputed roadway which is 10 feet in width runs over the ditch referred to. According to the survey report, a culvert constructed of cement had been there, which the defendant claimed, was put up by him, about 10 years precedent to the survey.

The surveyor in his testimony affirmed to what he had stated in his report P1 (referred to above). In describing the culvert, the surveyor had stated, that a concrete slab 10 feet in width had been constructed over the ditch, resting on cemented side walls. He also expressed the opinion that the culvert appears to be about 10 years in vintage.

Plaintiff had not given evidence at the trial, however, his wife gave evidence and stated that the dispute over the construction of the road arose in 1987. What is significant of the evidence of this witness is her assertion, that the construction of the culvert and placing a slab over it had been completed within two to three days and the plaintiff complained to the Grama Sevaka with regard the said construction. The substituted defendant did not dispute the fact that the roadway in issue, runs over the land owned by the Plaintiff and the road leads from Rambukkana main road to his house. The Defendant's position was that he became the owner of Lot 1 of Plan No.3217 (P1) in 1970 and even at

that time this road was in existence. The only difference had been, according to the defendant, instead of a properly constructed culvert that is presently in place, he used a foot bridge what is commonly called as "Edanda" to cross the ditch. The defendant had said that in 1972 a concrete slab was placed over the ditch and he has used it since then. In 1987 the defendant says both the 1st and 2nd Plaintiffs obstructed the roadway by erecting a barbed wire fence. Consequently, the original defendant had lodged a complaint with the police. Reiterating that the construction of the culvert took place in 1972, the witness had said that it took about a month and a half to construct the culvert. What is significant is that the Plaintiff does not appear to have objected to this construction of the culvert at the initial stages.

According to the evidence of the Plaintiff the dispute had arisen in 1987, and the surveyor had visited the land in 1990. As referred to earlier, the Surveyor had said the culvert appeared to be about 10 years old.

Defendant also had called the Grama Sevaka who served in the G.S. Division within which the lands are situated. His evidence was that he served the Division between 1982 and 1994, and when he assumed duties in 1982, he used the disputed road to access the Defendant's house for official matters. This witness also had testified to the effect that the parties (Plaintiff and the Defendant) complained to him over this dispute and he had added that the complaint was with regard to the obstruction of the road that already existed.

It is to be observed that the learned District Judge who delivered the judgment in this case had heard all the evidence save for the examination in chief of the surveyor. The learned District Judge had carefully analysed the evidence and had come to a finding that the

Defendant has acquired the right of way as a prescriptive user. The learned District Judge has also relied on the observation made by the learned Magistrate who was called upon to inquire into this dispute in terms of Section 66 of the Primary Courts Ordinance which was marked and produced as 1V1.

The learned Magistrate who inquired into the matter in the year 1987 itself and having visited the disputed road had observed that the Defendant (who was the 1st Respondent in the said 66 application) appeared to have used the roadway for a long period of time.

Upon consideration of all the material, the learned District Judge had come to the conclusion that the Defendant had acquired prescriptive rights to use the disputed road way.

The issue that this court is called upon to decide is as to whether the learned District Judge erred in arriving at her finding on the facts and if so, did the learned District Judge err in holding that the Defendant has acquired prescriptive rights.

As his Lordship Justice Chitrasiri held in the case of ***M. Abdul Gaffoor Vs. M. Jethum Uma*** (SC Appeal 95/2013 SC minutes 7.06.2016)

"…that when such an issue involving facts and circumstances of a given case is to be determined, the Appellate Courts are always slow to interfere with such decisions of the trial judges since trial judges are judges who personally hear the witnesses giving evidence. Hence, they become the best judges as to the facts of the case and His Lordship with approval referred to the observation made by Justice G.P.S.de Silva (as he then was) in the case of ***Alwis v. Piyasena Fernando*** 1993 1 SLR 111

wherein Justice de Silva observed that *"..it is well established that findings of primary facts by a trial Judge who hears and sees the witnesses are not to be lightly disturbed on an appeal."*

In the present case for cogent reasons the learned District Judge had believed the defendant's version which had received the approval of the judges of the High Court of Civil Appeals who heard the appeal.

The learned counsel for the Plaintiff-Appellant relied heavily on the credibility of the witness who testified on behalf of the defendant and other infirmities in the evidence.

The learned counsel drew the attention of the court to the evidence of the Surveyor who, in addition to stating that in his opinion the culvert is about 10 years old had added that the Defendant also conveyed to him that the culvert is of that vintage.

The learned counsel submitted that this position contradicts the position taken up by the substituted Defendant who said it was constructed in 1972. The expression of the opinion as to the age of the culvert appears to be a general one. The court cannot ignore the evidence which establishes the fact that the defendant had been using the same road even before the construction of the culvert, with the aid of a foot bridge.

It was also brought to the attention of court that all the witnesses who testified on behalf of the Defendant were partisan witness including the retired Grama Sevaka. The fact remains, however, that the learned District Judge had, having considered the credibility of the witnesses

had thought it fit to rely on the evidence of the Defendant. I am of the view that there are no cogent reasons to reject the evidence or to conclude that the learned District Judge was wrong in relying on the testimonies of the witnesses who testified on behalf of the Defendants.

I wish to cite with approval of the observations made by Justice Parinda Ranasinghe (as he then was) in the case of ***De Silva Vs. Senevirathne*** - 1981 2 SLR pg. 7, wherein His Lordship observed:

"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 has 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 doi ng so".

For the reasons set out above, I see no reason to interfere with the findings of the learned District Judge or the judges of the High Court of Civil Appeals.

Thus, I answer the question of law on which leave was granted in the negative and hold that the Provincial High Court exercising its civil appellate jurisdiction did not err in law, when it held that the defendant has acquired the right of way over the Plaintiff's land by prescription.

Accordingly the appeal is dismissed; however, I make no order as to costs.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE K.T CHITRASISRI

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.

NAGALINGAM SELVARAJA
Dikhena, Weweldeniya, Kegalle.
PLAINTIFF

SC. Appeal No. 75/2011
SC./HCCA/LA No. 350/2010
SP/HCCA/KAG/60/2010/LA
D.C.Kegalle Case No. 5420/L

VS.

RAMAIYA RAJAMMA
No. 245, North Circular Road,
Weweldeniya, Kegalle.
DEFENDANT

AND

RAMAIYA RAJAMMA
No. 245, North Circular Road,
Weweldeniya, Kegalle.
DEFENDANT-APPELLANT

VS.

NAGALINGAM SELVARAJA
Dikhena, Weweldeniya, Kegalle.
PLAINTIFF-RESPONDENT

AND NOW BETWEEN

RAMAIYA RAJAMMA
No. 245, North Circular Road,
Weweldeniya, Kegalle.
DEFENDANT-APPELLANT
-PETITIONER/APPELLANT

VS.

NAGALINGAM SELVARAJA
Dikhena, Weweldeniya, Kegalle.
PLAINTIFF-RESPONDENT
-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J.
Priyantha Jayawardena,PC,J.
Prasanna Jayawardena, PC J.

COUNSEL: Priyantha Gamage for the Defendant-Appellant -Petitioner/Appellant
Sunil Abeyratne for the Plaintiff-Respondent-Respondent.

WRITTEN SUBMISSION FILED: By the Defendant-Appellant -Petitioner/Appellant on 25th October 2011.
By the Substituted Plaintiff-Respondent-Respondent on 18th May 2018.

ARGUED ON: 23rd March 2018.

DECIDED ON: 08th November 2018.

Prasanna Jayawardena, PC, J.

This appeal arises from a dispute over the possession of an allotment of land in Kegalle, which is A: 0 R: 01 P: 5 in extent [hereafter referred to as "the property"]. It is common ground that the property was originally State Land and was granted to one Vellasamy Paapathi by a Grant No. 4568 dated 31st March 1986 issued under the Land Development Ordinance No. 19 of 1935, as amended. It is also common ground that there are two houses on the property - one house bearing Assessment No. 245 and the other house bearing Assessment No. 247.

It is necessary to set out the history of this dispute to identify the questions to be decided in this appeal. When doing so, I will, in addition to referring the petition and annexed documents filed in this Court by the Defendant-Appellant-Petitioner/Appellant ["the defendant"], also refer to documents in the records of D.C. Kegalle Case No. 5420/L and D.C. Kegalle Case No. 7243/L which were called for by our Order dated 13th January 2017. That Order was made because, in the circumstances of this particular

appeal, we considered it necessary to examine both records and ascertain the facts and history of both cases.

The *dramatis personae* in this dispute are Vellasamy Paapathi's grandson - one Nagalingam Selvaraja; Vellasamy Paapathi's adopted daughter - one Ramaiya Rajamma; and Vellasamy Paapathi's son - one Susanth Nagalingam.

There are two cases instituted in the District Court of Kegalle which relate to this dispute. The first case is D.C. Kegalle Case No. 5420/L. The second case is D.C. Kegalle Case No. 7243/L.

I will set out, as briefly as possible, the relevant facts and circumstances of these two cases.

D.C. Kegalle Case No. 5420/L

The subject of this appeal is an Order dated 20th September 2010 made by the High Court of Civil Appeal holden in Kegalle refusing to grant the defendant leave to appeal from an Order dated 28th June 2010 made by the District Court in the above case.

The aforesaid Nagalingam Selvaraja - *ie:* the Plaintiff-Respondent-Respondent ["the plaintiff"] - instituted this case against the aforesaid Ramaiya Rajamma - *ie:* the defendant.

The plaintiff pleaded that Vellasamy Paapathi was his grandmother and that she had named him as her successor upon her death and that, after her death in 1988, the plaintiff has been duly registered as the person who was entitled to succeed to the property. The plaintiff stated that he had permitted the defendant to occupy a house on the property as his licensee and that he has since terminated the license and given the defendant notice to quit, but that the defendant remains in wrongful occupation of the property. On that basis, the plaintiff prayed for a declaration of title to the property, the ejectment of the defendant and the recovery of damages from the defendant.

The defendant filed answer pleading that she is the daughter of Vellasamy Paapathi and that she has been in occupation of the house and property for forty five years. She stated that the plaintiff had fraudulently obtained registration as the person entitled to succeed to the property and prayed that the plaintiff's action be dismissed. The defendant also prayed for an order that she is entitled to remain in possession of the property. However, the defendant did not claim any title to the property.

After trial, the District Court entered judgment on 30th April 2003 in the plaintiff's favour. The defendant did not appeal within the appealable period of 60 days.

However, the defendant later made an application dated 08th January 2004 to the Court of Appeal for revision of the judgment of the District Court. On 06th June 2005, the Court

of Appeal acted in revision and held that the plaintiff had committed a fraud when he obtained registration as the person entitled to succeed to the property. On that basis, the Court of Appeal held in favour of the defendant and determined that the plaintiff did not have any right or title to the property. Accordingly, the Court of Appeal set aside the judgment of the District Court and dismissed the plaintiff's action. However, the Court of Appeal did not grant the defendant the relief she had prayed for in her answer - *ie:* an Order that she is entitled to remain in possession of the property. The judgment of the Court of Appeal was not challenged by the plaintiff in the Supreme Court.

But, *in the meantime*, the plaintiff had obtained a writ of ejectment in the aforesaid Case No. 5420/L and ejected the defendant from the property on 16th February 2004 - *ie:* more than a year *before* the judgment of the Court of Appeal was entered.

In these circumstances, the defendant filed a petition dated 03rd August 2005 stating that she had been ejected from the property by the execution of a writ issued in the present case [*ie:* Case No. 5420/L] and praying that, following the judgment of the Court of Appeal which set aside the judgment entered in favour of the plaintiff by the District Court, the defendant is entitled to have the earlier *status quo* restored and be placed in possession of the property.

The plaintiff filed a Statement of Objections on 24th March 2006 stating that there were two houses on the property- one house bearing Assessment No. 247 occupied by the plaintiff and the other bearing Assessment No. 245 which had been occupied by the defendant at the time he instituted this action [*ie:* Case No. 5420/L]. The plaintiff pleaded that he was and continues to be in occupation of the house bearing Assessment No. 247. He went on to state that, on 16th February 2004, the defendant had been ejected from the house bearing Assessment No. 245 in execution of the writ issued in the present case. The plaintiff admitted that, subsequently, the Court of Appeal had set aside the judgment entered in plaintiff's favour in pursuance of which that writ had been issued.

However, the plaintiff went on to state that, since the Court of Appeal has held that the plaintiff's claim to have succeeded to the title to the property was defective ["දෝෂ සහිත"], Vellasamy Paapathi's eldest son - the aforesaid Susanth Nagalingam - is the person who is, in Law, entitled to the property under and in terms of the provisions of the Land Development Ordinance. The plaintiff also pleaded that the defendant was not entitled to any claim to the property under the provisions of the Land Development Ordinance.

The inquiry into the defendant's aforesaid application commenced on 16th May 2007 and was postponed for 23rd August 2007. However, the inquiry was not taken up on that day and the inquiry was postponed for 13th March 2008. On that day, the plaintiff led the evidence of an officer from the Registry of the District Court of Kegalle who produced the case record in the aforesaid D.C. Kegalle Case No. 7243/L which had been filed by one Susanth Nagalingam against the plaintiff and defendant in the present case [No. 5420/L] to obtain a declaration of title to the very same property which is the

subject matter of the present case and for the ejectment of the plaintiff and the defendant from that property. The plaintiff produced several of the pleadings and documents in the aforesaid Case No. 7243/L.

By leading this evidence, the plaintiff [*ie:* Nagalingam Selvaraja] proved that Susanth Nagalingam had obtained judgment and decree in his favour against him in that Case No. 7243/L. The plaintiff also proved that he had been ejected from the property on 06th February 2008 in pursuance of a writ of execution issued against him in that case and that the plaintiff in that case [*ie:* the aforesaid Susanth Nagalingam] had been placed in possession of the property from that date onwards. Thus, the plaintiff proved that he was no longer in possession of the property which was also the subject matter of Case No. 5420/L and which the defendant claimed a right to possess in the aforesaid application which was being inquired into. The plaintiff led the evidence of another witness on 17th December 2008 and the inquiry was concluded. The parties were given an opportunity to make written submissions.

In the written submissions filed on behalf of the defendant, it has been stated that the defendant's application is made under the provisions of section 777 of the Civil Procedure Code. The defendant highlighted the fact that section 777 enables *"a party entitled to any benefit [by way of restitution or otherwise] under a decree passed in an appeal ….. "* to obtain execution of the appellate decree by applying to the Court which passed the decree against which the appeal was preferred. The defendant submitted that, consequent to the judgment and decree of the Court of Appeal setting aside the earlier judgment of the District Court entered in the plaintiff's favour, the defendant was entitled to make this application under section 777 to be restored to possession of the property from which she was ejected in pursuance of that judgment of the District Court. The defendant submitted that, in these circumstances, the District Court has the inherent power and duty to restore the defendant to possession of the property.

In the written submissions filed on behalf of the plaintiff, it was conceded that, in so far as present case [*ie:* Case No. 5420/L] is concerned, the plaintiff was obliged to hand over possession of the property to the defendant following the judgment and decree of the Court of Appeal ["දිසා අධිකරණ තීන්දුවෙන් පසුව එය ක්‍රියාත්මක කරමින් ෆිස්කල්වරයා මගින් පැමිණිල්ල අංක: 245 පරිශ්‍රයෙහි බුක්තිය ලබාගත් පසු යලිත් එම තීන්දුව අභියාචනාධිකරණය විසින් ඉවත් කළ විට එහි බුක්තිය පැමිණිලිකාර වගඋත්තරකරු විසින් ආපසු විත්තිකාර පෙත්සම්කාරියට භාර දීම සිදුවිය යුතුය. ඒ වගට තර්කයක් නැත"].

However, the plaintiff submitted that he was prevented from handing over possession of the property to the defendant because the property was no longer in his possession since the plaintiff in D.C. Kegalle Case No. 7243/L [*ie:* the aforesaid Susanth Nagalingam] had been placed in possession of the entire property on 06th February 2008 in pursuance of the writ of execution issued in that case against the plaintiff.

By his Order dated 28th June 2010, the learned District Judge held that, following the Court of Appeal setting aside the judgment entered in favour of the plaintiff, the

defendant would be entitled to succeed in her application for the restoration of the *status quo* by ejecting the plaintiff from the property and placing the defendant in possession.

However, the learned District Judge observed that, *in the meantime*, the plaintiff in Case No. 7243/L had been placed in possession of the property in pursuance of the writ executed in that case and the plaintiff in the present case [*ie:* Case No. 5420/L] had been ejected from the property. The learned District Judge held that the plaintiff in Case No. 7243/L, who had been lawfully placed in possession of the property in pursuance of the writ executed in that case, could not be dispossessed by an Order issued in the present Case No. 5420/L to which he is not a party. The learned District Judge observed that these supervening circumstances had rendered the defendant's application nugatory ["ප්‍රතිඵල විරහිත ඉල්ලීමකි"].

The defendant made an application to the High Court of Civil Appeal holden in Kegalle praying for leave to appeal from the aforesaid Order dated 28th June 2010 made by the learned District Judge.

By its Order dated 20th September 2010, the High Court refused leave to appeal. When doing so, the learned Judges of the High Court held that the District Court had correctly determined that an order to eject the plaintiff from the property could not be issued in the present case [*ie:* Case No. 5420/L] because it was an admitted fact that the plaintiff was not in possession of the property after 06th February 2008. In this connection, the learned Judges of the High Court stated *"When the case No. 5420 was taken up for inquiry in respect of the application made by the petitioner for restoration into possession the respondent testified the Registrar of the District Court of Kegalle. His evidence revealed that the respondent had already been evicted by execution of writ in case No. 7243/L. The plaintiff in that case is placed in possession. Thus it is clear that the learned District Judge cannot deliver an order to evict the respondent as he is already evicted by execution of writ in case No. 7243/L. The petitioner has suppressed all these material facts in the application filed seeking leave to appeal. The learned District Judge considered all these facts and pronounced his impugned order dated 28.06.2010. We cannot see any legal point involved there to be clarified in the appeal"*. The High Court also commented that the Court of Appeal had dismissed the plaintiff's action in Case No. 5420/L *"but no enforceable order has been made."*.

The defendant made an application to this Court seeking leave to appeal from the Order of the High Court and this Court granted leave to appeal.

D.C. Kegalle Case No. 7243/L

A few months after the Court of Appeal held that the plaintiff in D.C. Kegalle Case No. 5420/L [*ie:* Nagalingam Selvaraja] did not have any right or title to the property, the aforesaid Susanth Nagalingam instituted D.C.Kegalle Case No.7243/L on 31st October

2005 against the defendant in the present Case No. 5420/L [*ie:* Ramaiya Rajamma] and the plaintiff in the present Case No. 5420/L [*ie:* Nagalingam Selvaraja].

Susanth Nagalingam's cause of action [as the plaintiff in Case No. 7243/L] was that, consequent to the Court of Appeal holding that Nagalingam Selvaraja had no right, title or entitlement to the property, Susanth Nagalingam became entitled to the property since he is the eldest son of Vellasamy Paapathi. He pleaded that Nagalingam Selvaraja was in unlawful occupation of the entire property from 16th February 2004 onwards consequent to the writ of ejectment issued in Case No. 5420/L. Further, he pleaded that Ramaiya Rajamma was also disputing his title to the property.

On that basis, Susanth Nagalingam named Ramaiya Rajamma and Nagalingam Selvaraja [*ie:* the defendant and the plaintiff in present case No. 5420/L respectively] as the 1st and 2nd defendants respectively, in Case No. 7243/L.

Susanth Nagalingam [*ie:* the plaintiff in Case No. 7243/L] prayed for a Declaration that he has title to the property and for an order ejecting Ramaiya Rajamma and Nagalingam Selvaraja from the property and for other reliefs including the recovery of damages from Nagalingam Selvaraja who was in possession of the entire property.

Ramaiya Rajamma [*ie:* the defendant in the present case No. 5420/L] who was the 1st defendant in Case No. 7243/L, filed answer dated 31st March 2006 in that case pleading that it was a collusive action between Susanth Nagalingam [*ie:* the plaintiff in that case] and his son, Nagalingam Selvaraja [*ie:* the plaintiff in the present Case No. 5420/L]. She denied that Susanth Nagalingam had any right or title to the property. She prayed that Case No. 7243/L be dismissed and that an Order be made restoring the *status quo* which prevailed at the time of the institution of Case No. 5420/L. She did not claim that she had title to the property. She only claimed a right to occupy the property.

Nagalingam Selvaraja [*ie:* the plaintiff in the present case No. 5420/L] who was the 2nd defendant in Case No. 7243/L, filed answer dated 30th June 2006 in that case admitting the averments in the plaint in Case No. 7243/L.

On the basis of the averments in the answer of the 2nd defendant in Case No. 7243/L [*ie:* Nagalingam Selvaraja who is the plaintiff in the present case No. 5420/L], the learned District Judge acted under the provisions of section 72 of the Civil Procedure Code and entered judgment against him in Case No. 7243/L on 13th July 2007.

The learned District Judge fixed Case No. 7243/L for trial between the plaintiff in that case [*ie:* Susanth Nagalingam] and the 2nd defendant in that case [*ie:* Ramaiya Rajamma who is the defendant in the present Case No. 5420/L].

On 06th February 2008, writ was executed in Case No. 7243/L against the 2nd defendant in that case [*ie:* against Nagalingam Selvaraja who is the plaintiff in the present case No. 5420/L] and who was the *only* person in possession of the property at that time [after Ramaiya Rajamma had been ejected from the property on 16th February 2004 in

pursuance of the writ of execution issued in Case No. 5420/L]. As a result of the writ executed in Case No. 7243/L, Nagalingam Selvaraja was ejected from the property on 06th February 2008. On the same day, possession of the property was handed over to the plaintiff in Case No. 7243/L [*ie:* to Susanth Nagalingam].

Case No. 7243/L proceeded to *inter partes* trial between the plaintiff in that case [*ie:* Susanth Nagalingam] and the 1st defendant in that case [*ie:* Ramaiya Rajamma who is the defendant in the present Case No. 5420/L].

On 15th November 2011, the District Court entered judgment and decree in favour of the plaintiff [*ie:* Susanth Nagalingam] making a Declaration that he has title to the property. The learned District Judge also rejected the claim made by the 1st defendant in that case [*ie:* Ramaiya Rajamma who is the defendant in the present Case No. 5420/L] that Case No. 7243/L was a collusive action between the plaintiff in that case [*ie:* Susanth Nagalingam] and the 2nd defendant in that case [*ie:* Nagalingam Selvaraja who is the plaintiff in the present case No. 5420/L]. It is seen that the judgment of the District Court was entered after the defendant filed the present leave to appeal application dated 27th October 2010 in this Court.

The 1st defendant in that case [*ie:* Ramaiya Rajamma who is the defendant in the present Case No. 5420/L] appealed from that judgment to the High Court of Civil Appeal holden in Kegalle. That appeal bears No. SP/HCCA/KEG/921/2012 (F). On 21st November 2013, the High Court has dismissed that appeal and affirmed the judgment dated 15th November 2011 of the District Court. There is no indication that the 1st defendant in that case [*ie:* Ramaiya Rajamma who is the defendant in the present Case No. 5420/L] sought to challenge the Order of the High Court in this Court.

Questions of law to be decided

On 17th June 2011, the defendant was granted leave to appeal on the following questions which are reproduced *verbatim*:

(i) Has the Hon. High Court erred or misdirected itself on the law in concluding that the Court of Appeal Order vis : in *Case bearing No. CA 22/2004* is an enforceable order ?

(ii) Has the Hon. High Court erred or misdirected itself on the law in failing to see that the Respondent has committed a fraud ?

(iii) Have the Hon. High Court Judges failed to appreciate that, there is ample provision to restore the judgment-debtor in the interests of justice ?

(iv) Have the Hon. High Court Judges failed to appreciate that the balance of convenience lies in favour of the Petitioner ?

(v) Have the Hon. High Court Judges failed to appreciate that the equitable considerations favour the Petitioner ?

(vi) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, the learned Judges have failed to appreciate that the Respondent's own behaviour and actions have thwarted the course of justice into a sheer mockery ?

(vii) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, The Hon. High Court erred or misdirected itself on the law in stating/ concluding that, there is no legal point involved to be clarified in the Appeal ?

(viii) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, when a party appears and complains that when she has been wronged by a process of law, the court would not helplessly watch and allow the fraud practised on that party to be perpetuated ?

(ix) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, a court has inherent power to repair an injury caused to a party even by its own mistake ?

(x) H(as the Hon. High Court erred or misdirected itself on the law in failing to appreciate the maxim *Actus Curiae Neminem Gravabit* (An act of the court harms no one) or the underlying principle ?

(xi) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, there was no impediment for the restoration of the Petitioner into possession ?

(xii) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, the Petitioner is entitled to be restored into original possession which had been taken away in the process of execution of the erroneous decree of the Court of first instance ?

(xiii) Has the Hon. High Court erred or misdirected itself on the law in failing to appreciate that, the Petitioner deserved to have the fruits of costly and long drawn out litigation ?

Question of law no. (i) asks whether High Court erred when it commented that the Court of Appeal did not make an *"enforceable order"*. In this regard, it is seen that Court of

Appeal only set aside the judgment entered in the plaintiff's favour and dismissed the plaintiff's action but did not go on to make an Order that the defendant is entitled to possession of the property. To that extent, the learned High Court Judges were correct when they stated that the Court of Appeal did not make a specific *"enforceable order"* in favour of the defendant.

However, since it is common ground that the defendant was dispossessed in pursuance of the judgment entered in the plaintiff's favour in Case No. 5420/L, the defendant could rely on Section 777 of the Civil Procedure Code which states that a party who is entitled to any benefit (including by way of restitution or otherwise) under an appellate decree may apply to the original Court which passed the decree which was appealed from and have the original Court execute the appellate decree. In WICKREMAYAKE vs. SIMON APPU [76 NLR 166], this Court held that where a party is placed in possession of a land in execution of a decree which is later set aside in appeal, section 777 enables the successful appellant to be restored to possession of the land. H.N.G.Fernando CJ stated [at p.167] *"….. the effect of the decree of the Supreme Court was that there was no longer in existence a valid decree in pursuance of which the plaintiff could properly be placed in possession of the land. Justice therefore requires that the plaintiff who had been placed in possession in execution of a decree which turned out to be invalid, should no longer be allowed to continue in possession of the land."*.

In any event, the plaintiff has, as set out above, specifically conceded that he was obliged to hand over possession of the property to the defendant following the judgment of the Court of Appeal. In these circumstances, there is no dispute that, *if* the plaintiff had remained in possession of the property, the defendant was entitled to be granted possession of the property and to have the plaintiff ejected from the land. As mentioned earlier, the learned District Judge has specifically stated so and the learned Judges of the High Court have not disagreed with that position.

In these circumstances, I am inclined to the view that the statement made by the learned High Court Judges that the Court of Appeal did not make an *"enforceable order"*, must be taken to have been an *obiter* comment made after the High Court had held that *"Thus it is clear that the learned District Judge cannot deliver an order to evict the respondent as he is already evicted by execution of writ in case No. 7243/L."*. That *obiter* comment had no bearing on the reasoning of the learned High Court Judges that the District Court could not make an enforceable Order to eject the plaintiff in Case No. 5420/L [*ie:* Nagalingam Selvaraja] from the property because he was not in possession of the property after 06th February 2008. L. Therefore, this *obiter* comment had no bearing on the determination by the High Court that leave to appeal should be refused.

For the aforesaid reasons, I answer question of law no. (i) in the negative.

Question of law no. (ii) asks whether the High Court erred by failing to see that the plaintiff has committed a fraud. Question of law no. (viii) raises a similar issue. Therefore, these two questions can be taken together.

An examination of the proceedings at the inquiry held in Case No. 5420/L into the defendant's aforesaid application dated 03rd August 2005 praying to have the earlier *status quo* restored and to be placed in possession of the property, shows that the defendant did not give evidence and did not lead the evidence of any witnesses or produce any documents to establish that the plaintiff [*ie:* Nagalingam Selvaraja] had committed a fraud. It appears that the defendant relied solely on the finding by the Court of Appeal that the plaintiff had committed a fraud when he obtained registration as the person entitled to succeed to the property.

It was only the plaintiff who led evidence to produce the documents in Case No. 7243/L and prove that he was no longer in possession of the property following his being ejected from the property on 06th February 2008 in pursuance of the writ of execution issued against him in that Case No. 7243/L.

In has to be understood that, although the Court of Appeal had determined that the plaintiff in Case No. 5420/L had committed a fraud on the defendant in that particular case, that determination by the Court of Appeal cannot have any effect on the rights of the plaintiff in Case No. 7243/L who was not a party to Case No. 5420/L in the District Court or before the Court of Appeal.

It is in this light that the District Court held that the defendant cannot obtain an Order in Case No. 5420/L which will result in the dispossession of the plaintiff in Case No. 7243/L who had been placed in possession of the property in pursuance of a writ of execution issued by the Court. As mentioned earlier, the High Court affirmed that Order when it refused the defendant leave to appeal from that Order.

However, by the aforesaid questions of law, the defendant appears to urge that Case No. 7243/L was a fraud perpetrated on the defendant by *both* the plaintiff in that case [*ie:* Susanth Nagalingam] and the 2nd defendant in that case [*ie:* Nagalingam Selvaraja, who is the plaintiff in Case No. 5420/L].

Therefore, this Court has to examine whether there was material before the District Court and High Court in Case No. 5420/L to establish that Case No. 7243/L was a fraud perpetrated on the defendant by *both* the plaintiff and the 2nd defendant in that case. The next question to be examined is, in the event there was material to establish such a fraud, whether the District Court erred in refusing to make an Order restoring the defendant to possession of the property in Case No. 5420/L and whether the High Court erred when it refused leave to appeal from that Order of the District Court.

In this regard, the mere fact that the plaintiff in Case No. 7243/L [*ie:* Susanth Nagalingam] is the father of the plaintiff in the present case [*ie:* Nagalingam Selvaraja] does not, by that fact itself, prove a fraud. On the contrary, following the determination by the Court of Appeal that the plaintiff in the present case [*ie:* Nagalingam Selvaraja] had no right to the property, it is none other than the plaintiff in Case No. 7243/L [*ie:*

Susanth Nagalingam], who is eldest son of Vellasamy Paapathi, who is entitled to the property in terms of section 72 the Land Development Ordinance.

In these circumstances, the plaintiff in Case No. 7243/L [*ie:* Susanth Nagalingam] had good cause and every right to institute Case No. 7243/L and claim title to the property. Further, the mere fact that the 2nd defendant in that case [*ie:* Nagalingam Selvaraja who is the plaintiff in Case No. 5420/L] admitted the averments in the plaint in Case No. 7243/L does not by itself, establish collusion or fraud. It could well be that the 2nd defendant recognised that the plaintiff [who is his father] had title in Law and saw no reason to attempt a futile defence. The likelihood that Case No. 7243/L was not a collusive action is strengthened by the fact that the Fiscal's Report dated 06th February 2008 in that case records that the 2nd defendant [*ie:* Nagalingam Selvaraja] was ejected from the property and the property was handed over the plaintiff [*ie:* to Susanth Nagalingam] when writ was executed in that case.

Accordingly, I hold that that there was no material before the High Court to have reached a correct finding that there was a fraud which vitiated the Order dated 28th June 2010 made by the District Court in Case No. 5420/L. Therefore, I answer questions of law no. (ii) and (viii) in the negative.

The fact that there was no material before the District Court or High Court in Case No. 5420/L to establish a fraud perpetrated on the defendant in Case No. 7243/L, is reflected in the subsequent judgment of the District Court in Case No. 7243/L where the learned District Judge held that the mere fact that the plaintiff and 2nd defendant in that case are father and son does not, by itself, justify a finding that the action is a collusive one. The learned judge has recognised that it is likely that the plaintiff filed this action upon becoming aware that he was the person who was entitled to the property under the provisions of the Land Development Ordinance. In the appeal from that judgment, the learned Judges of the High Court of Civil Appeal have observed that the plaintiff in Case No. 7243/L cannot be held responsible for an alleged fraud perpetrated by the 2nd defendant in that case upon the 1st defendant in that case. As set out earlier, I am in agreement with the aforesaid views expressed by the learned District Judge and the learned Judges of the High Court.

Next, question of law no.s (iii), (iv),(v), (vi), (ix) and (x) ask whether the High Court erred by failing to appreciate that there was ample provision to restore the defendant to possession of the property *"in the interests of justice"*, *"on the balance of convenience"* and *"equitable considerations"*, because the plaintiff's *"behaviour and actions have thwarted the course of justice into a sheer mockery"*, because *"a court has inherent power to repair an injury caused to a party even by its own mistake"* and because of *"the maxim Actus Curiae Neminem Gravabit [an act of court harms no one"*. Some of the considerations raised in these questions are more appropriate to issues relating to interlocutory relief. Nevertheless, all these questions are facets of the central issue of

whether the interests of justice required the Court to restore the defendant to possession of the property.

In this regard, as observed earlier, there is no dispute that, following the Court of Appeal setting aside the judgment entered in favour of the plaintiff in Case No. 5420/L, the defendant would have been entitled to succeed in her application for the restoration of the *status quo* by ejecting the plaintiff from the property and placing the defendant in possession *provided* the plaintiff had remained in possession of the property. The plaintiff has expressly conceded this position. The learned District Judge has correctly held so.

Therefore, there is no doubt whatsoever that, ***if*** the plaintiff in Case No. 5420/L *had remained in possession of the property*, the defendant was entitled to be restored to possession after the Court of Appeal set aside the judgment entered in favour of the plaintiff in pursuance of which he had obtained possession of the property on 16th February 2004 by the writ of execution issued in Case No. 5420/L.

But, as observed earlier, the difficulty which stood in the way of the defendant being restored to possession of the property was the supervening circumstance that the plaintiff in Case No. 7243/L had obtained a declaration of title to the property and had been lawfully placed in possession of the property on 06th February 2008 in pursuance of the writ of execution issued in that Case No 7243/L.

It hardly needs to be said here that the interests of justice operate equally in favour the defendant in Case No. 5420/L [who claims she is entitled to be restored to possession of the property as against the plaintiff in Case No. 5420/L] and the plaintiff in Case No. 7243/L who has been earlier placed in possession of the property in execution of the writ issued in that case.

The defendant's contention that the *"interests of justice"* entitle her to ride roughshod over the rights of the plaintiff in Case No. 7243/L without him even being given an opportunity to be heard, is itself inequitable and must be rejected. Justice can be done only if the scales of justice are held evenly. The defendant was attempting to tilt the scales in her favour and subvert justice by denying the plaintiff in Case No. 7243/L his right to be heard. The learned District Judge had seen what the defendant was trying to do and ensured that the plaintiff in Case No. 7243/L was not prejudiced. This has been affirmed by the High Court.

In this regard, if the defendant, who was a party to Case No. 7243/L and was well aware of the fact that the plaintiff in that case had been placed in possession of the property on 06th February 2008, wished to obtain an Order restoring her to possession, she should have awaited the judgment in that Case No. 7243/L in which she had prayed for an Order that she had a right to be restored to possession of the property. Alternatively, the defendant could have explored the possibility of making an interlocutory application in Case No. 7243/L against the plaintiff in that case seeking an interim Order restoring her

to possession of the property. At the very least, the defendant should have moved to add the plaintiff in Case No. 7243/L as a party to her application made in Case No. 5420/L by which she sought an Order [in that Case No. 5420/L] restoring her to possession of the property. The defendant did none of those things and attempted to surreptitiously obtain an order restoring her to possession of a property which she knew full well was in the possession of the plaintiff in Case No. 7243/L, without giving him an opportunity to be heard. That is certainly not just or equitable conduct on the part of the defendant. For these reasons, questions of law no.s (iii), (iv),(v), (vi), (ix) and (x) are answered in the negative.

Question of law no. (vii) asks whether the High Court erred when it took the view that there is no *"legal point involved there to be clarified in the appeal".* It appears to me that when the High Court made the aforesaid observation, the learned Judges were referring to the fact that the District Court could not issue an effective order to evict the plaintiff in Case No. 5420/L from the property because he had already been evicted from the property on 06th February 2008 in pursuance of the writ of execution issued in Case No. 7243/L. The validity of this position is indisputable since it is a long-established principle of law that a court will not issue an order that cannot be given effect to or which will be nugatory. I am of the view that the aforesaid observation by the learned High Court Judges has to be understood in that light. Accordingly question of law no. (vii) is answered in the negative.

Question of law no. (xi) asks whether the High Court erred in failing to appreciate that *"There was no impediment for the restoration of the petitioner into possession"*. However, as explained earlier, the plaintiff in Case No. 7243/L had been placed in lawful possession of the property on 06th February 2008 and could not be evicted by a collateral process. Thus, there was a tangible obstacle to the District Court issuing an Order in Case No. 5429/L restoring the plaintiff to possession of the property. Accordingly, question of law no. (xi) is also answered in the negative.

Question of law no (xii) asks whether the High Court erred in law in failing to appreciate that the defendant was entitled was to be restored to possession of the property from which she had been ejected in pursuance of the judgment entered by the District Court in Case No. 5420/L, which had been later set aside by the Court of Appeal.

Here too, as mentioned earlier, although the defendant would have been entitled to be restored to possession of the property ***if*** the plaintiff in Case No. 5420/L had remained in possession of the property, the defendant was not entitled to dispossess the plaintiff in Case No. 7243/L who had lawfully obtained possession of the property on 06th February 2008. Therefore, question no (xii) is also answered in the negative.

Finally, question of law no. (xiii) asks whether the High Court failed to appreciate that the petitioner deserved to have the *"fruits of costly and long drawn out litigation"*. I have already explained earlier the reasons why the defendant was not entitled to obtain an Order in Case No. 5420/L restoring her to possession of the property and thereby

evicting the plaintiff in Case No. 7243/L who had been lawfully placed in possession of the property on 06th February 2008. It is not necessary to repeat those reasons here.

In any event, it is seen that the defendant's claim to a right to possess the property against the plaintiff in Case No. 7243/L has been examined by the District Court in the *inter partes* trial in that case. After trial, the District Court has rejected the defendant's claims and entered judgment in favour of the plaintiff. The High Court of Civil Appeal has affirmed that judgment. There is no suggestion that these judgments were challenged by the defendant in the Supreme Court. In these circumstances, the plaintiff in Case No. 7243/L is undoubtedly entitled to reap the benefits of the judgments entered in his favour in Case No. 7243/L, which have affirmed his right, title and entitlement to the property. The defendant who claims no title to the property cannot interfere with those rights of the plaintiff in Case No. 7243/L. Therefore question no. (xiii) is answered in the negative.

For the aforesaid reasons, this appeal is dismissed with costs. The Order of the High Court of Civil Appeal Holden in Kegalle in Application No. SP/HCCA/KAG/60/2010(LA) dated 20th September 2010 and the Order dated 28th June 2010 of the District Court in D.C. Kegalle Case No. 5420/L are affirmed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardena, PC, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal against Judgment of the Provincial High Court of Central Province dated 17.12.2009

SC Appeal 76/2010
SC HCCA LA No.26/2010
CP/HCCA/562/2004
D.C. Kandy Case No.19692/L

IN THE DISTRICT COURT OF KANDY

Rev. Galboda Sumangala Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, Kandy)

Plaintiff

Vs.

Rev. Welihelathenne Somaloka Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, (Kandy)

Substituted Plaintiff

Vs.

1. ChandasekeraWasala Mudiyanselage George Chandrasekera of 8/4 Mawilmada, Kandy.
2. ChandasekeraWasala Mudiyanselage Anuradha Chandrasekera, alias, Arty Chandrasekera of No.82, 1st Lane, Mawilmada, Kandy.

3. Rev. Arambegama Saranankara
Thero of Keda Pansala ,Asgiri
Viharaya,Kandy.

Defendants.

AND BETWEEN IN THE HIGH COURT OF Central PROVINCE

1. ChandasekeraWasala Mudiyanselage
George Chandrasekera of 8/4
Mawilmada, Kandy.

2. ChandasekeraWasala
Mudiyanselage
Anuradha Chandrasekera, alias, Arty
Chandrasekera of No.82, 1st Lane,
Mawilmada, Kandy.

3. Rev. Arambegama Saranankara
Thero of Keda Pansala ,Asgiri
Viharaya,Kandy.

Defendants-Appellants

Vs.

Rev. Welihelathenne Somaloka Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, (Kandy)

Substituted Plaintiff-Respondent

AND NOW BETWEEN, IN THE SUPREME COURT IN AN APPEAL

(DECEASED)

1.ChandasekeraWasala Mudiyanselage
George Chandrasekera of 8/4
Mawilmada, Kandy.

1A Herath Mudiyanselage Walgampahe Gedera Podi Menike of No.8/4, Aluthgantota Road, Mawilmada, Kandy. (*1A substituted Defendant Appellant Petitioner)*

2. ChandasekeraWasala Mudiyanselage Anuradha Chandrasekera, alias, Arty Chandrasekera of No.82, 1st Lane, Mawilmada, Kandy.

3. Rev. Arambegama Saranankara Thero of Keda Pansala Asgiri Viharaya,Kandy.

Defendant-Appellant-Petitioners

Vs.

Rev. Welihelathenne Somaloka Thero of Asgiri Viharaya, Kandy. (Temporary trustee of Niththawela Rajamaha Viharaya, (Kandy)

Substituted-Plaintiff-Respondent-Respondent

BEFORE BUWANEKA ALUWIHARE, PC, J,
PRIYANTHA JAYAWARDENA, PC, J &
PRASANNA S. JAYAWARDENA, PC, J.

COUNSEL: Ms. Sudarshani Cooray for the Defendant-Appellant-Appellants.
Harsha Soza, PC with Ranil Prematilake for the Substituted Plaintiff-Respondent-Respondent.

ARGUED ON: 13.01.2017

DECIDED ON: 05.09.2018

ALUWIHARE, PC, J:

Ven. Galboda Sumangala Thero, the original Plaintiff filed an action in the District Court of Kandy against 2nd and 3rd Defendant-Appellants and another Defendant seeking among other reliefs to have the land referred to in the schedule to the plaint declared a property belonging to "Nittawela" Raja Maha Viharaya and to have the 1st and 2nd Defendants evicted from the said land. The action referred to was filed on the basis that Plaintiff was the temporary trustee of the temple concerned.

In response to the plaint filed by the Ven. Sumangala Thero, the Defendants-Appellants filed a joint answer followed by the replication of the Plaintiff priest; consequently, the trial was fixed by the learned District Judge for the 30th March, 2001. On the said date of trial Ven. Sumangala Thero was not present in court and due to this reason, the learned District Judge dismissed the action filed by the Plaintiff. On 4th July, 2001, by way of a Petition and affidavit, invoking Section 87 (3) of the Civil Procedure Code, the Plaintiff moved to have the order of dismissal vacated, and to have the action restored.

The Defendant-Appellants resisted the said application and filed objections. Consequently, the learned District Judge inquired into the matter where the parties were afforded an opportunity to place oral evidence, and by order dated 15th September, 2004 the learned District

Judge vacated the order of dismissal of the Plaintiff's action and the case was re-fixed for trial.

The Defendant-appellants aggrieved by the order of the learned District Judge invoked the appellate jurisdiction of the Court of Appeal and with the establishment of the High Court of Civil Appeals, the matter was referred to the High Court of Civil Appeals, Central Province.

The High Court of Civil Appeals having heard the parties, by its judgment dated 17th December, 2009 dismissed the appeal of the Defendants-Appellants holding that this was not a fit matter to be interfered with.

The Defendant-Appellants aggrieved by the said judgment of the High Court of Civil Appeals moved this court by way of leave to appeal and leave was granted on the question set out in sub-paragraph (vii) of paragraph 13 of the Petition of the Petitioner which is as follows:

> *"Did the learned Provincial High Court judges misdirect themselves in deciding that the Plaintiff had acted within the framework of Section 87 (3) of the Civil Procedure Code and that it is sufficient for a purge default application".*

The relevant facts can briefly be stated as follows:

The original Plaintiff, Somaloka Thero, filed an action in the District Court against the Defendants seeking certain reliefs pertaining to some land. After the completion of the filing of pleadings, the matter was fixed for trial on 30th March, 2001. On that day the Plaintiff had been absent, but represented by his Attorney-at-Law, who informed the court that he had no instructions with regard to the matter. Acting in terms of Section 87

of the Civil Procedure Code the learned District Judge dismissed the action of the Plaintiff due to his non-appearance.

About three months after the dismissal of the Plaintiff's action, the Plaintiff by way of Petition and affidavit moved court to have the order of dismissal vacated and to have the matter restored back. To this application, the Defendants objected and accordingly their written objections were also filed.

The Plaintiff in seeking to have the order of dismissal vacated, took up the position that his failure to attend court on the date the matter was fixed for trial was due to serious health conditions he was suffering at the relevant time, namely Tuberculosis, which was supported by a medical report from the doctor who treated the Plaintiff.

The Plaintiff said in his evidence that he was hospitalized during the relevant time. Even on the day he gave evidence he was not certain as to the date on which he defaulted appearance. Even the year he was not certain of. Under cross examination the Priest had said he was suffering from Tuberculosis and had been advised not to go out, due to the contagious nature of the illness. Further, under cross examination, in answer to a leading question put to him, the Plaintiff had said that it is possible that he mixed up the dates (of the trial).

According to Dr. Korosgolla who testified at the inquiry, the Plaintiff was suffering from Tuberculosis and he recommended bed rest for a period of three months from 28th March, 2001. He had added that the priest was physically weak and due to the possibility of the patient transmitting the disease to others he recommended three months rest.

Upon consideration of the material placed before the learned District Judge by his order dated 15th September, 2004, vacated the order of dismissal of plaint and re-fixed the matter for trial.

The learned District Judge had held that the Plaintiff Priest had established through evidence the reason for his non-appearance on the date the matter was fixed for trial, and there is no reason to reject the evidence so placed by the Plaintiff. The learned District Judge had further observed the fact that the Plaintiff Priest passing away 27 days after he testified in court is confirmation of the fact that he was ill.

It was the contention of the learned counsel for the Defendant-Appellant that both the learned District Judge as well as the learned Judges of the High Court of Civil Appeals, fell into error by arriving at the finding that the Plaintiff (Respondent) had proved by evidence that he had reasonable grounds or reasonable cause for the default.

It was also contended on behalf of the Appellant that both courts fell further into error by their failure to consider that the Plaintiff (Respondent) was suffering from a common disease, namely tuberculosis and it was further argued that the Plaintiff-Respondent's evidence at the inquiry to purge the default was that he had forgotten the date, and it cannot be considered as a ground, in favour of purging default.

I am of the view that, this factor, i.e. Forgetting the date the matter was fixed for trial, if taken in isolation is certainly not a ground to purge the default. The judges, however are expected to give due regard to the totality of evidence placed before the court and to arrive at a decision

upon evaluation of such evidence. In the instant case, the finding of the learned District Judge as to whether the grounds urged by the Plaintiff-Respondent for his default were reasonable to purge default is purely a question of fact, and as such not to be lightly disturbed unless we are convinced by the plainest considerations it would be justified in doing so.

The fact that the Plaintiff-Respondent was suffering from tuberculosis is not disputed nor the fact that he passed away a few weeks after he gave evidence at the purge default inquiry. The doctor who had issued the medical certificate to the Plaintiff-Respondent had stated that he was physically weak and as such he recommended three months rest. Under these conditions, a person forgetting a date, in my view is quite natural and thus excusable.

The learned District Judge in his order dated 15th September, 2004 relied on the observations he had made with regard to the manner in which the Plaintiff-Respondent testified.

The learned District Judge had held that the fact that the plaintiff-Respondent's state of ill health was apparent from the observation, he had made of the Plaintiff-Respondent; the manner in which he testified at the inquiry. Further the learned District Judge had held that he has no reason to reject the medical evidence either.

The issue is whether this court can interfere with the above findings of fact on the part of the learned District Judge who would have been in a better position in deciding the questions of fact than this court or for that matter the High Court of Civil Appeals.

As Chief Justice G.P.S.de Silva observed in the case of Alwis Vs. Piyasena Fernando 1993 1 SLR 112 “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”

I also wish to cite with approval the decision in the case of ***De Silva and others v. Seneviratne and another – 1981 2 SLR page 7,*** where in Justice Ranasinghe observed: (at page 17)

> *“..it seems to me: that, 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 has 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: that, 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 the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task"*

In the case before us the learned District Judge appears to have made use of the advantage he had in considering the demeanour of the witnesses which the learned District Judge was fully entitled to do so.

Considering the above, I am of the view that it cannot be said that the learned District Judge could be said to have erred in setting aside the order of the dismissal of the plaintiff's case, nor could it be said that the learned judges of the High Court of Civil Appeals erred in affirming the order of the learned District Judges.

As such I answer the question of law on which leave was granted in the negative and accordingly this appeal is dismissed.

In the circumstances of the case I make no order as to costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA, PC.

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA, PC.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal from a judgment of the Court of Appeal.

1.A.M. Mohamed Mawjood,
No. 30B, Rattota Road,
Matale.
2.K. M. Mohamed Farook,
No. 16, Kumbiyangoda,
Matale.
Plaintiffs

SC APPEAL No. 79/2010
SC(Spl) LA No. 287/08
Court of Appeal No. 1268/99(F)
D.C.Matale No. 4410/L

Vs

1. Rev. Yatawatte Sumanajothi,
'Vivekaramaya', Yatawatte.
2. Herath Baron Munasinghe
(deceased)
3. Edirisinghelage Shanthi
4. Herath Mudiyanselage
Kanthi Munasinghe
5. Herath Mudiyanselage
Geetha Munasinghe
All of No.63, Dharmapala
Mawatha, Matale.
Defendants

AND THEN BETWEEN

K. M. Mohamed Farook,
No. 16, Kumbiyangoda,
Matale.
2nd Plaintiff Appellant

Vs

1. Rev. Yatawatte Sumanajothi,
'Vivekaramaya', Yatawatte.
2. Edirisinghelage Shanthi
3. Herath Mudiyanselage
Kanthi Munasinghe
4. Herath Mudiyanselage
Geetha Munasinghe
All of No.63, Dharmapala
Mawatha, Matale.

Defendant Respondents

AND NOW BETWEEN

K.M.Mohamed Farook,No. 16,
Kumbiyangoda, Matale.

2nd Plaintiff Appellant Appellant

Vs

1. Rev. Yatawatte Sumanajothi,
'Vivekaramaya', Yatawatte.
2. Edirisinghelage Shanthi
3. Herath Mudiyanselage
Kanthi Munasinghe
4. Herath Mudiyanselage
Geetha Munasinghe
All of No.63, Dharmapala
Mawatha, Matale.

Defendant Respondent Respondents

A.M.Mowjood, No. 31B,
Rattota Road, Matale.

1st Plaintiff Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ**
PRIYANTHA JAYAWARDENA PCJ &
VIJITH K. MALALGODA PCJ.

COUNSEL : H. Withanachchi for the 2nd Plaintiff Appellant Appellant.
Manohara de Silva PC for the Defendant Respondent Respondent.

ARGUED ON : 24.11.2017.

DECIDED ON :28. 02.2018.

S. EVA WANASUNDERA PCJ

This is an Appeal arising from the judgment of the Court of Appeal which affirmed the judgment of the District Court of Matale. The main contention of the 2nd Plaintiff Appellant Appellant (hereinafter referred to as the 2nd Plaintiff) is that the Defendant Respondent Respondents (hereinafter referred to as the Defendants) are holding a 4.1 Perch land with a tenement on it, in trust for the Plaintiffs under Sec. 83 of the Trusts Ordinance and the title to the said property should be reversed back either to the 2nd Plaintiff or the 1st Plaintiff Respondent Respondent (hereinafter referred to as the 1st Plaintiff).

The 1st and the 2nd Plaintiffs filed action in the District Court of Matale on 18.07.1991 against the Defendants praying for a declaration that the Defendants were holding premises No. 63, Dharmapala Mawatha, Matale in trust for the Plaintiffs. The extent of the land with the tenement is 4.1 Perches. They also prayed that the Defendants be directed to convey the said property to the Plaintiffs or any one of them on payment of a sum of Rs. 41000/- which was the amount of the alleged loan obtained when the property was transferred on trust.

The Plaintiffs pleaded their cause of action in this way in the Plaint. The 2nd Plaintiff Farook was the owner of premises No. 63 by virtue of deed No. 4574 dated 19.01.1980 and the **2nd Defendant** was in occupation of the said premises

as a **tenant of the 2nd Plaintiff Farook**. When the 2nd Plaintiff wanted to obtain a loan in the year 1982, he had conveyed the said property to one P.M.Wijayapala by deed No. 1242 dated 20.12.1982, allegedly on the condition that it would be conveyed back to the 2nd Plaintiff on re payment of the loan. Later when the loan was paid back, by deed No. 2350 dated 22.07.1985, the **2nd Plaintiff re-acquired the property**. In 1988 again allegedly on account of his sister's marriage, the 2nd Plaintiff again wanted a loan and as such he conveyed the same property to the **1st Plaintiff Mowjood** as security for the loan, by deed No. 706 dated 06.03.1988. In 1990, allegedly as the 1st Plaintiff wanted his money back and since the 2nd Plaintiff was unable to repay, he had approached the 1st Defendant Thero to get the money as a loan for the purpose of repaying the loan to the 1st Plaintiff Mowjood.

The position of the Plaintiffs is that, **thereafter, the 2nd Plaintiff had then conveyed the property to the 1st Defendant Thero for a sum of Rs. 41000/-** on the condition allegedly, that it would be reconveyed *to **either*** of the **Plaintiffs** upon repayment of the loan. But later on, the **1st Defendant Thero had transferred the premises to the 2nd to 5th Defendants a**nd had failed to reconvey the property to the Plaintiffs when the loan money was ready to be repaid, as agreed.

The 2nd Plaintiff alleges that it was property held in trust by the 1st Defendant Thero on behalf of both the Plaintiffs and that the *1st Defendant is in violation of the trust.*

The 1st Defendant Thero filed answer and pleaded that he had purchased that property by deed No. 1024 on payment of the full value and that the Plaintiffs had conveyed all their rights including the beneficial interest. Thereafter the Thero had transferred the property for good consideration to the 2nd to 5th Defendants who were residing in the house on the land, by deed No. 6436 dated 07.08.1990. The 2nd to 5th Defendants filed answer stating that the **2nd Defendant, Herath Baron Munasinghe had been the tenant of the said premises No. 63, long prior to the 2nd Plaintiff acquiring title** and that the **2nd Plaintiff had never possessed** the said property. Furthermore they pleaded that **they were bona fide purchasers** and that they had no contractual relationship with either of the Plaintiffs. In all the answers it was pleaded that there was a **misjoinder of parties and causes of action.**

Trial had commenced on 07.09.1995; admissions and issues were raised and the 1st Plaintiff had given evidence and he was cross examined. On 16.09.1998, the 1st Plaintiff was absent and the lawyer informed that there were no instructions from him to appear on behalf of the 1st Plaintiff. **Court dismissed the action of the 1st Plaintiff** and commenced the trial de novo with only the 2nd Plaintiff, with the consent of the 2nd Plaintiff to proceed with the case as it then was. The 2nd Plaintiff had not made any application to amend the Plaint but proceeded to trial with the **same plaint.**

In the admissions , it was recorded that the 2nd Defendant had been in occupation of the premises as the tenant of the 2nd Plaintiff. He was the head of the family as father who lived with his family as tenants of the **2nd Plaintiff, Farook**. The father died and his heirs were the 3rd , 4th and 5th Defendants. The premises was governed by the Rent Act and the father had been depositing rent in the Municipal Council.

The pivotal issue was whether **Deeds Nos. 706 and 1024 were executed on trust or not** and if it was on trust, whether **the 2nd Plaintiff was entitled to get the property re-conveyed.**

The 2nd Plaintiff got title to this property by deed P1 bearing No. 4574 dated 19.01.1980. After 8 years the 2nd Plaintiff Farook transferred the same to the 1st Plaintiff Mowjood by deed P4 bearing No**. 706** dated 06.03.1988. The 1st Plaintiff Mawjood transferred the same to the **1st Defendant Thero** , a Buddhist monk by deed P5 bearing No. **1024** dated 15.06. 1990.

The evidence before court was that the property was **occupied by the tenant the 2nd Defendant, Herath Baron Munasinghe and the other members of his family** who are the 3rd to 5th Defendants. **The land lord was the 2nd Plaintiff, Farook**. It is only while the tenants were occupying the house, that the property was transferred by the **2nd Plaintiff Farook to the 1st Plaintiff Mowjood** . The said Mowjood had then transferred the same to the 1st Defendant Thero. Neither of the two plaintiffs, **Farook and Mowjood nor the 2nd Defendant Thero had ever been in possession of the house** because it was **tenanted.** The rent was deposited in the Municipal Council and not handed to the owner of the house, the 2nd Plaintiff. Therefore it has to be understood that the relationship between

the land lord and the tenants were not in a good way at all. The tenant and the family had not known about any change of hands of the ownership of the house where they were living in. After two years from the transfer of property to him, the said 2nd Defendant **Thero** transferred the house and property to the **tenants** headed by the **2nd Defendant who lived with his family members, who are the 3rd to the 5th Defendants.**

This Thero's position was that he purchased the property from the 1st Plaintiff Mowjood to use the place for an Ayurvedic Dispensary for him to practice Ayurvedic treatment. The broker in this transaction had undertaken to get the tenants out of the premises, after the transfer is done. The broker however had failed to make any arrangements to get the vacant possession of the premises for the Thero, to do what he intended to do. **It is only then that he sold the place to the tenants themselves** as he did not have any alternative but to sell it to the tenants who had been there since around the year 1980, because he could not get vacant possession of the premises he had already bought.

On the face of the transactions, it can be seen that the house owner, 2nd Plaintiff, Farook executed deed No. 706 for a consideration of Rs. 41000/- paid by the 1st Plaintiff Mowjood in 1988. It is the 1st Plaintiff Mowjood who transferred the same to the 1st Defendant Thero after two years in 1990 again, for Rs. 41000/-. There was no valuer before Court to give evidence on the market value of the property. In 1990, the market price for 4.1 Perches of land with a tenement of which the rent was a small amount which was continuously deposited in the Municipality by the tenants, at Matale could have been Rs. 41000/-. It does not seem to be an undervaluation of the property . Two years after he bought the property, the 2nd Defendant Thero had sold the same for Rs. 100000/- to the tenants. This price also seems to be the correct market value of such a place in Matale. No valuers were called to give evidence to prove that it was an under valuation either. It could very well be the correct position that the then owner Thero sold it to the tenants who were in possession of the house as he was unable to get vacant possession.

However, the concept of trust cannot be attributed to the buyers who were tenants in the house and property. There was no relationship between the 1st Plaintiff Mowjood and the tenants. The 2nd Plaintiff Farook's position is that the 1st Plaintiff Mowjood took a loan from the Thero who promised to re convey the

property to the 1st Plaintiff Mowjood when the loan is paid back with interest. How can Farook give evidence to any factual situation which is claimed to have existed **between two other persons** such as 'an oral agreement between Mowjood and the Thero' ? **Mawjood decided not to pursue the case as the 1st Plaintiff and he went out of the case**. The only Plaintiff who pursued the case was the 2nd Plaintiff, Farook. Farook's evidence to say that it was on trust that Mowjood transferred the property to the Thero has **no evidential value** in the case in hand.

There is no evidence before the trial court to the effect that the 2nd Plaintiff or the 1st Plaintiff had continuously paid interest to the Thero or any other transaction in that regard between them. The Notary giving evidence had stated that the money given as a loan was deposited by **the 1st Plaintiff Mowjood with the Notary**. He had not said that it was deposited by the 2nd Plaintiff. Farook could not have said that Mowjood had transferred the property to the Thero on trust. It is not a piece of evidence that can be recognized as valid in law. Mowjood should be present before court to give evidence as he is the only person who can give evidence to prove what he did and that he transferred it to the Thero on trust that it will be reconveyed.

The Notary is the person who came before Court and gave evidence and produced letter P6 which is to the effect that Mowjood had deposited the Rs. 41000/- with the Notary. Mowjood had deposited the money with the Notary Attorney at Law and demanded that the property be conveyed back to Mowjood. (In P6, there is no mention about how much interest was deposited with the lawyer along with the principal amount. Furthermore the interest rate contained in the said letter is 7% per month, i.e. 84% per year, which I find to be unrealistic.) **Now, Mowjood was not a plaintiff any more**. How can only the **2nd Plaintiff Farook** go on with the case on trust against the Thero and the tenants who had bought the property for good consideration of Rs. 100000/- in the year 1990 from the **1st Plaintiff Mowjood**?

Having gone through the documents and the evidence led before the trial judge which is contained in the brief before this Court, I hold that there existed no proper suite before the District Court for only the 2nd Plaintiff to proceed and

prove that there existed any trust under Sec. 83 of the Trusts Ordinance between the 1st Plaintiff and the Thero.

The District Court had concluded the trial and entered judgment dismissing the Plaint having considered the facts and the law on trust under Sec. 83 of the Trusts Ordinance quite correctly. The Court of Appeal also had considered the facts and the law including the authorities quite well and affirmed the judgment of the trial judge. I totally agree with the analysis of the Court of Appeal on the points of law raised by the parties and I do not wish to repeat the same in this judgment.

The Appeal is dismissed. However I do not wish to grant 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

In the matter of an Appeal from the Judgment of the Court of Appeal

Sri Lankan Airlines Limited,
Level 19-22, East Tower,
World Trade Centre,
Echelon Square, Colombo 1.

Petitioner

SC APPEAL 79/2013

SC Spl LA Application No. 164/2010

CA Writ Application No. 1461/2006

Vs

1. Sri Lankan Airlines Aircrafts Technicians Association, No. 14, Mahawela Place, Kirulapone, Colombo 06.
2. D.S.Edirisinghe, Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 05.
3. T.Piyasoma, No. 77, Pannipitiya Road, Battaramulla.
4. Hon. Atauda Seneviratne, Minister of Labour Relations and Foreign Employment, Labour Secretariat, Colombo 05.

Respondents

AND NOW BETWEEN

Sri Lankan Airlines Limited,
Level 19-22, East Tower,
World Trade Centre,
Echelon Square, Colombo 1.

Petitioner Petitioner

Vs

1. Sri Lankan Airlines Aircrafts Technicians Association, No. 14, Mahawela Place, Kirulapone, Colombo 6.
2. D.S.Edirisinghe, Commissioner Of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2A. W.J.L.U. Wijayaweera, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

3A. Mrs. Pearl Weerasinghe, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2B. Herath Yapa, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2C Mrs. M.D.C.Amarathunga, Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 5.

2D R.P.A.Wimalaweera, Commissioner General of Labour, Labour Secretariat,

3. T.Piyasoma, No. 77, Pannipitiya Road, Battaramulla.
4. Hon. Atauda Seneriratne, Minister Of Labour Relations and Foreign Employment, Labour Secretariat, Narahenpita, Colombo 5.

4A. Hon. Gamini Lokuge, Minister of Labour Relation and Productivity

Improvement, LabourSecretariat
Narahenpita, Colombo 5.

4B. Hon. Dr.Wijayadasa Rajapaksha, Minister of Justice and Labour Relations.

4C. Hon. S.B.Navinna, Minister of Labour, Labour Secretariat, Narahenpita, Colombo 5.

4D. Hon. John Seneviratne, Minister of Labour and Trade Union Relations, Labour Secretariat, Narahenpita, Colombo 5.

5. The Registrar, Industrial Court, 9th Floor, Labour Secretariat, Colombo 5.

Respondents Respondents

BEFORE **: S. EVA WANASUNDERA PCJ.**
H.N.J. PERERA J. &
PRASANNA JAYAWARDENA PCJ.

COUNSEL : Palitha Kumarasinghe PC with Sanjeeva Jayawardena PC and Rajeev Amarasinghe for the Petitioner Petitioner.
Faiz Mustapha PC with Keerthi Thilakarathne for the 1st Respondent

ARGUED ON : 23.01.2018.
DECIDED ON : 12 .03.2018.

S. EVA WANASUNDERA PCJ.

This matter arises from an Industrial Dispute between the Sri Lankan Airlines Aircraft Technicians Association (hereinafter referred to as SLAATA) and the Sri Lankan Airlines Ltd. Members of the SLAATA, the employees were not paid the '13th month incentive bonus for the year 2001' by the employer, Sri Lankan Airlines Ltd and SLAATA complained to the Commissioner of Labour who tried to bring about a settlement failing which the matter was referred to an Arbitrator who was appointed by the then Minister of Employment and Labour under Sec. 14(1) of the Industrial Disputes Act.

The Arbitrator T.Piyasoma on 19.06.2006 , made an award in favour of SLAATA directing that the members of SLAATA be paid the '13th month incentive bonus for the year 2001' by the Sri Lankan Airlines Ltd. the employer company within two months of the publication of the award in the gazette.

The Sri Lankan Airlines Ltd. (hereinafter referred to as the Employer Company) came before the Court of Appeal with an Application dated 22.09.2006, to get an order in the nature of a Writ of Certiorari quashing the said Arbitration Award dated 19.06.2006. The Court of Appeal dismissed the Application for a Writ and affirmed the award of the Arbitrator. Thereafter the Employer Company has come before the Supreme Court seeking to set aside the judgment of the Court of Appeal dated 21.07.2010. This Court has granted Special Leave to Appeal on 07.06.2013 on the questions of Law contained in paragraph 38(a) to (n) of the Petition dated 31.08.2010 as well as on two other questions of law at the request of the Counsel for the 1st to 5th Respondents.

The questions of law can be narrated as follows:-

1. Did the Court of Appeal fail to appreciate the fact that the learned Arbitrator fell into serious error by failing to consider in its fullness, the important fact that the Petitioner was advisedly conferred the power to decide in its discretion, as to whether the bonus should or indeed, could be paid or not, in a particular year?
2. Did the Court of Appeal fail to appreciate the fact that the Arbitrator failed to consider the true impact of Clause 13 of the Collective Agreement, wherein it is expressly stated that a ' bonus may be payable …..at the sole

discretion of the management ' and that the said provision clearly vests the management with the discretion to decide on the payment of the said bonus?

3. Did the Court of Appeal fail to compare the terms in which Clause 13 had been articulated as opposed to the manner in which the clauses pertaining to other allowances had been articulated in the very same collective Agreement?
4. Did the Court of Appeal fail to consider the fact that the said collective agreement was entered into between two contracting parties pursuant to the exercise of their independent contractual volition to govern their respective rights, duties and interests and that the said agreement clearly manifests the agreement of the parties to invest the Petitioner with the discretion to decide the payment of the bonus?
5. In any event, did the Court of Appeal fail to take due cognizance of the fact that the Arbitrator failed to consider the issue of whether the discretion was examined reasonably and in a fair manner, and upon proper considerations, given the totality of the attendant adverse exigencies, which were common public knowledge and even well known internationally?
6. In any event, did the Court of Appeal fail to take cognizance of the fact that the bonus was not referable to any additional periods that had been worked, as is borne out by the record?
7. Did the Court of Appeal err by upholding the purported conclusion of the Arbitrator that the Petitioner Company had not incurred losses in the relevant year under review and that as such, the relief sought by the workmen was justified?
8. Did the Court of Appeal fail to consider in any event, the composite losses incurred and sustained by the Petitioner Company?
9. Notwithstanding expressly classifying the interpretation adopted by the learned Arbitrator as being a "narrow interpretation" , did the Court of Appeal err by nevertheless endorsing the same without reference to objectively defensible criteria that are countenanced by law?
10. Is the judgment of the Court of Appeal bad in law in as much as the reasoning underlying the same is tantamount to according to the workmen, a bonus as a matter of an invariable right?

11. Did the Court of Appeal fail to appreciate the fact that the Arbitrator failed to evaluate the evidence placed before him properly and objectively and as required by law?
12. Did the Court of Appeal misapply the established principle that an Arbitrator's award should be just and equitable to both parties and fail to appreciate that the said failure vitiates the impugned award?
13. Did the Court of Appeal misapply the governing principles of administrative law in the course of refusing to exercise its power of judicial review?
14. In all the circumstances of the case, is the judgment of the Court of Appeal and the impugned arbitral award liable to be set aside and should the reliefs prayed for by the Petitioner, be granted?

And

15. Whether the arbitrator acted within the mandate in terms of the reference that was granted by the arbitrator?
16. Did the Arbitrator consider the financial position of the Company at the time that the 13 month bonus payment was due to be made in December, 2001?

Both the Court of Appeal and the Arbitrator held in favour of the SLAATA , the employees and the Employer Company contends that both the decisions are not justified.

The Employer Company had entered into a collective agreement in January 1999, setting out the terms and conditions of employment of aircraft technicians. The members of the 1st Respondent Union are the Aircraft Technicians. Clause 13 of the said Agreement reads as follows:-
" A 13 month incentive bonus may be payable each year in the end-December payroll as per the rules and regulations that are announced each year at the sole discretion of the management of the company to all employees."

The reference to the Arbitration as aforementioned reads as follows:-

" Whether the non payment of the 13th month incentive bonus for the year 2001 to the employees of Sri Lankan Airlines Ltd. who are members of Sri Lankan

Airlines Aircraft Technicians Association is justified, if not what relief they are entitled to".

The arguments submitted by the counsel for the Appellant Employer Company takes the stand that the wording of the Clause 13 is clear and the 13th month bonus can be given **only at the discretion** of the Employer and given the terrible financial problems of the said Company, it has chosen not to pay the said bonus for 2001 which the Company is legally entitled to do. The Company could not do so, simply because of the extremely difficult economic conditions which prevailed in the year 2001 even though it had been paying the bonus up until then for over 20 years. The Company also takes up the stand that even though there are over 4600 employees and many unions, only the 1st Respondent Union has come before Court claiming this bonus. The number of members of this Union is only 219 members.

The Arbitration was concluded and by the award dated 19.06.2006 the 3rd Respondent Arbitrator held that the non payment of the bonus is not justified and that the **Company should grant the payment** within 2 months of the publication of the award in the Gazette. The Employer Company filed a Writ Application before the Court of Appeal, seeking to quash the said arbitral award. The Court of Appeal had inquired into it and delivered judgment dated 21.07.2010 dismissing the Application of the Employer Company. When the Company appealed from the Court of Appeal judgment, Special Leave was granted on the aforementioned questions of law by this Court.

The position of the Employer Company in this regard is that due to the terrorist attack on the Katunayake Air Port on 24.07.2001 which destroyed a fleet of Aeroplanes and damaged the company so much, and the fact that US 9/11 attack had an impact of the number of tourists travelling from any country to another, the company was in a very bad way. Therefore, as it was at the discretion of the company whether to grant the bonus or not, according to the clear wording of the Collective Agreement between the employer and the employee, the company decided not to pay the bonus. The decision was made in November, 2001 at a crucial time when the company was economically down. The company argued that the decision of the company not to pay the '13th month incentive bonus' was just and reasonable and correct according to law.

The position of the Employee SLATAA is that with the change of the name of the Employer Company from Air Lanka to Sri Lankan Airlines Ltd. in 1997, the Chief Executive Officer by his letter dated 29.07.1999 had informed the employees of the company that the terms and conditions of employment that they enjoyed with Air Lanka including the already negotiated Collective Bargaining Agreement remain unaltered by the change of name to Sri Lankan Airlines. The Employee Union also took up the position that the 13th month incentive had been paid continuously from 1979 for a period of 20 years and that it was a **customary payment from the employer to the employee**. It was done so because in fact the workers had **actually worked 13 roster cycles** in the course of one calendar year and the said year was the period from 01.04.2000 to 31.03.2001 during which time there had not been any loss of income or any drastic economic downfall of the company. It was argued that the Employer Company had not used its discretion reasonably but unreasonably and unjustly.

The issue on which the Arbitrator had to hold the inquiry and decide was framed as follows:-
" Whether the non payment of the 13th month incentive bonus for the year 2001 to the employees of Sri Lankan Airlines Limited who are members of the Sri Lankan Airlines Aircraft Technicians' Association is justified and if not what relief they are entitled to."

A Collective Agreement is defined in Sec. 5(1) of the Industrial Disputes Act No. 53 of 1973 as amended, in this way. " In this Act, ' collective Agreement' means an agreement (a) which is between (i) any **employer** or employers; **and** (ii) **any** workmen or any **trade union** or trade unions consisting of workmen; and which relates to the terms and conditions of employment of any workmen or to the privileges, rights or duties of any employer or employers or any workmen or any Trade Union or Trade Unions consisting of workmen or to the manner of settlement of any Industrial Dispute." According to Sec. 8(1), the terms of the Agreement shall be implied terms in the contract of employment between the employer and workmen and they are bound by the Agreement.

Sec. 17(1) of the Act reads as follows:-

" When an Industrial Dispute has been referred under Sec. 3(1) (d) or Section 4(1) to an Arbitrator for settlement by Arbitration, he shall make all such inquiries into

the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him to be **just and equitable**…."

In the case of ***State Bank of India Vs Edirisinghe and Others 1991 1 SLR 397*** , a bench of seven judges held, at page 415 thereof, that **"An Industrial Arbitrator is not tied down and fettered by the terms of a contract of employment between the employer and the workmen."**

When an Arbitrator is at work, listening to the oral evidence, considering the documentary evidence, analyzing the evidence and concluding the inquiry with a look at the totality of evidence before him, he is duty bound to weigh all the evidence and arrive at a decision and make the award "which appears to him to be just and equitable". Parties are at liberty to point at the terms of the contract which are obvious on the first reading of the clauses of the Collective Agreement but the Arbitrator is not tied down and fettered by the terms contained therein. It is a principle of law accepted in making an award after the arbitration proceedings held with regard to an industrial dispute.

In the case in hand the question before the arbitrator was whether Clause 13.1 of the Collective Agreement which states that the payment of the 13th incentive bonus is at the **sole discretion of the employer** or whether in all the circumstances of the case as they have transpired in evidence, **the non payment is just and equitable.**

There had been no collective agreement before the year 1999. Air Lanka Ltd. existed from 1979. From 1979 to 1999 also, the payment for **an extra month for each financial year** was paid at the end of each calendar year. It was called the '13th month incentive bonus' or rather named as such, only **after** the Collective Agreement came into existence. Salaries were paid in respect of each month for **only 12** months to every employee and the members of SLATAA being workers on **roster cycles of 28 days in each month works 13 lunar months.**

Three hundred and sixty five days of the year, when divided by 28 roster cycle days is equal to 13 (365/28 = 13.04). So, in fact, the workers of SLATAA work 13 lunar months within the year. When persons work on roster cycle days , they do work , through out the calendar year including Saturdays, Sundays and Public

Holidays such as Poya days etc. They work for 365 days on roster. No single day of the year can they opt out of work for any reason whatsoever. According to **Clause 22.3** of the Collective Agreement, a workman on roster cycles have to work **160 working hours per 28 day roster cycles.** Each person on roster gets paid the monthly salary for a 28 day roster cycle. There are 13 of 28 day roster cycles per a calendar year. The workers on roster work 13 roster cycles within one year. They get paid, monthly salaries each month as all other workers but there is remaining one more roster cycle month left to be paid due from the employer but unpaid within that calendar year. That seems to be the reason for naming this 13th payment as '13th month incentive bonus'.

Clause 22.3 reads as follows under the heading **"Rosters":-**

All rosters will be constructed so that actual working hours per week (excluding breaks) are 40 hours per week or 160 working hours per 28 day roster cycle. As one illustrative example(but this is not an exhaustive list of all possible shift types):

<u>Basic Shift Pattern</u>

- Day shift time of 08.00 -19.25
- Elapsed length of 11 hours and 25 minutes
- Contains one break of 30 minutes and two breaks of 15 minutes each
- Hence actual working hours are 10 hours and 25 minutes

- Night Shift time of 19.00 – 08.25
  Elapsed length of 13 hours and 25 minutes
  Contains one break of 30 minutes two breaks of 15 minutes each
  Hence actual working hours are 12 hours and 25 minutes
- Pattern is normally 1 day plus 1 night plus 2 off, repeated 7 times in a 28 day roster
- This equates to a total of 159 hours and 50 minutes per 28 day cycle.

The witness on behalf of SLAATA , Bentarage Nandalochana de Silva in his evidence on 26.05.2006 had explained in detail the calculation of the payments as follows;-

“අපි වැඩ කරන්නේ වැඩ මුර ක්‍රමයකට. මෙම රොස්ටර් ක්‍රමය අනුව දිවා කාලයේ දින 92ට වැඩ කරන පැය ගණන පැය 958 කුත් විනාඩි 19ක්. රාත්‍රී සේවා මුර 91ක් වන නිසා වසරකට වැඩ කල පැය ගණන 2088 විනාඩි 13ක් වෙනවා. නමුත් ආයතනය සහ සංගමය බැඳි සිටින ගිවිසුමේ ප්‍රකාර ආයතනයට වැඩකල යුතු දින ගණන වන්නේ 160x12. වසරකට පැය 1920. නමුත් අපි වැඩ කර තියනවා පැය 2088 විනාඩි 13ක්. මේ 2088.13 න් පැය 1920ක් අඩුකල විට අතිරේක පැය ගණන වශයෙන් පැය 168.13 ක් වැඩ කර තියනවා. මෙය ජනවාරී මාසයේ සිට සේවකයින් වැඩකර තියෙන අතිරේක පැය ගණන .....”

I am of the opinion that this payment which SLAATA had prayed for from the Arbitrator cannot be recognized as a payment on which the employer can use its discretion and avoid payment because it is a payment the employee has earned with his sweat having worked on a roster. The Arbitrator had analysed the evidence before him on the facts and held that it is a right for payment which the members of SLAATA has earned. Even though Clause 13.1 of the Collective Agreement reads as ‘at the sole discretion of the Management of the Company’, the just and reasonable interpretation of the use of discretion of the employer should be in favour of the employee. It is nothing but reasonable for the employer to recognize that due payment as something the employee has worked and earned.

The Employer Company was not in a position economically to pay the dues at that particular time of the year, i.e. December, 2001 but it was something which the workers had earned at the end of the financial year ending in April, 2001. The Company should have realized that even though the practice had been to pay it at the end of each calendar year, at the discretion of the Company, it is a payment which **they had earned by April, 2001** but put off by practice, by the employer, purposely at a delayed stage which fact had been accepted by the employees in all the previous years. The Arbitrator had looked at the facts and determined correctly that it was just and equitable to make the award in favour of the employees. The name of the 13th month payment is surely not an incentive bonus but a payment which the employees have earned.

The Court of Appeal had quoted about discretion as defined in ***Sharp Vs Wakefield 1891, AC 173 by Halsbury L.C.*** which reads as follows:
“ Discretion means when it is said that something is to be done within the discretion of authorities ; that something is to be done according to the rules of

reason and justice not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge of his office ought to confine himself."

I find that the alleged discretion contained in clause 13.1 of the Collective Agreement has not been used properly by the employer, specially not having taken into account that the said payment did not arise after the economic downfall during the period when it was due, i.e. before terrorists' attack at the air port and the loss of business which followed. The employees cannot afford to loose a right which they had earned prior to that event. After all, the company had not come to a halt where no business was conducted but had continued to use the employees to build up the business. The Company should have come to a settlement with the employees when they requested for the payment, considering the fact that it was a payment due to them as they had already worked for the same. Yey the company had refused to pay and it is only then that the matter had to be arbitrated.

The Court of Appeal had quite correctly affirmed the award of the Arbitrator.

I answer the questions of law 1 to 14 in the negative against the Appellant and questions of law 15 and 16 in the affirmative in favour of the Respondent in this Appeal. The 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.

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 Appeal

Leader Publication (Pvt) Limited
C/o Com- Sec Management Services (Pvt) Ltd
No.41, Alfred House Gardens, Colombo3

And presently of
No.24, Katukuruduwatta Road, Ratmalana.

Defendant-Appellant-Petitioner-Petitioner-Appellant

SC Appeal 81/2014
SC(Spl) LA 35/2014
CA Appeal No. 790/99(F)
DC Colombo Case No. 17964/MR

Vs

Ronnie Peiris
No.155, Notting Hill Gate, London
W 113LF, United Kingdom.

Plaintiff-Respondent-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
NalinPerera J
Vijith Malalgoda PC J

Counsel : Faiz Musthapa PC with Randila de Silva for the Defendant-Appellant-Petitioner-Petitioner-Appellant
Romesh de Silva PC with NR Sivendran and Renuka Udumulla for the Plaintiff-Respondent-Respondent-Respondent-Respondent

Argued on : 4.10.2017

Written Submission
Tendered on : 15.7.2014 by the Defendant-Appellant-Petitioner-Petitioner-Appellant

Decided on : 9.2.2018

Sisira J De Abrew J

This is an appeal against the judgment of the Court of Appeal dated 18.3.2014 wherein the Court of Appeal refused an application to relist the appeal filed by the Defendant-Appellant-Petitioner-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant). Facts of this may be briefly summarized as follows:

The Plaintiff-Respondent-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action against the Defendant-Appellant claiming damages for publishing a defamatory article on 5.12.1995 in Sunday Leader News Paper which was owned by the Defendant-Appellant. The case was decided ex-parte as the Defendant-Appellant was absent on the trial date. Later an application to vacate the ex-parte judgment was dismissed by the learned District Judge. Being aggrieved by the said order of the learned District Judge, the Defendant-Appellant filed an appeal in the Court of Appeal. Having filed the appeal in the Court of Appeal the Defendant-Appellant failed to make an application to the Registrar of the Court of Appeal for issue of copies of the record as set out in Rule No.4 of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978 which reads as follows.

"Within two weeks of the presentation of the Petition of Appeal the appellant shall apply in writing to the Registrar of the Court of Appeal for the number of copies of

the record stating in such application whether the copies of the whole or portions only, and if so of what portions of the record are necessary for the decision of the appeal. Such application shall state the number of copies required by him. The appellant shall within three days of his so filing his application serve a copy of the same on the respondent who shall within seven days of receipt by him of the said copy file in the said court a memorandum of any further portions of the record which he considers necessary for the decision of the appeal and of such portion which he considers unnecessary together within an application specifying the number copies required by him."

In the present case the Registrar of the Court of Appeal directed the parties to appear in the Court of Appeal on 4.10.2011. On 4.10.20111 the Defendant-Appellant was absent and unrepresented. The Court of Appeal on 4.10.2011 directed the Registrar of the Court of Appeal to notify the Defendant-Appellant to pay brief fees on or before 31.12.2011 in terms of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978 and to be present in court on 30.1.2012. The Court of Appeal also directed the Registrar of the Court of Appeal to send a copy of the said notice to the Registered Attorney-at-law of the Defendant-Appellant. The Registrar of the Court of Appeal complied with the said direction of the Court of Appeal. But the Defendant-Appellant failed to pay brief fees as directed by the Court of Appeal. On 30.1.2012 when the case was called in open court, the Court of Appeal observed that the Defendant-Appellant was absent and unrepresented and by judgment dated 30.1.2012 dismissed the appeal of the Defendant-Appellant in terms of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978. In February 2014 (the date is not mentioned in the petition) the Defendant-Appellant filed an application in the Court of Appeal to relist his appeal which was

dismissed on 30.1.2012. It is noted here that this relisting application was filed two years after the dismissal of the appeal. The Court of Appeal by its judgment dated 18.3.2014 refused the application to relist the appeal. Being aggrieved by the said judgment of the Court of Appeal, the Defendant-Appellant has filed this appeal in this court.

This court by its order dated 4.6.2014 granted leave to appeal on questions of law stated in paragraphs 24(a) (b) and (c) of the Petition of Appeal dated 19.3.2014 which are set out below.

1. Did the Court of Appeal misdirect itself in failing to take into account that there has been noncompliance with requirements of Rule 13(b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978?

2. Did the Court of Appeal fail to take into account that the order of the Court of Appeal dated 30.1.2012, rejecting the appeal(C), had been based on the presumption that the notice on the Registered Attorney-at-Law had been served, whereas, such a presumption could not have been drawn in as much as the said notice had not been dispatched to the proper address of the then Registered Attorney-at-Law of the Petitioner Company?

3. Did the Court of Appeal fail to take into account that the notice dated 23.9.2011 requiring the attendance of the Petitioner in Court was flawed in as much as it was not in breach of the requirement that the petitioner should be noticed to deposit the brief fees?

This court also framed the following question of law.

Has the learned trial Judge indulged in a proper assessment of damages having regard to the evidence placed before the Court?

If the answer to the aforementioned question is in the affirmative is the amount of damages awarded excessive?

The Court of Appeal in its judgment dated 30.1.2012 observed the following matters.

1. The notice sent to the Defendant-Appellant (dated 18.11.2011) had been returned with an endorsement that the Defendant-Appellant was not at the given address and that change of address (if any) had not been notified to the Registry of the Court of Appeal by the Defendant-Appellant.

2. The notice sent to the Registered Attorney of the Defendant-Appellant is presumed to have been served as the same had not been returned undelivered.

The Court of Appeal rejected the appeal of the Defendant-Appellant for failure to pay brief fees in terms of Rule 13 (b) of the Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978. The fact that the notice dated 18.11.20111 sent to the Defendant-Appellant was returned undelivered with an endorsement that the Defendant-Appellant was not at the given address is not disputed by the parties in this case. The Defendant-Appellant in his petition of appeal filed in this court takes up the position that after filing the appeal in the Court of Appeal, his address was changed. Learned President's Counsel who appeared for the Defendant-Appellant took up this position at the hearing before us. But has the Defendant-Appellant notified the Registry of the Court of Appeal about his change of address? This question is answered in the negative.

Learned President's Counsel who appeared for the Defendant-Appellant relying on Section 27 of the Civil Procedure Code contended that court could not send notice to the Defendant-Appellant when a proxy had been filed on his behalf and that any notice should be sent to the Registered Attorney. I now advert to this contention. Section 27 of the Civil Procedure Code reads as follows.

> *27. (1) The appointment of a registered attorney to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.*
>
> *(2) When so filed, it shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court, or until the client dies, or until the registered attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.*
>
> *(3) No counsel shall be required to present any document empowering him to act. The Attorney-General may appoint a registered attorney to act specially in any particular case or to act generally on behalf of the State.*

Learned President's Counsel cited the judicial decision in the case of Podisingho Vs Perera 75 NLR 333 to support his contention. In the said case His Lordship Justice Wimalaratne (single Judge) observed the following facts.

"The defendant, tenant of the plaintiff, denied that he received a notice to quit the premises let. In proof of the notice to quit, the plaintiff relied on the copy of the notice and the registered postal article receipt. Although the copy of the notice to quit contained the full address of the defendant, there was no evidence that the same address was inserted on the envelope enclosing the notice. In the postal article receipt neither the name of the road nor the number of the premises was inserted."

His Lordship held as follows.

"The evidence was not sufficient to prove that the notice to quit had been properly addressed. The postal receipt was only proof of the posting of a letter, but not proof of the posting of a letter properly addressed."

In my view, the above judicial decision does not support the contention of learned President's Counsel. Although learned President's Counsel advanced the above contention, Section 27 of the Civil Procedure Code does not prohibit court from sending notices to the parties.

Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978 reads as follows.

"Where the appellant fails to pay the fees due under these rules, the Court of Appeal may direct the appellant to comply with such directions as the court may think fit to give, and may reject such appeal if the appellant fails to comply with such directions."

According to the above rule, the Court of Appeal has the power to send notices to the appellant. Further the established practice of our judicial system is to send notices to the parties although the proxies have been filed by their Registered

Attorneys. Considering all the aforementioned matters, I reject the above contention advanced by Learned President's Counsel for the Defendant-Appellant. If an appellant after filing an appeal changes his address given to court, it becomes the duty of such appellant to inform the Registry of the Court of Appeal about his new address. The Registry of the Court of Appeal cannot be blamed for his failure. He has to suffer the consequence of his failure. The Defendant-Appellant did not notify the Registry of the Court of Appeal about the change of his address. It is therefore seen that failure to pay brief fees has occurred due to the negligence and fault of the Defendant-Appellant. If the Court of Appeal cannot contact the Defendant-Appellant due to the aforementioned failure and when the Court of Appeal rejects his appeal, the Court of Appeal cannot be blamed. Once an appeal is filed, it becomes the duty of the appellant and his Registered Attorney to make inquiries of the appeal. After filing the appeal if the appellant fails to comply with Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978, the Court of Appeal has the power to reject his appeal and also it becomes the duty of the Court of Appeal to reject such an appeal. If the Court of Appeal does not perform this duty, the respondent would not be able to implement the judgment of the court below. Such decisions of the Court of Appeal would undoubtedly minimize the laws delay in this country. It has to be mentioned here that the courts' appointments are definite and that it is the duty of the Judge to conclude cases without any delay. This view is supported by the judgment of Justice Amarasinge in the case of Jinadasa Vs Sam Silva [1994] 2SLR page 232 wherein His Lordship held thus:

> *"A judge must ensure a prompt disposition of cases, emphasizing that dates given by the court, including dates set out in lists published by a court's registry, for hearing or other purposes, must be regarded by the parties and*

their counsel as definite court appointments. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for."

It has to be noted here that the Defendant-Appellant filed the appeal in the Court of Appeal against the judgment of the District Court in 1999 and the Court of Appeal sent notices in 2011. When his appeal was dismissed on 30.1.2012, he filed a relisting application only in February 2014. The above conduct of the Defendant-Appellant shows the fact that he was not interested in his appeal.

Learned President's Counsel for the Defendant-Appellant next contended that the decision of the Court of Appeal is wrong when it decided that notice issued on Samararathne Associates (Registered Attorney) was presumed to have been served as the same had not been returned. He contended that the correct address of Samararatne Associates as borne out by notice dated 23.9.2011 is 810, "2nd Floor, Maradana Road Colombo 10" but the address stated in the notice dated 18.11.2011 is "108, 2nd Floor, Maradana Road Colombo 10". I now advert to this contention. Although the number written in the notice dated 18.11.2011 is wrong, was the said notice returned undelivered by the relevant post office? The answer is in the negative. Although Mr.Samararathne in his affidavit dated 17.2.2014 stated that he did not receive the notice dated 18.11.2011, it was not returned by the post office. When I consider the above matters, I hold that the conclusion reached by the Court of Appeal on 30.1.2012 that 'the notice on Samararathne Associates (Registered Attorney) is presumed to have been served as the same had not been returned undelivered' is correct. For the above reasons, I reject the said contentions of learned President's Counsel for the Defendant-Appellant. If the notice dated

18.11.2011 which is presumed to have been served on the Registered Attorney had directed the Defendant-Appellant to pay brief fees and if the brief fees were not paid by the Defendant-Appellant the Court of Appeal was correct when it rejected the appeal. When the Registered Attorney received such a notice (directing the Defendant-Appellant to pay brief fees) it becomes the duty of the Registered Attorney to inform his client about the direction given by the Court of Appeal. I have earlier held that the failure to pay brief fees had occurred due to the negligence of the Defendant-Appellant. At this stage it is relevant to consider a judicial decision in the case of Pakiyananthan Vs Singaraja [1991] 2SLR 205 wherin this court held as follows:

"Relief will not be granted for default in prosecuting an appeal where –

(a) the default has resulted from the negligence of the client or both the client and his attorney-at-law,

(b) the default has resulted from the negligence of the attorney-at-law in which event the principle is that the negligence of the attorney-at-law is the negligence of the client and the client must suffer for it.

As the applicant's default appeared to be the result of his own negligence as well as the negligence of his attorney-at-law the conduct of the appellant and his attorney-at-law cannot be excused. The appellant had failed to adduce sufficient cause for a re-hearing of the appeal.

It is necessary to make a distinction between mistake or inadvertence of an attorney-at-law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. The Court will in granting

relief ensure that it's order will not condone or in any manner encourage the neglect of professional duties expected of Attorney-at-Law."

In my view when the appellant fails to pay brief fees as directed by court, the Court of Appeal has the right to reject the appeal of the appellant in terms of Rule 13 (b) of Supreme Court (Court of Appeal-Appellate Procedure-Copies of Records) Rules 1978.

For the above reasons, I hold that the Court of Appeal was correct when it rejected the appeal of the Defendant-Appellant on 30.1.2012.

The Court of Appeal by its judgment dated 18.3.2014 rejected the application of the Defendant-Appellant to relist his appeal. To succeed in a relisting application, he must establish sufficient reasons for his failure to appear on the date of argument. This view is supported by the judicial decision in Jinadasa Vs Sam Silva (supra) wherein at page 234 His Lordship Justice Amarasinghe held as follows.

> *"Where a party has established that he had acted bona fide and done his best, but was prevented by some emergency, which could not have been anticipated or avoided with reasonable diligence from being present at the hearing, his absence may be excused and the matter restored. The Court cannot prevent miscarriages of justice except within the framework of the law: it cannot order the reinstatement of an application it had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds. Inasmuch as it is a serious thing to deny a party his right of hearing, a court may, in evaluating the*

established facts, be more inclined to generosity rather than being severe, rigorous and unsparing."

In the present case, I have earlier held that the Court of Appeal was correct when it rejected the appeal of the Defendant-Appellant on 30.1.2012. The Defendant-Appellant has not established sufficient reasons for his failure to pay brief fees and for his failure to appear on 30.1.2012. In view of the conclusion reached above, I answer the 1st to 3rd questions of law in the negative. The other two questions of law do not arise for consideration.

Considering all the aforementioned matters, I hold that the Court of Appeal was correct when it rejected the application for relisting on 18.3.2014. For the above reasons, I affirm the judgments of the Court of Appeal dated 18.3.2014 and 30.1.2012 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Nalin Perera 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

In the matter of an application for Leave to Appeal in terms of Section 5 (c) (1) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006.

SC Appeal No:-82/2014

SC/(HC)CALA/ 111/2013

WP/HCCA/MT/134/2007(F)

DC MT.Lavinia case No:-624/01/RE

M.I.S.Batcha,
No.19, Lily Road,
Wellawatta,Colombo 6.

PLAINTIFF

V.

L.E.Muttiah,
No.19A, Lily Road,
Wellawatta, Colombo 6.

DEFENDANT

AND BETWEEN

L.E.Muttiah, (Deceased)

No.19A. Lily Road,

Wellawatta, Colombo 6.

DEFENDANT-APPELLANT

M.S.Muttiah,

No 19A, Lily Mawatha,

Wellawatta, Colombo 6.

SUBSTITUTED-DEFENDANT-APPELLANT

V.

M.I.S.Batcha,

No 19, Lily Road,

Wellawatta, Colombo 6.

PLIANTIFF-RESPONDENT

AND

M.I.S.Batcha,

No 19, Lily Road,

Wellawatta, Colombo 6.

PLAINTIFF-RESPONDENT-PETITIONER

V.

M.S.Muttiah,

No.19A, Lily Mawatha,

Wellawatta, Colombo 6.

SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENT

BEFORE:- S.E.WANASUNDERA,PC, J.

H.N.J.PERERA, J.

P.S.JAYAWARDENA, PC, J.

COUNSEL:- Ranjan Suwandaratne,PC with Anil Rajakaruna for the Plaintiff-respondent-Appellant

D.P.Mendis, PC, with J.G.Sarathkumara instructed by Pieris & Pieris for the Substituted-Defendant-Appellant Respondent

ARGUED ON:- 29.01.2018

DECIDED ON:- 22.03.2018

H.N.J.PERERA, J.

The Plaintiff-Respondent-Petitioner Appellant (here-in-after referred to as the Appellant) made this application for Leave to Appeal against the judgment of the civil Appellate High Court of the Western province Holden at Mt.Lavinia delivered on 27.02.2013. The Civil Appellate High court by its judgment dated 27.02.2013 set aside the judgment of the learned District Judge which was in favour of the Plaintiff and entered judgment in favour of the Defendant-Appellant-Respondent-Respondent (here-in-after referred to as the Defendant) and dismissed the Plaintiff's action with costs. This Court on 09.06.2014 granted leave to appeal on the questions set out in paragraph 40 (a), (b) and (c) of the Petition dated 15.03.2013.

40(**a**) Have the Hon. High Court Judges of the Civil Appeal High Court err in law by holding that the owner contemplated in Section 2 (4)(c) of the

Rent Act No.7 of 1972 as amended by Act N0 55 of 1980 is the present owner who has instituted action?

40(**b**) Have the Hon. High Court Judges totally misdirected themselves in determining that the word "owner" does not include the "owner" as at 1st January 1980?

40(**c**) Have the Hon. High Court Judges err in law by failing to consider the fact that the Petitioner has proved beyond any doubt that the predecessor in title of the Petitioner were in occupation of premises No.19A which is the subject matter of the said District Court action on 1st of January 1980 and therefore let the same to the deceased Appellant in arriving at their final conclusion?

According to the Plaintiff the original Defendant came into occupation of premises which is part of No 19 Lily Avenue, Wellawatta under one Mohamed Ashraff Gouse, Shahul Hameed Mohamed Gouse and Fathima Gouse. The present Plaintiff bought the said premises on 06.07.1987.It is the plaintiff's position that after he had purchased the entirety of the premises he requested the original Defendant (deceased) to attorn to him, which was done.

The evidence led in this case clearly establishes the fact that the current owner –the Plaintiff never occupied the premises in 1980 and that he became the owner of the said premises only in 1987.

It was the position of the Plaintiff that the said premises in suit (19A) is a residential premises and the same was occupied by the owner on 1st January 1980, and rented out the said premises after the that date, and as such the premises are excepted from the application of the provisions of the Rent Act No. 7 of 1972 as amended by Act No.55 of 1980.It was the contention of the learned Counsel for the Defendant that the subsequent owner who buys over the head of the tenant cannot get the benefit under the provisions (section 22(7)) of the Rent Act as amended by Act No 55 of 1980.

Section 2(4)(c) reads thus:-

"So long as this Act is in operation in any area, the provision of this Act shall apply to all premises in that area, other than –

(a)……..

(b) residential premises constructed after January 1, 1980 and let on or after that date:

(c) residential premises **occupied by the owner on January 1**, **1980**,

And let on or after that date"

(d)……

Therefore if any residential premises **occupied by the owner** of the property as at 1st January 1980 and **let thereafter**, such premises are considered as excepted.

It is very clear that these amendments to the Rent Act section 2(4)(b) & (c) was brought about in 1980 to encourage the construction of new houses and also to encourage the owners of premises who were occupying the said premises on 1st January 1980 to rent out the said premises to tenants. And for that purpose such premises rented out for the **first time** after construction in January 1980 and those premises where occupied by owners on 1st January 1980 and rented out to a tenant thereafter, were exempted from the application of the provisions of the Rent Act.

Where exemption from the Rent Act is claimed on the basis of section 2(4)(c) of the Rent Act the onus is on the Plaintiff to prove,

(1)That the premises were residential premises
(2)That the owner was in occupation of the premises on 1st January 1980.
(3)That the said premises were given on rent on or after the 1st January 1980

It was the position of the Plaintiff that the said premises were let to the Defendant after 1st January 1980. The learned trial Judge has in his impugned judgment stated that it is very clear from the answers given by the defendant in cross examination that he has come into occupation of the said premises after 1982. It was an admitted fact that the original defendant came to live in the said premises as a tenant under Mr.Gouse. It is also not disputed by parties that the original owner Mr.Gouse was in occupation of the premises as at 1st January 1980. Further the learned Trial judge has held that that the Plaintiff had proved by producing documentary evidence that the original owner Mr.Gouse and members of his family was in occupation of the said premises in January, 1980.

It is also not in dispute that the Plaintiff became the owner of the premises and the Landlord of the Defendant only in 1987. It was contended by the Counsel on behalf of the plaintiff that, what the plaintiff had to prove in this case was that on 1st January 1980 the owners were in occupation of the premises in suit and that the defendant had come into occupation of the said premises as a tenant of the said owner after 1st January 1980. Very clearly the Plaintiff had proved that the owner Mr. Gouse and his family was in occupation of the premises on 1st January 1980.

It is clear that the Plaintiff being the new owner who has bought the said premises with the defendant as the tenant in 1987 can get the benefit of section 2(4)(c) of the Rent Act No 55 of 1980. The learned trial Judge's finding is supported by the admissions and oral and documentary evidence that was before court. The learned trial Judge clearly held that the Plaintiff who became the owner of the said premises in 1987 can get the benefit of section 2(4)(c) of the Rent Act.

In M.P.Munasinghe V. C.P.Vidanage 69 N.L.R 98 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.

Further in Alwis V. Piyasena Fernando 1993 (1) S.L.R 119 it was 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 in appeal."

In Gunawardene V. Cabral and Others (1980) 2 Sri.L.R it was held tht the appellate court will set aside the inferences drawn by the trial judge only if they amount to findings of facts based on:-

(1)inadmissible evidence ; or

(2)after rejecting admissible and relevant evidence; or

(3)if the inferences are unsupported by evidence' or

(4)if the inferences or conclusions are not possible or perverse.

In the case before me I do not see that the findings of the Learned District Judge and the inference drawn by him are vitiated by any of these considerations. In my opinion, the Civil Appellate High Court had misdirected itself in fact and in law and had set aside the judgment of the trial Judge and had held with the Defendant- Appellant and dismissed the Plaintiff's action with costs.

Quite contrary to the findings of the Civil Appellate High Court, the evidence led in this case revealed that the said premises were occupied by the owners of the said premises on 1st January 1980 and that the said premises had been rented out to the original defendant somewhere in 1982. It is quite evident from the pleadings of both parties that the original owner Mr. Gouse was in occupation of the said premises as at 1st January 1980 and the defendant became a tenant under the said Mr. Gouse after the said amendment came into operation. There is no requirement under this section for the Plaintiff himself to have occupied the said premises on 1st January 1980 as the

owner. Therefore it is abundantly clear that the plaintiff is not estopped from having recourse to the exceptions as laid down in section 2(4)(c) of the Amendment to the Rent Act No 55 of 1980.

The facts in the case referred to by the Hon.Judges of the Civil Appellate High Court is quite distinct to the facts of this case. In the said case Hettiarachchi V.Hettiarachchi [1994] 2 Sri.L.R.188, the Plaintiff who occupied the said premises on 1st January 1980 instituted action against the defendant in the said case for ejectment of the tenant and claimed that the Rent Act (as amended) did not apply to the premises by reason of the provisions section 2(4)(c). In that case it was held that the onus was on the Plaintiff to establish

(1)that the premises were residential premises;

(2)that he (the Plaintiff) was in occupation of the premises on 1st Jnuary 1980 and that the premises were let on or after 1st January 1980;

(3)that the Plaintiff was in occupation of the premises on 1st January 1980 in the capacity as the owner.

At the trial it was admitted that the premises were residential premises. It was also not disputed that the premises were let to the defendant after 1st January 1980. The clear finding of the trial Judge was that the Plaintiff was in occupation of the premises on 1st January 1980.However, the learned trial Judge dismissed the Plaintiff's action on the ground that he has failed to prove that his occupation of the premises on 1st January 1980 was in the capacity of the owner. At the trial Plaintiff sought to prove ownership of the premises by producing a deed. The said deed was marked subject to proof and it was common ground that the Plaintiff failed to prove due execution of the deed as required by the provisions of the Evidence Ordinance. In appeal it was held that proof of ownership need not necessarily be only by due proof of title deed. Oral testimony which is not challenged

and extracts from Assessment Registers are sufficient and that the evidence on record is sufficient to establish the fact that the Plaintiff was the owner of the premises for the purpose of section 2(4)(c)of the Rent Act.

In the instant case the plaintiff had clearly proved that the owners were in occupation of the premises on 1st January 1980. The Defendant has not disputed the said fact. What the Plaintiff in this case has to prove is that the said owners were in occupation of the said premises on 1st January 1980. Further the Plaintiff has to prove that the defendant came to occupy the said premises as the tenant on or after 1st January 1980. The learned trial Judge has clearly held that the defendant became the tenant of the original owner M. Gouse after 1st January 1980. In fact the evidence established that the defendant came into occupation of the said premises somewhere in 1982. The learned trial Judge has clearly held that the said premises are residential premises, that the original owner Mr.Gouse was in occupation of the said premises on 1st January 1980 and that the original owner had let the said premises to the defendant after 1st January 1980.

Under section 2(4)(c) what the Plaintiff had to prove was that it is residential premises occupied by the owner on 1st January 1980, and let on or after that date. Any residential premises occupied by the owner on 1st January 1980 and let on or after that date is deemed to be excepted premises under section 2(4)(c). Therefore what the Plaintiff In the instant case had to prove was that the owner of the said premises were occupying the premises on 1st January 1980 and that he had let the said premises to the defendant on or after 1st January 1980. Although Plaintiff had become the owner of the said premises in 1987 he has led sufficient evidence to establish the fact the person who was the owner of the said premises Mr.Gouse occupied the said premises on 1st January 1980.

In my opinion the learned Judges of the Civil Appellate High Court had misdirected themselves in fact and in law, in holding that it was incumbent on the present owner , the Plaintiff in this case to occupy the said premises on 1st January 1980 to maintain and to succeed in this action. Giving such a narrow interpretation to this section would make this amendment meaningless and would defeat the very purpose for which this amendment was brought in by the legislature.

Therefore I answer the three questions of law raised in this case in the affirmative in favour of the Plaintiff.Accordingly the appeal of the Plaintiff-Respondent-Petitioner-Appellant is allowed. I set aside the judgment of the Civil Appellate High Court dated 27.02.2013 and affirm the judgment of the learned District Judge of Mt.Lavinia dated 13.12.2007. I make no order for costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC,J.

I agree.

JUDGE OF THE SUPREME COURT

PRASANNA.S.JAYAWARDENA, PC,J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal from the Civil Appellate High Court.

Seyyadu Mohommaduge Razik,
Gallenbindunuwewa,
Horowpotana.

Plaintiff

SC APPEAL 89/2010
SC/HC CA/LA 311/2009
D. C. Anuradhapura 15625/L

Vs

1. Suleiman Adam Kandu,
   Kivul Kade, Horowpathana.
2. Abdul Hameed Mahamad Mihilar,
   Fancy Textiles, Mahaveediya,
   Horowpathana.

Defendants

AND THEN

Seyyadu Mohommaduge Razik,
Gallenbindunuwewa,
Horowpotana.

Plaintiff Appellant

Vs

1. Suleiman Adam Kandu,
   Kivul Kade, Horowpathana.
2. Abdul Hameed Mahamad Mihilar,
   Fancy Textiles, Mahaveediya,
   Horowpathana.

Defendant Respondent

AND NOW BETWEEN

Seyyadu Mohommaduge Razik,
Gallenbindunuwewa,
Horowpotana.

Plaintiff Appellant Appellant

Vs

1. Suleiman Adam Kandu,
   Kivul Kade, Horowpathana.
2. Abdul Hameed Mahamad Mihilar,
   Fancy Textiles, Mahaveediya,
   Horowpathana.

Defendant Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRIYANTHA JAYAWARDENA PCJ. &
MURDU FERNANDO PCJ.

COUNSEL : Mahanama de Silva with K.M.N.Dilrukshi for the Plaintiff Appellant Appellant.
N.M.Shaheed with Husni M. Rizni for the first Defendant Respondent Respondent.

ARGUED ON : 23.07.2018.

DECIDED ON : 10.10.2018.

S. EVA WANASUNDERA PCJ.

In the District Court of Anuradhapura, Seyyadu Mohammaduge **Razik** filed action against two persons, namely Sulaiman **Adam Kandu** and Abdul Hamid Mohamed **Mihilar** to obtain a declaration as the owner of a portion of land and the building thereon which was described in the Schedule to the Plaint containing in extent of 4.25 Perches, as well as to evict the 1st and 2nd Defendants from the building on the said land. The date of the Plaint is 29.02.1996. The Plaintiff has claimed damages against the Defendants as well. The 2nd Defendant is a tenant of the 1st Defendant. The main contest is between the Plaintiff Razik and the 1st Defendant Adam Kandu.

Having gone through the brief, I find that the declaration sought by the Plaintiff as the owner of an extent of 4.25 Perches is truly on the ground a "boutique room". The Northern boundary of the said land is the other "boutique room" of the 1st Defendant. These two boutique rooms are adjoining each other. Each boutique room is exactly the same in extent. Both of these boutiques were originally owned by one Seinul Abdeen and his brother in law Adam Kandu who is the 1st Defendant situated on the land contained in the Schedule to the original Deed No. 246 dated 03.06.1978 which land was purchased by both of them together from three vendors as mentioned in the deed from Point Pedro.

The Plaintiff Razik claims title by deed No. 79 dated 28.09.1993 attested by Herath Banda Ratnayake Notary Public. The original owner of the land and building had been Sella Marikkar Seinul Abdeen. He had passed away and the heirs were his wife and children. The wife and the children had signed as heirs of Seinul Abdeen and transferred the corpus to the Plaintiff by the said Deed 79. Seinul Abdeen had got title to the same by Deed 246 dated 03.06.1978 attested by Kanagasegeram Muthukumar Notary Public. By this deed Adam Kandu, the 1st Defendant and Seinul Abdeen had become co-owners of an extent of land of 1/4th share of the bigger land of an extent of 34 Perches with the buildings thereon. So, each one was entitled to half share of 1/4th of 34 Perches, i.e. 4.25 Perches. It can be concluded that according to the deeds, the Plaintiff's predecessor and the 1st Defendant had become co-owners to the land of 8.5 Perches.

According to the evidence on record, I observe that these are two boutiques were possessed separately, one boutique by the Plaintiff's predecessor in title, namely

Seinul Abdeen and the other by the 1st Defendant. They enjoyed the two boutiques separately for some time by renting the same out, to outsiders. One deed of lease giving out the boutique which was owned and possessed by the 1st Defendant Adam Kandu was produced at the trial. It was a lease of the boutique for two years. The Deed of Lease number is 6862 dated 23.02.1988 attested by Lionel Peter Dayananda Notary Public. It is evident that Adam Kandu was the Lessor and S.A.M. Muhuthar was the Lessee. In the Schedule thereof it is specifically mentioned that the premises leased out is " boutique number 148, in length 80 feet and in width 13 feet." This boutique is the one possessed by Adam Kandu which was on the Eastern Side of the co-owned land of 8.5 Perches.

Then in the year 1991, Seinul Abdeen died. The heirs of Seinul Abdeen sold the boutique owned by Seinul Abdeen to the Plaintiff, Razik on 28.09.1993 by Deed No. 79 attested by Herath Banda Rathnayake, Notary Public.

The 1st Defendant, who was the brother in law of Seinul Abdeen had got a transfer deed done in his favour by forging the signature of Seinul Abdeen. The said transfer deed No. 9075 dated 06.07.1991 was attested by L.P. Dayananda Notary Public. It is on this Deed that the 1st Defendant claimed that he was the owner of the boutique of which the former owner was Seinul Abdeen , his brother in law. When she came to know about that fraudulent Deed, Seinul Abdeen's wife complained to the police with regard to the said deed of transfer No. 9075 on the ground that the signature thereof was not that of her husband who used to sign in English and not in Tamil as it was in Deed 9075. Furthermore she had pointed out that on the date of the said deed, her husband was inside the Anuradhapura hospital and that he had expired the next day.

The Police had investigated and filed action in the Magistrate's Court of Anuradhapura under case number 7395 **against Adam Kandu** and two others who had signed as witnesses. On 10.12.2012 he was **convicted** on charges under Sections 459 read with Section 457 and under Section 402 of the Penal Code by the Magistrate. The decision of the Magistrate was appealed to the High Court of Anuradhapura. The **Appeal was considered** under Case No. Appeal 04/2013 and judgment was delivered by the High Court Judge on 03.04.2014, **dismissing the Appeal.** The Certified copies of the said Judgements have been filed in this Court with an Affidavit and a motion dated 23.10.2014 marking them as A1 and A2. Thereafter the 1st Defendant Adam Kandu again filed papers in Appeal against the

judgment of the High Court , firstly seeking 'leave to appeal to the Supreme Court', under case number **SC Spl Leave to Appeal No. 67/2014**. I have the original Supreme Court brief with me, which was called for by me from the Supreme Court Registry to verify what the position of the matter as it is, as at the moment. I find that on the 5th of October, 2016, the **Supreme Court has refused Special Leave from the judgment of the High Court.**

Therefore, on this day, it is a concluded matter that the **Deed No. 9075 dated 06.07.1991 is a fraudulent deed and it has no legal validity in law**. The 1st Defendant is not the legal owner of the boutique which was formerly owned by the deceased Seinul Abdeen.

The action filed by the Plaintiff was dismissed by the District Court. The Plaintiff had preferred an Appeal to the Civil Appellate High Court. That Appeal was also dismissed on 20.10.2009. Then the Plaintiff Appellant Appellant preferred this Appeal to the Supreme Court and leave to appeal was granted on two questions of law which read as follows:

1. Has the High Court misdirected itself in holding that the corpus was an undivided and co-owned land on the basis of Deed P1 since the evidence was that after the execution of the said deed, the Vendees, namely the 1st defendant and the said Seinul Abdeen had possessed their respective shares separately and as two distinct and divided lots?

2. Has the High Court misdirected in law in holding that the order made in respect of the said preliminary issue No. 22 is not final and conclusive? Is the said determination obnoxious to Section 147 of the Civil Procedure Code?

Section 147 of the Civil Procedure Code reads thus:

"When issues both of law and of fact arise in the same action, and the court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues on fact until after the issues of law have been determined."

In the case in hand while the case was going on after parties had settled the issues on fact which were 21 in number, another issue was raised as Issue No. 22 by the Counsel for the 1st Defendant. This issue No. 22 can be narrated as follows:

" Since what has been received is a co-owned title,

(a) have the said co-owned property been legally partitioned?

(b) If it has not been done so, can the Plaintiff file an action regarding land and pray that the co-owner be evicted?

(c) As such, should the Plaintiff get the relief against the Defendants by way of a Partition Action? "

The District Judge thought it fit and proper to take up this issue as a preliminary issue under Section 147 of the Civil Procedure Code and directed the parties to file written submissions on the same and thereafter made order on 07.12.1998 concluding that " As at present, the Plaintiff seems to be the only owner of the whole land and premises since he has bought the undivided portion of the same land. Prior to the Plaintiff purchasing the said undivided share, the parties had been in possession of the separated divided portions for a very long time and enjoying them separately as specific portions owned by them. Therefore there is no legal bar to allow the Plaintiff to proceed with the case as a re-vindicatio action against the Defendants."

There was no attempt made by the Defendants to appeal from that order and the case proceeded to trial. The judge who made this order had got transferred and the next Judge had proceeded with the matter. Then again, a third Judge had concluded the matter and written the judgment. **He had answered the issue No. 22 which was already taken up and decided on by the first Judge , once again**. It is hard to believe that the judge who wrote the judgment had not seen or observed that a preliminary objection had been raised and argued and considered by his predecessor and **that the matter was concluded.**

Once a question of law is taken up as a preliminary question and a decision is made, there will be no room for that question to be considered by the judge again before the same court. **It amounts to one issue being answered twice in the same proceedings.** That is not legal. It is not proper and highly unnecessary and unwarranted. Any trial Judge should go through the proceedings thoroughly before he steps on to writing the judgment. There is no room for the Judge to

consider once again an issue which was already decided within the same trial. It can lead to absurdity if it is done so. In the case in hand the judge who decided on the preliminary issue had held in one way and the Judge who wrote the final judgment had held in another way, contrary to the former order. I hold that the trial Judge was legally wrong in having done so.

At the time of filing the action, the Plaintiff Razik was the owner of the boutique room which covered the land co-owned **earlie**r by Seinul Abdeen and his brother in law the 1st Defendant. Razik's position is that when Seinul Abdeen died, he purchased the share of the dead person, from his wife and children, by Deed No.79 dated 28.09.1993. Seinul Abdeen had died on the **07.07.1991** and the 1st Defendant claims that he bought the share of Seinul Abdeen on **06.07.1991** , i.e. the day prior to his death in the hospital, by Deed No. 9075 attested by Lionel P. Dayananda Notary Public. This transfer Deed 9075 was allegedly signed by the deceased Seinul Abdeen one day prior to his death. The wife complained to the Police and the Police filed action against the 1st Defendant. As I have explained earlier in this Judgment, **the 1st Defendant was convicted for the fraud** of getting such a deed executed and therefore the said Deed 9075 is invalid, illegal and has no force or avail in law.

The 1st Defendant is not the owner of the boutique which was formerly owned by Seinul Abdeen. The legal heirs of the deceased owner had sold the same to the Plaintiff.

So, the Plaintiff's position is that he has not filed a re vindicatio action against **any co-owner.** The Plaintiff Razik, when he filed action in 1996, filed the said action for a declaration of title to the land and premises containing in extent only of 4.25 Perches which he had purchased by **Deed P1**, namely Deed 79 dated 28.09.1993 which had been a boutique room separately owned and possessed by Seinul Abdeen. He prayed for ejectment of the 1st Defendant and the 2nd Defendant, Mihilar who was occupying the boutique room as the tenant of the 1st Defendant.

The land of 8.5 Perches were co-owned by Seinul Abdeen and the 1st Defendant Adam Kandu, brothers in law by Deed P1(a), namely Deed No. 246 dated 03.06.1978 until the death of Seinul Abdeen. Even then, according to the said Deed, which was again marked by the 1st Defendant as 1V1 , it is specifically mentioned that each of them, i.e. Atham Kandu and Seinul Abdeen will hold it in

equal share. So, each one , according to the evidence on record had possessed one boutique room separate from the other, each covering the land of 4.25 Perches which two boutique rooms were already on this land of 8.5 Perches. Since the day of the purchase in 1978 they had been possessing the two boutique rooms separately.

However, whether I consider the Plaintiff as the owner of the particular boutique room or whether I consider the Plaintiff as a co-owner of the whole land containing the two boutique rooms, **the Plaintiff has a right to evict a trespasser** who is the 2nd Defendant Respondent Respondent, Mihilar, who had come into occupation of the boutique room as a **tenant of the 1st Defendant** and who has remained therein against the wish of the 1st Defendant after the lease period without paying rent. The 1st Defendant himself has filed a rent and ejectment case against the said 2nd Defendant.

The 2nd Defendant has taken advantage of the dispute between the Plaintiff and the 1st Defendant and has continued to be there. **He is a trespasser**. He has no grounds whatsoever to be in the boutique room which is the subject matter of this case. It is trite law in our legal system that even a co-owner has every right to eject the trespassers without making other co-owners parties to the suit. I hold that the Plaintiff has a legal right to evict the 2nd Defendant Respondent Respondent from the boutique room which he is occupying. **Neither the learned Civil Appellate High Court Judges nor the learned District Judge had given any thought to the 2nd Defendant Respondent Respondent's unlawful occupation of the boutique room** and had not made any order regarding that position. The High Court and the District Court **have erred** in the judgments delivered in that regard.

When any immovable property is co-owned according to the title deeds of the parties who own them, each party gets rights against outsiders on behalf of all the co-owners. If the parties find it difficult to occupy the land as co-owners in peace, then any party can file a Partition Action and get relief to own each one's shares according to a plan drawn by the court commissioner surveyor according to the law on partition. Many co-owners divide the land by themselves amicably and posses them, having got an amicable survey plan done with the consent of the parties. The main objective is to get each co-owner to have separate allotments so that they can do whatever with that allotment of land which they possess separately.

In the case in hand the two brothers in law had bought the building which had two boutique rooms which were equal in extent and therefore they possessed each boutique separately and peacefully from the year 1978. In the mind of each person who were the two co-owners according to the original deed of ownership, there was a particular boutique room which each one owned. Each person, i.e. Seinul Abdeen and his brother in law Adam Kandu possessed 4.25 Perches each: they owned each boutique room separately: they gave each boutique room on rent/lease separately to outsiders and enjoyed the proceeds without any problem separately and thus it was until the death of Seinul Abdeen.

It can be concluded that they owned and possessed the co-owned property having divided the same in equal shares distinctly and separately in peace without any problem whatsoever from 1978 up to 1991, i.e. 13 years continuously. There had not existed any need for them to partition by way of a partition action or to write separate deeds declaring that they are possessing their portion in a peaceful way simply due to the reason that they were holding on to the right share, in a right way , without any problems whatsoever. Each one was owning and occupying their share of the property in a peaceful way as there had not been any problem in possessing their already separated extent of 4.25 Perches with only a boutique room on each separated extent of land with a single boutique on it.

Since they had been holding on to each boutique for over 10 years, each one of the co-owners had prescribed to each boutique room as well, against any rights of outsiders other than the co-owners. They had held the separate properties by themselves in their minds as separate property of each one single handedly without ever thinking that the property is co-owned. If any person recognizes that it was a co-owned land, it is a misconception according to the way each party had dealt with each boutique room after the day they bought the land of 8.5 Perches together. On the deed of purchase it is a co-owned land but each purchaser held each boutique as his singly owned property in all aspects for 13 years.

It is interesting to note that in the **Answer of the 1st Defendant**, he had **not taken up the position that the land was co-owned land** and therefore the **Plaintiff is not entitled to the relief prayed for.** There was no issue raised regarding co-ownership.

Only 21 issues were raised as seen at pages 77 to 80 of the brief in hand before the Supreme Court. During the course of the examination in chief, issue number 22 was raised. Thereafter again the Plaintiff was cross examined on the basis that a co-owner cannot be evicted. It is only then that the learned District Judge decided to try issue No. 22 as a preliminary issue. After calling for written submissions, the District Judge made order dismissing the said preliminary issue and decided that the case could be proceeded with , as a re- vindicatio action and an action to evict the Defendants.

When the preliminary issue was decided upon by the Judge who heard the case at that time, that order is final on that issue because neither party appealed from the said Order. The third Judge who wrote the final judgment has wrongfully adjudicated on that issue once again and held the contrary view. The trial judge had dismissed the plaint on the basis that the property is co-owned and therefore the Plaintiff who bought the boutique room cannot evict the other co-owner from the property.

I hold that the Trial Judge as well as the Civil Appellate High Court Judges have wrongly identified the land as co-owned and totally had not paid any attention to the 2nd Defendant who is a trespasser and not made any order with regard to him being in possession wrongfully and unjustifiably of the corpus, the subject matter of the case. In **Rockland Distilleries Vs Azeez 52 NLR 490**, it was held that one co-owner can institute action for damages caused to the common property without joining the other co-owners either as plaintiff or defendants.

The learned Judges have turned a blind eye to the fact that this third party who is the 2nd Defendant can be evicted from the boutique room as he is a trespasser on the land.

I answer the questions of law enumerated above in the affirmative in favour of the Plaintiff Appellant Appellant and against the Defendant Respondent Respondents.

I set aside the judgment of the Civil Appellate High Court dated 20.10.2009 as well as the judgment of the District Court of Anuradhapura dated 18.05.2004. The Plaintiff Appellant Appellant is entitled to the reliefs prayed for in the Plaint.

The Appeal is allowed with costs of suit in all the courts.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 from a judgment of the Court of Appeal

Gammeddegoda Saranatissa Thero,
Controlling Viharadhipathi of Sri Sudharshanaramaya, Horangalle, Thalgaswela and
Saila Bimbaramaya, Indurupatwila.

Plaintiff

Vs

SC APPEAL No. 92/2010
SC Spl. L.A. No. 316/2008
C.A.Application No. 160/2000(F)
D.C.Balapitiya No. 1730/ Spl.

Horangalle Samiddhi Thero of Sri Sudharshanaramaya, Horangalle.
Horangalle.

Defendant

AND

Gammeddegoda Saranatissa Thero,
(Deceased)
Controlling Viharadhipathi of Sri Sudharshanaramaya, Horangalle, Thalgaswela and
Saila Bimbaramaya, Indurupatwila.

Plaintiff Appellant

Gammaddegoda Amarasiri Thero,
Sri Mahindaramaya, K.E,Perera Mawatha, Thalwatta, Kelaniya.

Substituted Plaintiff Appellant

Vs

Horangalle Samiddhi Thero,
Sri Sudharshanaramaya,
Horangalle.

Defendant Respondent

AND NOW BETWEEN

Horangalle Samiddhi Thero,
Sri Sudharshanaramaya,
Horangalle.

Defendant Respondent Appellant

Vs

Gammaddegoda Amarasiri Thero,
Sri Mahindaramaya, K.E,Perera
Mawatha, Thalwatta, Kelaniya.

Substituted Plaintiff Appellant
Respondent

BEFORE : **S. EVA WANASUNDERA PCJ,**
H.N.J. PERERA J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Manohara de Silva PC with Hirosha Munasinghe for the Defendant Respondent Appellant

Widura Ranawaka with Shyamal Rathnayaka for the Substituted Plaintiff Appellant Respondent.

ARGUED ON : 09.01.2018.

DECIDED ON : 19.02.2018.

S. EVA WANASUNDERA PCJ.

This Court has granted Special Leave to Appeal on the questions of law contained in paragraph 11(a) to (e) , (h) and (i) of the Petition dated 31.08.2010. At the stage of hearing , a preliminary objection was taken up by the counsel for the Substituted Plaintiff Appellant Respondent (hereinafter referred to as the Respondent) that the Defendant Respondent Appellant (hereinafter referred to as the Appellant) had failed to file written submissions within the time allowed by Rule 30(6) of the Supreme Court Rules of 1990 and Court was moved to dismiss this Appeal in limine.

However, on the reasoning that the written submissions have been factually filed even though late, I prefer to deal with the arguments on merits of the case in hand.

The questions of law allowed are as follows:

11(a) Did the Court of Appeal err in permitting the Respondent to take a different Position to the Plaint and to raise new issues on the basis of P2, which he did not do at the trial?

(b) Did the Court of Appeal err in holding that the Sangha Sabha decision P2 is proof of the fact that Gunaratana Thero renounced his rights to the Viharadhipathiship ?

(c) Did the Court of Appeal err in holding that P2 recognizes the Respondent Thero as the senior most pupil of Wimalarathana Thero?

(d) Has the Court of Appeal erred in law in coming to a conclusion that Completion of the temple by a bhikku and making it established give

any rights of succession to such a Bhikku to become the Viharadhipathi?

(e) Has the Court of Appeal erred in failing to consider that P2 only makes the said Pabhankara Thero "Adhikari" of the said temple and not the Viharadhipathi?

(h) Did the Court of Appeal err in holding that the documents marked P4 and P6 Support the view that the deceased Plaintiff was the Viharadhipathi?

(i) Has the Court of Appeal failed in coming to a finding that who is entitled to the Viharadhipathiship of the Temple in question according to the rules of Shishyanu Shishya Paramparawa, succeeding Wimalarathana Thero and thereby erred in law?

It can be recognized that the contentions in the case in hand revolve around the documents **P2, P4 and P6** and the interpretation thereof.

The Plaintiff had averred in his Plaint that the **Defendant Samiddhi Thero** was a pupil of the Plaintiff, G. Saranathissa Thero and that the Defendant Samiddhi Thero had come into the residency of the temple, Sri Sudharshanaramaya under the **leave and license of the Plaintiff.**

The Temple land was about 3 Acres in extent and had all the necessary items such as a Chaitya, a Dharma Shala, a building for the monks to live in, a Dana Shala, a Bo Maluwa and a Seema Malakaya for vinaya ceremonies etc. According to the Plaintiff, the land had been bought by a monk by the name of Baddegama Pabhankara Thero on 27.08.1918 by Deed No. 899 attested by D.A.Gunasekera Notary Public. He had developed the same to be a fully fledged temple. The Plaintiff had submitted in the Plaint that the said Pabhankara Thero had been the Viharadhipathi of this temple, Sri Sudharshanaramaya until his death in the year 1971. The Plaintiff **G.Saranathissa Thero** had been the only pupil who was **robed and ordained (made Upasampada) by Pabhankara Thero** and at his demise, the Plaintiff, G.Saranathissa Thero had become the Viharadhipathi, according to the accepted rule in Buddhist Temporalities Ordinance by the Shishya shishyanu paramparawa.

He had been an old monk by the year 1987 and it is alleged that the Defendant Samiddhi Thero had created problems regarding the movable property within the

premises of the Viharaya, and had started quarrelling with the Plaintiff on or around 10.07.1987 making a claim on the Viharadhipathiship. Allegedly, having sold some of the items like an electricity generator, almirahs etc. he had again attempted to remove the other valuable movable items from the temple. It is only then that the Plaintiff had filed this action and moved Court to grant an interim injunction to stop the Defendant from removing and trying to sell the movables which were within the premises. **The Court had granted the interim relief**.

The Defendant had filed answer on 08.03.1988. He had denied the position taken up by the Plaintiff and stated that Kariyawasam Weerasinghege Adiriyan Appu was the owner of the land which is described in the Schedule to the Plaint called Pansalwatta alias Delgahawatta and that he had sold it to Baddegama Ratanapala Thero by Deed No. 8129 dated 24.02.1885. Then the said **B. Ratanapala Thero was the the first Viharadhipathi** of the temple. After he died **Horangalle Wimalaratana** Thero had got the Viharadhipathiship. When the said Thero also died, his senior pupil **Baddegama Gunaratana Thero** had become the Viharadhipathi. At his death, on 02.11.1975, **Waihene Pannaloka Thero** had received the Viharadhipathiship.

The Defendant further states that Baddegama Pabankara Thero did not become Viharadhipathi according to the Deed No. 899 dated 27.08.1918. It was further submitted that B. Pabankara Thero was only looking after the temple on behalf of Baddegama Gunaratana Thero. After the said B. Gunaratana Thero died, the Defendant claims that he has been looking after the temple for and on behalf of Waihene Pannaloka Thero. The Defendant states further that the Plaintiff has come to the temple from Sailabimbaramaya where he was residing right along and on or about 11.07. 1987 , **the Plaintiff had commenced to reside unlawfully within a part of the property of the particular temple**.

However I find that **the Defendant is not claiming the Viharadhipathiship** of the temple which is the subject matter of this Appeal. In the District Court the **Defendant** Appellant had prayed **only for a dismissal** of the Plaintiff's action.

It is obvious from the evidence before Court that the Plaintiff G. Saranathissa Thero was very old at the time of filing the case and as such he had not given evidence at the trial. The present **Substituted Plaintiff Appellant Respondent**, G.

Amarasiri Thero had given evidence in Court on behalf of the Plaintiff and had stated that as the Plaintiff Saranathissa Thero was residing at Sailabimbaramaya, he had directed the Defendant Samiddhi Thero to look after the temple. It is the position of the Plaintiff that the Defendant was at the temple looking after the place under the license of the deceased Plaintiff.

It was an accepted position by both parties that the said temple which is the subject matter of this action, is exempted under Sec. 4(1) of the Buddhist Temporalities Ordinance No. 19 of 1931 but governed by the other provisions of the said Ordinance.

At the trial 13 issued had been raised. The substituted Plaintiff Appellant Respondent had given evidence and another witness from the Department of Buddhist Affairs was also called on behalf of the Plaintiff. The documents P1 to P7 was led in evidence.

On behalf of the Defendant, the Defendant Samiddhi Thero and two witnesses namely Gurusinghagoda Buddharakkitha Thero and Poddiwela Rathanasiri Thero had given evidence and documents V1 to V13 was marked in evidence.

The trial Judge had **dismissed the Plaintiff's action** with costs on 24.04.2000. The Plaintiff preferred an Appeal to the Court of Appeal. The Appeal was argued and judgment was delivered on 28.10.2008 allowing the Appeal and granting the declaration of **Viharadhipathiship to the Plaintiff**. The Substituted Plaintiff Appellant was also granted costs in both courts. Then the Defendant Respondent Appellant (hereinafter referred to as the Appellant) appealed to the Supreme Court and special leave was granted.

The Deceased Plaintiff had stated in his Plaint that the Appellant is a pupil of the Plaintiff and that he had come to reside at the temple under the license of the Deceased Plaintiff. The **Appellant** marked in evidence the document **P4** at the trial. **P4** is the declaration regarding Upasampada Bhikku of the Appellant which was registered under Sec. 41 of the Buddhist Temporalities Ordinance which is **at page 465** of the brief. According to that Upasampada Bhikku Registered Declaration, **the Appellant is a pupil of Baddegama Pabankara as well as a pupil of the Deceased Plaintiff, G. Saranathissa Thero.** The Appellant himself has

signed accepting the contents thereof. Therefore the Appellant cannot be heard to state that he is not a pupil of the Plaintiff G. Saranathissa Thero.

In P4, at cage 19 it is also mentioned that **Pabankara Thero was the Viharadhipathi of Sudarshanaramaya at that time, i.e. in the year 1954. It refers to Pabankara Thero as "Sudharshanaramadhipathi".** The Defendant Appellant Samiddhi Thero **had also been living** at the Sudarshanaramaya from the time he was robed, as mentioned in that declaration. The **Document P6 is a letter** written by the Appellant to the deceased Plaintiff is further proof of the fact that he had accepted the **Viharadhipathiship** of the deceased Plaintiff since within the four corners of that letter, **he had requested from the Plaintiff Thero to grant permission for him to continue to stay longer at the temple**.

It is observed that the Appellant had tried to deny the Viharadhipathiship of **his own tutors** who **robed him as well as ordained him.** The conduct of the Appellant cannot be recognized as a good move by a pupil of any senior monk in the Buddha Sasana. The bone of contention of the Appellant is that "Adhipathi" does not mean Viharadhipathi.

Even though the Appellant had taken up the position that he was staying at the temple as a licensee of Waihene Pangnaloka Thero who was the Viharadhipathi of the temple in question, when giving evidence, he had changed the position and stated that the **Viharadhipathi of the temple on whose license he is staying at the temple is Gurusinghagoda Buddharakkitha Thero**. This is a **contradiction** of his position regarding his stay at the temple. This contradiction cannot be taken lightly. When any person comes before any court, he should be quite sure in the basic position taken up by him. While giving evidence if he says against his basic stance taken up in his own pleadings , it is a serious contradiction. The Appellant cannot at one time state that he came to Sudharshanaramaya under the license given to him by Pangnaloka Thero and then change the position to say that he came to the place under the licence given to him by Buddharakkitha Thero. It cannot be regarded as a small deviation. It is of importance with regard to his credibility.

The Document **P2 came into being** as a result of the Sangha Sabha giving a direction on 14.01.1940 to **inquire into two Petitions** described as Nos.479 and 479. The document had brought about a Resolution to a dispute pertaining to the

management of the temple. The Resolution was passed after the inquiry and a settlement thereon, entered into on 17.02.1940 **with the consent of all the parties to the dispute along with their dayakas from both sides of the contesting parties** , who were before the inquiring officer, Ven. Yagirala Pannananda **Maha Thero**. Thereafter it had been tabled before the Karaka Maha Sangha Sabha held at Gonagala Sudhammakara Pirivena and unanimously **ratified** by the said authority on 27.02.1940. It is reported as such by Maha Nayaka Thero named as Wihamune Dharma Keerthi Sri Saranankara Sumangala Thero under his signature placed thereon on 03.03.1940. I find that this document is not one which could be taken lightly. It has to be looked into as a **full and final settlement of a dispute between Gammeddegoda Saranathissa Thero and Baddegama Gunarathana Thero in the year 1940.**

This document P2 allocates all the temples mentioned therein to be managed by the clergy specifically named for each temple. It speaks of the Adhikari of the temple. The opening sentence to the resolution states that "When Horangalle Wimalaratana Thero died he left 5 temples which was under his administration." The said five temples were specifically allocated to separate Theros to be in charge of each temple. There is praise on Baddegama Pabhankara Thero and then the temple in question , **Sri Sudharshanaramaya was allocated to Baddegama Pabhankara Thero.** The settlement states that he was staying therein by the word "viharavasi" and then places him elevated to the post of **"Viharasthanaye Adhikari". Baddegama Gunarathana Thero** was given the "Adhikari" post of Matteka Poddiwela Sumana **Shailaramaya.** Gammaddegoda **Saranathissa** Thero was given the Adhikariship in Baddegama **Shailabimbaramaya** and the rest of the pupils of Horangalle Wimalaratana Thero were also allocated the Adhikariship of several other temples. It was a total full and final settlement which had been arrived at by the parties. **P2 can be held as a legal document finalized and ratified by the higher authority of the Karaka Maha Sangha Sabha.**

This settlement was made and ratified by the authorities in command, deciding on the pupilage of Horangalle Wimalaratana Thero who passed away on 28th of July, 1938. Any pupilage of Horangalle Wimalaratana Thero cannot go beyond that document. That document P2 should be held as a finality upon the problems of who are the pupils of Horangalle Wimalaratana Thero.

The contested question is whether **'Adhikari' is the same as 'Viharadhipathiship'**. The legal authorities have to be looked into at this juncture.

In the case of ***Saranankara Unnanse Vs Indajoti Unnanse 20 NLR 385*** , Bertram Chief Justice of Ceylon had written the Judgment on Nov. 13, 1918. It was held that "According to the original theory of its institution, a vihara is dedicated to the whole Sangha. This has been modified by the religious custom known as "pupillary succession" under which a vihara is specially dedicated to a particular priest and his pupils. By virtue of this dedication the priest and his pupils have a preferential right of residence and maintenance at the vihare but this appears to be subject to the general dedication to the Sangha as a whole, in as much as on the failure of the succession, the vihare reverts to the Sangha. In Ceylon every Vihare is presumed to be dedicated in pupillary succession, unless the contrary is proved." Accordingly, it is on pupillary succession that the particular priest and his pupils have a preferential right to reside and be maintained at the particular Vihare. It is now trite law that pupillary sccession or shishyanu shishya paramparawa succession is the system of running a vahare or any temple in this country. The Viharadhipathi is the chief incumbent and at his demise, his most senior pupil has a right to succeed to his place as Viharadhipathi.

At page 397 of the said Judgment, it states as follows:
"The officer who in Ceylon decisions and ordinances is referred to as the 'incumbent' is an officer of a different nature. The term by which he is described is 'adhikari' (' a person in authority') a word derived from the Sanskrit word 'adhikara', meaning 'authority'. Where there are several persons in the line of pupillary succession, the *Adhikari* is appointed from among these persons, either by nomination of his predecessor or by selection of these persons. This selection, in such cases is not made by a formal act of the Sangha, as in the case of the officers created by the Vinaya; but it is nevertheless, the formal choice of the other persons entitled to the succession. By custom the right to succeed is determined by seniority." I find that what the Chief Justice Bertram is speaking about nothing other than pupillary succession. It is a known fact that pupillary succession is spoken of only relating to Viharadhipathiship. In ecclesiastical law, nobody gets anything but Viharadhipathiship by pupillary succession. The Buddhist monks at a temple does not get any property to be owned by themselves. It is all Sanghika property. They cannot sell the property movable or immovable from the precincts of any temple by themselves. The pupils of the

robing tutor and/or the ordaining tutor succeeds to the Viharadhipathiship at the demise of the tutor teacher according to the seniority they obtain from the date of ordination. All the pupils get a right to live in the Vihare and be maintained therin. When Bertram CJ speaks of Adhikari it means Viharadhipathi or the chief incumbent of the temple. He is the one in authority. He is not speaking of any instance of 'looking after the temple'. He speaks about the person in authority at the temple as the Adhikari which term is equal to the term Viharadhipathi.

I have gone through the authorities cited by the Defendant Respondent Appellant's Counsel as well as the authorities cited by the Plaintiff Appellant Respondent's counsel with regard to the word Adhikari and Viharadhipathi.

I find that Chief Justice G.P.S. De Silva has written the judgment in ***Werepitiye Sobhitha Thero Vs Werepitiye Anomadassi Thero in SC Appeal No. 79/94 which was decided on 23.08.1995 ,*** after considering the following authorities, namely,

1. Punchirala Vs Dharmananda Thero 48 NLR 11,
2. Rev. Galle Amarawansa Isthavira Vs Rev. Galle Wimaladhamma Maha Thero 79 NLR Vol I pg. 439,
3. Wickramasinghe Vs Unnanse 22NLR 36,
4. Baddegama Rathanasara Thero Vs Bashir 66 NLR 433

   and also the case of
5. ***Jananada Therunnanse Vs Rathanapala Therunnanse 61 NLR 375***

had decided that the word Adhikari is a synonym for the word Viharadhipathi. He had mentioned therein thus; - " I am **not unmindful** that Basnayake CJ in Jananada Therunnanse Vs Rathanapala Therunnanse 61 NLR 375 has observed that it well established that the office of viharadhipathi and viharadhikari are not the same." However he had come to the conclusion that adhikari and viharadhipathi are synonymous terms. I quite agree with the Chief Justice G.P.S.De Silva in his analysis and the conclusion.

Therefore, I hold that in the case in hand also P2 containing the word Viharadhikari refers to the synonym Viharadhipathi. P2 has resolved the matter with regard to the Viharadhipathiship and the contents thereof stands final between the parties and their successors are bound by the terms of that

document P2. Pabhankara Thero had been appointed as the Viharadhipathi of Sri Sudharshanaramaya . The senior most pupil of Pabhankara Thero undisputedly was the deceased Plaintiff G.Saranathissa Thero. He should have succeeded to the Viharadhipathiship after the demise of Pabhankara Thero.

The deceased Plaintiff had proved the case against the Defendant on a balance of probability before the trial court. I hold therefore that the Court of Appeal had quite correctly come to the finding that prayer (a) to the Plaint should be granted as relief. I answer the questions of law enumerated above in the negative against the Appellant. I affirm the judgment of the Court of Appeal.

The 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 Application for Leave to Appeal

Henry Perera Samarakoon,
No.200, Batahena Road, Sooriyagama,
Kadawatha.

Plaintiff

SC Appeal No. 95/2015
SC/ HCCA/ LA No. 117/2013
WP/HCCA/ GPH/ 25/2012 (LA)
D.C. Gampaha Case No. 1126/L

-Vs-

1. Abeysinghe Pathiranage Indrani,
   No.166 / 2 / B, Weboda Road, Kirillawala,
   Kadawatha.

2. Rupasinghe Jayasundara Muhandhiram
   Tilak Pathmasiri Rupasinghage,
   I.G.Gold House, Super Market, Borella,
   Colombo 08.

3. Padma Alwis,
   No.715/1/a, Erawwala Road, Pannipitiya.

4. Sandaradura Nihal Lakshman Silva,
   No. 3/7, Ragama Road, Mahabage.

5. Cader Meedin Mohamed Anzar,
   No.464/2, Kasawatte, Batagoda, Kandy.

Defendants

AND BETWEEN

5. Cader Meedin Mohamed Anzar,
   No.464/2, Kasawatte,Batagoda, Kandy.

5th Defendant Petitioner

-Vs-

Henry Perera Samarakoon,
No.200, Batahena Road, Sooriyagama,
Kadawatha.

Plaintiff - Respondent

1. Abeysinghe Pathiranage Indrani,
   No.166/2/B, Weboda Road, Kirillawala,
   Kadawatha.

2. Rupasinghage Jayasundara Muhandhiram
   Tilak Pathmasiri Rupasinghage,
   I.G. Gold House, Super Market, Borella,
   Colombo 08.

3. Padma Alwis,
   No.715/1/a, Erawwala Road, Pannipitiya.

4. Sandaradura Nihal Lakshman Silva,
   No. 3/7, Ragama Road, Mahabage.

Defendants - Respondents

AND NOW BETWEEN

5. Cader Meedin Mohamed Anzar,
   No.464/2, Kasawatte, Batagoda, Kandy.

5th Defendant – Petitioner - Appellant

- Vs-

Henry Perera Samarakoon,
No. 200, Batahena Road, Sooriyagama,
Kadawatha. (Deceased)

Solanga Arachchige Wimalawathie Perera,
No.200, Batahena Road, Sooriyagama,
Kadawatha.

Subtituted Plaintiff-Respondent-Respondent

1. Abeysinghe Pathiranage Indrani,
   No.166/2/B, Weboda Road, Kirillawala,
   Kadawatha.

2. Rupasinghage Jayasundara Muhandhiram
   Tilak Pathmasiri Rupasinghage,
   I.G. Gold House, Super Market, Borella, Colombo 08.

3. Padma Alwis,
   No.715/1/a, Erawwala Road, Pannipitiya.

4. Sandaradura Nihal Lakshman Silva,
   No. 3/7, Ragama Road, Mahabage.

Defendants- Respondents -Respondents

Before: S. Eva Wanasundara PC. J.,

Vijith. K. Malalgoda PC. J. and

Murdu N.B. Fernando PC. J.

Counsel: Rohan Sahabandu PC for the 5th Defendant- Petitioner - Appellant

Sudarshani Cooray for the Substituted Plaintiff-Respondent – Respondent

Argued On: 02.07.2018

Decided On: 12.12.2018

Murdu N.B. Fernando, PC. J.

This appeal before us pertains to an Order rejecting the application to abate an action filed in the District Court of Gampaha. Civil Appellate High Court of Gampaha affirmed the Order of the District Court and the 5th Defendant- Petitioner- Appellant (hereinafter referred to as the Appellant) sought leave to appeal from the Civil Appellate High Court Judgment which was granted by this Court on 28.05.2015 on the following questions of law,

i. Did the Learned High Court Judge as well as the Learned District judge appreciate the due interpretation and meaning of section 402.
ii. Is there a duty cast on the plaintiff to take steps as ordered by Court and make appropriate application to Court, seeking further assistance and orders to prosecute his action, if he finds that he is not able to proceed according to Law.
iii. In the circumstances of this case were there any steps taken by the plaintiff to prosecute the action for over 12 months from 21.06.2010.
iv. Did the Learned High Court Judge fail to appreciate that, what is referred to in Section 402 is to prosecute the action and not action against any single defendant.
v. In the circumstances of the case, were there laches on the part of the plaintiff which has occasioned a failure of justice.

Thus the pivotal matter to be decided by this Court is whether the learned District Judge was correct in rejecting the application dated 21.02.2012 to lay by the case under Section 402 of the Civil Procedure Code as no steps had been taken by the plaintiff for a period exceeding 12 months after Court made order on 21.06.2010 "to take steps against the 3rd and 4th defendants and move."

To set out the factual background, the plaintiff (now deceased and substituted before this Court by the Substituted Plaintiff-Respondent-Respondent) instituted action dated 19.06.2006 against four defendants upon the basis that the four defendants were holding the "land" (more fully described in the schedule to the plaint) on a constructive trust in favour of the plaintiff and sought an Order **(i)** directing the 4th defendant to execute a deed and transfer the land to the plaintiff accepting the sum referred to in the plaint with interest, **(ii)** in the event of the failure of the defendant to transfer the land to the plaintiff, order the Court Registrar to transfer the land, **(iii)** an alternative remedy for a declaration that the four deeds referred to in the plaint are deemed to be cancelled, and **(iv)** damages in a sum of Rs. 1,000,000 against the 4th defendant.

The plaintiff also alleged, that the land referred to in the schedule to the plaint was transferred by way of a deed in the year 1995 by the plaintiff to the 1st defendant as security for a loan obtained, but not specifically stated in the deed, thereafter the land was transferred by the 1st defendant to the 2nd defendant and the 2nd defendant to the 3rd defendant and then by the 3rd defendant to the 4th defendant upon deeds as security for further loans obtained by the plaintiff and being aware that the 4th defendant was taking steps to alienate the land the plaintiff made a request to redeem the land and on the failure of the 4th defendant to accede to the request of the plaintiff, plaint was filed in the year 2006.

Journal entries in the District Court Record, indicates that summons were initially served only on the 2nd defendant and thereafter the plaintiff moved Court to serve notice of interim injunction on the 4th defendant but Summons nor notice was served, and in October 2007, the present Appellant moved the District Court to be added as a defendant on the basis of a bona fidae purchaser of the land which application was permitted by Court and the present Appellant was added as the 5th defendant to the District Court Case. Thereafter answer was filed by the 5th defendant praying for a declaration of title to the land on the basis of a bona fidae purchaser and damages against the plaintiff. Replication was filed by the plaintiff in 2009. Journal entries also reveal that although the Court has made order on numerous occasions to take steps pertaining to the 1st, 3rd and 4th defendants (by providing the correct addresses, stamps, envelopes) the plaintiff has failed to do so. I observe that the 5th defendant in his answer has stated that the 1st defendant is dead and on 08.03.2010, the plaintiff informed Court that action will not be pursued against the deceased 1st defendant and the case against the 1st defendant was dismissed.

According to Journal entry dated 21.06.2010 the Court fixed the case for ex-parte trial against the 2nd defendant and trial against the 5th defendant. The post script to the Journal entry of the date states 'plaintiff is not aware of the 3rd and 4th defendants. Take steps and move.' This is the pivotal journal entry which this Court has to examine.

By motion dated 22.02.2012, the 5th defendant moved Court to dismiss or lay-by the District Court case as the plaintiff has failed to take steps for a period exceeding 12 months. The District Court heard the plaintiff and the 5th defendant pertaining to the above application, called for written submissions and thereafter on 18.05.2012 rejected the motion and made order that action can proceed when the addresses of the 3rd and 4th defendants are known.

The Civil Appellate High Court affirmed the said Order on 14th February 2013 and stated that the plaintiff has taken steps to supply summons to be issued by Court and therefore being unaware of the defendants' whereabouts cannot be attributed as a fault of the plaintiff.

Being aggrieved by this order, the 5th Defendant-Petitioner-Appellant has come before this Court.

The application to lay by the District Court Case by the Appellant was made under Section 402 of the Civil Procedure Code. Section 402 of the Civil Procedure Code reads as follows,

> **"If a period exceeding twelve months in the case of a District Court ….elapse subsequent to the date of the last entry of an order or proceeding in the record without the plaintiff taking any steps to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate."**

The submission of the Appellant before this Court is, since no steps had been taken by the plaintiff for over 18 months subsequent to the last journal entry dated 21.06.2010, wherein it is minuted "take steps and move", District Court should have laid by the case.

The Substituted Plaintiff-Respondent-Respondent (hereafter referred to as the Respondent) takes up the position that there were no steps for the plaintiff to take as the plaintiff has tendered the necessary documents to serve summons on the 3rd defendant as far back as in January 2009 and with regard to the 4th defendant, plaintiff was not in a position to ascertain the correct address of the 4th defendant and therefore substituted service of summons on the 4th defendant was not possible and in the absence of a specific procedure laid down in the Civil Procedure Code as to what the plaintiff ought to do in such a situation, dismissing the action of the plaintiff without a trial is unreasonable and unfair.

Let me now advert to the position of the Respondent stated above.

It is undisputed that the plaintiff filed this action to obtain relief and the principal relief sought was against the 4th defendant. Thus, for the plaintiff to obtain relief prayed for plaintiff should bring the 4th defendant before Court. Failure of the plaintiff to do so would be to his own detriment. The first step to bring the 4th defendant before Court is to serve summons on him and if the plaintiff fails to do so, he should bear the consequences. In the instant case, the plaintiff has failed to give the address of the 4th defendant to Court for serving of summons. Thus from the institution of the action in 2006 until the motion was filed to lay by the case in February 2012, for a period of 5 ½ years, summons could not be served on the 4th defendant.

It is also significant that the plaintiff informed Court that action will not be pursued against the deceased 1st defendant (even the heirs were not substituted) to whom the land was originally transferred in 1995, 10 years prior to the institution of the action by the plaintiff as averred to in the plaint on a constructive trust. In 2006 when plaint was filed, plaintiff was aware (as averred to in the plaint) that the 4th defendant who refused to accede to the plaintiff's request to redeem the land was taking steps to alienate the land and that the 5th defendant moved Court to be added as a defendant on the basis that he purchased the land from the 4th defendant as a bona fidae purchaser. Thereafter, in 2012 the 5th defendant moved court to lay-by the case for non-prosecution of the case by the plaintiff for a period exceeding 12 months.

In ***Supramanium Vs Symons 18 NLR 229*****,** Wood Renton CJ held as follows:-

> **"People may do what they like with their disputes as long as they do not invoke the assistance of the Courts of Law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisors and of the Courts themselves to seek that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled to allow the accumulation upon is cause list of a mass of inanimate or semi animate actions."**

In the above referred Judgment, Wood Renton CJ has succinctly held that a party is bound to take steps and proceed with all possible and reasonable expedition to prosecute an action without allowing it to accumulate the case list. The words stated by the learned Chief Justice in the above Judgment one hundred years ago augur well for present day Courts as well. Cases should not be accumulated in Courts. Cases should be expeditiously concluded.

In the instant case, plaintiff has taken five and half years to serve summons and yet has not been able to ascertain the correct address. In such a situation, were the steps taken by the 5th defendant correct or in accordance with the law in moving Court to lay by the case and/or to dismiss the case for failure to prosecute the action by the plaintiff or should the case remain in the case list until the plaintiff obtain the addresses.

In the given circumstances of this case, I am inclined to agree with the steps taken by the Appellant to move Court to lay by the case.

In the supra case it was also held that a Court has power under Section 402 of the Civil Procedure Code to make an order of abatement ***ex mero motu.*** Nevertheless, it is desirable that a Court, before making an order of abatement should notice the parties, as far as it conveniently can, to give them an opportunity of showing cause against the order. Wood Renton CJ further went on to say that if the plaintiff is injured by absence of notice he can proceed under Section 403.

In ***Fernando Vs Peiris 3 NLR 77*****,** it was held that an abatement order under Section 402 can be entered by Court ***ex mero motu***, however since the consequences are serious it should be made on application by the defendant with due notice to the plaintiff.

In the instant case, upon the Court being moved by the 5th defendant, the Court heard the parties and refused the application of the 5th defendant to lay-by the action on the basis that case can proceed when the addresses of the 3rd and 4th defendants are tendered to Court.

The learned Judges of the Civil Appellate High Court affirmed the order of the District Court on the premise that the rejection of the motion to lay-by was proper.

In the instance case, as stated earlier, the addresses of the 3rd and 4th defendants should have been tendered by the plaintiff. The Court has no duty to obtain addresses. It is the plaintiff's action and there is a duty cast upon the plaintiff to take steps as directed by Court to tender addresses. If the plaintiff fails to fulfill same and does not take steps to prosecute or continue with the action ***ex mero motu*** or the Court on its own could have made order to abate the action after hearing the parties.

Before this Court, Respondent relied heavily on ***Cave & Co. Vs. Erskine 6 NLR 338*** wherein it was held that where the Fiscal has failed to serve summons, no blame is allocated to the plaintiff and it is not open to Court to abate the suit.

The instant case can be distinguished from the above case, as in the instant case for the Fiscal to serve summons the present addresses of the 3rd and 4th defendants should be tendered to court and the only person who could tender the addresses is the plaintiff who is seeking relief from the said defendants albeit the 4th defendant from whom order is sought to transfer the land back to the plaintiff and also damages. I also observe that the plaintiff has failed to tender the correct address

from the date of institution of action to 21.06.2010 the material date on which the Court made order "to take steps and move" and also thereafter until the motion to lay by was filed on 12.02.2012. If the plaintiff fails to tender the addresses, my considered opinion is that the plaintiff has failed to prosecute the case and undoubtedly the blame will fall on the plaintiff and the Court could abate the suit in such a situation.

Even in an instance in which the plaintiff could not obtain the addresses of the 3rd and 4th defendants, there were steps for the plaintiff to take. The plaintiff could have made an application to serve Summons by way of substituted service on the last known addresses of the 3rd and 4th defendants or move for an appropriate order from Court not to proceed against the 3rd and 4th defendants but to proceed against the 2nd defendant against whom ex parte trial had been fixed and against the 5th defendant against whom trial had been fixed. But for a period of 18 months after Court made order on 21.06.2010 to take steps and move, the plaintiff has not taken any meaningful steps and has failed to prosecute the case. On the other hand 5th defendant, the bona fidae purchaser of the land who got himself added as a defendant to the case is waiting with the Sword of Damocles hanging over his head.

However, since the 5th defendant has also included a cross claim against the plaintiff praying for a declaration of title and damages against the plaintiff, the 5th defendant could have moved Court to proceed with the trial and I observe that the 5th defendant too has failed in his duty towards Court.

On the other hand this Court in ***Fernando Vs Curera 2 NLR 29*** and ***Lorensu Appuhamy Vs Paaris 11 NLR 202*** held that fixing a date of hearing is a matter for Court.

In the instant case on the relevant date, namely 21.06.2010, the Court fixed the case for ex-parte trial against the 2nd defendant and trial against the 5th defendant but has not fixed a 'date' for the ex parte trial and trial respectively.

The failure of the District Court to fix a date for ex-parte trial against the 2nd defendant and trial against the 5th defendant has caused immense prejudice to the parties and has led to the delay in prosecuting and concluding the case expeditiously. This I observe is an instance as aptly quoted by Wood Renton CJ in ***Supramanium Vs Symons 18 NLR 229*** (referred to above), wherein he stated that no Judge is obliged or entitled to allow the accumulation upon is cause list of a mass of inanimate or semi animate actions.

In the above circumstances, I answer the questions of law raised in this appeal in favour of the 5th Defendant- Petitioner- Appellant. The appeal is allowed. The Judgment of the Civil Appellate High Court of Gampaha dated 14.02.2013 and the Order of the District Court of Gampaha dated 18.05.2012 are set aside.

In the circumstances of this case, parties will bear their own costs.

Judge of the Supreme Court

S. Eva Wanasundera PC. J

I agree

Judge of the Supreme Court

Vijith. K. Malalgoda PC. J.

I agree **Judge of the Supreme Court**

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

In the matter of an Appeal from a Judgment of the Civil Appellate High Court.

1. Henda Witharana Badralatha
2. Henda Witharana Nandasiri
   Both at Kurunduwatte,
   Wathugedera

Plaintiffs

SC APPEAL No. 95/16
SC HC CA LA No. 117/2014
HCCA Galle No. SP/HCCA/GA/25/2008(F) Vs
DC Balapitiya No. 1916/L

1. K.W.Chandra Mallika,
2. K.W.Wijesiri alias Wimalasena
3. K.K.V. Pramawathi
   All of Kurunduwatte,
   Wathugedera.

Defendants

AND

1.Henda Witharana Badralatha
2.Henda Witharana Nandasiri
Both at Kurunduwatte,
Wathugedera

Plaintiff Appellants

Vs

1.K.W.Chandra Mallika,
2.K.W.Wijesiri alias Wimalasena
3.K.K.V. Pramawathi
All of Kurunduwatte,
Wathugedera.

Defendant Respondents

AND NOW BETWEEN

1.Henda Witharana Badralatha
2.Henda Witharana Nandasiri
Both at Kurunduwatte,
Wathugedera

Plaintiff Appellant Appellants

Vs

1. K.W. Chandra Mallika,
   Kurunduwatte, Wathugedera,
   Presently at
   No. 4/13, Heegalduwa Road,
   Wilegoda, Ambalangoda.
2. K.W.Wijesiri alias Wimalasena,
   Kurunduwatte, Wathugedera.
3. K.K.V.Pramawathi,
   Kurunduwatte, Wathugedera,
   Both presently at
   C/o K.W.Viraji, Near Dallukanda
   Junction, Thalgasgoda,
   Ambalangoda.

Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
L. T. B. DEHIDENIYA J &
MURDU FERNANDO PCJ.

Counsel : Chathura Galhena with Tivanka Jayasinghe for the Plaintiff Appellant Appellants.
The Defendant Respondent Respondents were absent and Unrepresented.

ARGUED ON : 08.06.2018.

DECIDED ON : 29.06.2018.

S. EVA WANASUNDERA PCJ.

This Court has granted leave to appeal on the following questions of law at the time the matter was supported for leave on 10.05.2016 :-

1. Did the Civil Appellate High Court misdirect itself in deciding that the Petitioners had not produced the Partition Plan No. 164?
2. Did the Civil Appellate High Court err in law by deciding that the Petitioners are not entitled to the reliefs prayed for in their Plaint?
3. Did the Civil Appellate High Court misdirect itself by failing to give due consideration to the evidence of the Licensed Surveyor who prepared the Plan bearing No. 4047?

The two Plaintiff Appellant Appellants (hereinafter referred to as the Plaintiffs) had filed action in the District Court of Balapitiya on 11.08.1992 against the three Defendant Respondent Respondents (hereinafter referred to as the Defendants) praying from court, a declaration of title to the land morefully described in the 1st Schedule to the Plaint and for a declaration that the land morefully described in the 2nd Schedule is an **access road to the land in the 1st Schedule to the Plaint**.

The said 1st and 2nd Schedules to the Plaint described the land and the access road according to Plan No. 164 dated 17.03.1975. This Plan 164 was a final partition plan of the Partition Action No. 2775/NP which was heard and concluded in the District Court of Balapitiya. The Plaintiffs claimed that they were legally entitled to Lot 1 of the said plan with the right of way through Lot 12. The Defendants filed answer denying all the averments in the Plaint and prayed for a dismissal of the action. However the Plaintiffs raised 7 issues and the Defendants raised 3 issues at the commencement of the trial. The Plaintiffs took out a commission on a Surveyor namely, Gunasiri Mendis and he produced Plan No. 4047 and gave evidence at the trial. The Defendants also took out a commission on a surveyor named Victor Godahena and he produced Plan No. 518.

The subject matter of this action is the ' access roadway ' claimed by the Plaintiffs. **The Plaintiffs allege that this roadway was encroached by the Defendants**. The 1st Plaintiff Bhadralatha gave evidence of this encroachment and two Policemen also gave evidence on their behalf at the trial. Furthermore, on behalf of the Plaintiff, the surveyor Delath **Gunasiri Mendis** of 70 years of age, the Court Commissioner gave evidence and produced **the Plan No. 4074 dated 03.05.1995** marked **as X** and the **report** thereon marked as **X1**. While giving evidence he had produced to court certified copies of two other survey plans which were used by him to make Plan No. 4074 by superimposing the said Plans on the Plan he had made. The said certified copies of Plans were marked as **X2 and X3** which are respectively Plans Nos. **1778** done by the surveyor Garvin de Silva and **164** done by the surveyor A.G.F. Perera. The Plaintiffs closed their case marking in evidence, documents X, X1 ,X2, X3 and P1 to P13 through four witnesses.

The 1st Defendant , Mallika, surveyor Victor Godahena and Waradana Sarath Samarajeeva de Silva, a member of the Pradeshiya Sabha were the three witnesses who gave evidence for the defense. The surveyor and court commissioner Victor Godahena giving evidence marked the superimposed plan **518 as Z.** He stated that he used Plan X2 for superimposition. That is the Plan 164 as aforementioned which was already marked by the surveyor who gave evidence on behalf of the Plaintiffs. The defense had marked documents V1 to V10 and Plan Z.

On 30.01.2008, the District Judge dismissed the Plaintiffs' action without costs on the ground that the roadway claimed by the Plaintiffs was not properly identified. Being aggrieved by the said judgment, the Plaintiffs appealed to the Civil Appellate High Court. After hearing both parties and having considered the written submissions of both parties, the High Court Judges dismissed the Appeal on 21.01.2014. The basis on which the learned High Court Judge had done so, is that the **Plan on which the rights of the Plaintiffs are identified has not been produced before the trial court for its consideration.**

I find that the Plan 4074 dated 03.05.1995 made by Licensed Surveyor and the Court Commissioner who was issued with a commission by the District Court at the instance of the Plaintiffs is marked as "X" and produced. It is in page 246 of the brief. This Plan clearly shows the house and the land in which the Plaintiffs live, (adjacent to the rail road reservation) which is **Lot 1 in Plan No. 164** and the access road which is **Lot 12 in Plan No. 164,** ending at the entrance to the block of land marked Lot 1 which belongs to the Plaintiffs. The surveyor Gunasiri Mendis had superimposed Plan No. 164 relied on by the Plaintiffs and Plan No. 1178 containing Lots 32 and 33 within that area which is relied on by the Defendants, on the total area surveyed by him and identified that the **Defendants had encroached on the access road. The surveyor had shown the encroached areas as Lot A of an extent of ½ a Perche and Lot B of an extent of 1 Perch** and marked in red and green lines.

Then the Plaintiffs have marked the report of the survey X written by Gunasiri Mendis as X1 and it is at pages 250 and 251 of the brief. The Plans which were superimposed are Plan 164 and Plan 1778. Plan 164 and its report are marked as X3 which is at page259 and its report is at page 258. This plan is dated 8.3.1973 and done by surveyor A.G.F. Perera. Plan No. 1778 dated as partitioned on 17.07.1975 is marked as X2 and it is at page 257 of the brief. The Licensed Surveyor and Court Commissioner in his evidence at page 89 of the brief states thus:

ප්‍ර. තමා ගාවින් ද සිල්වා මහතා විසින් සකස් කොට ඇති අංක.1178 දරණ සැළැස්මේ සහතික පිටපත X.2 ලෙස ලකුණු කර ඉදිරිපත් කරනවා ?

උ. ඔව්.

ප්‍ර. තමා ඒ.පී.එෆ්.පෙරේරා මහතාගේ අංක.164 දරණ සැලැස්මේ පිටපතක් X.3 ලෙස ලකුණු කර ඉදිරිපත් කරනවා ?

උ. ඔව්.

ප්‍ර. තමා කියන්නේ, එම අධිෂ්ඨාපනය මොනවගේ එකක් කියලද ?

උ. නිශ්චිත අධිෂ්ඨාපනයක්.

ප්‍ර. එම අධිෂ්ඨාපනයන් අනුව අංක.32,33 කැබැලිවල විත්තිකරුවන් මෙම අංක.12 දරණ කැබැල්ලේ කොටස් අල්ලාගෙන තිබෙනවාද ?

උ. එහෙමයි පාරෙන් අල්ලාගෙන ඇත.

ප්‍ර. එම කැබැලි තමා ලකුණු කරලා ඇත්තේ මොන අක්ෂර වලින්ද ?

උ. 33 කැබැල්ල ඒ. අක්ෂරය වශයෙන්, 32 කැබැල්ල බී.අක්ෂරය වශයෙන්.

ප්‍ර. එම අංක.12 පාර කොපමණ පලලද ?

උ. අඩි 12 ක් 13 ක් පලලයි.

The commission moved by the Defendants was done by Licensed Surveyor Victor Ganegoda and he also had made the superimposed Plan No. 518 which was surveyed on 19.06.1996. This Plan and its report were marked and produced as Z. The Plan 518 is at page 252 and the report is at page 253 of the brief. This report **specifically mentions that Lot B of an extent of 0.06 Perches has been encroached by the 2nd Defendant and Lot C of an extent of 0.64 Perches has been encroached by the 1st Defendant**. This surveyor while giving evidence has stated thus at page 203 of the brief:

ප්‍ර. දැන් තමා දන්නවා තමාට මේ " ඉසෙඩ් " දරණ සැලැස්මේ අධිෂ්ඨාපනය කරන්න තමාට සැලැස්මක් ඉදිරිපත් කලා. ඒ සැළැස්ම බී.2 නොහොත් X.2 විදියට ඉදිරිපත් කරලා තිබෙනවා?

(එය පෙන්වයි.)

උ. එහෙමයි. මේ පිඹුර තමයි අධිෂ්ඨාපනය කලේ මම අධිෂ්ඨාපනය කරලා මගේ පිඹුරේ පෙන්වා තිබෙනවා.

ප්‍ර. දැන් තමා කියා සිටියා ඒ අධිෂ්ඨාපනය තමාගේ සැළැස්මේ රතු ඉරි වලින් පෙන්වා තිබෙනවා?

උ. එහෙමයි.

ප්‍ර. ඒ සැලැස්මේ දැන් තමා කියා තිබෙනවා බස්නාහිට තිබෙන්නේ පාරක් කියලා?

උ. බස්නාහිරට පාරක් තිබෙනවා.

ප්‍ර. ඒ පාරෙන් අල්ලාගෙන තිබෙනවාද ?

උ. <u>විත්තිකරුවන්</u> පාරෙන් කොටස් දෙකක් අල්ලාගෙන තිබෙනවා. කැබැලි අංක.බී, කැබැලි අංක.සී.කැබලි.

It is rather conspicuous that the access road Lot 12 which leads up to Lot 1 in Plan No. 164 has been encroached upon by the Defendants, according to the Plans done by both the Commissioners who surveyed the land at the instance of the Plaintiffs and the Defendants.

In the judgment of the District Judge, issues 1 and 2 have been answered in the affirmative and as such the Plaintiffs have been held to have good title to Lots 1 and 12 of Plan 164 as in the Schedules to the Plaint. The learned trial judge has erred when he went on to find that the end of the roadway is not correctly depicted in the Commission Plan of the Plaintiff whereas the Plaintiffs contended only ' that the access roadway was encroached by the Defendants and that the same be removed". Anyway the learned District Judge had correctly answered the issues and affirmed the position that the Lot 12 of the Partition Plan No. 164 is a roadway used by the Plaintiffs; the said roadway has been encroached upon by the Defendants and that the said encroachments have been identified as 'A' and 'B' in the Commission Plan No. 4074.

The Civil Appellate High Court has arrived at an incredible conclusion that Plan No. 164 was not marked and produced at the trial before the District Court. At page 4 of the judgment, it is stated thus:

" පැමිණිල්ලේ 1 වන සහ 2 වන උප ලේඛණ දෙකම පදනම් කරගෙන ඇත්තේ, ඒ.පේ.එෆ්.පෙරේරා මිනින්දෝරුවරයා විසින් සකස් කරන ලද අංක.164 හා 17.03.1973 දරණ පිඹුර මතය. නමුත් එම පිඹුර මෙම නඩුවට ඉදිරිපත් කර නොමැත."

" ඉහතින් විස්තර කරන ලද අංක.164 දරණ පිඹුර නඩුවට ඉදිරිපත් කර නැති නිසා එකි පිඹුර පදනම් කරගෙන පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති සහන ප්‍රදානය කිරීමේ ගැටළුවක් පවති."

I have gone through the brief and found that not only the Plan 164 but also the report thereto attached by the Surveyor had been marked and produced before the trial judge as explicitly explained in the foregoing paragraphs hereof. It must have been a hallucination in the minds of the Civil Appellate High Court Judges to state that the said plan was not produced at the trial.

I answer the questions of law raised at the inception of this judgment in the affirmative in favour of the Plaintiff Appellant Appellants and against the Defendant Respondent Respondents. I set aside the Judgment of the Civil Appellate High Court dated 21.01.2014. I set aside the judgment of the District Court dated 30.01.2008. The Plaintiffs are entitled to the reliefs as prayed for in the Plaint.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court.

L. T. B. Dehideniya J.
I agree.

Judge of the Supreme Court.

Murdu Fernando 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

Mahamarakkalage Mahindarathne
Kudabolana, Ambalantota.

Plaintiff

SC Appeal 95/2017
SC/HC(CA) LA 203/2014
SP/HCCA/TA Tangalle 10/2012(F)
DCHambantota FD 4167

Vs

Rate Ralalage Gedera Anuradha Chathurangani
No.634, Hirimbura Road, Labuduwa.

Defendant

AND

Mahamarakkalage Mahindarathne
Kudabolana, Ambalantota.

Plaintiff-Appellant

Vs

Rate Ralalage Gedera Anuradha Chathurangani
No.634, Hirimbura Road, Labuduwa.

Defendant-Respondent

AND NOW BEWEEN

Rate Ralalage Gedera Anuradha Chathurangani
No.634, Hirimbura Road, Labuduwa.

Defendant-Respondent-Petitioner-Appellant

Vs

Mahamarakkalage Mahindarathne
Kudabolana, Ambalantota.

Plaintiff-Appellant-Respondent-Respondent

Before : Sisira J De Abrew J
NalinPerera J
Vijith Malalgoda PC J

Counsel : Senany Dayartne with Eshanthe Mendis and
Nisala Seniya Fernando for the Defendant-
Respondent-Petitioner-Appellant
Rohan Sahabandu PC with Hasitha Amarasingha
Plaintiff-Appellant-Respondent-Respondent

Argued on : 21.9.2017

Written Submission
Tendered on : 27.9.2017 by the Defendant-Respondent-Petitioner-Appellant.
2.10.2017 by the Plaintiff-Appellant-Respondent-Respondent.

Decided on : 22.1.2018

Sisira J De Abrew J

Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed an action against his wife to obtain a decree of divorce on the ground of malicious desertion. The Defendant-Respondent-Petitioner-

Appellant (hereinafter referred to as the Defendant-Appellant) filed answer requesting a decree of divorce on the ground of constructive malicious desertion. She also asked for permanent alimony of Rs.5.0 Million. After trial, the learned District Judge holding in favour of the Defendant-Appellant granted her the divorce. He also ordered the Plaintiff-Respondent to pay Rs.18,65000/- as a permanent alimony to the Defendant-Appellant. Being aggrieved by the amount of permanent alimony ordered by the learned District Judge, the Plaintiff-Respondent appealed to the Civil Appellate High Court (hereinafter referred to as the High Court). The High Court holding that the amount of permanent alimony ordered by the learned District Judge was highly excessive, reduced it to Rs.700,000/-. Being aggrieved by the said order of the High Court, Defendant-Appellant has appealed to this court. This court by its order dated 23.5.2017 granted leave to appeal on questions of law set out in paragraphs 17(b), (g) and (h) of the Petition of Appeal dated 24.2.2015 which are set out below.

1. Did the High Court of Civil Appeal err in law by reducing the alimony from Rs.18,00000/- to Rs.700,000/- in the circumstances of the case?

2. Did the High Court of Civil Appeal err in law by failing to take cognizance of the fact that by reducing the amount of alimony sought for when there was no objection from the Respondent in relation to the permanent alimony claimed by the Petitioner?

3. Did the High Court of Civil Appeal err in law by failing to give reasons in reducing the quantum of alimony from Rs.18,00000/- to 700,000/-?

The Plaintiff-Respondent is a Government teacher. The learned District Judge according to the evidence placed before him concluded that the salary of the

Plaintiff-Respondent was Rs.23,000/- at the time of filing the action. The learned District Judge considering the above salary of the Plaintiff-Respondent concluded that the monthly amount entitled by the Defendant-Appellant was Rs.4625/-. There is no dispute about this figure. According to the evidence, at the time of filing the action the Plaintiff-Respondent was 48 years old and the Defendant-Appellant was 34 years old. The learned District Judge concluded that the Defendant-Appellant was entitled to 30 years of alimony at the rate of Rs.4625/- per month. Thus the amount ordered by the learned District Judge was (4625x12x30=16,65,000/-)Rs.16,65,000/-. In addition to the above amount the learned District Judge concluded that the Plaintiff-Respondent should pay Rs.200,000/- on the basis that he receives income from his properties. However the learned District Judge in his judgment observed that although the Defendant-Appellant claimed that the Plaintiff-Respondent has two acres of paddy land and five acres of coconut land, it has not been proved. The Plaintiff-Respondent has, in his evidence, stated apart from the government salary he does not get any other income. He has further stated that he does not have five acres of coconut. The learned District Judge has observed in his judgment that the Defendant-Appellant had not proved the amount of monthly income that the Plaintiff-Respondent receives from his paddy and coconut lands. Therefore granting the above sum of Rs.200,000/- is, in my view, wrong and has to be set aside. The learned Judges of the High court in their judgment have considered most of the matters which I have stated above. Considering all the above matters I hold that the learned High Court Judges were correct when they decided to remove Rs.200,000/- from the amount ordered by the learned District Judge.

The next question that must be decided is whether the amount calculated by the learned District Judge for 30 years on the basis of Rs.4625/- per month is

excessive or not. Learned counsel for the Defendant-Appellant cited the following judicial decisions.

In Mathew Vs Mathew 57 NLR 511 the Supreme Court held as follows:

> "The Court, when granting a decree of separation in favour of a wife, ordered the husband to pay an annual sum o f R s. 20,400 in monthly instalments of Rs.1,700. With a view to securing for the wife the payment of the annual sum of Rs.20,400 the husband was ordered to hypothecate certain immovable property specified in the decree.
>
> Held, (i) that the order for hypothecation of immovable property did not fall within the ambit of either sub-section 1 or sub-section 2 of section 615 of the Civil Procedure Code and could not therefore stand.
>
> (ii) that the order for paying the annual sum of Rs, 20,400 in monthly instalments did not come within the ambit of sub-section 1 of Section 615 of the Civil Procedure Code but could be treated as an order falling within the ambit of sub-section 2.
>
> Held further, that in deciding the amount of permanent alimony no fetter was imposed by section 615 of the Civil Procedure Code on the discretion of the Judge. Nor was the Judge bound by the amount awarded as alimony *pendente lite*."

Wijeratne Vs Wijeratne 73 NLR 546 Supreme Court held as follows.

> "In an action for divorce, sufficient ground must be shown before the Court can award as permanent alimony a sum in excess of the amount claimed by the wife as alimony *pendent lite*."

The learned District Judge decided to grant permanent alimony for the next 30 years at the rate of Rs.4625/- per month on the basis that the life expectancy in this country 75 years of age. Can anybody predict the life expectancy of a human being? No one can answer this question because life is uncertain. In this country the Judges have departed the world whilst holding office.It has to be stated here that this situation does not always exist. Court must be reasonable in deciding the amount of alimony. According to the learned District Judge's order the Plaintiff-Respondent should pay alimony for 18 years even after his retirement. The calculation done by the learned District Judge is, in my view, is unreasonable.

The learned District Judge when calculating the amount of Rs.4625/-, observed that another sum could be added considering the inflation in the country. But there is no evidence placed before court regarding the rate of inflation. The learned District Judge appears to have made the said observation to justify the ordering of the amount even after retirement of the Plaintiff-Respondent. Although the Plaintiff-Respondent could earn his salary increments, there is no evidence before court about his salary increments. When I consider all the above matters, I feel that it is not reasonable to order the same amount to be paid even after the retirement of the Plaintiff-Respondent. But the order to pay Rs.4625/- per month prior to retirement of the Plaintiff-Respondent is, in my view, reasonable. At the time of filing the action the Plaintiff-Respondent was 48 years old. His retiring age is 60 years. Therefore the decision to pay alimony for a period of 12 years at the rate of Rs.4625/- per month (4625x12x12=666,000) is, in my view, reasonable. Since the Plaintiff-Respondent is a Government servant it is reasonable to conclude that after retirement he would get a pension of 80% of his salary. Then considering the amount of Rs.4625/-, the monthly amount after retirement would be (4625x80/100) Rs.3700/-

In my view the conclusion reached by the learned District Judge that the Plaintiff-Respondent should pay Rs.4625/- per month even after the retirement of the Plaintiff-Respondent is erroneous. The next question that must be considered is that the period for which that the Plaintiff-Respondent should pay alimony after his retirement. As I pointed out earlier no one could predict the life expectancy of a human being. In my view it is reasonable to order five years of alimony at the rate of Rs.3700/- per month after the retirement of the Plaintiff-Respondent. This amount would be (3700x12x5=222,000/-) Rs.222,000/-. Considering all the above matters, I hold that the Defendant-Appellant would be entitled to receive a permanent alimony as follows:

4625x12x12= 666,000

3700x12x5=222,000

The total amount would be Rs.888,000/-

The learned High Court Judges have given reasons when they reduced the amount ordered by the learned District Judge. But in my view the amount ordered by the learned District Judge cannot be considered to be reasonable.

For the aforementioned reasons, I answer the 1st question of law in the affirmative, but the 2nd question of law does not arise for consideration. The 3rd question of law is answered as follows.

"The learned Judges of the High Court did not give sufficient reasons when they reduced the alimony from 18 lakhs to 700,000."

I have decided that the Defendant-Appellant is entitled to Rs.888,000/- as a permanent alimony. The learned District Judge is directed to amend the decree

accordingly. Subject to the above variation of the amount of alimony, the appeal of the Defendant-Appellant is dismissed. Considering the facts of this case I do not make an order for costs.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.

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

In the matter of an Appeal from the Civil Appellate High Court.

Mohamed Ghouse Mohamed
Sulaiman Zurfick, No. 142/4,
W.A.de Silva Mawatha,
Colombo 6.

Plaintiff

Vs

SC APPEAL 96/17
SC/HCCA/LA/630/16
WP/HCCA/COL/120/11
D.C.Colombo 4415/09

M.N.Naufer, No. 43, Hulftsdorp
Street, Colombo 10.
And currently at,
Bogambara Prison, Kandy.

Defendant

AND THEN BETWEEN

Mohamed Ghouse Mohamed
Sulaiman Zurfick, No. 142/4,
W.A.de Silva Mawatha,
Colombo 6.

Plaintiff Petitioner

Vs

M.N.Naufer, No. 43, Hulftsdorp
Street, Colombo 10.
And currently at,
Bogambara Prison, Kandy.

Defendant Respondent

AND THEREAFTER BETWEEN

Mohamed Ghouse Mohamed
Sulaiman Zurfick, No. 142/4,
W.A.de Silva Mawatha,
Colombo 6.

Plaintiff Petitioner Appellant

Vs

M.N.Naufer, No. 43, Hulftsdorp
Street, Colombo 10.
And currently at,
Bogambara Prison, Kandy.

Defendant Respondent
Respondent

AND NOW BETWEEN

M.N.Naufer, No. 43, Hulftsdorp
Street, Colombo 10.
And currently at,
Bogambara Prison, Kandy.

Defendant Respondent
Respondent Appellant

Vs

Mohamed Ghouse Mohamed
Sulaiman Zurfick, No. 142/4,
W.A.de Silva Mawatha,
Colombo 6.

Plaintiff Petitioner Appellant
Respondent

BEFORE	**: S. EVA WANASUNDERA PCJ.** **SISIRA J DE ABREW J. &** **H.N.J. PERERA J.**
COUNSEL	: Harith de Mel for the Defendant Respondent Respondent Appellant. Instructed by Ms. Alanka Dias Kamran Aziz with Krishantha Premasiri for the Plaintiff Petitioner Appellant Respondent instructed by S.D.Seneviratne.
ARGUED ON	: 19.01.2018.
DECIDED ON	: 06.03.2018.

S. EVA WANASUNDERA PCJ.

In this matter, this Court granted leave to Appeal on 23.05.2017 on the questions of law contained in paragraph 15 (a) to (g) of the Petition of Appeal filed by the Defendant Respondent Respondent Appellant (hereinafter referred to as the Appellant) dated 15.12.2016 and on two more questions raised by the counsel for the Plaintiff Petitioner Appellant Respondent (hereinafter referred to as the Respondent). The said questions of law are as follows:-

1. Have the learned High Court Judges erred in coming to the finding that the non compliance of Sec. 755(2)(b), by not providing Notice of Appeal to the Registered Attorney is a curable defect?
2. Have the learned High Court Judges erred in holding that the non provision of Notice of Appeal to the Registered Attorney of the Respondent makes the Notice of Appeal void ab initio?
3. Have the learned High Court Judges gravely erred in not duly considering the authorities of Mahatun Mudalali alias Paranatota Vs Naposingo and others 1986, 3 CALR 318 , Sumanasekara Vs Yapa 2006, 3 SLR 183 and Francis Vs Premawathy 2005, 3 SLR 87?

4. Have the learned High Court Judges gravely erred in misapplying the Ratio of Jayasekera Vs. Lakmini 2010, 1 SLR 41 and Wilson Vs Kusumawathie 2015 BLR 49 to this facts of this case?
5. Have the learned High Court Judges erred in coming to the finding that Sec. 759(2) of the Civil Procedure Code can be made applicable to the want of compliance under Sec. 755(2)(b), in the circumstances of this case?
6. In any event have the learned High Court Judges erred in coming to the finding that the Petitioner in the circumstances of this case is not materially prejudiced by the non compliance of Sec. 755(2)(b) by the Respondent?
7. In any event have the learned High Court judges erred in the interpretation of material prejudice for the purpose of Sec. 759(2) of the Civil Procedure Code?

And (questions of law raised by the counsel for the Respondent)

8. Even if the notice of Appeal sent is contrary to Sec. 755(2)(b) , has it caused material prejudicial to the Petitioner?
9. In any event, does Sec. 770 of the Civil Procedure Code provide authority for notice of Appeal to be re-sent to a party?

The facts of the case in brief can be narrated as follows. The Plaintiff Zurfick had instituted action against the Defendant Naufer in the District Court of Colombo in Case No. DMR 4415/2009, by plaint dated 25.06.2009 seeking relief in granting;

i. A declaration that the Defendant had unlawfully ejected the Plaintiff from premises bearing assessment No. 188 ½ , Second Cross Street, Colombo 11.
ii. Judgment and Decree in favour of the Plaintiff against the Defendant in a sum of Rs. 50 Million as damages in respect of the said unlawful ejection of the Plaintiff by the Defendant.

On 05.07.2010, the Plaintiff's registered Attorney had sought for a postponement of the case on personal grounds of the counsel who was due to appear in the case on behalf of the Plaintiff. The Additional District Judge had found that the Plaintiff also was absent and informed the registered attorney of the Plaintiff that he would take up the case in a little while and then at 10.20 a.m. the ADJ had made order dismissing the Plaint. The Plaintiff had presented himself soon after the case was dismissed on the same day and got himself represented

by counsel and made an application to set aside the dismissal of the Plaint. His explanation for not being present at the time of the case when it was firstly called amounted to the fact that ' the police escort provided for the Plaintiff by the Police to come to Court, since he had death threats from the Defendant had not arrived in time to take him.' However, the ADJ had not changed his order of dismissal. The Plaintiff had made an Application under **Sec. 87(3) of the CPC , to purge his default in appearance, but at the said inquiry also the ADJ had dismissed the said Application on 29.07.2011.**

Thereafter, being aggrieved by the said order dated 29.07.2011 of the ADJ who dismissed the application on purging the default inquiry, the Plaintiff then preferred a Final Appeal to the Civil Appellate High Court by a Petition of Appeal dated 30.08.2011. **Both parties were represented before the Civil Appellate High Court.** It is **on the notice sent by the Plaintiff Zurfick to the Defendant Naufer by registered post, that the Defendant was represented in the High Court by counsel,** although the notice was not served on the registered attorney of the Defendant.

However, thereafter, in the Civil Appellate High Court, **after 5 years** from the date of the Petition of Appeal having been filed, the counsel for the **Defendant** Naufer who was the Respondent in the said Appeal, by way of a **motion** dated 26.08.2016, **moved court to consider a dismissal of the Appeal** on the ground of **"not duly complying with the mandatory provisions of Sec.755(2)(b) of the Civil Procedure Code**". It was considered as a **preliminary objection**. The parties had to file written submissions on **this preliminary objection**.

The Civil Appellate High Court by its order dated **09.11.2016 overruled** the **preliminary objection** and had set down the Appeal before the High Court for hearing on merits. Then **the Defendant** Respondent Respondent **Appellant** has come before this Court in Appeal from that order and this Court has granted leave to appeal on the aforementioned questions of law.

The position taken up by the Appellant is that , a copy of the Notice of Appeal regarding the case before the Civil Appellant High Court , was not served on the Registered Attorney of Naufer who was the Defendant Respondent Respondent in that case, as required by Section 755(2)(b) of the Civil Procedure Code and that it is a mandatory provision.

However it is a **fact** that such a Notice of Appeal was sent to the Defendant Respondent Respondent Naufer in the case before the Civil Appellate High Court. **It is accepted that a Notice of Appeal was not sent to the registered attorney of the Defendant Respondent Respondent in that case but was sent to the Defendant Respondent Respondent himself.**

The submission of the counsel of Plaintiff Zurfick who was the Appellant in the Civil Appellate High Court is that there has been **substantive compliance** with the requirements set out in terms of Section 755(2)(b) and **in any event, even if** the Notice of Appeal was required to be served on the Registered Attorney of the Defendant Respondent before the Civil Appellate High Court, that such would not render a **reason for the dismissal of the Appeal** before the said Court.

The submission of the counsel for the Defendant Respondent Respondent Appellant Naufer is that in the circumstances of this case where it is admitted that no notice of appeal was sent to his registered attorney, the Civil Appellate High Court should have dismissed the Appeal in limine.

Section 755 of the Civil Procedure Code provides for ' filing of an appeal'.

Section 755(1) reads as follows:

Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the **Appellant** ***or*** his **registered attorney** and shall be duly stamped. Such notice shall also contain the following particulars:-

(a) The name of the court from which the appeal is preferred
(b) The number of the action
(c) The names and addresses of the parties to the action
(d) The names of the appellant and respondent
(e) The nature of the relief claimed.

Provided that where the appeal is lodged by the Attorney General, no such stamps shall be necessary.

Section 755(2) reads as follows:-

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 receipt in proof of such service.

Section 759(2) reads as follows:-

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.**

Section 770 reads as follows:-

If at the hearing of the Appeal, the respondent is not present and the **court is not satisfied upon the material in the record** or upon other evidence that the notice of appeal was duly served upon other evidence **that** the notice of appeal was duly served upon him or his registered attorney as herein before provided, or if it appears to the Court at such hearing that any person who was a party to the action in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, **the court may issue the requisite notice of appeal for service.**

The Civil Procedure Code has made provision as to how an Appeal should be lodged in an Appellate Court from a final order/judgment of a lower court when one party is aggrieved by a decision of that court. The provisions direct the litigant what should be done step by step. The legislature at its wisdom has very intently drafted the provisions to facilitate the person who is aggrieved to go to a higher court in appeal. Section 755 narrates the steps to be taken at the inception. Section 770 narrates the step which may be taken by any appellate court at the hearing of the appeal if the respondent is not present in court and the court is

not satisfied that the notice of appeal was duly served **upon him or his registered attorney.** By Section 770, the appellate court is empowered to issue the requisite notice of appeal for service.

I find that, all the provisions with regard to appeals stand for 'hearing of the appeals of the aggrieved parties on the merits' and 'not to throw away the appeals without hearing them on merits'. That is the very reason for having placed Section 770 in the Civil Procedure Code, paving the way for the Appellate Judge or Judges to take over the task of issuing the requisite notice or notices for service on the respondent or respondents in the Appeal which is set down for the Appellate Court to hear and determine. The legislature has stressed on the fact that the respondent should be noticed.

Sec. 755(2)(b) specifically provides for the Appellant to serve notice on the Respondent **or** his Registered Attorney. It is an accepted fact in the case in hand that the notice of appeal was served on Naufer, the Respondent in that case, at his home address and at the Bogambara Prison where he was personally present at the time of the Appeal being filed. The registered article receipts have been filed and accepted in the pleadings by the Respondent and having received the said Notice of Appeal, the said Respondent Naufer had got himself represented in that case before court with an Attorney at Law , having filed proxy on his behalf and having a counsel being retained on his behalf. The preliminary objection against the appeal being heard by court was **the mere allegation** that having failed to send the notice to the registered attorney , the appeal should be dismissed.

When the wording of the Section is clear and notice has been sent to the Respondent, how could he allege non - compliance of the provision and seek a dismissal of the Appeal? There is no prejudice caused to the Respondent at all. The Respondent was served with notice and he was represented before court by his lawyers. Strict compliance of Sec.755(2)(b) has taken place.

In the case of ***Jayasekera Vs Lakmini 2000 1 SLR 41,*** the ratio decidendi can be drawn to the effect that ;

i. When the issue at hand falls within the purview of a mistake, omission or defect on the part of the appellant in complying with the provisions of Section 755, in such a situation, if the Court of Appeal is of the

opinion that the respondent has not been materially prejudiced, the appellate court is empowered to grant relief to the appellant on such terms as it deemed just.

ii. The power of the court to grant relief under Section 759(2) 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.

iii. Relief cannot be granted if the court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

In the case of ***Heenmenike Vs Mangala Malkanthi , Bar Association Law Journal 2016 Vol XXII pg. 110***, it was held that the failure to comply with Section 755(1) by not citing the 2nd substituted plaintiff as a respondent in the notice of appeal and in the petition of appeal is a curable defect under Section 759(2) and Section 770 of the Civil Procedure Code.

In the case of ***Wilson Vs Kusumawathie 2015 BLR 49***, it was held that it is undoubtedly incumbent upon the court to utilize the statutory provisions and grant the relief embodied therein if it appears to court that it is just and fair to do so.

In the case of ***Francis and another Vs. Premawathy 2005 3 SLR 87 ,*** it was held that Sec.755(2)(b) lays down that the notice of appeal shall be accompanied by 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.

In the case in hand the notice of appeal was sent to the respondent by registered post to his house and the prisons and the registered article receipts were produced as evidence and as a result the respondent was represented in court by lawyers. I find that no prejudice has been caused to the Defendant Respondent.

The counsel for the Appellant in the case in hand complained that the Civil Appellate High Court has not considered the case of ***Sumanasekera Vs Yapa***

2006, 3 SLR 183 and Mahatun Mudalali alias Paranatota Vs Naposingho and another 1986, 3 CALR 318.

The case of ***Sumanasekera Vs Yapa (supra***) is a judgment of the Court of Appeal. The District Court had given judgment in favour of the Plaintiff. The Defendant had filed notice of appeal and the petition of appeal within time. The Plaintiff Respondent before the Court of Appeal took up a preliminary objection before the District Court that the notice of appeal had been given to the Counsel of the Plaintiff Respondent and not to the Registered Attorney. The District Judge upheld the objection.

On leave being granted, it was held by the Court of Appeal, that;

(i) The authorities make it mandatory that the notice of appeal and petition of appeal have to be signed by the Registered Attorney and

(ii) The Petitioner has not shown any good and sufficient ground for not complying with Section 755(2)(b) and as the Respondent has been materially prejudiced by such non-compliance, the Petitioner is not entitled to relief under Section 759.

I find that this case is with regard to the notice being served on the Counsel without sending the same to the Registered Attorney. It is **not** a case where the notice was sent to the Respondent without sending the same to the Registered Attorney. The Civil Appellate High Court in the case in hand must have considered the decision in **Sumanasekera Vs Yapa** and concluded that the ratio in that case does not apply to the case in hand. In the case in hand the notice had been sent to the Respondent; he had received it; he had come before court and participated in the case and it is with a motion that he had taken up the position that the notice should have been sent to the Registered Attorney after many years. But it is clear in the wording of the Section 755(2)(b) that the notice has to be sent to **the Respondent *or* the Registered Attorney** on record for the Respondent.

In the case of ***Mahatun Mudalali alias Paranatota Vs Napasingho and another 1986 3 CALR 318,*** which again is a Court of Appeal decision, a document purporting to be a notice of appeal was tendered by the Petitioner

to the court of first instance within the time stipulated by Sec. 754(4) of the Civil Procedure Code. The Petition of Appeal was filed within 60 days. Petitioner failed to deposit security for the Respondents costs within 14 days. Upon objection being

taken, in that regard, the District Judge refused the purported notice of appeal. The Petitioner sought leave to appeal from that order.

It was held that the effect of the notice of appeal is to inform the respondent that the jurisdiction of the lower court will be suspended, once the appeal is taken and also to deprive the respondent temporarily of the fruits of his victory. By notice is meant actual notice and not some constructive notice. Mere compliance with section 755(1) may at most constitute constructive notice. Actual notice means compliance with Section 755(1) , (2) and Section 754(4) regarding the time within which the notice must be presented and also Section 755(1) and (5) . These requirements are mandatory to constitute a proper notice of appeal. If these conditions are not fulfilled, the court has the power to refuse to receive the notice of appeal.

I do not find that in the case in hand the Plaintiff Petitioner has defaulted in complying with any of the sections as mentioned in the reported case of ***Mahatun Mudalali alias Paranatota Vs Naposingho and another (supra).*** This case must have been considered by the appellate court even though the Appellant complains that it has not been considered.

I find that the Civil Appellate High Court has considered the provisions of the Civil Procedure Code quite correctly and in addition considered the authorities on the pertinent sections and overruled the preliminary objection “that there was no proper notice because the ‘notice of appeal has not been served on the registered attorney’ of the respondent.” I hold that the Plaintiff Petitioner Appellant Respondent has complied with Section 755(2)(b) of the Civil Procedure Code. The order of the Civil Appellate High Court is a well considered order and I affirm the same.

The Appeal is hereby dismissed with costs. The Civil Appellate High Court is directed to hear the Appeal on its merits.

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 application for Special Leave to Appeal under Article 128 of the Constitution

SC Appeal 99/2014
SC Special L.A No. 199/2012
CA No. 169/2006
DC Mawanella No.635/L

Sinna Lebbe Saliya Umma of
Mawana, Mawanella.

PLAINTIFF

-Vs-

Shahul Hameed Mohammed Yaseen of No. 129/2,
Courts Road, Marawa,
Mawanella.

DEFENDANT

Between

Sinna Lebbe Saliya Umma of

Mawana, Mawanella.

PLAINTIFF- PETITIONER

-Vs-

1. Shahul Hameed Mohammed Yaseen of No. 129/2,
Courts Road, Marawa,
Mawanella.

DEFENDANT- RESPONDENT

2. Zainul Abdeen Mohammed Naufer of No. 40A,
Kandy Road, Mawanella.

3. Mohammed Saly Mohammed Musthafa of No. 74,
Hemmathagama Road,
Mawanella.

RESPONDENTS

And Between

3. Mohammed Saly Mohammed Musthafa of No. 74, Hemmathagama Road, Mawanella.

3rd RESPONDENT

PETITIONER

-Vs-

Sinna Lebbe Saliya Umma of Mawana, Mawanella.

PLAINTIFF-PETITIONER-RESPONDENT

1. Shahul Hameed Mohammed Yaseen of No. 129/2, Courts Road, Marawa, Mawanella.

DEFENDANT-RESPONDENT-RESPONDENT

2. Zainul Abdeen Mohammed Naufer of No. 40A, Kandy Road, Mawanella.

2ND RESPONDENT-RESPONDENT

And Now Between

Sinna Lebbe Saliya Umma of Mawana, Mawanella.

PLAINTIFF-PETITIONER-RESPONDENT-APPELLANT

-Vs-

1. Shahul Hameed Mohammed Yaseen of No. 129/2, Courts Road, Marawa, Mawanella.

DEFENDANT- RESPONDENT-RESPONDENT-RESPONDENT

2. Zainul Abdeen Mohammed Naufer of No. 40A,
Kandy Road, Mawanella.

2ND RESPONDENT-RESPONDENT-RESPONDENT

3. Mohammed Saly Mohammed Musthafa of No. 74,
Hemmathagama Road,
Mawanella.
(Deceased)

3.(a) Mohammed Musthafa Mohammed Manazeer,

3. (b) Mohammed Musthafa Fathima Nusrath,

3.(c) Mohammed Musthafa Farhan,

3. (d) Mohammed Musthafa Rasman Ahmad,

All of No. 74, Hemmathagama Road, Mawanella

SUBSTITUTED 3A to 3D RESPONDENT-PETITIONER-RESPONDENT

Before: Priyantha Jayawardena, PC, J

K.T Chitrasiri, J

Vijith K. Malalgoda, PC, J

Counsel: S. N Vijithsingh with R.S Serasinghe for the Plaintiff- Petitioner- Respondent-Appellant

M. S. A Saheed with A. M Hussain for the 3rd Respondent- Petitioner-Respondent.

Argued on : 12th February, 2018

Decided on : 4th April, 2018

Priyantha Jayawardena PC, J

This is an appeal filed against the judgment of the Court of Appeal dated 7th August, 2012 setting aside the order of the learned Judge of the District Court of Mawanella dated 27th April, 2006.

The Plaintiff-Petitioner-Respondent-Appellant (hereinafter referred to as 'the Plaintiff') instituted an action in the District Court against the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as 'the Defendant') to have a deed of transfer declared void and sought the ejectment of the Defendant from the premises. The said Court granted the reliefs as prayed for in the Plaint.

Thereafter, the Plaintiff made an application to the said court for the execution of the decree to eject the Defendant from the said premises and accordingly a writ was issued. When the Fiscal proceeded to the said premises to execute the said writ on 19th September, 2005, he was resisted by the 3rd Respondent- Petitioner-Respondent and the 2nd Respondent-Respondent-Respondent (hereinafter referred to collectively as 'the Respondents') claiming to be the owner and the tenant/lessee of the said premises, respectively.

Thereafter, on 20th October, 2005, the Plaintiff made an application to the District Court in terms of Section 325(1) of the Civil Procedure Code seeking, *inter alia*, an order to add the said Respondents as parties to the application, and to re-issue the writ and fix it for inquiry. The court ordered the issuance of notices on the said Respondents.

At the inquiry, the said Respondents raised a preliminary objection stating that the application of the said Plaintiff had been filed out of time, and thus, cannot be maintained. The learned District Court Judge, by Order dated 27th April, 2006 overruled the said preliminary objection of the said Respondents stating that the time frame stipulated by Section 325(1) of the Civil Procedure Code is not a mandatory requirement because of the word "may" used in the said section.

Being aggrieved by the said Order, the said 3rd Respondent preferred an appeal to the Court of Appeal and the said Court by its Judgment dated 7th August, 2012 allowed the said Appeal.

The Court of Appeal held that the learned Judge of the District Court had erred in law by not upholding the objection of the Respondents and that the Plaintiff's application which was filed on 20th October, 2005, under of Section 325(1) of the Civil Procedure Code, was out of time, as the stipulated time period in the instant application was to be computed from 19th September and expired on 19th October.

Being aggrieved by the said Judgment of the Court of Appeal, the Plaintiff sought leave to appeal from this court and the leave was granted on the following question of law:

> *"Whether the Court of Appeal erred in law by not applying Section 14(a) of the Interpretation Ordinance to the facts of this case in as much as Section 325 of the Civil Procedure Code which specifically uses the word "from" to express the one month [time period] from the obstruction or resistance?"*

Notwithstanding the fact that the notices were sent to the Defendant and the 2nd Respondent, only the Plaintiff and the 3rd Respondent appeared in this Court. The 3rd Respondent died during the pendency of the instant application and his heirs were substituted in place and room (hereinafter referred to as the 'substituted Respondents').

Submissions by the Plaintiff

The Plaintiff submitted that in terms of Section 14(a) of the Interpretation Ordinance No. 21 of 1901 as amended (hereinafter referred to as 'the Interpretation Ordinance'), the use of the word "from" by the Legislature means that the first day of a series of days has to be excluded; therefore, when calculating the one month period, the date of resistance must be excluded from the computation. Accordingly, the Plaintiff contended that when calculating the one month period in the instant appeal, the date of resistance i.e. 19th September, 2005 must be excluded and time runs from 20th September, 2005.

The Plaintiff further submitted that Section 2(o) of the Interpretation Ordinance defines a month as "a calendar month, unless words be added showing lunar months to be intended". As such, after excluding the date of resistance, the calendar month in this application commences from 20th September, 2005. Therefore, the date on which the application was filed i.e. 20th October, 2005 falls within the prescribed time.

The Plaintiff further submitted that the word "within" used in Section 325(1) allows anyone to file an application on the numerically corresponding day of the next month.

The Plaintiff referred to the following judgments in support of her argument. In *Silva v Upasena* SC/FR Application No. 472/96 Supreme Court Minutes, it was observed that one month should be computed from 30th April to 30th May with regard to Article 126 of the Constitution which states that fundamental rights applications must be filed within one month of the date of violation. Further, in *Hewakuruppu v Tea Commissioner* SC/FR Application No. 118/84 Supreme Court Minutes, it was held that if the violation occurred on 13th July, 1984, the application ought to have made on or before 13th August, 1984.

Submissions by the substituted Respondents

The said Respondents submitted that when the word "within" is used, the relevant papers must be filed in court before the stipulated time period lapses and it is not possible to file an application on the last day.

The Respondents relied on the case of *Hare v Gocher* (1962) 2 QB 641 wherein it was held:

> "From that same point of time there is to be calculated for the purpose of Section 14 of the [Caravan Sites and Control of Development Act of 1960], a period of two months beginning with August 29th, 1960 and it appears to me, and I would hold, that such a period expired at midnight on October 28, 1960. Accordingly, hard as it may be for the Defendant, he was 12 hours late when he delivered his application at noon on the following day, October 29th, 1960".

The Respondents further submitted that according to the above authority and the definition given to the word "month" in Webster's Collegiate Dictionary 10th Edition, a calendar month consists of 30 days. When the said definition is applied, the instant application which was filed on 20th October, 2005 is out of time by one day as the one month period expired at midnight on 19th October, 2005. Therefore, even if the contention of the Plaintiff is accepted by Court, her application is still out of time by one day.

Further, the word "from" used in Section 325(1) of the Civil Procedure Code does not exclude the day of resistance.

Did the Plaintiff file her application within the prescribed period?

The question of law that needs to be considered in this appeal is whether, in terms of Section 325(1) of the Civil Procedure Code, the Plaintiff had made an application to the District Court within the stipulated time.

Section 325(1) of the Civil Procedure Code states thus:

> " Where in the execution of a decree for the possession of movable or immovable property the Fiscal is resisted or obstructed by the Judgment-Debtor or any other person, or where after the officer has delivered possession, the judgement-creditor is hindered or ousted by the judgement-debtor or any other person in taking complete and effectual possession thereof, and in the case of immovable property, where the judgment-creditor has been so hindered or ousted within a period of one year and one day, the judgment- creditor may at any time within one month from the date of such resistance or obstruction or hindering or ousting complain thereof to the court by a Petition……" [Emphasis added]

Hence, Section 325(1) requires a Petition to be filed within one month from the date of resistance or similar act.

In the instant case, the Fiscal was resisted from executing the writ on 19th September, 2005 and the application was filed on 20th October, 2005. Therefore, this court is called upon to decide whether the application filed on 20th October 2005, is out of time in terms of Section 325(1).

At the time of the hearing, the parties made submissions on the following words in the said section and invited the court to interpret the same:

a. "within";
b. "one-month"; and,
c. "from the date of resistance".

Therefore, this court is now called upon to consider the words "within one month from the date of resistance" referred to in Section 325 of the Civil Procedure Code in order to ascertain whether the application was filed within the stipulated time.

Effect of the word "within"

Maxwell on The Interpretation of Statutes, 12th Ed, page 309 states:

> "Where the statute prescribes some period of days or weeks or months or years within which some act has to be done, although the computation of the period in every case depends on the intention of Parliament as gathered from the statute, generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included.
>
> A complaint under Section 14 of the Cruelty to Animals Act No.1849, U.K. had to be made 'within one calendar month after the cause of the complaint shall arise.' It was held that an information preferred on June 30, 1891 alleging ill-treatment of a certain sheep on the preceding May 30 was laid in time (*Radcliffe v Bartholomew* [1892] 1 QB 161)."

Venkataramaiya's Law Lexicon with Legal Maxims. 2nd Ed, Vol 4 states as follows:

> "The word 'within' whether legal or otherwise, can only mean at any time before the fixed date. The word 'within' means 'on or before'."

I am of the opinion that when interpreting a time frame given to an aggrieved party to apply to a court or lodge an appeal in respect of a matter that affects his or her rights, the courts should not interpret such legislation in a way that deprives a litigant from accessing justice. The right to access justice hails back to the Magna Carta of 1215 and I am of the opinion that the Legislature had not intended to curtail a litigant's rightful recourse to justice. In light of this, such legislation should be given a liberal interpretation.

The same approach has been adopted in several cases. In *Silva v Sankaram* [2002] 2 SLR 209, it was held:

> "The phrase 'within 60 days from the date of judgment or decree', encompasses a limited time span. In Black's Law Dictionary the word within 'when used in relation to time', has been defined as meaning any time before, at or before, at the end of, before the expiration of, not beyond, not exceeding, not later than. The use of the word 'within' as a time or limit, or degree or space, embraces the last day or degree or entire distance covered by the time fixed".

Further, in *Okolo v Secretary of State for the Environment* [1997] 2 All ER 911 at 916, it was held:

> "I prefer the view, corresponding with both colloquial usage and legal principle, that six weeks beginning on a Tuesday end six Tuesdays later, and that an act done on the final Tuesday is therefore an act done "within" the six weeks." [Emphasis added]

A contrary view was taken in *Hare v Gocher* (1962) 2 QB 641, wherein the Court held that where a period of two months began on 29th August 1960, the time period expired on 28th October, 1960.

It is evident that the preposition "within" used in Section 325(1) of the Civil Procedure Code should be interpreted to include the last day of the stipulated time frame when computing the time period within which an act is required to be carried out.

Thus, I am of the opinion that in view of the usage of the word "within", an application can be filed on or before the last day of the stipulated time frame set out in Section 325(1) of the Civil Procedure Code.

Effect of the phrase "one month"

Section 2(o) of the Interpretation Ordinance defines the term "month" as **"**a calendar month, unless words be added showing lunar months to be intended".

As Section 325(1) does not make specific reference to a lunar month, in this context "one month" should be interpreted to mean one calendar month.

I am of the opinion that a calendar month should be calculated from a day in a specific month to the numerically corresponding day in the following month. Therefore, in this application, if time starts to run on 20th September 2005, the final date to file the application will be 20th October 2005.

Stroud's Judicial Dictionary of Words and Phrases, 6th Ed, Vol 1, page 366 states:

> "So, of a complaint, which has to be made 'within one calendar month after' its cause; and, therefore, where in such a case the alleged offence be on May 30, the complaint is in time on June 30…"

In *Burne v Munisamy* 21 NLR 193 held that where notice of intention to quit was given on June 11 and which date was excluded from the computation, the calendar month expired at midnight on July 11.

In *Ceylon Estates Staffs' Union v Superintendent, Pallekelle State Plantation* [1984] 1 SLR 66, it was held:

> "Section 2(p) of the Interpretation Ordinance defines month to mean 'a calendar month, unless words be added showing lunar month to be intended.' …. It is equally well established that when the relevant period is a month or a specified number of months after the giving of the notice the general rule is that the period ends on the corresponding date in the subsequent month, i.e. the day of that month that bears the same number as day of the earlier month on which the notice was given."

Effect of the word "From"

At the time of hearing, the parties conceded that although the present appeal is regarding an inquiry under Section 325 of the Civil Procedure Code, Section 14(a) of the Interpretation Ordinance applies to inquiries. Accordingly, I shall not consider the applicability of Section 14(a) to the instant application.

Section 14(a) of the Interpretation Ordinance defines the term "from" as follows:

> "for the purpose of excluding the first in a series of days or any period of time, it shall be deemed to have been and to be sufficient to use the word 'from'."

I am of the opinion that whenever the Legislator used the word "from" the date of an occurrence of an event, such date should be excluded when computing time. The effect of the word "from" in calculating time frames when used in legislation was considered in *Burne v Munisamy* (*supra*) where it was held that;

> "…in pursuance to the general rule with regard to the computation of time as well as the positive enactment of Section 9(1) of the Interpretation

> Ordinance, 1901, the day 'from' which the time runs must be excluded, and the day for the act to be done must be included." (Emphasis added)

In *Sivapadasundaram v Pathmaden* [2004] BASL Journal 89 at 90, the Court held that;

> "Our courts in many instances have considered the provisions of both sections mentioned above, and interpreted the words "from the date of the judgment" contained in Section 755(3) of the Civil Procedure Code. When computing 60 days from the date of the judgment, the date of pronouncement of the judgment should be excluded"

I agree with the ratio decidendi of the aforementioned judgments and hold that when the Legislator used the word "from", the date of the occurrence should be excluded when computing the time period.

Conclusion

In the circumstances, I am of the opinion that:

(a) the word "from" means that time begins to run on the day after the date of resistance;

(b) the phrase "one month" denotes a calendar month which should be calculated from a specific day in a month to the numerically corresponding day in the following month; and,

(c) the word "within" should be interpreted to include the last day of the stipulated time frame within which an act is required to be performed.

Therefore, I am of the view that the day the Fiscal was resisted must be excluded from the computation of the one month period specified under Section 325(1) of the Civil Procedure Code and accordingly, time starts to run from 20th September, 2005. Thus, the learned Judge of the Court of Appeal has erred in concluding that the one month period in the instant application commenced on 19th September, 2005.

Further, I am of the opinion that the one month period stipulated by Section 325(1) is a calendar month starting from 20th September, 2005 to 20th October, 2005. As such, I hold that the application made on 20th October, 2005 is valid in law as the one month period stipulated by the said section shall be calculated inclusive of the last day of the given time frame.

Thus, I am unable to agree with the submissions of the substituted Respondents. Further, I agree with the submissions of the Plaintiff. Accordingly, I allow the appeal and set aside the judgment of the Court of Appeal dated 7th August, 2012 and the Order of the District Court dated 27th April, 2006.

No costs.

Judge of the Supreme Court

K.T Chitrasiri, J

I agree **Judge of the Supreme Court**

Vijith K. Malalgoda, PC, J

I agree **Judge of the Supreme Court**

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

In the matter of an application for Leave to Appeal under and in terms of Article 154 (3) (b) of the Constitution and in terms of the Provisions of Industrial Dispute Act No.43 of 1950 (as amended) from the order of the Provincial High Court of the Western Province dated 10.05.2010 (pronounced on 1st June 2010)

Inter Company Employees Union,
No.470, Kandy Road,
Peliyagoda, Kelaniya.

(On behalf of H. D. N. S. Karunaratne)

Applicant

SC (HC) LA No.36/10
H/C A L.T No.28/2008
L/T Case No. 13/642/2002
S.C. Appeal 101/10

Vs.

Asian Hotels Corporation Ltd.
C/o Trans Asia Hotel,
No.115, Sir Chittampalam. A Gardiner Mawatha,
Colombo 2

Respondent

and

H. D. N. S. Karunaratne
No.73/61, Saman Uyana
Battaramulla.

Applicant-Appellant

Vs.

Asian Hotels Corporation Ltd.
C/o Trans Asia Hotel,
No.115, Sir Chittampalam. A Gardiner Mawatha,
Colombo 2

Respondent-Respondent

AND NOW BETWEEN

Asian Hotels and Properties PLC
(Formerly known as Asian Hotels Corporation Ltd.)
No. 77, Galle Road,
Colombo 03.

Respondent-Respondent-Petitioner

Vs.

H. D. N. S. Karunaratne
No.73/61, SamanUyana
Battaramulla.

Applicant-Appellant-Respondent

BEFORE: WANASUNDERA P.C., J
ALUWIHARE P.C. J
SISIRA J. DE ABREW J.

COUNSEL: Mohamed Adamaly with Janaka Abeysundera and
K. Sivaskantharajah for Respondent-Respondent-Appellant

J. C. Boange for Applicant-Appellant-Respondent

ARGUED ON: 17.12.2016

DECIDED ON: 24.07.2018

ALUWIHARE PC J:

The Applicant-Appellant-Respondent (Hereinafter referred to as the Applicant) sought an order for reinstatement from the Labour Tribunal on the basis that his employment was unjustly terminated by the Respondent-Respondent-Petitioner-Appellant Company (hereinafter referred to as the Appellant-Company)

At the conclusion of the inquiry before the Labour Tribunal, the learned President of the Labour Tribunal had come to a finding that the termination of the Applicant's services by the Appellant-Company was in fact unjust. The President, however, instead of making an order for reinstatement, ordered that the Applicant be paid compensation of Rs.189, 156/-. In her order, the learned President had reasoned out as to why she was not ordering reinstatement of the Applicant. She has also set out the criteria as to the computation of the compensation ordered.

The Applicant, however appealed against the said award of the Labour Tribunal President to the High Court. The relief the Applicant sought from the High Court was twofold. The applicant sought an order to have him reinstated with full back wages and in the alternative enhanced compensation.

The learned High Court Judge by his judgment dated 10th May, 2010, enhanced the compensation to Rs.662, 046/-. The learned High Court Judge, however, did not order reinstatement of the Applicant.

The present appeal is by the Appellant-Company aggrieved by the judgment of the High Court enhancing the compensation.

Special leave was granted on the following questions of law:

(i) Has the learned High Court Judge erred in failing to apply the appropriate tests for the computation of compensation payable to an employee whose services have been wrongfully terminated?

(ii) Has the learned High Court Judge erred in law in failing to appreciate that the Respondent had failed to prove his losses before the Labour Tribunal and in particular had failed to demonstrate that he had attempted to mitigate his losses by seeking alternative employment and or that he was unable to obtain alternative employment and or that he was unemployable?

(iii) Has the learned High Court Judge erred in law in taking into account extraneous and irrelevant considerations, such as the fact that no Domestic Inquiry had been held prior to the termination of the Respondent's services, that he had no prior history of misconduct, etc., when considering the quantum of compensation payable to the Respondent?

The thrust of the Appellant's case was that the High Court had no basis to enhance the compensation ordered by the learned President of the Labour Tribunal and the High Court erred in law when it applied wrong criteria in the computation of compensation.

Thus, the only issue before this Court is to consider whether the High Court erred when it varied the compensation payable to the Applicant by enhancing the same.

For ease of reference I wish to place the manner in which the Labour Tribunal and the High Court computed the compensation payable in their respective orders.

The President of the Labour Tribunal had held that although the termination of the services of the applicant was unjust, the Appellant Company had lost trust in the applicant, the premise on which the Labour Tribunal President decided not to order reinstatement. In lieu of reinstatement, the President decided to compensate the Applicant. Accordingly, the Labour Tribunal President had ordered the Appellant Company to pay 4 months basic salary (which was Rs.4, 299) for each year the applicant had served the Appellant Company (11 years) and had awarded Rs.189, 156 as compensation.

In appeal, the learned High Court Judge, enhanced the compensation payable to the Applicant to Rs.662, 046/stating that the 'criteria' relied upon by the learned President of the Labour Tribunal to compute the quantum of compensation was not clear.

The learned High Court Judge had ordered that the Applicant be compensated by payment of 12 times (the number of years he served Appellant company) the total salary he would have earned for a year and in addition the salary he would have

earned from the date of termination up to the date of the order of the learned High Court Judge. The computation, however, appears to be mathematically inaccurate. Nevertheless, I do not wish, to delve into the accuracy of the computation of compensation in this judgement.

As referred to earlier, the Appellant's grievance is that the decision of the High Court Judge is flawed as the legal principles relating to computation of compensation had been wrongly applied.

The following issues were raised on behalf of the Appellant at the hearing:

(1) The judgment of the High Court had not cited any basis or reasons for enhancement of compensation.

(2) It is trite law that the appellate jurisdiction of the High Court would be exercised to correct serious errors of law and substitution of the view of the High Court in place of the Labour Tribunal was wrong.

(3) The learned High Court Judge had totally ignored the relevant case law that had laid down the tests with regard to computation of compensation.

(4) The relief granted by the High Court is over and above what had been sought by the Applicant.

(5) The mathematical error referred to above and the awarding compensation inclusive of the time taken for the hearing of the appeal.

It was contended on behalf of the Appellant that an unlawful termination does not automatically entitle a workman to compensation. The worker, on the contrary, must establish his losses through evidence.

It was pointed out that the learned High Court Judge, in his judgement had merely said that "the applicant is entitled to receive the full salary for the entire period the applicant lost his employment". The only reason that can be gleaned from the judgment of the learned High Court Judge to enhance the compensation appears to be an observation made by the learned President of the Labour Tribunal in her award. The learned President has stated that "almost all the witnesses had spoken about the Applicants antecedents in complimentary terms". The learned counsel for the Appellant submitted that it was based on this reasoning, that the learned High Court Judge enhanced the compensation by four hundred percent and this factor is not relevant to decide the quantum of compensation to be awarded.

The learned counsel cited several decisions in support of the points urged. *The Ceylon Transport Board Vs Gunasinghe - 72 NLR pg. 76, The Ceylon Transport Board Vs. Wijeratne- 77 NLR 181, Caledonian (Ceylon) Tea & Rubber Estate Vs. Hillman- 1979 1 NLR 421, Ceylon Cinema and Films Studio Employees Union Vs. Liberty Cinema 1994 3 NLR 121 and Jayasuriya Vs. Sri Lanka State Plantation Corporation 1995 – 2 SLR 379,* are some of the cases to which the attention of this court was drawn by the learned counsel.

One decision both the Appellant as well as the Applicant Respondent relied on, in asserting their respective positions, was ***Jayasuriya Vs. Sri Lanka State Plantations Corporation***. In the said decision, his Lordship Justice Dr. Amarasinghe had exhaustively dealt with the issue of deciding the quantum of compensation that is to be awarded.

The first issue this court has to address is whether the learned judge of the High Court applied the appropriate tests for the computation of compensation payable to the Applicant and whether the enhancement of compensation was made without any legal basis.

The Industrial Disputes Act no doubt provides for the payment of compensation in lieu of reinstatement. The Act, however, does not provide any criteria on which the computation of compensation is to be made. This was pointed out by His Lordship Justice Vythialingam in the case of ***Ceylon Transport Board Vs. Wijeratne 77 SLR 181***. In this regard Justice Sharvananda (as he then was) in the case of ***Caledonian (Ceylon) Tea and Rubber Estate Ltd. Vs. Hillman*** held that:-

"The Legislature has wisely given untrammelled discretion, to the Tribunal to decide what is just and equitable in the circumstances of each case. Of course, this discretion has to be exercised judicially. It will not conduce to the proper exercise of that discretion if this court were to lay down hard and cast rules which will fetter the exercise of the discretion, especially when the legislature has not chosen to prescribe or delimit the area of its operations. Flexibility is essential. Circumstances may vary in each case and the weight to be attached to any factor depends on the context of each case".

Thus, it seems that there is no specific formula that has to be applied in the computation of the compensation that is to be paid. In my view the Tribunal is required to take into consideration facts and circumstances peculiar to each case, which may have a bearing on the amount of compensation to be awarded but keeping within the broad concept of just and equitable. Equally, the Tribunal must provide reasons for considering a particular sum just and equitable in a particular case.

In the case of ***Brook Bond (Ceylon) Ltd v. Tea, Rubber, Coconut and General Produce workers Union*** 77 NLR 6, the court held:

"For an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for such verdict should be set out to enable the parties to appreciate how just and equitable the order is. ***In the absence of reasons, it would not be a just and equitable order."***

Thus, the failure to give reasons might lead a party to conclude that the order was arbitrary. On the other hand, giving reasons would also lead the Tribunal to address its mind to the relevant considerations leading to its award as observed by De Kretser J in the case of ***Adams Peak Tea Estates Ltd v. Duraisamy*** SC 11/69 (SC Minutes of 26th October 1969).

In the present case, to reiterate-the gravamen of the Appellant is that the learned High Court Judge fell into error, when he acted beyond the pale of this threshold.

The learned High Court Judge in varying the amount of compensation ordered by the Labour Tribunal had not referred to any criteria as to why he ordered 12 years salary as compensation as oppose to '4 months salary for every year the applicant was employed under the Appellant (11 years)'-which was the formula adopted by the learned President of the Labour Tribunal.

The learned High Court judge had merely ordered enhanced compensation on the basis that the termination of the services of the Applicant was unjust and serious prejudice had been caused to the applicant. He had not given any reason whatsoever to say why the computation of compensation ordered by the learned President of the Labour Tribunal is erroneous or tainted with illegality. In fact both forums have arrived at the same conclusion—that the termination was

unjust. If the Learned High Court judge took it upon himself to enhance the compensation on the basis that serious prejudice has been caused to the Applicant without deviating from the material findings made by the Labor tribunal, it was incumbent on the learned High Court judge to substantiate what particular factor warranted the enhancement of compensation.

All what the Learned High Court Judge had done was to substitute the computation of compensation of the President of the Labour Tribunal with his own computation. In this respect the decision in the case of ***Jayasuriya v. Sri Lanka State Plantation Corporation*** *(supra)* is elucidating. It had been held that the Industrial Disputes Act No. 43 of 1950 Section 31D states that the order of a Labour Tribunal shall be final and shall not be called in question in any court except on a question of law. While appellate courts will not intervene with pure findings of fact, they will review the findings treating them as a question of law, if it appears that the Tribunal has made a finding wholly unsupported by evidence, or which is inconsistent with the evidence and contradictory of it; or where the Tribunal has failed to consider material and relevant evidence; or where it has failed to decide a material question or misconstrued the question at issue and had directed its attention to the wrong matters; or where there was an erroneous misconception amounting to a misdirection; or where it failed to consider material documents or misconstrued them or where the Tribunal has failed to consider the version of one party or his evidence; or erroneously supposed there was no evidence.

In the instant case, if the learned High Court Judge thought it fit to increase the compensation, there ought to have been some compelling ground which in the opinion of the High Court judge, which the learned President of the Labour Tribunal had overlooked or ignored. It is only in such instances would the Appellate body derive the authority to substitute a factual finding without being

repugnant to the Industrial Disputes Act. Moreover, even if there appears to be an unsubstantiated conclusion, where the factual intervention is one relating to compensation, the Appellate body must satisfy itself of the threshold issue, namely the extent of loss.

Dr. Amerasinghe J. explanation in ***Jayasuriya v. Sri Lanka State Plantation Corporation*** *(supra)* is on point.

"*While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal ?, for compensation is an "indemnity for the loss". (Per Soza, J. in Associated Newspapers of Ceylon Ltd. v. Jayasinghe (48)). Now, losses can be of various kinds; but the matter for consideration in this kind of case is the financial loss, and not sentimental harm caused by the employer. […] With regard to financial loss, there is, first, the loss of earnings from the date of dismissal to the determination of the matter before the Court, that is, the date of the Order of the Tribunal, or, if there is an appeal, to the date of the final determination of the appellate court. The phrase "loss of earnings" for this purpose would be the dismissed employee's pay (net of tax), allowances, bonuses, the value of the use of a car for private purposes, the value of a residence and domestic servants and all other perquisites and benefits having a monetary value to which he was entitled. The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred. For instance, if an employee claims that he would have earned more than his basic salary, he must adduce supporting evidence such as the fact that there was a general wage increase from which he would have benefited, and/or that he was on a regular ladder of promotion along which he would have progressed, and/or that he had special qualifications or opportunities which would have led to an improvement in his conditions of service during the*

relevant time. Otherwise, it must be assumed that he would continue to earn at the same rate as at the time of the termination of his services."

Accordingly, there can be no question that in an appeal against a Labour Tribunal decision on compensation, the Appellate body has two questions to answer. Firstly, whether the appellant has discharged the burden of proving financial losses; Secondly, whether there is a glaring failure on the part of the Labour Tribunal to evaluate the said evidence to the effect that the compensation remains substantially unsupported? It is only if both questions are answered in the affirmative, in my considered view, could the appellate body venture to review and substitute the compensation, where substitution is necessary.

In the case before us, the learned High Court judge fell into error by not taking into consideration the fact that the Applicant had not established losses before the Labour Tribunal. The Applicant Respondent had admitted in the written submissions filed on his behalf that he failed to lead separate and adequate evidence before the Tribunal to substantiate his losses. As stated earlier, the burden is squarely on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss the employee had incurred. It is only when the employee discharges the burden could the Tribunal proceed to determine an equitable amount as compensation based on the whole gamut of evidence led by both parties.

Notwithstanding the failure to inform himself of this threshold issue, the learned High Court judge still had an obligation to state the reasons for substituting the compensation.

As adverted to earlier, it is not possible to come out with an exhaustive list of factors or the circumstances that should be taken into account in determining

the quantum of compensation. It is a matter left to the discretion of the Court which the Court must exercise judicially. (cf. Sharvananda J. in ***Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. Hillman***) It is not satisfactory to simply say that a certain amount is just and equitable. There should be a stated basis for the computations, supported by the factors taken into consideration, in arriving at the amount of compensation awarded. In the case of ***Brook Bond (Ceylon) Ltd v. Tea, Rubber, Coconut and General Produce workers Union*** *(supra)* it was held that "*for an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for the verdict should be set out to enable the parties to appreciate how just and equitable the order is. In the absence of reasons, it would not be a just and equitable order*."

I wish to state at this point that the requirement to give reasons is applicable to both the learned High Court Judge and the President of the Labour Tribunal. There ought to be an appreciation of factors or circumstances which assisted the tribunal to compute the loss caused to the applicant. Such a practice allows the parties to appreciate how just and equitable the order is. It is also significant to do so as their awards of the Labour Tribunals are reviewable.

In the present case the learned High Court judge fell into error when he varied the order of compensation awarded by the learned President of the Labour Tribunal without stating any basis for doing so. He makes a cursory reference to the prior conduct of the Applicant which is extraneous to determine the financial losses.

For the reasons set out above, I hold all three questions of law raised in this matter in favour of the Appellant and accordingly I set aside the judgement of the learned High Court Judge dated 10-05-2010 and affirm the findings of the learned President of the Labor Tribunal.

The Applicant would be entitled to the compensation awarded by the Learned President of the Labour Tribunal with accrued interest and any other statutory dues the Applicant would be entitled to, under the law.

The appeal is allowed and in the circumstances of the case I make no order as to costs.

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 Appeal with Leave to Appeal obtained from this Court.

PALAMANDADIGE LALITHA PADMINI FERNANDO
116/4, Sevagama, Polonnaruwa.
PLAINTIFF

S.C. Appeal 102/2009
S.C. Case No. SC (SPL) LA 313/08
C.A. Appeal No. 349/05
D.C.Colombo Case No. 36051/MR

VS.

CEYLON TOBACCO COMPANY LIMITED
No.178, Srimath Ramanadan Mawatha,
Colombo 15.
DEFENDANT

AND BETWEEN

CEYLON TOBACCO COMPANY LIMITED
No.178, Srimath Ramanadan Mawatha,
Colombo 15.
DEFENDANT-PETITIONER

VS.

PALAMANDADIGE LALITHA PADMINI FERNANDO
116/4, Sevagama, Polonnaruwa.
PLAINTIFF-RESPONDENT

AND NOW BETWEEN

CEYLON TOBACCO COMPANY LIMITED
No.178, Srimath Ramanadan Mawatha,
Colombo 15.
DEFENDANT-PETITIONER
-PETITIONER/APPELLANT

VS.

PALAMANDADIGE LALITHA PADMINI FERNANDO
116/4, Sevagama, Polonnaruwa.
PLAINTIFF-RESPONDENT
-RESPONDENT

BEFORE: Priyasath Dep PC, CJ
Sisira J. De Abrew J
Prasanna Jayawardena PC, J.

COUNSEL: Manoj Bandara with T. Herath instructed by Sudath Perera Associates for the Defendant-Petitioner-Petitioner/Appellant.
Kanishka Witharana with H.M. Thilakarathne instructed by Ms. Medha N. Gamage for the Plaintiff-Respondent-Respondent.

ARGUED ON: 08th January 2018

WRITTEN SUBMISSIONS FILED: By the Defendant-Appellant-Petitioner/Appellant on 23rd October 2009 and 22nd January 2018.
By the Plaintiff-Respondent-Respondent on 14th December 2009.

DECIDED ON: 14th June 2018

Prasanna Jayawardena, PC.J

The Plaintiff-Respondent-Respondent ["the plaintiff"] was the wife of one K.S.Perera. He had started smoking when he was a teenager. Over time, he became a heavy smoker. In the month of September 1996, he was diagnosed with incurable cancer. The plaintiff's husband died on 13th April 2001. He was then 60 years old.

The Defendant-Petitioner-Petitioner/Appellant ["the defendant"] is a limited liability Company. It is the sole manufacturer of cigarettes in Sri Lanka. The defendant also distributes, sells and markets the cigarettes it manufactures. Further, at the times material to this action, the defendant advertised and promoted the sale of the cigarettes it manufactured.

Prior to his death, the plaintiff's husband instituted D.C. Colombo Case No. 21163/M against the defendant praying for the recovery of damages on account of the cancer, which he alleged was caused by smoking cigarettes manufactured by the defendant. He died during the pendency of that case. The plaintiff made an application to be substituted in place of her deceased husband. The District Court made Order refusing this application for substitution on the basis that the cause of action claimed by the plaintiff's husband was personal to him and did not survive his death. The plaintiff did not challenge that Order in the Court of Appeal.

On 11th April 2003, the plaintiff instituted this action against the defendant, pleading four alleged causes of action and praying for the recovery of a sum of Rs.5,000,000/- from the defendant. The plaint is a lengthy one. Some of the averments are less than

lucid. Some others are unnecessarily repetitive or needlessly detailed. However, a perusal of the plaint establishes that the plaint does set out alleged causes of action against the defendant.

The essence of the plaintiff's case against the defendant, as can be extracted from the plaint, is that: (a) the cigarettes manufactured, distributed, marketed, advertised, promoted and sold by the defendant contain Nicotine, which is an addictive substance, and other carcinogenic chemical substances which are harmful to the health of persons who smoke these cigarettes; (b) the defendant did not inform the public that, smoking these cigarettes is harmful to the health of persons who do so; (c) as a result of the defendant advertising and promoting the sale and use of the cigarettes it manufactures, the plaintiff's husband was induced to start smoking cigarettes and he was unaware that doing so was harmful to his health; (d) in the month of September 1996, the plaintiff's husband was diagnosed with incurable cancer which was caused by his having smoked cigarettes manufactured by the defendant; (e) he died on 13th April, 2001 as a result of this cancer; (f) the plaintiff's husband was a tailor who earned an income of about Rs.5,000/- per month; (g) the plaintiff is unemployed and was solely dependent on her husband; (h) as a result of her husband's death, the plaintiff has been deprived of the love, affection, care ["ආරක්ෂාව"], protection ["රැකවරණය"] and maintenance ["නඩත්තුව"] which she received from him; (i) the plaintiff has suffered grievous mental pain and anguish and the plaintiff has been deprived of the protection and hopes she had for her future life with her husband; (j) the plaintiff has been deprived of the pecuniary benefit she would have received, as the heir of the estate of her deceased husband, from the monies which would have been payable to her husband under a decree entered in D.C. Colombo Case No. 21163/M; (k) in these circumstances, the plaintiff has suffered loss and damages which are quantified at a sum of Rs. 5,000,000/-; (l) based on these alleged factual averments, the plaintiff claimed four causes of action upon which she claimed the defendant was liable to pay this sum of Rs.5,000,000/- to her: *ie:* causes of action upon the defendant's alleged negligence, alleged fraudulent acts and alleged violations of several provisions of the Sale of Goods Ordinance and Foods Act.

The defendant filed answer, admitting that it manufactured, marketed and advertised cigarettes and denying the other averments in the plaint. The defendant also pleaded, in its answer, that the plaint should be rejected and/or dismissed since: (i) the plaintiff's action is prescribed on the face of the plaint; (ii) the plaint does not disclose any cause of action and does not conform to the imperative provisions of the Civil Procedure Code and (iii) the plaintiff cannot have and maintain this action because of the refusal of her application to be substituted as the plaintiff in D.C. Colombo Case No. 21163/MR filed by her husband.

When the case was taken up for trial on 30th November 2004, the plaintiff framed issue no.s [1] to [41] and the defendant framed issue no.s [42] to [57]. The defendant then moved to take up its issue no.s [42], [43], [45] and [47] as preliminary issues of law. The plaintiff did not object to this application even though the defendant had

failed to previously move to have the plaint rejected or returned for amendment on account of an alleged failure to disclose a cause of action - *vide:* Kulatunge J's often quoted statement in **FONSEKA vs. FONSEKA** [1989 2 SLR 95 at p.100] that, where a defendant takes up the position that a plaint does not disclose a cause of action, *"…..the defendants should, before pleading to the merits, move to have the plaint taken off the file for want of particulars - Mudali Appuhamy v. Tikarala (4). Under Section 46(2) of the Civil Procedure Code this is the correct procedure even in a case where it is alleged that the plaint does not disclose a cause of action."*.

These issue no.s [42], [43], [45] and [47] were: issue no. [42] - Does the plaint disclose a cause of action against the defendant ?; issue no. [43] - In any event, is the cause of action depicted in the plaint vague ?; issue no. [45] - Is the plaintiff's action prescribed on the face of the plaint ?; and issue no. [47] - Is the plaintiff entitled to have and maintain this action in view of the fact that the application for substitution in D.C. Colombo Case No. 21163/MR was refused by the Court ?

In her written submissions tendered in the District Court, the plaintiff submitted that the four preliminary issues should be answered in her favour because: (i) the plaint does disclose a cause of action and is not vague; (ii) the action is not prescribed on the face of the plaint since the plaintiff's cause of action arose only upon the death of her husband and this action has been instituted within two years of that date; and (iii) the refusal of the plaintiff's application for substitution in D.C.Colombo Case No. 21163/MR has no bearing on her cause of action in this case.

On the other hand, in its written submissions tendered in the District Court, the defendant submitted that, the four preliminary issues should be answered in the defendant's favour and the action be dismissed since: (i) the plaint is prolix; (iii) the plaint does not disclose a cause of action because the plaintiff is not seeking to recover compensation for patrimonial loss but is, instead, seeking to recover loss and damages for loss of love, affection, care and protection, which is not recoverable under our law; (iii) the plaint is vague due to the plaintiff's failure to plead the exact amount of the loss and damage caused by the loss of support consequent to her husband's death; (iv) the plaintiff's cause of action *"emanates from the time her husband came to know that he was suffering from cancer" - ie:* in September 1996 - and, therefore, this action is *ex facie* prescribed on the face of the plaint, since it has been filed long after the expiry of two years from September 1996; and (v) the Court's refusal to substitute the plaintiff in the place of her deceased husband in D.C. Colombo Case No. 21163/MR and the plaintiff's failure to appeal from that Order, *"precludes her from filing this action."*.

The learned trial judge made Order answering all four preliminary issues in the plaintiff's favour and directing that the case proceeds to trial on the other issues. The defendant filed an application in the Court of Appeal seeking leave to appeal from that Order and was granted leave to appeal, in the first instance. After hearing both counsel and considering the written submissions fled by them, the Court of Appeal dismissed the defendant's appeal.

The defendant then filed an application in this Court seeking special leave to appeal from the Order of the Court of Appeal. This Court has granted the defendant special leave to appeal on the following three questions of law:

(i) Whether the Court of Appeal failed to appreciate as to what the cause of action of the plaintiff is, against the defendant ?

In paragraph [16] (a) of its petition to this Court, the defendant stated the basis on which it raised this question of law by citing the definition of a "Cause of Action" in section 5 of the Civil Procedure Code and pleading that, *"In the circumstances, it is submitted with respect that the date of death of the Plaintiff's husband cannot be construed as the date of the commencement of the `wrong' allegedly committed by the Defendant that gives rise to all the damages that the plaintiff seeks":*

(ii) Whether the Court of Appeal failed to appreciate that, the plaintiff's action is prescribed on the face of the plaint, in that, *inter alia*, the wrong for the prevention or redress of which the action was brought arose well prior to two years before the institution of action ?

(iii) Whether the Court of Appeal failed to appreciate that, on an application of the principles enunciated by the Supreme Court in **PROF. PRIYANI DE SOYZA VS. RIENZIE ARSECULERATNE**, the plaintiff is not entitled to the damages prayed for ?

It is evident from paragraph [16] (a) of the petition to this Court, that the first question of law is raised on the basis of the defendant's contention that, the plaintiff's alleged cause of action did not arise upon the death of her husband but, instead, arose in 1996, when he contracted cancer. The second question of law raises the specific issue of whether the plaintiff's action is prescribed on the face of the plaint because the alleged cause of action arose prior to two years before the action was instituted.

Thus, both the first and second questions of law relate back to the defendant's issue no. [45] which asked: *"Is the plaintiff's action prescribed on the face of the plaint ?"*. Therefore, these two questions of law can be considered together.

In this regard, it is evident from the averments in the plaint that, the plaintiff's alleged causes of action are based on the premise that the defendant's wrongful and/or unlawful acts caused the death of her husband and that, as a result of the death of her husband, she has suffered loss and damage, which she has quantified in a sum Rs. 5,000,000/-. It is also seen that, the plaintiff's action is in the nature of an Aquilian Action for the recovery of alleged loss and damages caused to the plaintiff by the wrongful acts and/or omissions of the defendant, which are said to consist of *culpa* with regard to the cause of action based on alleged negligence and also *dolus* with regard to the other causes of action based on alleged fraudulent conduct and alleged violation of statutory safeguards.

In this regard, it hardly needs to be said here that, the principles of the Roman-Dutch Law apply to Aquilian Actions of this nature and that, it is a well known principle of the Roman-Dutch Law that, dependents of a deceased person whose death was caused by the wrongful act of another, are entitled to claim compensation from the wrongdoer for the patrimonial loss they suffer as a consequence of the death of the person they were dependent on.

Thus, in **JAMESON'S MINORS vs. C.S.A.R** [1908 TS 575], where the children of a man killed in a railway accident claimed damages caused to them by their father's death, Innes CJ observed [at p. 585],with regard to this type of action, *"….. the compensation claimable under it is due to third parties, who do not derive their rights through his [the deceased's] estate, but on whom they are automatically conferred by the fact of his death"*. In **LEGAL INSURANCE COMPANY LTD vs. BOTES** [1963 1 SALR 608], where the widow of a man killed in road accident, sued to recover compensation for damages caused to her as a result of his death, Holmes J stated [at p. 614] with regard to the nature of the action, *"The remedy relates to material loss `caused to the dependents of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance , as they would have been in if the deceased had not been killed."*. Accordingly, Mckerron states [The Law of Delict 7th ed. at p. 149], *"….. the dependents of the deceased can claim compensation for the pecuniary loss they have suffered in consequence of the death."*. Similarly, Macintosh and Scoble [Negligence in Delict 3rd ed. at p. 203], also writing on the South African Law, observe, *"….. the right of action comes to the dependents quite independently, and is not derived from the deceased or his estate."*. As regards the Law in Sri Lanka, Wikramanayake states [The Law of Delict in Ceylon at p.39], *"This action is available to those to whom the deceased was legally bound to support and the damages awarded is the actual pecuniary loss."*.

With regard to the first and second questions of law, it is the plaintiff's position that her alleged causes of action *arose* only upon the death of her husband. On the other hand, the defendant's position is that, the plaintiff's cause of action arose when she became aware, in 1996, that her husband contracted cancer and while he was alive.

The aforesaid statements of the law make it apparent that, it is the plaintiff's position which is correct since, as set out above, her alleged causes of action to recover compensation for patrimonial loss she claims to have suffered as a result *of* the death of her husband, only *arose upon* the death of her husband which deprived her of the patrimonial benefits she received from him during his lifetime. In other words, the causes of action she claims in the plaint came into existence only upon the death of her husband. Until that time, she was dependent on her husband and she had no personal cause of action against the defendant. Her husband may [or may not] have, during his lifetime, had a cause of action against the defendant for loss and damage caused to him as a result of having contracted cancer after smoking cigarettes manufactured and marketed by the defendant. However, any such possible cause of action was personal to him and was extinguished upon his death. As set out above, the cause of action now claimed by the plaintiff is entirely different to any cause of action that her husband may have had during his lifetime.

The aforesaid position was recognised by the Supreme Court in **MEINONA vs. UPARIS** [60 NLR 116], where the widow and children of a person killed as a result of being hit by a motor car, instituted action claiming compensation from the owner and driver of that motor car, for the patrimonial loss caused to the widow and children as a result of the death of their husband and father, Pulle J observed [at p.118], *"…..the tort for which the defendant was responsible did not until the death of the deceased give to his dependents a cause of action, ….."*. In this connection, Pulle J also cited Salmond [Law of Torts 1953 ed. p. 396] which states, *"Nevertheless the cause of action conferred upon the relatives of the deceased by the Act is a new cause of action, and not merely a continuance of that which was formerly vested in the deceased himself. It is ' new in its species, new in its quality, new in its principle, in every way new [1 (1884) App. Cases 59 at 70.]"* On the same lines, in **NANDAKEERTHI vs. KARUNARATNE** [2004 1 SLR 205], where the widow of a person killed in a road accident claimed compensation from the owner of the vehicle, Wijayaratne J observed [at p.208], with regard to the plaintiff's right to recover compensation, *"Such right depends on the fact of the plaintiff being a dependent of the deceased where death deprived her of such dependence."*.

The case of **SUPPRAMANIA CHETTY vs. THE FISCAL, WESTERN PROVINCE** [19 NLR 129] cited by the defendant, was with regard to the damages caused to the plaintiff by the negligence of the Fiscal which resulted in the theft of goods seized in execution of a decree entered in favour of the plaintiff. It is not relevant to the present case. However, when the observation made by Schneider J [at p. 139] that, *"….. the rule is well established that prescription generally runs in cases of tort from the date of the tort, and not from the occurrence of the damage. But, there is an exception to this where the original act itself was no wrong, and only becomes so by reason of subsequent damage"* is applied to the present case, it confirms the aforesaid position that the plaintiff's alleged cause of action in the present case before us arose only upon the death of her husband. That is because, the tort or delict which the plaintiff claims is the defendant causing the death of her husband and the damages caused to the plaintiff commenced only upon the death of her husband. The decision in **CARTLEDGE vs. E. JOPLING & SONS LTD** [1963 1 AER 341] which was cited by the defendant, is also not relevant to the present case. That decision was with regard to the plaintiff having contracted pneumoconiosis as a result of adverse working conditions and the interpretation of section 2 (1) of the Limitation Act, 1939. It has no bearing on a cause of action which accrues to the dependents of a person who dies as a result of tortious or delictual acts of another.

As set out above, it is very clear that, the alleged causes of action claimed by the plaintiff in this action arose only upon the death of her husband on 13th April 2001. This action has been filed on 11th April 2003. Therefore, this action has been filed within two years of the time when the plaintiff's alleged causes of action arose and within the two year limitation period specified in section 9 of the Prescription Ordinance, as being applicable to actions for the recovery of *"loss, injury or damage"*,

Thus, it is apparent that, the defendant's contention that the plaintiff's cause of action arose when her husband contracted cancer in 1996 is devoid of any merit. Accordingly, the first and second questions of law are answered in the negative.

The third question of law asks whether the Court of Appeal failed to appreciate that, on an application of the principles enunciated by the Supreme Court in **PROF. PRIYANI DE SOYZA VS. RIENZI ARSECULERATNE** [2001 2 SLR 293], the plaintiff is not entitled to the damages prayed for in the plaint.

In this regard, the defendant contends that, the plaintiff's causes of action are to recover compensation for alleged loss and damage caused to her as a result of being deprived of the care and companionship of her husband and for the mental agony caused to her following the death of husband. The defendant goes on to submit that, the defendant is not entitled to such damages because, as the Dheeraratne J held in **PROF. PRIYANI DE SOYZA VS. RIENZIE ARSECULERATNE** [2001 2 SLR 293 at p.303-304], damages are recoverable in an Acquilian Action only on account of calculable patrimonial loss and also *"injured feelings arising out of and flowing naturally from physical hurt done"* but not on account of *"mental distress or wounded feelings causing no physical injury"* or *"loss of care and companionship"*.

However, a perusal of the plaint shows that, the defendant's aforesaid submission is factually incorrect since the plaintiff has *not* limited her claims to alleged loss and damage caused to her as a result of being deprived of the care and companionship of her husband and for mental agony caused to her following the death of husband.

Instead, the plaintiff has claimed loss and damages caused to her as a result of, *inter alia*: (i) losing the care ["ආරක්ෂාව"], protection ["රැකවරණය"] and maintenance ["නඩත්තුව"] which she received from her husband; and (ii) being deprived of the pecuniary benefit she would receive, as the heir of the estate of her deceased husband, from the monies which would have been payable to her husband under a decree entered in D.C. Colombo Case No. 21163/M. These heads of alleged damages may, if proved by evidence to that effect, constitute patrimonial loss which the plaintiff suffered as a result of the death of her husband. For example, in the celebrated case of **THE UNION GOVERNMENT vs. WARNEKE** [1911 AD 657] where the plaintiff's wife was killed in a railway accident and he sued to recover compensation for damages on account of the deprivation of her comfort and society and also on account of the loss of her assistance in the care, clothing and upbringing of his seven children, it was held that, while he was not entitled to damages on account of the loss of her comfort and society, he would be entitled to recover damages for such pecuniary loss, as he may prove to have sustained, as a result of the deprivation of her assistance in the care, clothing and upbringing of his children. Further, as Holmes J stated in **LEGAL INSURANCE COMPANY LTD vs. BOTES** [at p. 614], *" ….. material losses as well as benefits and prospects must be considered."*

It is obvious that the question of whether these alleged damages are in the nature of patrimonial loss or not and whether these alleged damages were, in fact, sustained, will be mixed questions of fact and law which can only be ascertained at the trial, upon evidence placed before the Court. These questions cannot be answered by simply looking at the averments in the plaint, as the defendant seems to suggest. It is apt to cite here the often quoted observation by Kulatunge J in **FONSEKA vs. FONSEKA** [at p.100] that the law requires a plaint to disclose a cause of action and that, *"The law does not require that the plaint should make out a prima facie case which is what the Defendants-Appellants appear to insist on, nor are the Plaintiffs required to state their evidence by which the claim would be proved."*

For these reasons, the defendant's remaining contention as embodied in the third question of law, is not only factually incorrect, it is also devoid of substance in law. Therefore, the third question of law is also answered in the negative.

Accordingly, this appeal is dismissed. The Orders of the District Court and the Court of Appeal are affirmed. As set out above, this appeal, which is on preliminary issues, has no merit. However, by its applications to the Court of Appeal and to this Court, the defendant company has succeeded in delaying the trial by more than 12 years and would have caused the plaintiff to incur expenses which are likely to have imposed a difficult burden on her The plaintiff would have also been put to considerable inconvenience. In another case, these obstacles may even have led to the plaintiff, whose resources are likely to be limited, caving in and giving up the action. In these circumstances, the defendant company shall pay the plaintiff a sum of Rs. 400,000/- as costs, within one month of today. The District Court should hear and determine the trial, on its merits based on the evidence and the law, as soon as possible

Judge of the Supreme Court

Priyasath Dep PC, CJ.
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 Special Leave to Appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution

The Director General,
Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

Complainant

SC Appeal 103/ 2012

SC/SPL/LA/ 210/2011
CA 260/2007
HC Colombo case No. 1172/1996

Vs,

Imbulana Liyanage Dharmawardana,
No. 145/53, Walawuwatta,
Waliweriya.

Accused

And

Imbulana Liyanage Dharmawardana,
No. 145/53, Walawuwatta,
Waliweriya.

Accused- Appellant

Vs,

The Director General,
Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

Complainant-Respondent

And now between

The Director General,
Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

Complainant-Respondent-Appellant

Vs,

Imbulana Liyanage Dharmawardana,
No. 145/53, Walawuwatta,
Waliweriya.

Accused- Appellant-Respondent

Before: **Priyantha Jayawardena PC J**
Vijith K. Malalgoda PC J
Murdu N.B. Fernando PC J

Counsel: Dilan Ratnayake DSG, for the Complainant-Respondent-Appellant
Shanaka Ranasinghe PC, with Niroshan Mihindukulasuriya for the Accused-Appellant-Respondent

Argued on **31.05.2018**
Decided on **14.12.2018**

Vijith K. Malalgoda PC J

The Director General, Commission to Investigate Allegations of Bribery or Corruption had filed a special leave to appeal application challenging the decision by the Court of Appeal in CA 260/2007 delivered on 17.10.2011.

As revealed before us, the said Commission to Investigate Allegations of Bribery or Corruption had forwarded an indictment against one Imbulana Liyanage Dharmawardana under section 23 A (3) of the Bribery Act (as amended)

The trial against the said accused Imbulana Liyanage Dharmawardana was taken up before the High Court of Colombo and at the conclusion of the said trial, the learned High Court Judge of Colombo had found the said accused guilty of the indictment against him and sentenced him as follows;

1) Four years Rigorous Imprisonment
2) Fine of Rs. 2500/- with a default term of six months
3) Further fine of Rs. 12, 000, 00/- under section 26 (a) of the Bribery Act (as amended) with a default term of 5 years Rigorous Imprisonment.
   (Jail terms to run consecutively)

Being aggrieved by the said conviction and sentence, the accused preferred an appeal to the Court of Appeal and the said appeal was taken up for argument on 16th June 2011. During the said appeal it was revealed that the documents relied upon by the prosecution in the High Court Trial and was marked and produced during the trial as P-1 to P-23 were not available to be examined both by the counsel and court since the said documents had been misplaced from the High Court Registry. During the argument before the Court of Appeal, the counsel for the accused-appellant took up a preliminary objection, that he was unable to effectively prosecute the appeal due to the absence of the marked documents.

In this regard the learned counsel for the Accused-Appellant-Respondent had taken up the position before the Court of Appeal that they would not object if the prosecution, in the very least, tendered

photocopies of the documents that are missing, but the prosecution failed the submit even photocopies of the lost documents before Court of Appeal.

The Court of Appeal by its order dated 17.10.2011 held that the trial courts failure to send all the documents to Court of Appeal has violated the undeniable rights of the appellant including his right of appeal and allowed the appeal by acquitting and discharging the Accused-Appellant.

Aggrieved by the said judgment the Complainant-Respondent-Appellant sought special leave to appeal from the said judgment and when it was supported before the Supreme Court on 08.01.2012, court granted special leave on the questions of law identified in paragraph 18 (a) to (e) along with a further question identified during the support stage.

The questions of law on which the special leave was granted can be summarized as follows;

a) Did the Court of Appeal err in law by holding that, the failure of the trial court to send all documents to the Court of Appeal violated the applicant's right of appeal in the circumstances of the present case?
b) Did the Honourable Court of Appeal err in law holding that productions referred to in the decision of ***Leelananda vs. Ernest de. Silva 1990 (2) Sri LR 237*** referred to real evidence and not to documents?
c) Did the Court of Appeal err in law by holding that the Court of Appeal does not have the power to dispense with the examination of all or any of the documents those that are not admitted by the contending parties?
d) Did the Honourable Court of Appeal fail to consider the learned High Court Judge's judgment and the proceedings to ascertain, as to what documents and contents thereof were admitted in the course of the trial?

e) Did the Honourable Court of Appeal err in law by holding that, the appellant had disputed documents P-17 to P-22 and that, there are certain deliberate false statements in the written submission of the state especially where the state has taken up the position that all the lost documents were admitted by the defence at the trial?

f) In the circumstances of the case, did the learned Judges of the Court of Appeal err in upholding the preliminary objection raised by the learned President's Counsel for the Respondent?

As submitted on behalf of the Complainant-Respondent-Appellant, the decision to acquit and discharge the Accused-Appellant-Respondent by the Court of Appeal by its order dated 17.10.2011 was arrived by only considering the preliminary objection raised on behalf of the Accused-Appellant-Respondent without going into the merits of the case and therefore it is premature for the Court of Appeal to reach the said decision. In support of the above contention the learned Deputy Solicitor General who appeared for the Complainant-Respondent-Appellant submitted that;

a) During the trial before the High Court, prosecution led the evidence of two witnesses namely G.A. David Singho Authorized Officer from the Commission to Investigate Bribery and Corruption and N. Sooriyakumara Director Finance of Sri Lanka Customs.

b) During their evidence documents from P-1 to P-23 were marked by the prosecution.

c) Out of the said documents, documents P-1 to P-16 and P-23 were admitted by the defence and therefore no additional witnesses were summoned to prove those documents.

d) At the conclusion of the prosecution case, an application was made on behalf of the accused under section 200 of the Code of Criminal Procedure Act to discharge the accused.

e) The said application made under section 200 of the Code of Criminal Procedure Act was rejected by the Learned High Court Judge and defence was called from the Accused above named.

f) The Accused elected to give evidence from the witness box and was subject to cross examination by the prosecution counsel.

g) At the end of both the prosecution and defence cases, both parties moved to make oral submissions as well as to produce written submission.

h) On 22.02.2007 both counsel made oral submissions. The prosecuting counsel had produced the marked document namely P-1 to P-23 in open court once he conclude his oral submissions.

i) The learned Trial Judge delivered his order on 23.03.2007 convicting the Accused-Appellant. In the said order the learned Trial Judge had considered all the documents produced at the trial by making reference to the documents and producing the contents of the said documents in his judgment.

and argued that the non-availability of the marked documents at the appeal stage is not per-se an impediment to consider the appeal unless it involves interpretation of the said documents. It was further argued by the learned Deputy Solicitor General that the function of the Appellate Court is not to engage in an examination of the productions but to consider whether the trial judge applied the correct standard and drawn correct inferences on the facts as found by the trial judge.

When considering the material placed before this court it is observed that the Accused-Appellant-Respondent had faced charges under section 23A (3) of the Bribery Act for acquiring assets in excess

of his known income. When establishing the said charge the prosecution had mainly relied on number of documents to establish the accused's known income as well as acquired assets.

Unlike in any other trial before a trial court, an Indictment forwarded under section 23(A) (3) of the Bribery Act depend largely on documentary evidence, to establish the known income as well as the known assets and liabilities of the accused.

As revealed from the evidence placed before the trial court as well as from the judgment of the trial judge, it appears that there was no challenge by the accused with regard to the known assets and/or the known expenditure of the accused for the relevant period, and infact the documentation with regard to known assets and liabilities were admitted and produced before the trial court. The said admitted documents namely P-1 to P-16 had been referred to by the trial judge in his judgment at page 4 to 8.

In addition to the above admissions, with regard to the known assets and/or known expenditure, a further admission was recorded with regard to P-19 which indicted the salaries, overtime and traveling money received by the accused during the period relevant to the indictment.

Rest of the documents produced at the trial was not admitted by the accused and the said documents are as follows;

P- 17 Affidavit of the accused made on form 5 of the Bribery Act

P-18 Declaration of assets and liabilities of the accused made under the Declaration of Assets and Liabilities Act

P-20 Rewards received by the accused from Sri Lanka Custom

P-21 Show cause notice issued to the accused

P-22 Show cause affidavit by the accused

During the arguments before this court the learned President's Counsel who represented the Accused-Appellant-Respondent whilst stressing the importance of the availability of documents at the appeal stage and submitted that the prosecution had relied on the said documents when securing a conviction before the High Court and the failure to produce them or any one of them in appeal would seriously prejudice the appellants rights during the argument before Appellate Court since the documents referred to above go to the very root of the conviction of the Accused-Appellant-Respondent.

I do agree with the learned President's Counsel's above submission that the documents referred to above had played a major role in the trial before the High Court and would be relevant to the appeal but reluctant to agree when the learned Counsel submitted that the appellant would be seriously prejudiced for non-availability of productions at the appeal stage.

As referred to above in this judgment, the decision to allow the appeal by the Court of Appeal was reached on a preliminary objection raised by the learned Counsel for the Accused-Appellant on the non-availability of documents marked during the High Court trial without considering the main appeal before the said court. However when reaching the said decision their lordships of the Court of Appeal had considered the importance of one such document namely document produced marked P-20 in the following manner,

> "Counsel for the Appellant contended that, out of the said documents P-20 is of utmost significance as it is clear from the evidence that the document did not set out the full particulars of the rewards the accused had obtained during the relevant period. At page 325 of the brief the Customs official who gave evidence had stated in evidence that there could have been other rewards granted to the Appellant other than those contained in the document. He has stated in his evidence that P-20 is not comprehensive and did not contain

particulars of all the rewards granted to the Appellant. The particular piece of evidence was corroborative of the evidence of the Appellant. The Appellant in his evidence had stated that the said document contained only a part of the rewards that were granted to him by the Sri Lanka Customs. According to the evidence of the customs officer (at page 325) it is apparent that P-20 does not reflect all the rewards granted to the Appellant hence failure on the part of the prosecution to produce an exhaustive and comprehensive list of rewards casts a serious doubt as to the correctness of the amount contained in the indictment. In this background P-20 is of paramount importance to this court in arriving at a fair decision."

I cannot understand as to how their lordships of the Court of Appeal made the said observation without going through the merits of the main appeal before the Court of Appeal since the Learned Trial Judge had considered each and every document produced at the trial in his judgment. As further observed by this Court, their lordships of the Court of Appeal had misdirected themselves when they come to the said conclusion without giving due consideration to the Judgment pronounced by the trial judge.

Section 331 of the Code of Criminal Procedure Act No 15 of 1979 had provided an accused person to lodge a leave to appeal application before the High Court, and subsection (f) of the section 331 (4) provides to contain in the said appeal "a plain and concise statement of the grounds of Appeal".

As further observed by this court, right to appeal is guaranteed in a fair trial and Sri Lanka being a state party to the International Covenant on Civil and Political Rights (ICCPR) had recognized the provisions of the said covenant by introducing the said provisions into our legislation. Section 4 (2) of the ICCPR Act No 56 of 2007 had guaranteed the right of appeal as follows;

4 (2) Every person convicted of criminal offence under any written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed.

However when considering the preliminary objection raised before the Court of Appeal, their lordships whilst drawing their lordships attention to the case of ***Wijerathne V. Republic of Sri Lanka 78 NLR 49*** had discussed the principle of a fair trial.

As submitted by both parties before this court, the Accused-Appellant before the Court of Appeal had not raised any complaint of depriving his rights before the trial court, either guaranteed under the provisions of the Code of Criminal Procedure Act No. 15 of 1979 or guaranteed under section 4 (1) of the ICCPR act No 56 of 2007.

In the said circumstances, I see no relevance of the said decision to the appeal before the Court of Appeal.

Their lordships of the Court of Appeal had further considered the decision reported in 1990 2 Sri LR 237 relied on behalf of the state and observed the difference between a "productions" and a "document" but failed to consider the principle laid down in the said decision to the effect that, "In appeals this court has to consider whether the trial judge applied the correct standard and drew the correct inferences on the facts as found by him."

As observed by me, the said principle identified in the case of ***Leelananda V. Earnest de. Silva reported in 1990 (2) Sri LR 237*** had clearly identified the role of an Appellate Judge in Appeal and for the Appellate Court to consider the above, they should hear the main appeal. When taking up the main appeal, the Appellate Court should always consider the relevancy of the documents to the case in hand. If the trial judge had failed to draw the correct inference on facts before him, the

documents before the trial court plays a major role in the appeal before the Appellate Court. However for the Appellate Court to consider whether the trial judge had failed to draw the correct inference on the facts before him, the Appellate Court should hear the main appeal and then only the Appellate Court can consider the importance of the documents which are not before court at the Appeal stage.

In the said circumstances, it is not correct for the Appellate Court to conclude that an accused person is deprived of a fair trial, when the documents relied at the trial stage are missing without considering the importance of the said document for the appeal before them.

In the said circumstances, I answer the questions of Law raised in this appeal in favour of the Complainant-Respondent-Appellant and conclude that their lordships of the Court of Appeal had erred in law when they upheld the preliminary objection raised on behalf of the Accused-Appellant-Respondent.

I therefore set aside the judgment of the Court of Appeal dated 17.10.2011 and direct the Court of Appeal to hear the main appeal in this case.

Appeal allowed.

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree,

Judge of the Supreme Court

Murdu N.B. Fernando 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 under and in terms of Section 9(a) of the High Courts of the Provinces (Special Provisions) Act No.19 of 1990 reads with Article 128 of the Constitution.

SC. Appeal No.114/2017

SC.(SPL) LA Application No.262/15

High Court of Kurunegala Case

No.29/13 Appeal

Magistrate's Court of Wariyapola

No.84309/2011

Edmange Sampath Amarasiri,

Pahala Minuwangete,

Minuwangete.

Accused-Appellant-Petitioner

Vs.

Officer-in-Charge

Police Station,

Wariyapola.

Complainant-Respondent-Respondent

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent-Respondent

BEFORE : **SISIRA J. DE ABREW, J.**

K.T. CHITRASIRI, J. &

L.T.B. DEHIDENIYA, J.

COUNSEL : Saliya Pieris PC with Thanuka Nandasiri for the Accused-Appellant-Petitioner.

Varunika Hettige DSG for the Respondent-Respondent.

ARGUED &

DECIDED ON : 07.02.2018.

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases. The Accused-Appellant in this case was convicted for the offence under Section 344 of the Penal Code. He was sentenced to 2 months simple imprisonment suspended for 5 years. He was also ordered to pay a fine of Rs.1000/- . In default of the fine, he was sentenced to one month's simple imprisonment. Being aggrieved by the said judgment of the learned Magistrate, the Accused-Appellant appealed to the High Court. The High Court by his judgment dated 28.10.2015 affirmed the conviction and the sentence. Being aggrieved by the said judgment of the High Court the Accused-Appellant has appealed to this Court. This Court by its order dated 07.06.2017 granted Leave to Appeal on questions of law set out in paragraph 16(c), (d), (e) and (f) of the Petition of Appeal dated 02.12.2015 which are set out below.

(1) Whether both the prosecution witnesses Kariyawasam Ranathungalage Mangalika Wijekirthi and Kariyawasam Ranathungalage Chandra Wijekirthi are not credible witnesses and therefore the conviction and sentence cannot stand on such evidence?

(2) Whether the learned Magistrate has erred in holding that there was no motive on the part of the virtual complainant to falsely

implicate the Petitioner, despite there being ample evidence to show that the virtual complainant was objecting to her land being taken to widen the village roadway?

(3) Whether the tainted, unsteady and improbable evidence of the prosecution witness Kariyawasam Ranathungalage Mangalika Wijekirthi cannot be strengthened by the corroboration of her sister who was not an independent witness?

(4) Whether both the learned High Court Judge and the learned Magistrate erred in law by shifting the burden of proof to the Petitioner?

The facts of this case may be briefly summarized as follows,

The Accused-Appellant who was the Grama Sevaka of the area went to the Complainant's house in order to make some inquiries about an expansion of the road. In the compound of the Complainant, the Accused-Appellant exposed his person to the Complainant. Soon after this incident, the Complainant ran into the house of her sister and brought the sister to the compound. When the Complainant and the sister both were present in the compound, the Accused-Appellant again exposed his person to both women. The Complainant and her sister have given this evidence. The evidence of the Complainant has therefore been corroborated by the sister.

The Accused-Appellant too gave evidence in the witness box. Accused-Appellant denied the position. However, Accused-Appellant admitted that he went to the compound of the Complainant in order to make some inquiries with regard to an expansion of the road. He, in his evidence takes up the position that there was an altercation between him and the Complainant with regard to the taking of complainant's land for the expansion of the road. He has made an entry in his diary to this effect, marked V1. The learned President's Counsel for the Accused-Appellant submits that the evidence of the Accused-Appellant has been wrongly rejected by the Learned Magistrate. I now advert to the above contention.

If the Accused's evidence creates a reasonable doubt in the prosecution case, the Accused is entitled to be acquitted. In ***Queen Vs. Kularatne 71 NLR page 529,*** this Court observed the following rules with regard to a dock statement of an Accused,

1. If the dock statement of the Accused is believed it must be acted upon.

2. If the dock statement creates a reasonable doubt about the case for the prosecution, the defence must succeed.

The above rules are also applicable to the evidence given by an accused person in the witness box.

The most important question that must be decided in this case is whether the evidence of the Accused-Appellant creates a reasonable doubt in the prosecution case. Although, the Accused takes up the position that there was an altercation between him and the Complainant, he has failed to make a complaint to the Police or to his superiors with regard to the said altercation. The Accused-Appellant takes up the position at page 53 that if there was an altercation of this nature he should have complained it to the Divisional Secretary of the area. He admits that he had not done so. He further admits that he did not complain to the Police. He has failed to give any reason as to why he did not complain to the Police. We have examined his entry made in the diary which was marked "V1". In the said diary he admits that he visited the place of the Complainant. But he has not produced any document or any decision of the government relating to the expansion of the road. When we examine the said entry we are unable to find that there was any request by the villagers to expand the road. When we consider all the above evidence, we feel that the evidence of the Accused-Appellant does not create any reasonable doubt in the prosecution case. We also hold that the rejection of the evidence of the Accused-Appellant by the Magistrate is correct.

Considering all the evidence led at the trial, we hold that the prosecution has proved its case beyond reasonable doubt. In view of the conclusion reached above, we answer the questions of law raised by the Accused-Appellant in the negative. For the above reasons, we affirm the judgment of the High Court Judge and the Magistrate and dismiss this appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

K.T. CHITRASIRI, J.

I agree.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

Mks

SC. Appeal No. 116/2017

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 the Provisions of Section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with the Provisions of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the Judgment of their Lordship of the Civil Appellate High Court Central Province holden at Kandy delivered on 15.12.2015.

SC. Appeal No. 116/2017

SC.HC.CALA. Application
No. 43/2016

Appeal No. CP/HCCA/Kandy/ 78/13(FA)

DC. Matale Case No. L/ 6019

Enasalmada Aluth Gedara Ariyasinghe,
Malgammana, Gangeyaya, Maraka.

Defendant-Respondent-Petitioner

-Vs-

Enasalmada Aluth Gedara Wijesinghe,
No.17, Malgammana, Maraka.

Plaintiff-Appellant-Respondent

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

Priyantha Jayawardena, PC, J &

Nalin Perera, J

Counsel: Nadvi Bahudeen for the Defendant-Respondent-Petitioner.

Prinath Fernando for the Plaintiff-Appellant-Respondent.

Argued &
Decided on: 05.02.2018

Sisira J. de Abrew, J

Heard both counsel in support of their respective cases. The Plaintiff in this case filed a case in the District Court asking for a declaration inter alia that he be declared as the lawful successor of the land. Learned District Judge after trial dismissed the action of the Plaintiff. Being aggrieved by the said Judgment of the learned District Judge, the Plaintiff appealed to the Civil Appellate High Court. The Civil Appellate High Court by its Judgment dated 15.12.2015 set aside the judgment of the learned District Judge and decided the case in favour of the Plaintiff. Being aggrieved by the said Judgment, the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) filed an appeal in this Court. This Court by its order dated 13.06.2017 granted leave to appeal on the questions of law set out in paragraph 25 (i), (ii), (iii), (vi) and (vii) of the Petition of Appeal dated 25.01.2016 which are set out below.

(1) Have their Lordships of the Civil Appellate High Court based their judgment on section 72 of the Land Development Ordinance ignoring the fact that the plaint was presented and the ownership was claimed in terms of the rights provided in Section 49 of the Land Development Ordinance ?

(2) Did their Lordships of the Civil Appellate High Court act beyond their jurisdiction in delivering their judgment based on Section 72 of the Land Development Ordinance ?

(3) Has the Respondent failed to establish by evidence that due procedure had been followed in appointing him as the successor following Section 56,58,60 and including Section 87 of the Land Development Ordinance ?

(4) Even if a due nomination has been made in terms of section 49, if sections 56,58 and 60 of the Land Development Ordinance are not followed, is the said nomination invalid in Law in terms of section 75 of the Land Development Ordinance ?

(5) Is the nomination of the Respondent as successor by the Land Officer invalid as the provisions of the Land Development has not been followed ?

At the trial the Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) raised several issues and the 1st issue is to the following effect.
" Whether the Plaintiff-Respondent has been nominated as the lawful successor of the land in dispute as described in paragraph 04 of the plaint ".

According to paragraph 04 of the plaint, the Plaintiff has been nominated as the lawful successor to the land and it had been entered in the ledger. Therefore the most important question that must be decided in this case is whether the Plaintiff's name has been entered as the lawful successor to the land in the ledger maintained in the Land Commissioner's Office. I will now examine whether the Plaintiff's name has been entered in the said ledger as the lawful successor to the land . The Land Officer in his evidence at pages 82 at 87 of the brief has stated that the Plaintiff-Respondent's name has been entered in the ledger as the lawful successor to the land. In the document marked P5 (page 182) the Land Officer has stated that the Plaintiff's name had been entered in the ledger as the lawful successor to the land. In the document marked P12 which is at page 194 and 195 of the brief, the Assistant Land Commissioner has also stated that the Plaintiff's name has been entered in the ledger as the lawful successor to the land. From the above evidence it is very clear that the name of the Plaintiff-Respondent has been entered in the ledger as the lawful successor to the land. Therefore the issue No. 01 has to be answered in the affirmative. But the learned District Judge has answered the said issue in the negative. We therefore hold that the said answer given by the learned District Judge to issue No. 01 is wrong. The Assistant Land Commissioner in the said letter marked P12 (letter dated 12.03.2007) has also observed that in the absence of any nomination, the Plaintiff-Respondent becomes entitled to succeed to the land as he is the eldest son of the original permit holder. According to section 72 of the Land Development Ordinance also in the absence of any nomination, the elder son becomes the successor to the land. The Assistant Land Commissioner in the said letter after referring to the above matters has stated that the Plaintiff's name had been entered in the ledger. Considering all these matters we hold that the learned District Judge's answer

given to issue No. 01 is wrong. The Learned Judges of the Civil Appellate High Court have considered the above material and have decided to set aside the judgment of the learned District Judge . When we consider all the above matters, we are of the opinion that the conclusion reached by the learned Judges of the Civil Appellate High Court is correct. We also note from the evidence that the father of the Plaintiff-Respondent has nominated his wife (the mother of the permit holder) as the person who is entitled to succeed as the life interest holder)

Considering all these matters we are of the opinion that the conclusion reached by the learned Judges of the Civil Appellate High Court is correct. In view of the conclusion reached above, we answer the 1st, 2nd and 5th questions of law above in the negative. The 3rd and 4th questions of law do not arise for consideration. For the aforementioned reasons, we affirm the Judgment of the Civil Appellate High Court 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

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

SC Appeal 118/17
SC (SPL) LA 257/2016
CA no. 212-213/2012
HC Kandy No. 309/07

In the matter of an application for Special Leave to Appeal in terms of Article128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

The Democratic Socialist Republic of Sri Lanka

Complainant.

Vs.

1. Junaiden Mohomed Haaris.
2. Abdul Razak Mohomed Salam (deceased)
3. Pakeer Mohomed Kamaldeen

Accused.

AND NOW

1. Junaiden Mohomed Haaris.

3. Pakeer Mohomed Kamaldeen

1st and 3rd Accused Appellants.

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent.

AND NOW BETWEEN

Junaiden Mohamed Haaris,

No.13, Kothmale Road,

Nawalapitiya.

Presently at,

Welikada Prison,

Borella, Colombo 08.

1st Accused Appellant Petitioner

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent-Respondent

BEFORE: Eva Wanasundera, PC, J
Buwaneka Aluwihare, PC, J &
Prasanna S. Jayawardena, PC, J

COUNSEL: Anil Silva, PC for 1st Accused-appellant-Petitioner

Rohantha Abeysuriya, DSG for A.G.

ARGUED ON: 12.01.2018

DECIDED ON: 09. 11.2018

Aluwihare, PC. J.,

The 1st Accused-Appellant-Petitioner-Appellant (hereinafter referred to as the Accused-Appellant) had been indicted along with two others on the following counts:

That on or about the 12th September, 2012 the accused-appellant along with the 2nd and 3rd accused;

1. Committed the offence of Rape on Solamalai Uma-Devi an offence punishable under section 364 (2) (g) of the Penal Code, as amended, the offence of "gang rape".

2. Committed the offence of Robbery in respect of a gold chain that was in the possession of aforesaid Solamalai Uma-Devi, an offence punishable under Section 380 of the Penal Code.
3. Committed the offence of murder, by causing the death of Solamalai Uma-Devi, an offence punishable under Section 296 of the Penal Code.

One of the Accused (2nd Accused) had passed away even prior to the commencement of the trial; accordingly, the trial at the High Court only proceeded against the Accused-Appellant and the 3rd Accused.

At the conclusion of the trial the learned High Court Judge convicted both the Accused-Appellant, and the 3rd Accused, on all charges.

The Court of Appeal after hearing the appeal of the Accused-Appellant, and the 3rd Accused, dismissed the same. Aggrieved by the judgment of the Court of Appeal, the Accused-Appellant sought special leave to appeal and special leave was granted on the following questions of law:

(i) Did the learned High Court Judge as well as the learned Judges of the Court of Appeal fail to consider that the evidence given by the witness Kandiah Vasudevan about the alleged statement made to the Petitioner by the 2nd Accused was belated and made at the instance of the Police.

(ii) Did the learned High Court Judge as well as the learned Judges of the Court of Appeal fail to consider that the alleged statement made by the

2nd accused which implicates the Petitioner as well is inadmissible in view of Section 30 of the Evidence Ordinance.

(iii) Did the learned High Court Judge as well as the learned Judges of the Court of Appeal misdirect themselves when they took into consideration the fact that the Petitioner was present with the 2nd accused when the 2nd accused pawned a gold chain allegedly belonging to the deceased as an item of evidence against the Petitioner.

(iv) Did the learned Judges of the Court of Appeal misdirect themselves when the conviction against the Petitioner in respect of the charge of rape was affirmed inasmuch as there was no evidence as regards the commission of gang rape or any involvement in the act of rape by the Petitioner?

The above questions of law are referred to in sub paragraphs (c), (d), (e) and (g) of paragraph 18 of the Petition of the Petitioner of the present application.

Before I consider the facts of the case and the legal issues raised in this appeal, it should be borne in mind that the prosecution relied entirely on circumstantial evidence to establish the charges, for the reason that there were no eyewitnesses to substantiate any of the charges against the Accused-Appellant. Thus, it was incumbent on the prosecution to establish that the 'circumstances' the prosecution

relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis.

Regard should be had to a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our courts.

The two basic principles are-

(i) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

(ii) The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (per Watermeyer J. in **R vs. Blom** 1939 A.D. 188)

The rule regarding the exclusion of every hypothesis of innocence before drawing the inference of guilt was laid down way back in 1838 in the case of **R vs. Hodges (1838 2 Lew. cc.227).** The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.

It would be pertinent to mention here that a trial judge or for that matter a judge sitting in appeal, must necessarily consider the evidence (circumstances) guided by the principle referred to above.

Before I embark on discussing the facts of this case, I also wish to make specific reference to Rule 4 of the five Rules in evaluating circumstantial evidence, laid

down by E.R.S.R. Coomaraswamy in his monumental work "The Law of Evidence" (Vol. Page 24).

> ***"Rule 4":*** *The chain or strand of proved facts and circumstances must be so complete that no link in it is missing. If any vital factor which is necessary to make the chain or strand complete is missing or has remained unproved, it must be held that the prosecution has failed to establish its case. A vital link should never be inferred.*

I shall now set about narrating the factual background to the charges.

Witness Pushpalatha had testified to the effect that she saw her sister Uma-Devi alive for the last time on 12.9.2001 when she left home around 8.00 to attend a class where she was learning typing. Although she had not returned home that day; no one, however, appeared to have panicked as the deceased Uma-Devi had said that she had to attend a wedding. On the following day, when she did not return home, their father Alagan lodged a complaint with the police about his missing daughter.

Anusha Ariyasena, who was attending the same vocational training, had stated in her evidence that on 12.09.2001 Uma-Devi did attend the class. Both of them had walked back to the bus terminal and they had parted ways. The evidence is that Uma- Devi used to trek the distance from home to the class on foot, a distance of about two kilometres.

On the day following around 2.30 in the afternoon, witness Jayasundera who had gone to the thicket by the Mallanda bridge, had accidentally come across the dead body of Uma-Devi. The police had been summoned to the scene and the investigations had commenced.

As far as the persons responsible for this heinous crime were concerned, the investigations led virtually to nothing. After the post mortem, the Judicial Medical Officer opined the death had resulted from manual strangulation. The Judicial Medical Officer had observed a number of minor injuries on the body. Two bite marks, two nail marks, a laceration of an ear lobe and an abrasion of the neck, two other injuries had been observed near the genital area and anus. Undoubtedly, these are injuries that clearly establishes that Uma-Devi had been ravished, before she was strangled to death. The laceration of the ear and the abrasion marks on the neck are indications of forcible removal of jewellery Uma-Devi was wearing. Police were not successful in making a breakthrough for one whole year. A year later somewhere in November 2002, witness Kandiah Vasudevan made a statement to the police with regard to the murder of Uma-Devi and the investigations recommenced.

The most crucial evidence in this case emanates from Kandiah Vasudevan. Due to the inherent weaknesses of his testimony which I shall advert to later, close scrutiny not only of his testimony but also of his credibility is critical. At this point, however, I will only refer to his testimony.

According to his evidence, Vasudevan was eleven years when he was first employed by the accused-appellant in his grocery store. After working there for 2 years, Vasudevan joined the deceased 2nd accused, Salam, in his fruit stall, which also had been located at a distance not far from the grocery of the accused-appellant.

Vasudevan had said that Uma-Devi was known to him as she used to visit the grocery of the accused-appellant on the way to her classes. In answer to a question whether she (Uma-Devi) came alone, the witness had said, she comes with her small brother. He had come to know of the tragedy that had befallen Uma-Devi and had gone near the location where her body was, but not near enough to see the body.

The witness had further stated that two or three days after the body of Uma-Devi was located, he overheard a conversation between the deceased 2nd accused Salam, and the accused-appellant.

The conversation, as heard by Vasudevan in Vasudevan's own words is as follows:

" සලාම් කිව්වා, අපි දෙන්නා මැරුවා කියා කවුරුවත් දන්නේ නැහැ. පෙළපාලි ගියොත් හාරීස් යන්න එපා".

According to Vasudevan the utterance had been made by the deceased 2nd accused to the accused-appellant. At this point the prosecution had posed a question:

"කවුද මැරුවා කීවේ"?

To which witness Vasudevan had responded by stating "උමා මැරී ".

In my view, this question is clearly a leading question, as it suggests that the name of the deceased was referred to by the 2nd accused in the course of the alleged conversation.

Thus, the learned High Court Judge ought not to have allowed this question to be asked as it relates not to a peripheral matter, but to a matter that goes to the very root of the case. In the interest of justice, no witness should be prompted to say what the prosecution wants the witness to state; especially regarding issues that are critical. This is especially so, as Vasudevan's testimony is infirm because it is belated and also due to the fact that his relationship with the accused appellant had soured by that time.

Vasudevan's position was that due to fear, he did not divulge the conversation he purported to have overheard and had kept it to himself for more than a year and decided to divulge it, after he found employment on a farm, which was in the same area (Nawalapitiya). He left the employment of Haaris (the accused-appellant) on an unpleasant note as the accused-appellant had refused to increase his salary.

The other witness who purported to connect the deceased 2nd accused to the incident, is Sundaralingam, a businessman in Nawalapitiya who ran a textile shop and a pawn broking business. According to Sundaralingam, both the accused-appellant and the deceased 2nd accused (Salam) had been known to him and they had on numerous occasions come to him to pawn jewellery and to borrow money and subsequently had redeemed those articles as well. His evidence was that the

deceased 2nd accused had come to his textile shop on a date in September, 2001 in the company of the 1st accused-appellant and had pawned a chain (necklace).

The prosecution also had led evidence of witness Nilusha Herath, who said she lived in Mallanda Nawalapitiya and that the road leading to her house is somewhat densely populated. The 3rd accused was the caretaker of the building close to her house, which was used for slaughtering poultry. She had said that on a day in September, 2001, she heard the noise of someone wailing which had lasted for an instant, but could not say whether it was that of a man or a woman. Although this witness had come out of her house on hearing the noise, she had not seen anyone.

Ismail Mohamed Hanifa was the person who ran the poultry farm and the slaughter house and had admitted that the 3rd accused was the caretaker of the building that was used to slaughter birds and there were instances when more than 50 birds were slaughtered in a given day.

Chief Inspector De Silva, who conducted the investigations into this matter had inspected the building used for slaughtering and having observed dry stains similar to blood on the floor and on the walls, had obtained the substance that gave the appearance of blood stains, onto cotton swabs and had referred them for analysis to the Government Analyst. The witness from the Government analyst, Jayamanne who testified with regard to the analysis stated that he identified human blood on the specimens sent for analysis, but the condition of the specimens was not suitable for grouping.

DIG Abeyrathne Bandara in his evidence, on being questioned by the learned State Counsel, had said that the accused revealed information with regard to the productions (the chain) that were recovered in the course of the investigations. The above, appears to be the sum total of evidence led by the prosecution to establish the charges.

Analysis of the evidence.

Before I analyse the evidence, I wish to reiterate the fact that the 2nd accused was dead before the trial commenced and the 3rd accused whose conviction was affirmed by the Court of appeal had not canvassed his conviction before the Supreme Court. Thus, the issue this court is called upon to decide is the legality of the judgment of the Court of Appeal in relation to the accused-appellant who stood as the 1st accused before the High Court. I shall now deal with the questions of law on which special leave was granted in this matter.

The first question was whether:

(1) the learned High Court Judge as well as the Court of Appeal failed to consider that the evidence of Kandiah Vasudevan was belated and made at the instance of the Police.

At the outset, it must be stated that apart from the bare suggestion that Vasudevan gave evidence at the behest of the police, there is nothing to indicate that that was the case and as such I have no hesitation in holding that it cannot be said that

Vasudevan's evidence was at the behest of the Police. The witness, however, came out with his story after more than a year had passed since the death of Uma-Devi and sometime after he left the employment of the deceased 2nd accused. It is also in evidence that he left the employment with the accused-appellant over a salary issue. These are factors that accentuate the inherent weaknesses in Vasudevan's evidence. On the other hand, the witness was only a boy of 14 years when he overheard the purported conversation, between the accused-appellant and the deceased 2nd accused. In view of these factors, the infirmity in Vasudevan's evidence, resulting from belatedness dilutes to some extent. As such, having observed the demeanour and deportment of the witness, if the learned trial Judge had formed the view that Vasudevan was a credible witness, I do not think this court can fault the trial judge for forming such an opinion.

However, both the High Court and the Court of Appeal have overlooked a fundamental principle in evidence, that is, 'evidence must be weighed and not counted'. In this regard both the High Court as well as the Court of Appeal failed to evaluate the testimony of witness Vasudevan but had taken it on its face value which ought not to have been done in a case that is based purely on circumstantial evidence.

The court is required to consider whether the items of evidence are consistent with any other hypothesis other than the guilt of the accused. The Court of Appeal had neither considered the issue of credibility of the witness nor the admissibility of the statement purported to have been made by the deceased 2nd accused to the

accused-appellant, although both these issues had been raised before the Court of Appeal as reflected in the judgment itself. Having considered the issue of credibility of witness Vasudevan, I am of the view that the learned High Court Judge cannot be faulted for treating Vasudevan as a credible witness. In fairness to the learned High Court Judge, he had, to an extent considered the infirmities of Vasudevan's testimony before deciding to act on it. As such I answer the 1st question of law on which Special Leave was granted in the negative.

The second question of law on which Special Leave was granted was on the issue of admissibility of the purported statement made by the deceased 2nd accused to the accused-appellant which witness Vasudevan supposed to have overheard.

This issue had been raised before the Court of Appeal but the judgment of their Lordships does not appear to have considered this issue. There is only a passing reference that the said question was raised as an issue on behalf of the 1st accused-appellant.

At the hearing of this appeal the learned President's Counsel on behalf of the accused-appellant contended that this evidence is obnoxious to section 30 of the Evidence Ordinance, and therefore inadmissible.

Section 30 of the Evidence Ordinance reads as follows: -

> *"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself*

and some other of such persons is proved, the court shall not take into consideration such confession as against such other person."

Illustration

A and B are jointly tried for murder of C. It is proved that A said "B and I murdered C". The court shall not consider the effect of this confession as against B.

In the instant case the 2nd accused Salam was dead at the time the accused-appellant was tried before the High Court. As such the admissibility of the purported statement has to be considered under the evidentiary provisions relating to "statements by persons who cannot be called as witnesses" and to be more precise under section 32 of the Evidence Ordinance which deals with statements made by a person who is dead.

Section 32 (3) of the Ordinance states: -

(3) When the statement is against the pecuniary or Proprietary interest of the person making it or when ***if true, it would expose him or would have exposed him to criminal prosecution or to a suit for damages****.*

*(*Emphasis added)

In terms of the aforesaid provision, the statement made by deceased 2nd Accused Salam, to the Accused-appellant would be admissible under the provision, as the statement if "true", would have exposed Salam to a criminal prosecution.

The authority for this proposition is found in the case of **King Vs. Ludowyke 37 NLR 129**. In this case, the accused who was the Assistant Sweep Secretary of the Galle Gymkhana Club was charged with Criminal Breach of Trust of monies belonging to the Club. A clerk (since deceased) worked as an Assistant to the accused. The clerk had made a statement to the Secretary of the Club, as well as to the police having deposited the club money to the account of the accused at the request of the accused. Dreiburg J admitted this statement under Section 32(3) of the Evidence Ordinance because the statement would have exposed the clerk to a criminal prosecution. A similar decision was taken in the case of **Korossa Rubber Co. Vs. Silva 21 NLR 73** at page 75.

This provision is one of the exemptions to the hearsay rule and the rationale for admission of such statements appears to be that no person would implicate himself (of a crime) unless it is true. Thus, even though the statement purported to have been made by the deceased 2nd accused to the accused-appellant would not be admissible under Section 30 of the Evidence Ordinance, its admissibility under Section 32 (3) of the Ordinance cannot be denied.

As such I answer the 2nd question of law raised on behalf of the accused-appellant also in the negative.

Having held so I am of the view that it would be remiss on my part, if I am to overlook the evidentiary value that could be attached to the purported statement made by the deceased 2nd accused. It is the sole item of evidence that would even remotely connect the accused-appellant to this crime and in my view, it is

imperative that its evidentiary value should be tested to see whether it is consistent with the irresistible inference of guilt that is required to convict the accused-appellant.

It so appears that judges tend to gloss over facts and draw inferences whereas close scrutiny of evidence is *sine qua non* in cases based on circumstantial evidence. I find the Court of Appeal also had committed this cardinal error in the present case.

The court is not only required to decide whether the facts are consistent with the hypothesis of the prisoner's guilt, but whether they are inconsistent with any other reasonable hypothesis of his innocence (**R Vs. Hodges** *supra*) The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. I shall now consider the evidence of witness Vasudevan in the backdrop of the aforesaid principles relating to circumstantial evidence referred to above.

It is common ground that Vasudevan made a statement to the police after more than a year had elapsed since the incident. As such the accuracy of his memory and the risk of forgetfulness come into issue. Vasudevan, a person belonging to Tamil ethnicity gave evidence in Sinhala. Throughout his examination-in-chief including the purported statement he said he overheard, Vasudevan testified in Sinhala. His proficiency in the Sinhala language was not tested. In his own words, this is what Vasudevan said that he overheard:

"*සලාම් කිව්වා, අපි දෙන්නා මැරුවා කියා කවුරුවත් දන්නේ නැහැ. පෙළපාලි ගියොත් හාරීස් යන්න එපා*".

To which the accused-appellant had not responded, according to Vasudevan.

The fact remains witness Vasudevan had heard only a part of the conversation that was taking place. According to him, he approached the accused-appellant's Grocery with the intention of getting some instructions from Salam. No sooner he heard this utterance he says he turned back and went, as such court does not have the benefit of ascertaining the context in which the statement was made.

Witness had not been asked what was the first word he heard when he approached the grocery or whether he heard anything else after this utterance.

In cross examination, it transpired that the conversation between Salam and accused-appellant had taken place in Tamil language and not in Sinhala. In the course of the cross examination he came out with the Tamil words said to have been used during this most crucial conversation. He translated on his own, the words he thought he heard and said the same before the Court. It appears that everybody, including the learned trial judge, has unquestioningly admitted that the translation was accurate.

Even if the statement made by Salam is taken, at its face value, the question is, whether the only irresistible inference that can be drawn from this conversation is that both Salam and the accused-appellant committed the murder of Uma-Devi.

The prosecution's case was that this murder was committed by three persons and not two.

Thus, the issue is when Salam said "අපි දෙන්නා මැරුවා කියා කවුරුවත් දන්නේ නැහැ" did he refer to

i. himself and the 3rd accused? ; or
ii. was it Salam and the accused-appellant? ; or
iii. could it have been Salam and some other person whose identity was not known to the prosecution?

One may have an inkling that Salam referred to himself and the accused-appellant. But without the knowledge of how the entire conversation between the two ensued and the context in which the utterance was made, can one say with certainty that the words "අපි දෙන්නා", referred to none other than Salam and the accused-appellant, when the prosecution's own case was that three people were involved?

If Salam's statement is to be acted upon, then the murder had been committed by two persons and not three. The complicity of Salam is in no doubt. Then it has to be either Salam and the accused appellant, or Salam and the 3rd accused who stand convicted or it could even be Salam and a third person. Thus, the question arises as to which two of the three persons indicted were responsible for the murder. Salam, when he said "අපි දෙන්නා මැරුවා" did he refer to himself and the 3rd accused who now stand convicted?

I also wish to state that the manner in which the prosecution has led evidence in this case by the prosecution is not desirable. Vasudevan is a belated witness by a considerable time gap and who had also had some displeasure with the accused-appellant. In this context the prosecution ought to have allowed the witness to

testify freely without prompting or leading, so that the credibility of the witness could have been properly evaluated. Immediately after witness Vasudevan had referred to the purported conversation, the learned State Counsel had shot the question "කවුද මැරුවා කීවේ?" Suggesting that the name of the deceased transpired during the conversation which was not the case. The learned State Counsel should never have asked this question and on the other hand ought not to have been permitted by the learned High Court Judge as up to that point of his evidence, Vasudevan had not referred to the identity of the dead person.

In response to this question Vasudevan answered "Uma-Devi".

The manner of questioning not only diminishes the evidentiary value of the testimony, but also tarnishes the testimonial trustworthiness of the witness, as one could reasonably expect the witness to have come out with the name "Uma-Devi" on his own, if that name was referred to in the conversation between Salam and the accused-appellant.

For the reasons set out above, I am of the view that it is difficult to conclude with certainty that the use of the word "අපි" in the purported conversation, is an exclusive reference to Salam and the accused-appellant. As such, that evidence cannot be used as an item of incriminating evidence against the accused-appellant.

The 3rd question of law, on which leave was granted was: as to whether both the learned High Court Judge and the Court of Appeal misdirected themselves in taking into consideration an item of incriminating evidence; namely, that the accused-

appellant was present with the deceased 2nd accused when an item of jewellery was pawned.

Apart from the purported conversation overheard by witness Vasudevan, the only other item of evidence the prosecution led to connect the accused-appellant to the crime, was the evidence of witness Sundaralingam which I have referred to earlier.

The significance of this evidence was that the item of jewellery that Salam and the accused-appellant alleged to have pawned to Sundaralingam, was identified as the chain that was worn by Uma-Devi when she left home for the last time.

Here again, Sundaralingam was questioned by the police after more than one year had elapsed since the death of Uma-Devi. Therefore, when his statement was recorded, he was required to recollect a transaction that he had performed with the deceased 2nd accused more than a year before. Sundaralingam being a businessman, it is reasonable to presume, that he is a man who attends to this type of transactions day in and day out, in the normal course of his business. The Court was in no position to gauge the frequency of such transactions; he may have carried out hundreds of such transactions in that year. The witness was asked to recollect all of a sudden, the details of a transaction that had taken place around 12 months before, where the deceased 2nd accused had pawned an item of jewellery. Here again the only way to test his memory was to allow the witness to narrate the transaction as best as he could remember. He did say that it was the deceased Salam, who brought the item of jewellery, it was Salam, who handed over

the piece of jewellery to him and the witness wrote out a note recording the transaction in the name of Salam.

Here again, I observe that the manner in which this witness had been questioned by the learned State Counsel is improper and as a result, the probative value of Sundaralingam's evidence is diminished to such an extent, that I do not think that the evidence of Sundaralingam should be taken into consideration, against the accused-appellant.

I shall advert to the questioning:

Q එහෙම නාවලපිටියේ ව්‍යාපාර කරන අය, ඒ විදියට උකස් කරලා සල්ලි අරගෙන යනවද

A. ඔව්

Q. හාරිස් , සලාම් දෙන්නත් ඇවිල්ල අරගෙන ගිය අවස්ථා තියෙනවද ?

A. ඔව්

Q. තමාට මොකක් හරි විශේෂ අවස්ථාවක් මතකද ඒ දෙන්න ඇවිල්ල යම් කිසි රන් බඩුවක් උකස් තිබ්බා ?

A. ඔව්

Up to this point of questioning, the witness had never said that both the accused-appellant and the deceased 2nd accused had approached him to pawn an item of jewellery.

The question (referred to above) suggests to the witness that both of them (Salam and the accused appellant) in fact had come to his shop to pawn jewellery. Thus, the manner of questioning referred to above has thereby substantially diminished

the probative value of the testimony. It is significant to note that under cross examination, he had only made reference to the deceased 2nd accused as the person who brought the chain for pawning. For completeness, I have reproduced below, that evidence as well:

Q. බඩු ගන්ඩ එන කස්ටමර් කෙනෙක් හැටියට කියන්ඩ වෙන් එක අරගෙන ඇවිල්ල බිස්නස් එක කරන්නේ කොහොමද ?

A. දන්නවනම් විතරයි ගන්නේ, අඳුනන අයෙක් වන සලාම් ගෙනත් දුන්නා. මම සල්ලි දුන්නා. නැවත මුදල් දුන්නොත් ආපහු බාරදෙනවා.

Q. සලම්ද උකස් කලේ ?

A. ඔව් සලාම් තමයි

Q. සලාම්ගේ නමද ලිව්වේ

A. සලාම්ගේ නම තමයි ලිව්වේ

Q. සලාම්ගේ නම ලිව්වා සලාම් සලාම් ගෙනාපු නිසා.

A. ඔව් සලාම් තමයි මගේ අතට බාරදුන්නේ.

The Accused -appellant in his dock statement had denied that he ever went with Salam to pawn jewellery to Sundaralingam and the Court of Appeal does not appear to have considered the dock statement of the accused-appellant.

As referred to earlier the purported conversation between the deceased 2nd accused Salam and the accused appellant and the evidence relating to the pawning

of the chain are the only two items of evidence led against the accused-appellant to establish the charge of murder and the charge of gang rape. As far as the offence of rape is concerned, the prosecution has placed no evidence whatsoever. Both the learned trial judge and their lordships of the Court of Appeal, however, had thought it fit to convict the accused -appellant on that count based on the two items of evidence referred to.

In relation to both these items of evidence, it would be pertinent to apply the rule laid down in the case **of D.P.P v. Christie 1914 A.C 545**

In the said case Lord Moultan said that where the evidential value of some evidence is slender, whereas the prejudicial effect which its reception might have on the minds of the jurors would potentially be so substantial as seriously to impair the fairness of the trial, it ought not to be admitted.

Reiterating the rule, Lord du Parcq in the case of **Noor Mohamed vs. R 1949 A.C 182** said;

> "*In all such cases the judge ought to consider whether the evidence is sufficiently substantial having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as the purpose is concerned, it can in the circumstances have only trifling weight, the judge will be right to exclude it.*"

For reasons adumbrated above, I hold that, due to the inherent weaknesses in the evidence, the evidence cannot be acted upon and in the absence of any other incriminating evidence, the conviction against the accused-appellant cannot be sustained. It appears that the Court of Appeal had also misdirected itself by holding that the evidence of the investigating officer had revealed that witness Sundaralingam to whom the chain had been pawned was discovered on a statement made by both, the accused-appellant and the deceased 2nd accused.

It must be noted that the prosecution had not led any evidence under Section 27 of the Evidence Ordinance with regard to any discovery of fact, consequent to the statements made by the accused at the trial and secondly, it is trite law that the discovery of a witness consequent to a statement made by a witness cannot be considered as a discovery of a fact for the purpose of Section 27.

For the reasons set out above, I am of the view that the conviction and the sentence imposed on the accused-appellant cannot be sustained.

Accordingly, I set aside both the judgments of the learned High Court Judge as well as the Court of Appeal and make order acquitting the accused-appellant of all charges in the indictment.

In view of the above finding, answering the 4th question of law on which special leave to appeal was granted, does not arise. Suffice it to say that the prosecution had not led any evidence to show that the accused-appellant was complicit in any way in committing the offence of gang rape.

As the 3rd accused had not preferred an appeal against the judgment of the Court of Appeal, I do not wish to disturb the findings against the 3rd accused.

The appeal of the 1st Accused-Appellant-Appellant is allowed.

Appeal allowed

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA PC.

I Agree

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA PC.

I Agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal with leave to appeal obtained from this Court.

DANGOLLAGE KAMAL NANDASIRI
Kadadara, Imbulana.

PLAINTIFF

SC. Appeal No. 119/15
SC./HCCA/LA No. 276/20174
WP/HCCA/AV/530/2008/F
D.C.Avissawella Case NO. 21794/L

VS.

1. **DANGOLLAGE VINITHA NILMINI**
   Kadadara, Imbulana.

2. **KARIYAWASAM WICKRAMA ARACHCHILAGE PIYASENA**
   Kadadara,Imbulana

3. **KARIYAWASAM WICKRAMA ARACHCHILAGE THILAKARATHNA**
   Kadadara, Imbulana.

DEFENDANTS

AND

2. KARIYAWASAM WICKRAMA ARACHCHILAGE PIYASENA
Kadadara,Imbulana

2A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE
Kadadara, Imbulana.

3. KARIYAWASAM WICKRAMA ARACHCHILAGE THILAKARATHNA
Kadadara, Imbulana.

3A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE
Kadadara, Imbulana.

2A AND 3A DEFENDANTS-APPELLANTS

VS.

DANGOLLAGE KAMAL NANDASIRI
Kadadara, Imbulana.
PLAINTIFF-RESPONDENT

DANGOLLAGE VINITHA NILMINI
Kadadara, Imbulana.
1st DEFENDANT-RESPONDENT

AND NOW BETWEEN

DANGOLLAGE KAMAL NANDASIRI
Kadadara, Imbulana.
PLAINTIFF-RESPONDENT-PETITIONER/APPELLANT

VS.

DANGOLLAGE VINITHA NILMINI
Kadadara, Imbulana.
1st DEFENDANT- RESPONDENT-RESPONDENT

2. KARIYAWASAM WICKRAMA ARACHCHILAGE PIYASENA
Kadadara,Imbulana

2A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE
Kadadara, Imbulana.

3. KARIYAWASAM WICKRAMA ARACHCHILAGE THILAKARATHNA
Kadadara, Imbulana.

3A.KARIYAWASAM WICKRAMA ARACHCHILAGE LEELAWATHIE
Kadadara, Imbulana.
2A AND 3A DEFENDANTS-APPELLANTS-RESPONDENTS

BEFORE: Sisira J. De Abrew J.
K.T. Chitrasiri, J.
Prasanna Jayawardena, PC J.

COUNSEL: Pradeep Perera for the Plaintiff-Respondent-Petitioner/Appellant
Sandamal Rajapakse for the 1st Defendant-Respondent-Respondent.
Rasika Dissanayake for the 2A and 3A Defendants-Appellants-Respondents.

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Respondent-Petitioner/Appellant on 07th December 2015.
By the 2A and 3A Defendants-Appellants-Respondents on 24th May 2016.

ARGUED ON: 29th November 2016.

DECIDED ON: 18th January 2018.

Prasanna Jayawardena, PC, J.

The Plaintiff-Respondent-Petitioner/Appellant ["the plaintiff"] and the 1st Defendant-Respondent-Respondent ["the 1st defendant"] are brother and sister. The plaintiff instituted this action against the 1st defendant and the 2nd and 3rd Defendants-Appellants-Respondents ["the 2nd and 3rd defendants"] praying for a declaration that he and the 1st defendant are the joint owners of a land situated in the Kadadara village, which is in the Kegalle District. This land is a paddy field with appurtenant high land which has water sources used for the paddy field. Part of the high land has been asweddumized and is under paddy cultivation.

The District Court entered judgment in favour of the plaintiff. In appeal, the High Court set aside that judgment and dismissed the plaintiff's case. The plaintiff sought and obtained leave to appeal from this Court on three questions of law which are set out later on in this judgment.

The aforesaid land, which is the subject matter of the action, is described in the schedule to the plaint as the paddy field and appurtenant land called "Aswedduma Kumbura together with the Pillewa" also called "Talduwage Deniya" which is shown as Lots "A", "B" and "C" in plan no. 329 dated 19th October 1942 made by C. W. De Mel, Licensed Surveyor and having total extent of A:2 R:2 P:26 and bounded: on the North East by Ganekumbura; on the South East and South by Mahawatte *alias* Kuruwawatta of K.W.A.Daniel Singho and others; on the West by Gamarallagewatta of K.G.Podisingho and others; and on the North West by Baduwatta *alias* Miskin's land

of K.W.A.Daniel Singho and others. Plan no. 329 describes Lot "A" as a *"Paddy field"* having an extent of A:1 R:2 P:20.5. Lot "B" is described as a *"Jungle land"* having an extent of A:0 R:3 P:30.5. Lot "C" is described as a *"Deniya land"* having an extent of A:0 R:0 P:15. The aggregate extent of Lots "A", "B" and "C" is the aforesaid total extent of A:2 R:2 P:26. Plan no. 329 was produced at the trial marked **"පැ 1"**.

The 2nd and 3rd defendants are brothers who own or occupy lands which adjoin the land claimed by the plaintiff. The plaintiff states that, on 03rd May 2005, the 2nd and 3rd defendants entered Lots "B" and "C" shown in plan no. 329 marked **"පැ1"** and claimed ownership of these two Lots and started digging up a section of those Lots.

On 15th May 2005, the plaintiff instituted this action in the District Court of Avissawella against the 1st defendant and the 2nd and 3rd defendants praying for a declaration that, he and the 1st defendant are the owners of the entirety of the aforesaid land described in the schedule to the plaint - *ie:* Lots "A", "B" and "C" shown in plan no. 329 marked **"පැ1"**, having a total extent of A:2 R:2 P:26. The plaintiff also prayed for an interim injunction restraining the 2nd and 3rd defendants from entering Lots "B" and "C" of the land claimed by the plaintiff.

As set out in the plaint, the plaintiff's case, in brief, is that: from prior to 1952, R.A.P. Ranasinghe was the owner of and possessed the entire land described in the schedule to the plaint and shown in plan no. 329 marked **"පැ1"**; R.A.P. Ranasinghe transferred this land to J. A. Baba Nona and D. Jane Nona by deed no. 976 dated 07th November 1952, which was produced at the trial marked **"පැ3"**; J. A. Baba Nona and D. Jane Nona transferred this land to K. M. Soma Tillekaratne Menike by deed no. 8917 dated 26th January 1957, which was produced at the trial marked **"පැ4"**; K. M. Soma Tillekaratne Menike transferred this land to K. D. Jane Nona by deed no. 101 dated 20th January 1960, which was produced at the trial marked **"පැ5"**; K. D. Jane Nona gifted this land to her two sons, L. S. Nimal Perera and L. S. Wimal Perera, by deed no. 21580 dated 11th September 1983, which was produced at the trial marked **"පැ6"**; thus, L. S. Nimal Perera and L. S. Wimal Perera each had an undivided half share of the land; finally, L. S. Wimal Perera transferred his undivided half share of the land to the **1st defendant** by deed no. 6958 dated 07th June 1997, which was produced at the trial marked **"පැ7"** and L. S. Nimal Perera transferred his undivided half share of the land to the **plaintiff** by deed no. 8210 dated 14th December 1999, which was produced at the trial marked **"පැ8"**; thus, the **plaintiff** and the **1st defendant** jointly own the entirety of the aforesaid land described in the schedule to the plaint - *ie:* Lots "A", "B" and "C" shown in plan no. 329 marked **"පැ1"**, having a total extent of A:2 R:2 P:26; further, the plaintiff and the 1st defendant and their aforesaid predecessors in title have had undisturbed and uninterrupted possession of the said land for over ten years and, thereby, also have prescriptive title to the entirety of the aforesaid land; the 2nd and 3rd defendants have, wrongfully and without any right or title, disputed the plaintiff's ownership of the land described in the schedule to the plaint and shown as Lots "B" and "C" in plan no. 329 marked **"පැ1"**; the plaintiff pleaded that, in these premises, the plaintiff is entitled to the aforesaid declaration and interim injunction.

After an *inter partes* inquiry into the plaintiff's application for the interim injunction, the District Court issued an interim injunction restraining the 2nd and 3rd defendants from entering Lots "B" and "C" of the land claimed by the plaintiff.

The 1st defendant filed answer associating herself with the averments set out in the plaint and prayed for a declaration of title to a half share of the entire land - *ie:* a half share of Lots "A", "B" and "C" shown in plan no. 329 marked **"ඇ1"**.

The 2nd and 3rd defendants filed a joint answer stating that plan no. 329 marked **"ඇ1"** had been prepared for the purposes of D.C. Avissawella Case No. 3204 which had been decided many years previously and claimed that the subject matter of the said Case No. 3204 was *only* Lot "A" shown on plan no. 329 marked **"ඇ1"**.The 2nd and 3rd defendants put the plaintiff to proof of the title he claimed.

The 2nd and 3rd defendants went on to aver that, the 2nd Defendant had title to Lot "B" shown on plan no. 329 marked **"ඇ1"** and that the 3rd Defendant had title to Lot "C" shown on the same plan. With regard to the **2nd defendant's claim** to have title to Lot "B": the 2nd and 3rd defendants stated that, Lot "B" was a part of the land named Mahawatte *alias* Kuruwawatta owned by K.W.A. Daniel Singho and others which is shown as the Southern and South Eastern boundary of Lot "B" on plan no. 329 marked **"ඇ1"**. The 2nd and 3rd defendants claim they had possessed and cultivated Lot "B", for many years, on behalf of K.W.A. Daniel Singho and his wife, I.V. Samichchi Nona and that, subsequently, Samichchi Nona transferred the land named Mahawatte *alias* Kuruwawatta, including Lot "B", to the **2nd defendant** by deed no. 978 dated 23rd January 1980, which was produced at the trial marked **"වී 1"**. The 2nd and 3rd defendants also stated that, Lot "B" is known as the "Panwila Kumbura" and also as the "Kuruwawatta Kumbura" of the land named Mahawatta; With regard to the **3rd defendant's claim** to have title to Lot "C": the 2nd and 3rd defendants stated that, Lot "C" was a part of the land named Baduwatta *alias* Miskin's land owned by K.W.A. Daniel Singho and others which is shown as the North Western boundary of Lot "A" on plan no. 329 marked **"ඇ1"**. The 2nd and 3rd defendants claim that, they had possessed and cultivated Lot "C", for many years, on behalf of the aforesaid Daniel Singho and his wife, Samichchi Nona and that, subsequently, Samichchi Nona had transferred Lot "C" to the **3rd defendant** by deed no. 1248 dated 16th November 1980. The 2nd and 3rd defendants also stated that, Lot "C" is known as the "Hitina Watta" of the land named Baduwatta *alias* Miskin's land.

The 2nd and 3rd defendant went on to state that they have had undisturbed and uninterrupted possession of Lot "B" and Lot "C" shown on plan no. 329 marked **"ඇ1"**, for over ten years and, thereby, also have prescriptive title to Lot "B" and Lot "C". On the aforesaid basis, the 2nd and 3rd defendants made a claim in reconvention praying for a declaration that, the 2nd defendant has title to Lot "B" shown on plan no. 329 marked **"ඇ1"** and that, the 3rd defendant has title to Lot "C" shown on the same plan.

It should be mentioned here that, although, the 2nd and 3rd defendants prayed, in their answer, for declarations of title to Lots "B" and "C" shown on plan no. 329 marked **"පැ1"**, their answer does not describe these two specific portions of land by specifying their metes and bounds. A plan of these two portions of land was not annexed to the answer, either. Thus, the answer does not comply with the requirement set out in section 41 of the Civil Procedure Code that, where a party to an action claims a specific portion of land, that portion of land must be described *"so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only."*.

When the trial commenced, the parties framed issues in line with the averments in their pleadings. Thereafter, the plaintiff gave evidence and produced the documents marked **"පැ1"** to **"පැ15"**. The plaintiff also led the evidence of three other witnesses - namely, an Officer from the Agrarian Services Centre in Ruwanwella, one A.L. Gunaratne and the plaintiff's brother. The 1st defendant did not give evidence and associated herself with the plaintiff's case. When the 2nd and 3rd defendant's case commenced, the 2nd defendant did not give evidence. Only the 3rd defendant gave evidence. He produced only the deed no. 978 marked **"වි1"**. The plaintiff had earlier produced a copy of this deed marked **"පැ11"**.

Since the determination of this appeal will turn on the evidence placed before Court by the parties, it is necessary to set out the evidence, in some detail.

The plaintiff stated that he lives in the village of Kadadara, where the land which is the subject matter of the action is situated. He said this land is named "Aswedduma Kumbura together with the Pillewa" and is also named "Talduwage Deniya" and is shown in plan no. 329 marked **"පැ1"**. The plan no. 1557/L of the same land which was prepared by the Court Commissioner for the purposes of the present action was marked **"පැ2"** and the Court Commissioner's Report was marked **"පැ2ඇ"**. It is evident that, both plan no. 329 marked **"පැ1"** and plan no. 1557/L marked **"පැ2"**, show the same land.

The plaintiff stated that, the original owner of the land was R.A.P. Ranasinghe. The plaintiff then produced the aforesaid deeds marked **"පැ3"** to **"පැ8"** and traced the chain of title he relies on: commencing from deed no. 976 marked **"පැ3"** by which R.A.P. Ranasinghe transferred the land to J.A. Baba Nona and D. Jane Nona and ending with deed no.s 6958 and 8210 and marked **"පැ7"** and **"පැ8"** by which L.S. Wimal Perera and L.S. Nimal Perera transferred their undivided half shares of the land to the 1st defendant and plaintiff. The deeds marked **"පැ3"** to **"පැ8"**, which constitute the chain of title relied on by the plaintiff, were produced without any objection by the 2nd and 3rd defendants and were duly proved.

The plaintiff stated that, from 1994 onwards, he had cultivated the entire land which is the subject matter of this action, on behalf of L.S. Nimal Perera and L.S. Wimal Perera who were the owners of the entire land at that time. Later, the plaintiff and his sister -

ie: the 1st defendant - purchased the land from L.S. Nimal Perera and L.S. Wimal Perera and cultivated the entire land, as owners. The plaintiff said that, before purchasing the land described in the schedule to the plaint, he checked the boundaries of the land and was satisfied that its total extent was A:2 R:2 P:26.

The plaintiff produced, marked **"පැ9"**, the receipt issued to the plaintiff for the payment of Acreage Levy ["අක්කර බදු"] for the years 1997-1999 on account of the paddy field named "Talduwage Deniya". This receipt establishes that, the Agrarian Services Centre had recorded the extent of this paddy field as being A:2 R:2 P:26.

The plaintiff stated that, on 03rd May 2000, the 2nd and 3rd defendant had disputed the plaintiff's possession and ownership of Lots "B" and "C" shown in plan no. 329 marked **"පැ1"** and claimed ownership of these Lots "B" and "C". The plaintiff had then lodged the complaint, marked **"පැ10"**, at the Ruwanwella Police Station.

Thereafter, the plaintiff produced, marked **"පැ11"**, a copy of deed no. 978 referred to in the 2nd and 3rd defendants answer and under and in terms of which, the 2nd defendant claims he has title to Lot "B" shown in plan no. 329 marked **"පැ1"**. The plaintiff stated that, the land claimed by the 2nd defendant under this deed marked **"පැ11"** is described in Item 5 of the schedule to this deed as the land named "Panwila Kumbura" which is part of the land named Mahawatta. The plaintiff contended that, Item 5 of that schedule makes it clear that, this land claimed by the 2nd defendant is *not* Lot "B" shown in plan no. 329 marked **"පැ1"** since Item 5 of the schedule states that the land named "Talduwage Deniya" [which is Lot "B" shown in plan no. 329 marked **"පැ1"**] is the Northern *boundary* of the 2nd defendant's land named "Panwila Kumbura" described in Item 5 of the schedule to the deed marked **"පැ11"**. The plaintiff contended that, thus, the 2nd defendant's own deed marked **"පැ11"** shows that, the land named "Panwila Kumbura" claimed by the 2nd defendant under that deed and Lot "B" shown in plan no. 329 marked **"පැ1"** claimed by the plaintiff, are two *different* and *separate* lands.

The plaintiff then produced, marked **"පැ12"** and **"පැ13"**, copies of deed no.s 33291 and 1864 to lands which constitute other boundaries of the plaintiff's land shown as Lots "A", "B" and "C" in plan no. 329 marked **"පැ1"**.

Next, the plaintiff produced, marked **"පැ14"**, a certified extract of the entries made in the Agrarian Services Land Register maintained at the Agrarian Services Centre in Ruwanwella. This entry is in respect of the paddy field named "Talduwage Deniya" also named "Aswedduma Kumbura" which is stated to be A:2 R:2 P:25 in extent. The entry states that the Owner/Landlord of the paddy field is L. S. Perera and that the Tenant Cultivator of that paddy field is D. Piyasena.

Finally, the plaintiff produced, marked **"පැ15"**, a certified extract of another entry made in the Agrarian Services Land Register relating to the paddy field named

“Panwila Kumbura”. The plaintiff stated that, this is the land claimed by the 2nd defendant under and in terms of deed no. 978 marked **“වී1”/“පැ11”** and went on to say that the extract marked **“පැ15”** shows that “Panwila Kumbura” is an entirely different land and is not the plaintiff’s land named “Talduwage Deniya” and “Aswedduma Kumbura”.

When the plaintiff was cross examined, he again described the boundaries of the land which he claims and is the subject matter of this action. In cross examination, the plaintiff clearly stated that he claims title to the land by virtue of having purchased the land from L. S. Nimal Perera and L. S. Wimal Perera and upon the long possession of the land by his predecessors in title - ‘‘මම අයිතිවාසිකම් කියන්නේ මිලදී ගැනීමෙන් සහ මගේ පෙර උරුමකරුවන්ගෙන් දීර්ඝකාලීන භුක්තිය මත එන අයිතිවාසිකම්’’ . He also identified the aforesaid L. S. Perera, who is named in the extract marked **“පැ14”** as the Owner/Landlord of the land named “Talduwage Deniya” and “Aswedduma Kumbura” which the plaintiff claims, as being the father of L. S. Nimal Perera and L. S. Wimal Perera - *“නිමල් පෙරේරා සහ විමල් පෙරේරාගේ පියා ”*. The plaintiff also stated that, D. Piyasena, who is recorded in the certified extract marked **“පැ14”** as being the Tenant Cultivator of this paddy field owned/possessed by L.S.Perera, was a resident of Kadadara and had died some years earlier.

During cross examination, the plaintiff emphasized that, from 1994 onwards, he cultivated the entirety of the land which is the subject matter of this action - *ie:* Lots “A”, “B” and “C” shown in plan no. 329 marked **“පැ1”** - and that the 2nd and 3rd defendants have never had possession of any part of that land. When learned counsel for the 2nd and 3rd defendants suggested to the plaintiff that he did not have title to Lots “B” and “C”, the plaintiff rejected that suggestion and reiterated that he had title by virtue of purchase of the land under and in terms of the deeds produced by him and by long possession and enjoyment of the land – ‘‘මම එම යෝජනාව ප්‍රතික්ෂේප කරනවා. දීර්ඝ කාලීන භුක්තියෙන් සහ විඳීමෙන් සහ මිලදී ඔප්පු පිට මට අයිතිවාසිකම් ඇවිත් තිබෙනවා කියලා මම සිතනවා.’’

After the plaintiff concluded his evidence, the plaintiff called an Officer from the Agrarian Services Centre in Ruwanwella. This witness testified that, the certified extract marked **“පැ14”** was an extract of the entries relating to the year 1984 made in the Agrarian Services Land Register in that year.

The plaintiff’s next witness was A.L. Gunaratne who stated that, he lives in the village of Nivunhella, which is close to the village of Kadadara. The witness said he knows that, from 1994 onwards, the plaintiff has cultivated the land which is the subject matter of the action. The witness said that, for several seasons, he has ploughed the land for purposes of the plaintiff’s paddy cultivation and helped the plaintiff to obtain labour at the times of harvest.

Finally, the plaintiff’s brother gave evidence and stated that, he lives in the village of Kadadara and that from about the time he was ten years old in 1989 onwards, he has

known the land which is the subject matter of the action. He stated that, at that time, the land was held by L.S.Perera's two sons, Nimal Perera and Wimal Perera and, from about, 1994 onwards, his brother - *ie:* the plaintiff - had cultivated the land on behalf of Nimal Perera and Wimal Perera. The witness stated that, subsequently, Nimal Perera and Wimal Perera had sold the land to his sister – *ie:* the 1st defendant - and to his brother – *ie:* the plaintiff -, who had each purchased a half share of the land.

When the 2nd and 3rd defendants commenced their case, the 3rd defendant stated that he and his brother – *ie:* the 2nd defendant - had possessed Lots "B" and "C" shown in plan no. 329 marked **"පැ1"** and that their father had possessed these lands earlier. The 3rd defendant claimed that, under and in terms of deed no. 978 marked **"වී1"**/ **"පැ11"**, the 2nd defendant has title to Lot "B" shown in plan no. 329 marked **"පැ1"**. The 3rd defendant did not produce the other deed no. 1248 referred to in the answer of the 2nd and 3rd defendants, by which the 3rd defendant had claimed to have title to Lot "C" shown in plan no. 329 marked **"පැ1"**.

In cross examination, the 3rd defendant admitted that the plaintiff has title to Lot "A" shown in plan no. 329 marked **"පැ1"**. In cross examination, the 3rd defendant also admitted that, K. M. Soma Tillekaratne Menike, who is one of the persons who owned the land in the chain of title relied on by the plaintiff, had title to the land at some time.

The 3rd defendant limited the claims of the 2nd and 3rd defendants to Lots "B" and "C" shown in plan no. 329 marked **"පැ1"**. The 3rd defendant went on to state that, he is claiming title only to the land named "Hitinawatta" and that the 2nd defendant is entitled to the land named "Kuruwawatta".

The aforesaid evidence makes it clear that, there is *no* dispute between the parties with regard to the plaintiff's and 1st defendant's joint ownership of Lot "A" shown in plan no. 329 marked **"පැ1"**.

The *only* dispute between the parties is regarding the ownership of Lots "B" and "C" shown in plan no. 329 marked **"පැ1"**. As set out above, the plaintiff and the 1st defendant claim joint ownership of Lots "B" and "C" under and in terms of the chain of title set out in the deeds marked **"පැ3"** to **"පැ8"** *and* by prescriptive title. On the other hand, the 2nd defendant claims ownership of Lot "B" under and in terms of the deed marked **"වී1"/"පැ11"** on the basis that the land named "Panwila Kumbura" described in deed marked **"වී1"/"පැ11"** is the same land described as "Lot B" in plan no. 329 marked **"පැ1"**. The 2nd defendant also claims to have prescriptive title to Lot "B". The 3rd defendant has not produced any deed to support his claim to Lot "C" and has not given evidence.

In his judgment, the learned District Judge carefully analysed the cases presented to the Court by the plaintiff and the 2nd and 3rd defendants and the evidence that was placed before the Court. Having done so, the learned judge held that, the *corpus*

described in the schedule to the plaint and both plan no. 329 marked **"පැ1"** and the later plan No. 1577/1 marked **"පැ2"** made by the Court Commissioner, is the same as the land described in the deeds marked **"පැ3"** to **"පැ8"** relied on by the plaintiff to establish his title to the entire land which is the subject matter of this action. The learned judge further observed that, the deeds marked **"පැ11"**, **"පැ12"**and **"පැ13"** confirm that the boundaries of the land claimed by the plaintiff under and in terms of the deeds marked **"පැ3"** to **"පැ8"** are the same as the boundaries of the *corpus* depicted as Lots "A", "B" and "C" in plan no. 329 marked **"පැ1"** and the land shown in the later plan no. 1577/1 marked **"පැ2"**. Thus, the learned trial judge held that, the plaintiff has proved the identity of the *corpus* of the land claimed in this action and proved that, this was the land described in the deeds marked **"පැ3"** to **"පැ8"** relied on by the plaintiff to establish his title. The learned District Judge also held that, the plaintiff had duly proved these deeds marked **"පැ3"** to **"පැ8"**. Accordingly, the learned District Judge determined that the plaintiff had proved his title to the land which is the subject matter of this action.

The learned trial judge went on to hold that, the extract marked **"පැ14"** established that the land claimed by the plaintiff in this action was registered as a single unit of land in the register maintained by the Agrarian Services Centre and that the the extract marked **"පැ15"** shows that, the land claimed by the 2nd defendant is a different and separate land.

Thereafter, the learned judge held that the evidence established that, from 1994 onwards, the plaintiff had cultivated the land which is the subject matter of this action and that, the extract marked **"පැ14"** proved that, prior to 1994, the land had been possessed and enjoyed by L. S. Perera, who was the father of L.S. Nimal Perera and L.S. Wimal Perera. The learned judge held that, the evidence of the plaintiff's brother corroborated the position that the plaintiff's immediate predecessors in title had possessed and enjoyed the land before the plaintiff commenced cultivating the land on their behalf, in 1994. On the aforesaid basis, the learned District Judge held that, the plaintiff had also established prescriptive title to the land.

Finally, the learned trial judge held that, an examination of deed no. 978 marked **"වි1"/"පැ11"** relied on by the 2nd and 3rd defendants to establish the 2nd defendant's title to Lot "B" shown in plan no. 329 marked **"පැ1"**, showed that, the land referred to in that deed was different and separate to the land which is the subject matter of this action. The learned judge observed that, the 2nd and 3rd defendants had led no other evidence to support their claim that they had possessed the land which is the subject matter of this action or that they have title to that land.

Accordingly, the District Court entered judgment for the plaintiff as prayed for in the plaint and dismissed the 2nd and 3rd defendants' claim in reconvention.

The 2nd and 3rd defendants appealed to Provincial High Court of the Western Province exercising Civil Appellate Jurisdiction holden in Avissawella. During the pendency of the appeal, both the 2nd and 3rd defendants died and their sister was substituted in their place.

While the appeal was being heard, the defendants sought to produce a copy of the decree in the aforesaid D.C. Avissawella Case No.3204 in which the aforesaid plan no. 329 marked **"පැ1"** had been prepared together with a copy of the handwritten judgment in that case. Learned counsel appearing for the plaintiff and the 1st defendant did not object to the production of these documents in appeal and the learned High Court Judges allowed these documents to be produced, marked **"X"**. It should be mentioned here that the handwriting on the copy of the judgment has faded and several sections of the judgment are indecipherable.

The High Court set aside the judgment of the District Court and dismissed the plaintiff's action holding that the plaintiff had failed to prove title upon the deeds marked **"පැ3"** to **"පැ8"** which the plaintiff relied on and also holding that the plaintiff had failed to establish prescriptive title. The learned High Court Judges did not enter judgment in favour of the 2nd and 3rd defendants since they held that the 2nd and 3rd defendants had failed to prove title to the lands claimed by them.

The plaintiff made an application to this Court seeking leave to appeal from the judgment of the High Court. This Court granted the plaintiff leave to appeal on the following questions of law which are reproduced *verbatim*:

(i) Have their Lordships of the Provincial High Court of the Western Province (exercising civil appellate jurisdiction at Avissawella) erred in law in holding that the Petitioner did not prove prescriptive title to the land which is morefully described in the schedule to the plaint by cogent evidence ?

(ii) Have their Lordships of the Provincial High Court of the Western Province (exercising civil appellate jurisdiction at Avissawella) erred in law in holding that the Petitioner cannot succeed on the grounds that he is entitled to the bigger land on the decree of the case bearing number 3204 ?

(iii) Have their Lordships of the Provincial High Court of the Western Province (exercising civil appellate jurisdiction at Avissawella) erred in law by reaching the conclusion that the petitioner's predecessors in title did not acquire prescriptive title to the entire land which is morefully described in the schedule to the plaint ?

Questions of law no.s (i) and (iii) can be considered together since they both ask whether the learned High Court Judges erred when they held that, the plaintiff had not proved prescriptive title.

In this regard, firstly, the learned High Court Judges have formed the erroneous view that, deed no. 976 marked **"පැ3"**, which is the stem from which the plaintiff claims his title, states that the transferor - R.A.P. Ranasinghe - acquired title to the land by the decree entered in D.C. Avissawella Case No. 3204 and *by prescription*. That is an error since the deed marked **"පැ3"** makes **no** reference to R.A.P. Ranasinghe acquiring title *by prescription*. What this deed does state is that, R.A.P. Ranasinghe acquired title *"by inheritance from my father R.W. Mudiyanse upon Deed of Transfer No. 13387 dated 19th May 1927 attested by C.P.D.S. Senanayaka Notary Public of Ruwanwella and upon decree entered in case no. 3204 of the District Court of Avissawella."*. Having misread the deed marked **"පැ3"**, the High Court held that, R.A.P. Ranasinghe could not have acquired prescriptive title because less than ten years had passed between the time when the decree marked **"X"** dismissing D.C. Avissawella Case No. 3204 was entered and the day on which deed marked **"පැ3"** was executed. This was clearly an error because the deed marked **"පැ3"** placed *no* reliance on R.A.P. Ranasinghe having prescriptive title.

Secondly, it has to be considered whether the evidence before the Court showed that, the plaintiff and his predecessors in title had undisturbed and uninterrupted possession of the land for more than ten years prior to the plaintiff instituting this action on 15th May 2000.

In this regard, it is seen that, the learned High Court Judges have decided to disregard the extract marked **"පැ14"** from the Agrarian Services Land Register because the learned judges thought this extract relates to the year 2000 (which is the year this action was instituted) and also because the learned judges decided that L.S. Perera, who is named as the Owner/Landlord of the land in **"පැ14"**, has no connection to the plaintiff's chain of title. The learned judges erred on both counts. As stated earlier, the Officer from the Agrarian Services Centre had testified that **"පැ14"** is an extract of the entries made in the Agrarian Services Land Register for the year 1984 - *ie:* 16 years *before* this action commenced. Further, there was clear evidence that, L.S. Perera was the father of L.S. Nimal Perera and L.S. Wimal Perera who are the immediate predecessors in title of the plaintiff and the 1st defendant. Further, as mentioned earlier, the extract marked **"පැ14"** records that, L.S. Perera possessed the *entirety* of the paddy field named "Talduwage Deniya" also named "Aswedduma Kumbura" which is A:2 R:2 P:26 in extent – *ie:* the very same land claimed by the plaintiff and described in the plaint as Lots "A", "B" and "C" in Plan No. 329 marked **"පැ1"**. The learned High Court Judges also failed to realise that, the extract marked **"පැ14"** proves that, the Agrarian Services Centre had specifically recorded that, this land is *one* paddy field and *not* three separate lands. In this regard, it is also relevant to mention that, deed no. 21580 marked **"පැ6"** reveals that, when K.D. Jane Nona gifted that land to her two sons, L.S. Nimal Perera and L.S. Wimal Perera, they were living in Dehiwela and in France, respectively. That would explain why their father is named in the extract marked **"පැ14"** as owning and possessing the land. Thus, when all these facts are taken together, the extract marked **"පැ14"** constitutes cogent evidence which

establishes that, in 1984, the plaintiff's predecessors in title were in possession of the land which is the subject matter of this action.

Further, the learned High Court Judges appear to have disregarded the fact that, the evidence of the plaintiff's brother who stated that, from 1989 onwards - which is more than 10 years before the action was instituted - he was aware that L.S. Nimal Perera and L.S. Wimal Perera possessed the land and that, in 1994, the plaintiff commenced cultivating the land on their behalf, was not challenged in cross examination.

Thus, there was clear evidence before the Court to establish that, the plaintiff and his predecessors in title had possession of the land from, at least, 1984 onwards, which is 16 years before this action was instituted. Further, the deeds marked **"පැ3"** to **"පැ8"** relied on by the plaintiff to prove his title - which demonstrate an unbroken chain of title stretching back to 1952, which is 48 years before this action was instituted - all state that, the transferors named therein have had possession of the *entirety* of the land shown as Lots "A", "B" and "C" in plan no. 329 marked **"පැ1"** and that this possession has come to the plaintiff and the 1st defendant.

In the face of this evidence, the 2nd and 3rd defendants were unable to adduce any evidence to contradict the plaintiff's claim that he and his predecessors in title had exclusive possession of the entire land upon the title set out in the deeds marked **"පැ3"** to **"පැ8"**. The 2nd and 3rd defendants were also unable to adduce any evidence to even suggest that, the possession of the plaintiff and his predecessors in title had been disturbed or interrupted in any manner whatsoever until the incident on 03rd May 2000 which led to the plaintiff filing this action a few days later.

In these circumstances, the learned trial judge, who had the benefit of seeing and hearing the witnesses, held that the plaintiff had proved prescriptive title. I cannot see aside that determination by the trial judge. Further, as observed earlier, the learned High Court Judges erred gravely when they disregarded the valuable evidence presented by the extract marked **"පැ14"**. Accordingly, questions of law no.s (i) and (iii) are answered in the affirmative.

Question of law no. (ii) asks whether the learned High Court Judges erred when they held than, the plaintiff's action had to fail because the plaintiff is claiming title to a bigger land than the land which is the subject matter of the decree entered in D. C. Avissawella Case No. 3204.

The learned High Court Judges erred when they reached that conclusion because the extent of the land which was the subject matter of D.C.Avissawella Case No.3204 was not known. Further, the learned High Court Judges mistakenly assumed that, the deed marked **"පැ3"** establishes that the plaintiff relies *solely* on the decree marked **"X"** to vest his predecessors with title to the land. In doing so, the learned judges overlooked the fact that, the deed marked **"පැ3"** clearly states that, R.A.P. Ranasinghe's title to the land derives from paternal inheritance upon deed of transfer No. 13387 *in addition*

to the decree in D. C. Avissawella Case No. 3204. Thus, any rights that the plaintiff's predecessor in title may have derived from the decree marked **"X"** constituted only one of the sources of title claimed by R.A.P. Ranasinghe.

In any event, the learned High Court Judges completely overlooked the fact that, deed no. 976 marked **"පැ3"** which is the commencement of the chain of title relied on by the plaintiff, specifically states that, the land which is the subject matter of the deed is A:2 R:2 P:26 in extent, which is exactly the same extent of land claimed by the plaintiff and described in the schedule to the plaint and shown as the aggregate extent of Lots "A", "B" and "C" in plan no. 329 marked **"පැ1"**. It is exactly that same extent of land, with the very same boundaries described in the original deed no. 976 marked **"පැ3"**, which has been passed on to the plaintiff and the 1st defendant by the later deeds marked **"පැ4"** to **"පැ8"** relied on by the plaintiff to prove his title. Therefore, the plaintiff was certainly not claiming a bigger land than he was entitled to under and in terms of his chain of title. Therefore, question of law no. (ii) is also answered in the affirmative.

As a result of the aforesaid determination of the three questions of law which are before us, the judgment of the High Court has to be set aside and the judgment of the District Court has to be restored.

Before concluding, I would also like to advert to the learned High Court Judges' determination that the plaintiff had failed to prove title upon the deeds relied on by the plaintiff. A perusal of the judgment shows that the learned judges reached this conclusion because they mistakenly thought the deed marked **"පැ3"** establishes that the plaintiff relied solely on the decree marked "**X"** to vest his predecessors with title to the land. The learned judges then went on to hold that, the plaintiff could not do so because the decree marked "**X"** showed that, D.C. Avissawella Case No.3204 had been dismissed and, therefore, no title could flow to any party from that decree. In this regard, the learned judges stated, *"In the circumstances now the issue in hand is to determine whether the Plaintiff Predecessor in title namely R.A.P. Ranasinghe got the title to the entire land on the decree of the case bearing no. 3204. In my view it cannot be happened because the case has been dismissed."*.

The High Court erred in this process of reasoning, Firstly, as mentioned earlier, the learned judges overlooked the fact that, the deed marked **"පැ3"** states that, R.A.P. Ranasinghe's title to the land derives from paternal inheritance upon deed of transfer No. 13387 *in addition to* the decree in D. C. Avissawella Case No. 3204. Thereafter, the learned judges wrongly assumed that D. C. Avissawella Case No. 3204 was a Partition Case and held that no party can claim any title based on a decree which dismisses a Partition Case. Perhaps in arriving at this assumption, the learned judges relied on factual misrepresentations made in the Written Submissions dated 28th April 2014 filed on behalf of the 2nd and 3rd defendants which submitted that, D.C. Avissawella Case No. 3204 was a Partition Case and that, Plan No. 329 marked **"පැ1"** was a Partition Plan and the submission that, *"The decree marked as `X' clearly*

states that the case was dismissed. When a ***partition case*** *is dismissed there are no new rights that accrue from it."*. [emphasis added by me]

But, a glance at the decree and the marked "**X"** and the sections of the handwritten judgment which can be read, would have shown that, D.C. Avissawella Case No. 3204 was an action instituted by one Adasi Gamarallalage Peiris Appuhamy for a declaration of title to a land and that the decree marked **"X"** only states that, the plaintiff's action has been dismissed with costs. Therefore, all that could be safely concluded from the decree and judgment is that, the *plaintiff* in that case – *ie:* Adasi Gamarallalage Peiris Appuhamy - cannot claim title under the decree marked **"X"**. Any rights which the *defendants* in that case may have claimed to the land, would have remained undisturbed by the decree marked **"X"**. Therefore, if the aforesaid reference in the deed marked **"පැ3"** was to R.A.P. Ranasinghe deriving a part of his rights to the land from any rights held by the *defendants* in D.C.Avissawella Case No. 3204, the decree marked **"X"** would establish that those rights remained undisturbed by the claims made by the plaintiff in that action. However, nothing further can be determined from the decree and judgment marked **"X"**. But, what does remain certain is that, the High Court erred when it held that, the decree marked **"X"** *ex facie* disproved the plaintiff's title flowing from the deed marked **"පැ3".**

In any event, as mentioned earlier, the duly proved deeds marked **"පැ3"** to **"පැ8"** show an unbroken chain of title, stretching over 48 years, by which the entirety of the land shown as Lots "A", "B" and "C" in plan no. 329 marked **"පැ1"** eventually passed to the plaintiff and the 1st defendant. In fact, as set out earlier, in cross examination, the 3rd defendant admitted that, K.M. Soma Tillekaratne Menike who obtained the land under the deed marked **"පැ 4"**, had title to the land at some point. The 2nd and 3rd defendants did not produce any deed which disputes the plaintiff's title. Further, as mentioned earlier, the evidence shows that the plaintiff and his predecessors in title had possession of the entire land.

In these circumstances, it appears that, the learned High Court judges erred when they held that the plaintiff failed to prove title to the land. However, this issue need not be examined further since there is no question of law to be decided on this issue and since any injustice which might have been caused to the plaintiff by such an error on the part of the High Court, has been prevented as a result of the aforesaid determination of the questions of law which are before us.

For the reasons set out above, this appeal is allowed. The judgment of the High Court is set aside and the judgment of the District Court is restored. The Plaintiff-Respondent-Petitioner/Appellant is entitled to recover costs in a sum of Rs.25,000/- from the 2A and 3A Defendants-Appellants-Respondents.

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 Application for Special Leave to Appeal in terms of Article 128 of the Constitution

P.N. Maharajah,
No. 133/5, Nawala Road,
Narahenpita,
Colombo 05.

Deceased-Petitioner

1. Nagan Maharajah Weerasingham,
2. Muniyandi Aswath Ammal
3. Nagam Maharajah Nirmala

All of,
No. 133/5, Nawala Road,
Narahenpita, Colombo 05.

4. Nagam Maharajah Thilagawathie
5. Nagam Maharajah Thilakaranee

Both of,
No. 16/10, Liyanage Mawatha,
Nawala Road, Rajagiriya.

Substituted-Petitioners

SC. Appeal No. 121/2010

SC (SPL) 286/2008

CA/Writ/1923/2006

Vs,

1. Hema Wijesekara,
   The Commissioner of National Housing,
   National Housing Department,
   "Sethsiripaya"Battaramulla.

2. Perumal Muniyandi Sundarammal (Deceased),
   No. 133/5, Nawala Road,
   Narahenpita, Colombo 05.

3. M.S. Jaldeen
4. H. Akurugoda
5. R.W.M.S.B. Rajapkse
6. N.T. Padmadasa

All members of the Board of Review under Ceiling on Housing Property Law
No. 10G, Sri Vipulasena Mawatha,
Colombo 10.

Respondents

7. Sunil Kannangara
Director-Housing,
National Housing Department,
'Sethsiripaya' Battaramulla.

Added Respondent

Now Between

1. Nagan Maharajah Weerasingham,
2. Muniyandi Aswath Ammal
3. Nagam Maharajah Nirmala

All of,
No. 133/5, Nawala Road,
Narahenpita, Colombo 05.

4. Nagam Maharajah Thilagawathie
5. Nagam Maharajah Thilakaranee

Both of,
No. 16/10, Liyanage Mawatha,
Nawala Road, Rajagiriya.

Substituted-Petitioners-Petitioners

1. Hema Wijesekara,
The Commissioner of National Housing,
National Housing Department,
"Sethsiripaya" Battaramulla.

2. Perumal Muniyandi Sundarammal (Deceased),
No. 133/5, Nawala Road,
Narahenpita, Colombo 05.

2A. Kasamuthu Singiah
No. 133/6, Nawala Road,
Narahenpita, Colombo 05.

2B. Kasamuthu Sinniah
No. 133/5, Nawala Road,
Narahenpita, Colombo 05.

3. M.S. Jaldeen
4. H. Akurugoda
5. R.W.M.S.B. Rajapkse
6. N.T. Padmadasa

All members of the Board of Review under Ceiling on Housing Property Law
No. 10G, Sri Vipulasena Mawatha,
Colombo 10.

Respondents-Respondents

7. Sunil Kannangara
Director-Housing,
National Housing Department,
'Sethsiripaya" Battaramulla.

8. Raja Gunaratne
The Commissioner of National Housing,
National Housing Department,
"Sethsiripaya" Battaramulla

9. Dr. M. Karunadasa
The Commissioner of National Housing,
National Housing Department,
"Sethsiripaya" Battaramulla

10. S. Collure
The Commissioner of National Housing,
National Housing Department,
"Sethsiripaya" Battaramulla

Added Respondents-Respondents

Before: **Sisira J. De. Abrew J**
Priyantha Jayawardena PC J
Vijith K. Malalgoda PC J

Counsel: S.N. Vijithsingh for Substituted Petitioners-Petitioners
Ms. Yuresha De. Silva SSC for the 10th Added Respondent-Respondent
A.C.F. Benazir for 2A and 2B Substituted Respondents-Respondents

Argued on **26.10.2017**
Decided on **19.02.2018**

Vijith K. Malalgoda PC J

The Substituted Petitioners Petitioners have filed the present special leave to appeal application against the decision by the Court of Appeal in CA/Writ Application No. 1923/2005. When this matter was supported, this court had granted special leave on the questions of law raised in sub-paragraphs (a), (b) and (c) to paragraph 43 of the Petition which reads as follows;

43 (a) Whether the Court of Appeal err in law by holding that, at the time of deciding the questions of preliminary objections the Commissioner of National Housing, (the said decision was affirmed by the board of review) could determine the entire application of the Petitioner by dealing with the merits of the application without informing the Petitioner, that the Commissioner was going to decide the merits of the application as well.

(b) Whether the Court of Appeal err in law by holding that the inquiry before the commissioner could correctly proceeded under section 9 of the Ceiling on Housing Property Law and whereas the Court of Appeal by previous judgment dated 21st May 2002 held that the previous owner had sold the houses within the permitted time, in terms of section 10 of the Ceiling on Housing Property Law, (and there was no application made by the contesting Respondent under section 9 of the ceiling on housing property law?

(c) Did Court of Appeal err in law by not deciding that the inquiry should have proceeded in terms of section 13 of the Ceiling on Housing Property Law as observed by the Court of Appeal in previous judgment dated 21st May 2002 and hence equities of the parties would be a relevant consideration, it had to be decided by leading evidence in terms of section 13 of the said law.

As revealed before us, after instituting the said Writ application before the Court of Appeal, the Petitioner P.N. Maharajah had died on 06.06.2007 and his heirs were substituted as petitioners to the said application.

As further revealed before this court, the Deceased Petitioner and one K. Kasimuththu were employed in a company by the name Ramsay Limited. At the time the Ceiling on Housing Property Law came into operation the said Ramsay Limited was owned 44 tenements including the two tenements occupied by P.N. Maharajah and K. Kasimuththu. The two tenements occupied by the said P.N. Maharajah and K. Kasimuththu were bearing tenement numbers 94/5 and 94/6 respectively.

The present application is limited to the tenement bearing number 94/6 occupied by the said K. Kasimuththu and later by his wife Muniyandi Sundarammal and there were series of cases, including several inquiries under the Ceiling on Housing Property Law, a District Court action and two Writ applications filed before the Court of Appeal with regard to the said property. By the present application the Substituted Petitioners Petitioners were challenging the decision by the Court of Appeal dated 15.09.2008.

Since the said decision by the Court of Appeal, referred to an inquiry under the Ceiling on Housing Property Law, it is necessary to understand the background to the dispute between the two parties with regard to the tenement referred to above.

As referred to above, the Deceased Petitioner and the present Substituted Petitioners Petitioners (here-in-after referred to as Petitioners) lived in tenement No. 94/5 and there is no dispute with regard to the said tenement. The Deceased Petitioner being the tenant of the said tenement, purchased the said tenement from its previous owner at the time Ceiling on Housing Property Law came into operation, since the said premises came within the provisions of the said law.

This fact is very much clear from the document produced marked 7R10A which is a letter by the previous owner Ramsay Limited to the Commissioner of National Housing dated 11th January 1974 and as revealed this is a vital communication by the said previous owner with regard to the sale of houses to its previous occupants.

The 1st paragraph of the said letter reads as follows;

> "With reference to your letter No, CH/DB/1A/74 dated 7th January 1974, we write to inform you that out of the 44 houses in question five houses already been sold to the tenants. Of the balance, to the best of our knowledge and belief twelve of the tenants are citizen of Ceylon and 27 tenants are non-citizens. In view of the fact that they are non-citizens they could not purchase the houses"

From the above it is very much clear that, at the time the above letter was written on 11th January 1974, 5 houses had been sold to its tenants.

If the said position is correct, the balance houses would be vested with the Commissioner of National Housing by the operation of Ceiling on Housing Property Law and the disposal of the said property would have to be under the provisions of the said law. With regard to the 5 houses referred to above it is further clear that those tenements had been sold to its rightful tenants and not to any other person, including tenant of the other tenements.

However as revealed before the inquiry conducted by the Commissioner of National Housing, the said Ramsay Limited had disposed tenement bearing No. 94/6 to the Deceased Petitioner on 11th January 1974 by deed of transfer No. 545.

It was further revealed at the said inquiry that, when the said Ramsay Limited informed by letter dated 11th January 1974 (on the same day as the deed of transfer had been executed) that they have disposed 5 properties to its tenants, the Commissioner believed that the said 5 transfers are

to the rightful tenants and therefore vesting orders were cancelled in respect of those tenements by letter dated 06.06.1977.

By letter dated 17.03.1998 the said Commissioner of National Housing had cancelled his previous order and vested the tenement bearing No. 94/6 with the Commissioner of National Housing in order to proceed under the provisions of the Ceiling on Housing Property Law.

The Petitioners predecessor in title had filed a Writ application before the Court of Appeal against the said decision and the Court of Appeal allowing the said application, directed the Commissioner of National Housing to hold a fresh inquiry in order to consider whether the transfer referred to above by the said Ramsay Limited comes within the provisions of sections 9 and 10 of the Ceiling on Housing Property Law.

The Petitioners predecessor in title who agreed to face a fresh inquiry by the said order of the Court, had gone before the Commissioner of National Housing and raised a preliminary objection for the maintainability of the said inquiry. The Commissioner of National Housing, who permitted the parties to even file written submissions on the issues raised before him, finally disposed the whole matter when he realized that the Petitioner's predecessor in title is raising all these issues as a delaying tactic.

The said decision of the Commissioner of National Housing was once again considered by the Ceiling on Housing Property Board of Review and affirmed the said decision by its order dated 21.09.2005.

The Court of Appeal once again reviewed the decisions of both the Commissioner of National Housing and the Ceiling on Housing Property Board of Review and affirm the said decision to vest the tenement bearing No. 94/6 with the Commissioner of National Housing when Petitioners Predecessor in title filed a Writ application before the Court of Appeal and by the present application the Petitioners have challenged the said decision.

When deciding the said matter the Court of Appeal was mindful of the provisions of section 10 of the Ceiling on Housing Property Law which reads as follows;

Section 10; Where, on the date of commencement of this law, any person owns any house in excess of the permitted number of houses, such person may, if such person is an individual, within a period of twelve months from such date, and if such person is a

> body of persons, within a period of six months of the date on which the determination under this law by the Commissioner or as the case may be, by the Board of Review, of the maximum number of houses that may be owned by such body, or where such body applies for, and is granted an extension of time by the Commissioner within six months from the November 1, 1974, **dispose of such house with notice to the Commissioner** unless the tenant of such house or any person who may under section 36 of the Rent Act succeed to the tenancy of such house has made application with simultaneous notice to the owner for the purchase of such house (emphasis Added)

When going through the provisions of section 10 above, it is clear that, the above provision of the Ceiling on Housing Property Law deals with a situation, where a third party could purchase a property, that comes within the Ceiling on Housing Property Law, and such disposition can only take place with notice to the Commissioner of National Housing. As discussed above, the body of persons which belongs the tenement referred to above had transferred it to an outsider within the meaning of the Ceiling on Housing Property Law, without following the said provision of the Ceiling on Housing Property Law, pretending that it was sold to its rightful tenant.

Requirement under section 10 of the Ceiling on Housing Property Law was discussed in the case of ***Wahab V. Jayah (1988) 1 Sri LR 78*** by the Supreme Court as follows;

> "The Ceiling on Housing Property Law No. 1 of 1973, came into operation on 13.1.73. Under section 8 of the said law the Plaintiff made statutory declaration (P1 dated 4.4.73) which included the premises in suit, as a house owned by the appellant in excess of the permitted number of houses which the Plaintiff did not propose to retain. Section 10 of the said law provides that any person who owns any house in excess of the permitted number may, within a period of 12 months from the date of the commencement of the Law, *dispose* of such house with notice to the Commissioner unless the tenant of such house had made an application with simultaneous notice to the present owner for the purchase of that house."

During the arguments before this court, as well as before the Court of Appeal, the Petitioners alleged that rules of natural justice was not followed by the Commissioner of National Housing when making the impugned order without granting an opportunity to present their full case before the Commissioner.

However as observed earlier in this judgment, the Petitioners predecessor in title had raised an unprecedented objection before the Commissioner of National Housing with regard to his jurisdiction, when the Court of Appeal had directed him to hold an inquiry and even after raising the said objection, the Commissioner had granted time for the parties to file written submissions but, when he realized that it was only a delaying tactic he considered the entire matter on its merit with the help of the detail submissions placed by both parties and made his order.

In the said circumstances, I see no merit in the present application. I therefore answer the questions of law raised by the Petitioners in the negative and dismiss the application with costs.

Application dismissed with costs.

Judge of the Supreme Court

Sisira J. De. Abrew J

I Agree,

Judge of the Supreme Court

Priyantha Jayawardena PC

I Agree,

Judge of the Supreme Court

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

In the matter of an Appeal with Leave to Appeal obtained from this Court.

GUNESHI MALLIKA GOMES [*nee* GUNAWARDENA]
No.15/1/A, Gomes Path,
Colombo 4.

PLAINTIFF

S.C. Appeal No. 123/14
S.C. HC. CA. LA No. 215/14
HC Appeal No.
WP/HCCA/MT/134/10/F.
D.C. Mount Lavinia
Case No. 3600/2002/D

VS.

JAMMAGALAGE RAVINDRA RATNASIRI GOMES
No.15/1/A, Gomes Path,
Colombo 4.

DEFENDANT

AND BETWEEN

GUNESHI MALLIKA GOMES [*nee* GUNAWARDENA]
No.15/1/A, Gomes Path,
Colombo 4.

PLAINTIFF-APPELLANT

VS.

JAMMAGALAGE RAVINDRA RATNASIRI GOMES
No.15/1/A, Gomes Path,
Colombo 4.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

GUNESHI MALLIKA GOMES [*nee* GUNAWARDENA]
No.15/1/A, Gomes Path,
Colombo 4.

PLAINTIFF-APPELLANT-PETITIONER/APPELLANT

VS.

JAMMAGALAGE RAVINDRA RATNASIRI GOMES
No.15/1/A, Gomes Path,
Colombo 4.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE:	Priyasath Dep PC, CJ H.N.J. Perera J. Prasanna Jayawardena PC, J.
COUNSEL:	S.A. Parathalingam, PC with Varuna Senadhira instructed by M/S Samararatna Associates for the Plaintiff-Appellant-Petitioner/Appellant. Rohan Sahabandu, PC with Hasitha Amarasinghe for the Defendant-Respondent-Respondent.
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Appellant-Appellant on 01st September 2014 and 23rd February 2017. By the Defendant-Respondent-Respondent on 31st October 2014 and 16th February 2017.
ARGUED ON:	15th July 2016, 27th September 2016 and 24th January 2017
DECIDED ON:	07th June 2018

Prasanna Jayawardena, PC, J.

On 20th April 1983, the Defendant-Respondent-Respondent ["the defendant"] and the Plaintiff-Appellant-Petitioner/Appellant ["the plaintiff"] married each other, at Colombo. The plaintiff is the wife. The defendant is the husband. There are four

children born of the marriage - two sons and two daughters. The defendant's mother owned a house at Gomes Path, in Colombo 4. The newly wedded couple lived there for a few years. Later, they moved to the defendant's parental home in Dehiwela and during this time, the house at Gomes Path was renovated. After the renovation was completed, the plaintiff and the defendant lived at this house at Gomes Path, from 1995 onwards. They both described that house as their `matrimonial home'.

On 28th September 2001, the plaintiff instituted action against the defendant in the District Court of Mt. Lavinia praying for a decree of divorce *a vinculo matrimonii* on the ground that the defendant was guilty of constructive malicious desertion. At the time the action was filed, the plaintiff was 40 years of age and the defendant was 43 years of age. When this action was instituted and during the course of the trial, both the plaintiff and the defendant continued to live in the house at Gomes Path, together with their four children.

In this background, the plaintiff stated in the plaint that, from April 1995 onwards, there were frequent disagreements between the spouses and that the defendant and his mother harassed the plaintiff. The plaintiff also averred that, the defendant ill-treated the children of the marriage and failed to meet their needs. She claimed that, the defendant frequently abused, ill-treated and hit the plaintiff and the children and that he often instructed the plaintiff to leave the matrimonial home and that he threatened to eject the plaintiff from the matrimonial home and to divorce the plaintiff. However, in paragraph [8] (ඇ) of the plaint, the plaintiff specifically averred that, despite these difficulties, the plaintiff continued to tolerate the situation in the interests of her children.

Thereafter, the plaintiff made the following averments with regard to a specific incident which is alleged to have occurred on 07th July 2001: *ie:* that, on the night of 07th July 2001, the defendant, without any reasonable or justifiable cause, assaulted the plaintiff in an inhuman and ruthless manner [අමානුෂික හා නිර්දය ලෙස පහර දෙන ලදී] in the presence of the domestic staff. The plaintiff stated that, the defendant then ordered the plaintiff to leave the matrimonial home and threatened to pour kerosene on the plaintiff and burn her unless she does so. The plaintiff stated that, on the following morning, she made a complaint to the Police at the Bambalapitiya Police Station. This complaint was marked "පැ 6" at the Trial.

The plaintiff specifically averred that, as a result of the aforesaid incident, the plaintiff was compelled, from 07th July 2001 onwards, to terminate all marital relations and connections she had been having with the plaintiff. Further, the plaintiff specifically pleaded that, from 07th July 2001 onwards, she and the defendant ceased to cohabit with each other and lived entirely separately from each other, but within the house at Gomes Path. She also pleaded that, all attempts made by her and her relatives and friends to resuscitate the marriage, failed. The plaintiff stated that the plaintiff and the defendant have not cohabited from 07th July 2001 onwards and up to the date of the institution of this action on 28th September 2001,

Finally, the plaintiff averred that, the defendant engaged in the aforesaid conduct with the intention of ending the marriage and that, accordingly, the defendant is guilty of constructive malicious desertion.

In his answer, the defendant flatly denied the allegations made against him by the plaintiff in the plaint. He pleaded that the plaintiff has made these false allegations in her efforts to obtain a divorce from the defendant and alleged that, the plaintiff had made a false complaint to the Police on 08th July 2001. The defendant averred that, there had been some minor disputes between the spouses but that the defendant bore these difficulties in the interests of his children.

When the trial commenced, the plaintiff and the defendant framed their issues based on the averments in the plaint. The plaintiff gave evidence. She did not call any other witnesses. Similarly, only the defendant gave evidence.

A perusal of the judgment of the learned District Judge shows that he has considered the evidence, in detail. Having done so, he has observed that, the plaintiff has not claimed that, *prior to* 07th July 2001,the defendant had, by his deeds or words, sought to end the marriage or to eject the plaintiff her from the matrimonial home or to make it impossible for her to remain in the matrimonial home.

With regard the alleged incident which the plaintiff states occurred on 07th July 2001, the learned trial judge observed that, although the plaintiff had stated in her complaint marked "ළ 6" that, the defendant slammed the plaintiff's head against the wall, hit her with a torch and broken some furniture, the plaintiff has *not* made these claims during her evidence-in-chief. The learned judge went on to note that, although the plaintiff had stated in the plaint and in "ළ 6", that the defendant *threatened* to pour kerosene on her and burn her, the plaintiff has claimed, during her evidence-in-chief, that the defendant had, in fact, poured kerosene on her and tried to set her on fire. The learned judge noted that, the defendant had stated, at the Police Station, that he wished to continue with the marriage. The learned Judge observed that, despite the plaintiff's claims that the alleged incident was a grave one, she and the defendant had gone *together* to the Police Station on 08th July 2001 and returned *together* to the matrimonial home and that, the plaintiff has *not* asked the police to take any action in pursuance of her allegations of threats, assault and an attempt to set her on fire. In the light of these facts, the learned District Judge held that, the plaintiff had not proved the occurrence of the alleged incident on 07th July 2001, which is pleaded in the plaint.

With regard to the plaintiff's claim that the plaintiff and the defendant had lived entirely separately after 07th July 2001, the learned District Judge held that, the evidence showed that, after that day, the defendant had his meals in the matrimonial home and that these meals were prepared by the plaintiff, the defendant met some of the expenses of the children and continued to contribute towards a part of the domestic expenses and utilities bills of the household and regularly supplied the household with rice and liquid petroleum gas. The learned judge concluded that this evidence showed that a degree of matrimonial relationship between the spouses had continued after 07th July 2001.

In the light of these findings, the District Court held that, the plaintiff had failed to establish that the defendant was guilty of constructive malicious desertion and, therefore, dismissed the plaintiff's case.

The plaintiff appealed to the Provincial High Court of Civil Appeal holden in Mount Lavinia. In appeal, the learned High Court Judges affirmed the judgment of the District Court and dismissed the plaintiff's appeal.

The plaintiff sought leave to appeal from this Court. Leave to appeal was granted on the following four questions of law:

(i) Whether the Civil Appellate High Court erred when it held that the Police Statements marked "P3F", "P3G" and "P3H" did not bear evidence of cruelty on the part of the defendant ?

(ii) Whether the Civil Appellate High Court erred when it held that the matrimonial relationship between the parties continued even after the institution of the divorce action and erred by disregarding the evidence led by the plaintiff which established that the parties did not recommence their marital relationship after 07th July 2001?

(iii) Whether the Civil Appellate High Court erred by holding that the marriage between the plaintiff and the defendant had not failed ?

(iv) Whether the Civil Appellate High Court erred by holding that the plaintiff had failed to establish that the defendant was guilty of constructive malicious desertion ?

In this regard, it hardly needs to be said here that, section 19 (1) of the Marriage Registration Ordinance No. 19 of 1907, as amended, lists *"malicious desertion"* as one of the three grounds on which a decree of divorce *a vinculo matrimonii* may be entered by a competent court. It is equally well known that, "malicious desertion" may take place either by way of *simple* malicious desertion or by way of *constructive* malicious desertion.

Simple malicious desertion or, as it is sometimes called, *actual* malicious desertion is where the spouse who is alleged to be guilty of malicious desertion physically separates from the matrimonial home or terminates matrimonial consortium, with the intention of deserting his or her spouse. The term *"consortium"* usually denotes the composite incidents of a marital relationship. In **GROBBELAAR vs. HAVENGA** [1964 S SALR (N) 522 at p.525], Harcourt J described the term "*consortium"* as *"….. an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage."* Harcourt J went on to cite Birkett LJ and observe that, that this *"totality"* embraces *"companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state. Taken together, they make up the consortium;"*.

Constructive malicious desertion is where the conduct or speech of the spouse who is alleged to be guilty of malicious desertion gives his or her spouse no reasonable alternative other than to depart from the matrimonial home or to cease matrimonial consortium. In this regard, Gorrel Barnes J has commented in the early and often cited case of **SICKERT vs. SICKERT** [1899 Probate 278 at p.282], *"In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him."*. This led Lord Merriman to pithily observe in **LANE vs. LANE** [1951 P 284 at p.286] *"Desertion is proved if the husband leaves the home, or drives the wife away from the home, with intent to bring the home to an end and without her consent or fault. It does not matter, therefore, on which side of the front door, so to speak, the spouses are found when they part."*.

The four questions of law set out above require this Court to examine the evidence placed before the District Court and then determine whether the High Court was correct when it affirmed the view taken by learned trial judge that, the plaintiff had failed to prove that the defendant was guilty of constructive malicious desertion.

However, before examining the evidence, it is necessary, to ascertain *what* the plaintiff in this case was required to prove in order to obtain a divorce on the ground of constructive malicious desertion by the defendant. In order to do so and in the light of the need to carefully consider the plaintiff's appeal, particularly in view of the facts and circumstances of this case, this Court should examine the principles of the applicable Law.

In this regard, the Marriage Registration Ordinance does not define the term *"malicious desertion"* used in Section 19 (2) of that enactment. Therefore, one has to look at the decisions of the Courts to ascertain what amounts to *"malicious desertion"*. The decisions of our Courts on this subject frequently refer to decisions of the English Courts which have influenced the development of our Law in this area. This led a learned author [Law and the Marriage Relationship by S. Ponnambalam - 2nd ed. at p. 6] to comment, with regard to the decisions of our Courts on the law of marriage and divorce, that *"Indeed (our) judicial decisions are replete with reference to English law authority ….."*. A perusal of the decisions on malicious desertion in South Africa shows that the Courts in that country too, have referred to English decisions when formulating the South African law on malicious desertion. In this background, in addition to examining the decisions of our Court on malicious desertion, it will be useful to look at the decisions of the English Courts. When one does so, it is soon seen that, not only is there an, at times bewildering, multitude of cases where the English Courts have made pronouncements on malicious desertion, there are instances where it is difficult to reconcile the views that have been expressed in some of these cases. It is, perhaps, this, which led Lord Merriman P to observe, in **WATERS vs. WATERS** [1956 1 AER 432 at p. 437], *"I am not going to attempt the task, which would be difficult if not impossible, of reconciling all the recent cases in the Court of Appeal on these topics, or of reconciling some of them with some of the older cases."*.

However, a study of the decisions of our Courts and a perusal of the decisions of the English Courts together with a reference to the South African decisions, does enable the extraction of some broad principles applicable to the question of what constitutes malicious desertion, in our Law.

Firstly, it is evident that, broadly speaking, malicious desertion, whether it be simple desertion or constructive desertion, takes place when the following elements come together: the *factum* [fact] of physical separation when the spouse who is alleged to be guilty of malicious desertion deserts the matrimonial home or matrimonial consortium; coupled with *animus deserendi* [intention of deserting] on the part of that spouse. Thus, Lord Greene MR in **BUCHLER vs. BUCHLER** [1947 1 AER 319 at p.320] observed, *"It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion."*. In our law, Poyser J identified these two elements in **ATTANAYAKE vs. ATTANAYAKE** [16 Cey L.R. 206 at p. 207] when he cited, with approval, the statement by Gorrel Barnes J in **SICKERT vs. SICKERT** that, *"In order to constitute desertion, there must be cessation of cohabitation and an intention on the part of the accused party to desert the other."*. The term *"cohabitation"* used by Gorrel Barnes J means much the same thing as the term *"consortium"* mentioned earlier. In **PERERA vs. GAJAWEERA** [2005 1 SLR 103 at p.107], Wimalachandra J observed that establishing malicious desertion requires proving *"….. not only the factum of desertion but also the required animus to repudiate the marital relationship ….."*.

With regard to the <u>first</u> requirement of the *factum* of desertion or, to use the words of Poyser J in **ATTANAYAKE vs. ATTANAYAKE**, the *"cessation of cohabitation"*, the spouse who is accused of having committed malicious desertion, should have committed the acts or said the words which are said to constitute simple or constructive malicious desertion, *against the wishes* of his or her spouse. As Basnayake CJ stated in **RAJESWARARANEE vs. SUNTHARARASA** [64 NLR 366 at p.369], the desertion must be *"against the desire"* of the deserted spouse.

Consequently, separations by consent or by compulsion caused by an unavoidable requirement such as, for example, a spouse being deployed elsewhere by the armed forces, having to relocate for compelling business purposes or having to live apart for medical reasons would, usually, negative a charge of malicious desertion. However, it also has to be noted that, such consensual or compelled separation may later turn into malicious desertion if it is established that, at some point in time, one of the spouses changed the character of the arrangement and deserted the other. As Greene M.R observed in **PARDY vs. PARDY** [1939 P 288 at p.302], *"A de facto separation may take place without there being animus deserendi, but, if that animus supervenes, desertion will begin from that moment, unless, of course, there is consent by the other spouse."*. A similar observation was made by Sansoni J, as he then was, in **CANEKARATNE vs. CANEKARATNE** [66 NLR 380 at p.382]. However, as observed later, these issues with regard to separation by consent or

compulsion do not arise in the present appeal and, therefore, need not be considered further in this judgment.

A desertion may end if, before the deserted spouse commences an action praying for a divorce on the ground of malicious desertion, the deserting spouse reconciles and returns to the matrimonial home or resumes cohabitation or makes a *bona fide* offer to do so. Further, an unreasonable refusal of such an offer by the erstwhile deserted spouse may, in some circumstances, turn the tables and make the erstwhile deserted spouse a *deserting* spouse. Thus, in **MUTHUKUMARASAMY vs. PARAMESHWARY** [78 NLR 488 at p.493] Sharvananda J, as he then was, stated, *"Termination of desertion can take place by a supervening animus revertendi coupled with a bona fide approach to the deserted spouse with a view to resumption of life together….. The refusal of a defendant's bona fide offer to return which the plaintiff had no right to refuse converted the plaintiff into the deserting party and the plaintiff thereafter became the deserter and rendered himself guilty of malicious desertion."*. A similar observation was made by Sansoni J in **CANEKARATNE vs. CANEKARATNE** [at p.382]. However, as observed later, these issues with regard to reconciliation and return do not arise in this appeal and, therefore, need not be considered further in this judgment.

In cases of *simple* malicious desertion, the *factum* of the desertion is, usually, easy to identify and establish since the spouse who is alleged to have committed malicious desertion physically leaves the deserted spouse and the matrimonial home. Therefore, what remains is to ascertain that the departure was not consensual or for compulsive reasons and also whether there has been a *bona fide* offer to reconcile and return before the institution of the action.

However, it is less easy to identify the *factum* of desertion in cases of *constructive* malicious desertion where the Court is, usually, called upon to decide whether the conduct or speech of the spouse who is alleged to be guilty of constructive malicious desertion gave the deserted spouse no reasonable alternative other than to leave the matrimonial home or to cease cohabitation. Thus, In **ANULAWATHIE vs. GUNAPALA** [1998 1 SLR 63 at p.66] Weerasuriya J [then in the Court of Appeal] stated *"….. when a party seeks a divorce on the ground of constructive malicious desertion what is required to be proved is that, the innocent party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the other party.".* A similar statement was made by Ekanayake J [then in the Court of Appeal] in **FERNANDO vs. FERNANDO** [2007 1 SLR 159 at p.162].

It will be useful to look at the question of what amounts to the type of conduct or speech on the part of the deserting spouse which will be regarded as *"expulsive"* conduct or speech amounting to constructive malicious desertion. Adjectives such as *"grave and weighty"* or *"grave and convincing"* have been sometimes used when referring to the type of conduct or speech which justifies a charge of constructive malicious desertion. However, these adjectives do not, by themselves, help in identifying the nature of such conduct or speech.

Instead, in cases of constructive malicious desertion, the question that the Court is called upon to determine is whether the conduct or speech of the deserting spouse was of a nature which the deserted spouse, who is to be judged on the standard of a reasonable spouse who is in the marital relationship which existed in that particular case, could not be reasonably expected to tolerate and live with, in the light of the facts, circumstances and relationships of that particular case. As Diplock LJ, as he then was], stated in the Court of Appeal in **HALL vs. HALL** [1962 3 AER 518 at p.526] *"For conduct to amount to constructive desertion ….. the conduct must be such that a reasonable spouse in the circumstances and environment of these spouses could not be expected to continue to endure. This I apprehend is what is meant by such expressions as `serious', `convincing', `grave and weighty' ….."* . Diplock LJ wryly added *"….. although I await with some philological excitement an example of conduct which is `grave' without being `weighty'."*

Thus, the type of conduct or speech which will justify a charge of constructive malicious desertion is limited to conduct or speech which can be reasonably regarded as being *expulsive* in the facts, circumstances and relationships of that particular case; and, therefore, excludes trivial or even annoying behaviour which a reasonable spouse in the facts, circumstances and relationships of that particular case, would be reasonably expected to tolerate and live with. Thus, Asquith LJ, as he then was, observed in **BUCHLER vs. BUCHLER** [at p.326] that conduct or speech which will be regarded as being expulsive and constituting constructive malicious desertion "….. *must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other `for better for worse'. The ordinary wear and tear of conjugal life does not in itself suffice."*. On similar lines, Diplock LJ observed, in **HALL vs. HALL** [at p,526], that, *"The undue sensibility or eccentric phobias of the complaining spouse"* will not convert behaviour which *"a reasonable spouse would endure, albeit unhappily, as part of the wear and tear of married life"* into conduct amounting to constructive malicious desertion.

To move on to the second requirement of the *animus deserendi* or, to again use the words of Poyser J in **ATTANAYAKE vs. ATTANAYAKE**, *"intention on the part of the accused party to desert the other."*, the spouse who is accused of malicious desertion, whether it be simple or constructive, should have acted with the deliberate intention of finally terminating and repudiating the marriage and with no intention of resuming the marriage on some future date. Thus, in **SILVA vs. MISSINONA** [26 NLR 113.at p.116], Bertram CJ referred to the need for a *"deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state."* and added that the term `malicious desertion' *"clearly implies something in the nature of a wicked mind."*. The learned Chief Justice went on to say [at p.116] that, the desertion *"must be sine animo revertendi" - ie:* that the deserting spouse must not have the intention of resuming the marriage. In **GOONEWARDENE vs. WICKREMASINGHE** [34 NLR 5 at p.8] Garvin SPJ observed, with regard to malicious desertion, that, *"it must be of such a character as would justify the inference that the spouse who is alleged to have deserted the other did so deliberately and with the intention of repudiating the marriage state."*. See also

Dalton ACJ in **RAMALINGAM vs. RAMALINGAM** [35 NLR 174 at p.178], Basnayake CJ in **RAJESWARARANEE vs. SUNTHARARASA** [at p.369], Weerasekera J [then in the Court of Appeal] in **ROSALIN NONA vs. JAYATHILAKE** [2003 1 Appellate Law Recorder 16 at p.18], Ekanayake J in **FERNANDO vs. FERNANDO** [at p.162] and Wimalachandra J in **PERERA vs. GAJAWEERA** [at p.106 and p.108].

Here too, in cases of *simple* desertion, the *animus deserendi* of the spouse who is alleged to have committed malicious desertion is, usually, easy to identify since that intention is shown by the physical act of leaving the matrimonial home or terminating cohabitation. As Lord Greene MR observed in **BUCHLER vs. BUCHLER** [p.320] *"In the case of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one."*.

However, it is less easy to identify *animus deserendi* in cases of *constructive* malicious desertion since the intention of the spouse who is alleged to have committed constructive malicious desertion remains in the matrimonial home and his intention must be inferred and determined from his or her conduct or speech which is said to have caused his or her spouse to leave the matrimonial home or to cease cohabitation. In this regard, in **BUCHLER vs. BUCHLER**, Lord Greene MR went on to state [at p.320-321], *"In the case of constructive desertion where there is no such significant act as the departure by the spouse who is alleged to be in desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is an expulsion in fact not proved, but it is not legitimate to infer an intention to desert. A man may wish that his wife will leave him, but such a wish, unless accompanied by conduct which the court can properly regard as equivalent to expulsion in fact, can have no effect whatsoever. Conversely, where the conduct of the required nature is established, the necessary intention is readily inferred since no one can be heard to say that he did not intend the natural and probable consequences of his acts ….."*.

There has been some controversy in the English Law on the question of whether the intention of the spouse who is said to be guilty of constructive malicious desertion is to be ascertained *subjectively - ie:* by proof that he or she did, in fact, have the intention of finally ending the marriage at the time of the impugned conduct or speech; or *objectively - ie:* on the basis that he or she must be presumed to have intended the natural and probable consequences of that conduct or speech.

In the case of **BOYD vs. BOYD** [1938 4 AER 180], the Court took the subjective view that, in cases of alleged constructive malicious desertion, it must be proved that the spouse who is accused of constructive malicious desertion did, in fact, have the intention of ending the marriage when he or she indulged in the impugned acts or speech. However, as stated earlier, in **BUCHLER vs. BUCHLER**, Lord Greene MR took a more objective approach and held that, a spouse who is alleged to be guilty of constructively malicious desertion must be presumed to have intended the natural and probable consequences of his or her acts or speech which made the other spouse leave the marital home, even if he or she did not, in fact, intend to end the

marriage. In the later case of **HOSEGOOD vs. HOSEGOOD** [1950 66 1 TLR 735], Denning LJ, as he then was, sought to qualify the objective approach advocated by Lord Greene MR and stated that, when a spouse's behavior compels the other spouse to leave the matrimonial home, the presumption that such a consequence was intended is only one which *may* be drawn and not one which must be drawn and went on to hold that, that proof that the allegedly deserting spouse did not, in fact, intend to terminate the marriage, will absolve him or her of a charge of constructive malicious desertion. However, subsequently, in **SIMPSON vs. SIMPSON** [1951 1 AER 955 at p. 957] Lord Merriman disapproved of the aforesaid view taken by Denning LJ in **HOSEGOOD vs. HOSEGOOD** and followed the approach of Lord Greene MR in **BUCHLER vs. BUCHLER** that a spouse must be taken to have intended the natural and probable consequence of his own behavior.

This divergence of views was addressed by the Privy Council in **LANG vs. LANG** [1954 3 AER 571].which was an Appeal from the High Court of Australia. The judgment of Lord Porter suggests that the Privy Council was of the view that: if the husband's conduct or speech is such that a reasonable man must know that it will probably result in the departure of his wife from the matrimonial home, the fact that the husband did not wish this consequence does not rebut the inference that he intended the probable consequences of his behavior and, therefore, intended his wife to leave home. In the later case of **GOLLINS vs. GOLLINS** [1963 2 AER 966], the House of Lords examined the decision in **LANG vs. LANG** and Lord Reid explained the import of the earlier decision [at p.974] stating, *"So the decision was that if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her, whatever your desire or intention may have been."*.

Thus, the position in the English Law is that: a spouse who is charged with constructive malicious desertion is presumed to have intended the natural and probable consequences of his or her conduct or speech which made the other spouse leave the matrimonial home, even if he or she did not, in fact, intend to end the marriage. The natural and probable consequences of the impugned conduct or speech are to be judged on the standard of a reasonable spouse who is in the marital relationship which existed in that particular case and in the light of the facts, circumstances and relationships of that particular case.

Learned President's Counsel who appeared in this case have not referred to any decision of our Courts which has examined this question. I have not been able to find any such decision either. In my view, the aforesaid approach which is now used in England, recommends itself as a rational and equitable approach. I take this view because this approach, which I may term as being dualist in nature, succeeds in: objectively holding a spouse responsible for the natural and probable consequences of his or her conduct or speech; but, realistically, also takes into account the fact that, since the marital relationship is a very personal one, such behaviour should be subjectively assessed in the light of the relationship between the spouses.

Finally, a spouse who is charged with malicious desertion may counter such charge by: in the case of a charge of simple malicious desertion, establishing that, he or she was justified in leaving the marital home or ceasing cohabitation because he or she was given sufficient cause to do so by the other spouse; and, in the case of constructive malicious desertion, establishing that, the other spouse gave sufficient cause which justified the conduct or speech which is alleged to constitute constructive malicious desertion. This limitation is reflected in the observation made by Innes CJ in **WEBBER vs. WEBBER** [at p. 246], that, a wife who *"left her husband finally against his will and without legal justification ….."* is guilty of malicious desertion - *vide:* also Dalton ACJ in **RAMALINGAM vs. RAMALINGAM** [at p.178] and H.N.G.Fernando J, as he then was, in **ARIYAPALA vs. ARIYAPALA** [65 NLR 453 at p.454]. Here too, what amounts to sufficient cause which justifies a spouse leaving his or her matrimonial home or ceasing cohabitation or engaging in the impugned conduct or speech, will, naturally, vary with each case and the facts, circumstances and relationships which exist in each such case.

The considerations referred to above [other than the effect of a return to the matrimonial or cohabitation or a *bona fide* offer to do so] were neatly encapsulated by Sinha J in **BIPINCHANDRA JAISINGHBHAI SHAH vs. PRABHAVATI** [AIR 1957 SC 176 at p.183] where the learned judge stated, *"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned:(1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively."*.

To sum up, the decisions cited above indicate that, some of the aspects of the constituent elements required to establish `malicious desertion' are:

(i) With regard to the *factum* [fact] of malicious desertion: in the case of simple malicious desertion, the deserting spouse, should have deliberately and without being compelled to do and also without sufficient cause being given by the deserted spouse, left the matrimonial home or ceased cohabitation, against the wish of the deserted spouse; and, in the case of constructive malicious desertion, the deserting spouse should have deliberately and without being compelled to do and also without sufficient cause being given by the deserted spouse, engaged in conduct or speech which gave the deserted spouse no reasonable alternative other than to leave the matrimonial home or to cease cohabitation.

(ii) With regard to the *animus* [intention] of malicious desertion: in the case of simple malicious desertion, the deserting spouse, at the time he or she left the matrimonial home or ceased cohabitation, should have had the deliberate intention of finally terminating and repudiating the marriage and not had an intention of resuming the marriage at some

future date; and, in the case of constructive malicious desertion, the deserting spouse should have engaged in the impugned conduct with the deliberate intention of finally terminating and repudiating the marriage and without having an intention of resuming the marriage at some future date *or* such an intention was the natural and probable consequence of the impugned conduct - *ie:* that he or she should have acted with *animus deserendi*;

(iii) The deserting spouse should not have reconciled and returned to the matrimonial home or resumed cohabitation or made a *bona fide* offer to do so, before the deserted spouse instituted the action seeking a divorce on the ground of malicious desertion.

I have only sought to refer to some of the aspects of the constituent elements of malicious desertion and have not sought to attempt a definition of what constitutes `malicious desertion'. In this regard, it has to be kept in mind that, as Sir Henry Duke [later Lord Merrivale P.] perceptively observed in **PULFORD vs. PULFORD** [1923 Probate 18 at p. 21], *"Desertion is not the withdrawal from a place but from a state of things"*. The nature of that `state of things' and the manner of the `withdrawal' will, naturally, depend on the two spouses, their relationship, their personalities and beliefs, their social and financial position, their past histories and hopes for the future, their families, their circumstances, their dwelling place and a myriad other factors. Consequently, malicious desertion can occur in a wide variety of situations and circumstances. Further, it has to be kept in mind that, the two constituent elements - *ie:* the *factum* of desertion and the *animus deserendi* - may not be readily identifiable as separate elements and, instead, be inextricably intertwined within the facts and circumstances placed before the Court. Quite obviously, the result is that, as mentioned earlier, what constitutes `malicious desertion' will vary from case to case. This makes it unwise to contend that a definition of `malicious desertion' can be formulated and applied across the board. In this regard, I would like, if I may, to echo the sentiments of Lord Jowitt LC in **WEATHERLY vs. WEATHERLY** [1947 AC 628 at p. 631] where he referred to several decisions on `desertion' and commented *" ….. in all of them the judges have declined, in my view wisely declined, to attempt any definition of `desertion'"*.

Quite obviously, the question of whether the elements required to constitute malicious desertion have been established in a particular case are questions of fact to be decided by the Court upon the facts and circumstances of each particular case.

To now turn to the four questions of law before us, I will commence by considering the second question of law and fourth question of law since they are both founded on the principal issue of whether the plaintiff had successfully established that the defendant was guilty of malicious desertion.

The second question of law asks whether the High Court erred when it held that the matrimonial relationship between the parties continued even after the institution of the divorce action and whether the Court disregarded the evidence led by the plaintiff in this regard. The fourth question of law asks whether the High Court erred by

holding that the plaintiff had failed to establish that the defendant was guilty of constructive malicious desertion.

As set out in the aforesaid survey of the applicable legal principles, I should first examine whether the plaintiff had established the *factum* of malicious desertion.
In this regard, as mentioned earlier, the plaintiff acknowledged, in paragraph [8] (ආ) of her plaint, that the marital relationship between the plaintiff and the defendant existed up to 07th July 2001. In fact, during her cross examination, the plaintiff confirmed that, *"*2001 දක්වා විවාහක සම්බන්ධකම් පැවතුනා ..... *"*. Thus, the learned trial judge correctly observed that, the plaintiff did not claim that the marriage relationship had ended prior to 07th July 2001. Instead, as set out earlier, the plaintiff's alleged case is that, the marriage relationship ended as a result of the alleged incident on 07th July 2001 and that, from that date onwards, the plaintiff and the defendant have not cohabited.

With regard to this alleged incident, it has to be noted that, in her contemporaneous complaint to the Police marked "පැ6", the plaintiff has stated that the defendant slammed her head against the wall, hit her with a torch, smashed the furniture, ordered her to leave the house and threatened to pour kerosene on her and burn her if she did not do so. Thereafter, in her plaint, that, the plaintiff has averred that, the defendant assaulted her in an` inhuman and ruthless' manner and that the defendant threatened to pour kerosene on the plaintiff and burn her unless she leaves the matrimonial home. It can be persuasively contended that, if such an incident did, in fact, occur, the plaintiff would have been left with no reasonable alternative other than to leave the matrimonial home or to cease cohabitation and, thereby, make the defendant guilty of constructive malicious desertion. As Weerasooriya J stated in **BABUNONA vs. ALBIN KEMPS** [67 NLR 183 at p.185], *"It is hardly necessary to point out that under section 19 (2) of the Marriage Registration Ordinance (cap. 112), which governs the marriage of the parties to this case, cruelty per se is not a ground for dissolution of a marriage. But cruelty on the part of one spouse, which is of such a nature as to make cohabitation intolerable for the other, amounts in law to constructive malicious desertion by the offending spouse, and would on that basis constitute a ground for dissolution of the marriage at the suit of the innocent spouse."*.

It follows that, the success of the plaintiff's case is dependent on her succeeding in proving that the alleged incident did occur on 07th July 2001 in a manner similar to that described in the plaint.

However, a perusal of the proceedings show that, when the plaintiff gave her evidence-in-chief, she did *not* state that the defendant assaulted her or slammed her head against the wall or hit her with a torch or smashed the furniture or threatened to pour kerosene on her and burn her. Instead, in her evidence-in-chief, the plaintiff only voiced an entirely new accusation that the defendant had, in fact, poured kerosene on her and tried to set on her on fire but was prevented from doing so by the domestic staff and her children. Thus, it was very clear that, the plaintiff placed, before the District Court, significantly conflicting versions of the alleged incident

which is said to have occurred on 07th July 2001. In contrast, the defendant, in his answer and in his evidence, steadfastly denied the occurrence of the incident.

Further, the plaintiff did not call the members of the domestic staff or her children to testify regarding the alleged incident although she said that they had been present at the time. The plaintiff did not give any explanation for not calling these witnesses. The plaintiff did not produce any medical or photographic evidence which would show that she had been assaulted, even though it is likely that there would have been tell-tale signs if she had been assaulted in the manner she claimed in the plaint and in "එ6".

The plaintiff herself said that, she and the defendant had gone to the Police Station *together* and retuned home *together*. That is unlikely to be the conduct of a woman who has been gravely assaulted and threatened by her husband, the previous night. It is also significant that, the plaintiff did not ask the Police to take any action against the defendant with regard to an alleged assault or threat to burn her or, as she claimed in her evidence, an actual attempt to set her on fire.

In the light of all these facts and circumstances, the learned trial judge held that the plaintiff had failed to prove that the alleged incident which she claimed as the ground on which the defendant is guilty of constructive malicious desertion and, accordingly, dismissed the plaintiff's case. The High Court affirmed this determination.

In the light of the facts and circumstances I have recounted, I see no reason why this Court should take a different view. In this regard, there is much wisdom in the observation made Innes CJ in **OBERHOLZER vs. OBERHOLZER** [1921 AD 272 at p.274], which was cited to us by Mr. Sahabandu, PC who appeared for the defendant. Innes CJ stated *"These matrimonial cases throw a great responsibility upon a judge of the first instance; with the exercise of which we should be slow to interfere. He is able not only to estimate the credibility of the parties but to judge of their temperament and character. And we, who have not had the advantage of seeing and hearing them must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong."* .

In view of the second question of law, it is also necessary to examine whether, the conduct of the plaintiff and the defendant *after* 07th July 2001, supports the plaintiff's allegation of constructive malicious desertion.

In this regard, it is relevant to first consider the impact, upon the plaintiff's case, of the fact that the plaintiff and the defendant continued to live in the same house at the time of the institution of the action and, thereafter, during the continuance of the trial.

Learned President's Counsel who appeared in this case have not referred to any decision of our Courts which has examined this specific question. The only decision of our Courts on this point which I have been able to trace, is a case decided by the Supreme Court on 15th July 1881 and reported in SCC IV 107 [names of the parties are not stated in the Report]. In this case, Cayley CJ recognised that, in certain

circumstances, a divorce could be granted on the ground of constructive malicious desertion even though the parties lived in the same house.

Both learned President's Counsel have referred us to the South African case of **HATTINGH vs. HATTINGH** [1948 4 SALR 727] where the two spouses continued to live in one house with their children but the defendant wife refused to perform any marital obligations and did not speak with the plaintiff or look after the house, Broome J held that, the defendant's conduct showed a fixed determination to bring the marriage relationship to an end, which made her guilty of malicious desertion, although the spouse lived under one roof.

A perusal of the decisions of the English Courts on this issue is useful. In **POWELL vs. POWELL** [1922 P 278], Lord Buckmaster held that, malicious desertion can exist even where the two spouses live under the same roof but in two separate parts of the house and have no dealings with each other. Thereafter, in **SMITH vs. SMITH** [1939 4 AER 533], it was held that, the fact that the parties are living under the same roof raises a rebuttable presumption that they are cohabiting but that this presumption can be rebutted by evidence that, in fact, the parties lived entirely separately though they happened to live under the same roof. In this case, the husband lived in the basement of the house and the wife lived on the ground floor of the same house but there were no dealings, relations or conversations between them. Sir Boyd Merriman P held that malicious desertion had been established. The approach taken in **SMITH vs. SMITH** was approved in **ANGEL vs. ANGEL** [1946 2 AER 635] and **WALKER vs. WALKER** [1952 2 AER 138]. In **WILKES vs. WILKES** [1943 1 AER 433], Hodson J took the view that, where the parties live under the same roof but, nevertheless, one of them allege malicious desertion by the other, it must be shown that the two did not share a *"common home"* although they physically lived under the same roof. In **WANBON vs. WANBON** [1946 2 AER 366], the Court held that, malicious desertion can exist even where the two spouses live under the same roof and not in two physically separated tenements but, in the words of Pilcher J at *"completely at arm's length."*. In **HOPES vs. HOPES** [1948 2 AER 920], Denning LJ, as he then was, held that, where the two spouses lived under the same roof, malicious desertion can take place only where the two spouses have, in effect, ceased to share one household and have, in effect, set up two separate households under the same roof. Denning LJ stated [at p. 925], *"In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households or, in other words, when they are no longer residing with one another or cohabiting with one another."*. This approach was later followed in **EVERITT vs. EVERITT** [1949 1 AER 908].**BULL vs. BULL** [1953 2 AER 601], **NAYLOR vs. NAYLOR** [1962 P 253] and **LE BROCQ vs. LE BROCQ** [1964 3 AER 464].

I am of the view that, the aforesaid approach formulated by Denning LJ in **HOPES vs. HOPES**, which has been adopted in several subsequent decisions of the English Courts and constitutes strongly persuasive authority - *ie:* that, where the two spouses live under the same roof, malicious desertion can take place only where the two spouses have, in effect, ceased to share one household and have, in effect, set up two separate households - should be applied to the case which is now before us.

A perusal of the evidence shows that, although it is apparent that the spouses did not talk to each other, the plaintiff stated, in her evidence-in-chief, that (i) she and the defendant live in the same house but occupy separate bed rooms, which suggests that the rest of the living areas of the house, the kitchen and other areas are used by both spouses and their children and that they all use the same entrance door; (ii) the defendant brings about 10 kilos of rice for the use of the house, each month; and (iii) the defendant pays half of the electricity bill. Further, in cross examination, the plaintiff admitted that: (i) she cooked the meals and the defendant had those meals; (ii) the defendant paid for the liquid petroleum gas used in the matrimonial home; and (iii) the defendant met some of the expenses of the children. Thereafter, when the defendant gave evidence, he maintained that he supplied the major part of the needs of the household by way of food and supplies.

The learned trial judge was of the view that, the totality of the aforesaid evidence established that, after 07th July 2001, a degree of a marital relationship had continued between the plaintiff and the defendant while they lived under the same roof. It appears to me that, although the evidence does suggest that, the plaintiff and the defendant lived largely *"separate lives"* under one roof after 07th July 2001, there was still a family home and an extent of cooperation between them in maintaining the marital establishment in which the plaintiff and the defendant lived with their children. The evidence does not suggest that there were separate households.

In these circumstances, I do not think that this Court has reason to differ from the learned trial judge's determination that, a degree of a marital relationship had continued between the plaintiff and the defendant, after 07th July 2001. In this regard, I take a view similar to that expressed by Harmon LJ in **LE BROCQ vs. LE BROCQ** where the learned Judge stated [at p. 472] *"I do not think that there was desertion here. There was no separation of households. There was separation of bedrooms, separation of hearts, separation of speaking: but one household was carried on, one kitchen where cooking was done, and they had their meals from the same supply, the husband providing the money and the wife buying the food. It would be carrying the doctrine of desertion, or constructive desertion, beyond anything within my knowledge of this kind of matter if I were to say that there was desertion here."*.

Consequently, it is evident that, the plaintiff had failed to prove the *factum* of the `desertion' alleged by her. In these circumstances, there is no need to consider whether the alleged `desertion' was consensual or compulsive or whether there was sufficient cause for the alleged acts which are said to amount to `desertion'.

Further, since the plaintiff had failed to prove the *factum* of desertion, the question of ascertaining the defendant's intention, also does not arise.

In these circumstances and for the reasons set out above, the second and fourth questions of law are answered in the negative.

To now turn to the remaining two questions of law, the first question of law asks whether the High Court erred when it held that the Police Statements marked "P3F", "P3G" and "P3H" did not bear evidence of cruelty on the part of the defendant. These statements were produced at the trial marked "පැ6", "පැ7" and "පැ8" respectively. The

statement marked "ළ6" has been considered earlier in this judgment. The other two statements marked "ළ7" and "ළ8" were made by the plaintiff on 18th August 2006 and 20th July 2002 - *ie:* long after this action was instituted. Therefore, they are not strictly relevant to the plaintiff's cause of action, which was before the Court. In any event, the plaintiff has led no cogent evidence to support the claims she has made in "ළ7" and "ළ8". The defendant has emphatically denied that there is any truth in the claims made by the plaintiff in these statements. The statements, by themselves, do not constitute proof of `cruelty' on the part of the defendant. The learned trial judge, who had the advantage of seeing the demeanour of the plaintiff and the defendant and hearing their testimony has held that, the plaintiff had not proved that the defendant was guilty of any form of `cruelty' to her. I see no reason to take a different view.

The third question of law asks whether the High Court erred by holding that the marriage between the plaintiff and the defendant had not failed. This question of law appears to be misconceived since our law, as it now stands, does not recognize the irretrievable breakdown of a marriage or the failure of a marriage as constituting a ground for divorce. In any event, as set out earlier, the learned trial judge has held that, a degree of a marital relationship had continued between the plaintiff and the defendant while they lived under the same roof, after 07th July 2001. I see no reason to differ from that view.

Accordingly, the first and third questions of law are also answered in the negative.

In these circumstances, I am compelled to hold that, on an application of our law as it now stands to the facts of this case as were established by the evidence placed before the District Court, the learned trial judge was correct when he dismissed the plaintiff's case and the learned judges of the High Court were correct when they affirmed the judgment of the District Court and dismissed the defendant's appeal.

Before I conclude, it has to be observed that, this is a sad case which has seen the parties locked in a long and bitterly contested battle over whether they should remain married or not. The wife sought this divorce in 2001, when she and her husband were both in their early forties. The fact that this appeal was fought by both of them suggests that, the unhappy marriage which led to this action being instituted has continued to remain so during the 17 years in which this case has traversed the Courts. It seems that the rancour between the spouses continues unabated. This litigation has seen the plaintiff and the defendant into their late fifties and has to have exacted its heavy toll on both spouses and their children.

As stated earlier, on an application of the prevailing principles of law to the facts of this case, this appeal must be dismissed. The outcome is that, the wife must be denied the divorce which she has sought for 17 years and be compelled to remain in what she believes is an unhappy and unfulfilling marriage. The husband is left only with what appears to be the pyrrhic victory of an empty marriage.

Cases such as the present one raise the question of whether there should be changes to our law which is presently set out in section 19 of the Marriage

Registration Ordinance, and which was enacted over a century ago. Although, in practice, the fact that litigation in Sri Lanka is adversarial, gives an opportunity for parties who have reached a consensus, to exit the predicament they find themselves in, that solution is unavailable in the absence of consensus. It appears to me that, these are grave questions which befit the attention of the Law Commission of Sri Lanka and the Legislature. I will venture to make some observations in this regard, which I hope will be of some relevance.

The sole grounds for divorce in our law, at present, are the three grounds specified in section 19 of the Marriage Registration Ordinance, which are all `fault based'. This led Sharvananda CJ to observe in **TENNAKOON vs. TENNAKOON** [1986 1 SLR 90 at p.92], citing Professor Hahlo in The South African Law of Husband and Wife, *"Our common law of divorce is based on the `guilt' and not on the` marriage breakdown' principle ..... Adultery and malicious desertion are breaches of the fundamental obligations flowing from the marriage contract, for it is of the essence of the marriage relationship that the spouses should adhere to each other, being physically and spiritually 'one flesh' ..... ".* These solely `fault based' grounds for divorce set out in section 19 of the Marriage Registration Ordinance are derived from religious values which had prevailed in European countries and found their way into our Law with the advent of the colonialists to Sri Lanka. This was illustrated when Bertram CJ, in **SILVA vs. MISSINONA**, with his usual erudition, cited [at p. 115-116] a passage in Huber's Protectiones [Vol. III p.1203] (at p.115) which reads "*Moribus hodiernis sequimur ius divinum novi foederis, quo duetantum causae cognoscuntur, adulterium, item malitiosa desertio."* and traces the origin of the concept of `malicious desertion' to the *ius divinum* [`divine law'] which recognises two grounds for divorce - namely: (i) adultery and (ii) malicious desertion. I have ventured to obtain an approximate and perhaps inelegant translation of that passage into English, which would be: *`by the covenant and customs of the present day, we follow the divine law, in which there are only two known causes, adultery and malicious desertion which is made with the intention of not returning to it, by means of which the bond of marriage is dissolved'*. Bertram CJ went on to observe that, the idea that the divine law sanctioned divorce only on these two limited grounds is found in the 15th verse [7th chapter] of St. Paul's First Epistle to the Corinthians. The learned Chief Justice also observed that these two concepts are embodied in section 20 [now section 19] of the Marriage Registration Ordinance No. 19 of 1907, as amended. The thinking that the `fault based' grounds for divorce set out in section 19 of the Marriage Registration Ordinance are sanctioned by divine or theological authority is reflected in the passage from Professor Hahlo's book cited by Sharvananda CJ in **TENNAKOON vs. TENNAKOON** and, much more recently, in **ROSALIN NONA vs. JAYATHILAKE** where the Court of Appeal said [at p.18], *"We are not unaware of the saying that in order to put asunder what God has put together the Court must be satisfied that the intention of the parties was clear and deliberate that they wished to sever the bonds of matrimony."*.

It seems to me that, the restriction of the grounds on which a divorce may be granted to the solely `fault based' grounds set out in section 19 of the Marriage Registration Ordinance, is alien to our traditional laws which allowed for divorce to be granted on the ground of the breakdown of a marriage or upon consensus - *vide:* section 32 of the Kandyan Marriage and Divorce Act No. 44 of 1952, as amended and sections 27 and 28 of the Muslim Marriage and Divorce Act No. 13 of 1951, as amended

together with the provision under Islamic Law for a divorce by mutual consent [*Mubarat*]. Yet, it appears that, these initially alien ideas based on European theological values which were introduced by the colonial powers, have embedded themselves into the value system of this country during the time Ceylon [as Sri Lanka then was] was governed by these colonial powers and persist unchanged, to this day and, indeed, are often espoused as our very own traditional values.

However, the Law in England, which enabled a divorce only on `fault based' grounds from the time of the passing of the Matrimonial Causes Act of 1857, was changed in 1969 with the enactment of the Divorce Reform Act of 1969, later replaced with the Matrimonial Causes Act of 1973, both of which provides for divorce on the ground that a marriage has irretrievably broken down. It is telling that it was none other than the Archbishop of Canterbury who appointed the Study Group which submitted the recommendations set out in the *"Putting Asunder: A Divorce Law for Contemporary Society"* Report which led to the enactment of the Divorce Reform Act of 1969.

Similarly, in South Africa, the law enabled a divorce only on `fault based' grounds until 1979. Wille [Principles of South African Law - 9th ed. at p. 321] states that, *"Severe criticism of the shortcomings of the old divorce law led to an investigation by the South African Law Commission."*. The recommendations and report of the South African Law Commission led to the passing of the Divorce Act No. 70 of 1979 which did away with the "fault based" approach and enabled divorce on the ground of irretrievable breakdown of the marriage where the Court is satisfied that, *"the marriage relationship between the parties has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them." - vide:* section 4 (1) of the Act.

In India, in addition to the provisions of section 13 of the Hindu Marriage Act, 1955 and section 27 of the Special Marriage Act, 1954 which state that a non-consensual divorce may be obtained by an aggrieved spouse who establishes adultery, cruelty, desertion for not less than two years and some other limited and specific grounds, section 13B of the Hindu Marriage Act and section 28 of the Special Marriage Act provide for spouses to obtain a `no- fault' consensual divorce by mutual consent if they have lived separately for one year or more and satisfy the Court that the two spouses *"have not been able to live together and that they have mutually agreed that the marriage should be dissolved.."* Although the statute law of India does not list `irretrievable breakdown of the marriage' as a ground for granting a divorce., the Supreme Court of India has, on occasion, taken the view that the continuance of a marriage which has irretrievably broken down is tantamount to `cruelty', which [unlike in our Law] is a statutorily recognised ground for divorce in India - *vide:* **BHAGAT vs. BHAGAT** [AIR 1994 SC 710], **ROMESH CHANDER vs. SAVITRI** [AIR 1995 SC 851] and **SNEH PRABHA vs. RAVINDER KUMAR** [AIR 1995 SC 2170].In **JORDAN DIENGDEH vs. S.S.CHOPRA** [AIR 1985 SC 935 at p.940-941], the Supreme Court of India stated, *"It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down.".*

As stated earlier, on an application of our law as it now stands to the facts of this case as were established by the evidence placed before the District Court, this Court must dismiss this appeal and affirm the judgments of the District Court and High Court. The parties will bear their own costs.

I regret the delay, on my part, in preparing this judgment. It was partly due to unavoidable circumstances - official commitments at an Inquiry and an accident which required surgery.

Judge of the Supreme Court

Priyasath Dep PC, CJ
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

In the matter of an Appeal from the Civil Appellate High Court.

Sithamparapillai Kathieravelu,
No. 217, Station Road,
Vairavapuliyankulam, Vavunia.

Plaintiff.

Vs

SC APPEAL No. 132/2009
SC HC CA LA No. 153/09
Vavuniya Civil Appellate
High Court No. 04/2001(F)
Vavuniya D.C.No. L/254

1. Ramasamy Gowrinathan,
No. 193, Station Road,
Vavuniya.

2. Periyathamby Sivasothinathan
Station Road, Vavuniya.

Defendants.

AND THEN BETWEEN

Siethamparapzillai Kathieravealu,
No. 217, Station Road,
Vairavapuliyankulam, Vavunia.

Plaintiff Appellant

Vs

1. Ramasamy Gowrinathan,
   No. 193, Station Road,
   Vavuniya.

2. Periyathamby Sivasothinathan
   Station Road, Vavuniya.

Defendant Respondents

AND NOW BETWEEN

Siethamparapzillai Kathieravealu,
No. 217, Station Road,
Vairavapuliyankulam, Vavuniya.

Plaintiff Appellant Appellant

Vs

1. Ramasamy Gowrinathan,
   No. 193, Station Road,
   Vavuniya.

2. Periyathamby Sivasothinathan
   Station Road, Vavuniya.

Defendant Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRASANNA JAYAWARDENA PCJ. &
L. T. B. DEHIDENIYA J.

Counsel : M.A.Sumanthiran PC with K. Pirabakaran and R.Sujitha for the Plaintiff Appellant Appellant.
V. Puvitharan PC with R.R.Ushanthinie and Anuya Rasanayakham for the Defendant Respondent Respondents.

ARGUED ON : 18.06.2018.

DECIDED ON : 31.07. 2018.

S. EVA WANASUNDERA PCJ.

The Plaintiff Appellant Appellant (hereinafter sometimes referred to as the Plaintiff) was granted leave to appeal by this Court on 30.10.2009 on the questions of law as set out in paragraph 20 of the Petition dated 14.07.2009. The said questions are narrated as follows:-

(a) Have their Lordships of the High Court erred in law when they failed to appreciate the fact that the Plaintiff's possession of the disputed allotments of land marked lots 7, 10, 11 and 12 had been admitted by the 1st Defendant?

(b) Have their Lordships of the High Court erred in law when they failed to appreciate the fact that the Plaintiff's possession had been expressly admitted by K. Karunaivel Licensed Surveyor in his evidence?

(c) Have their Lordships of the High Court erred in law when they failed to consider the evidence of the Plaintiff, evidence of the Plaintiff's witnesses and the 1st Defendant on its merits in the light of the facts and marked documents of the District Court Case No. 254/L?

(d) Have their Lordships of the High Court erred in law having considered the matters in relation with Vavuniya District Court Case No. 184/L which is totally a different case in its facts, parties and circumstances?

(e) Have their Lordships of the High Court erred in law when they failed to appreciate that the Plaintiff was in possession in the allotments of land in question and proved the precise date of dispossession?
(f) Have their Lordships of the High Court erred in law when they failed to appreciate that the Plaintiff had instituted District Court of Vavuniya Case No. 254/L within one year of such dispossession?
(g) Have their Lordships of the High Court erred in law having made strong allegations about the intention of the Plaintiff and the invocation of Section 4 of the Prescription Ordinance?
(h) Have their Lordships of the High Court erred in law having held that the Plaintiff is not a credible witness?
(i) Have their Lordships of the High Court erred in law when they failed to evaluate the Judgment of the District Court Judge in Case No. 254/L in the light of the principles governing a possessory action?

The Plaintiff instituted action against the 1st Defendant Respondent Respondent (hereinafter referred to as the 1st Defendant) on 19.05.1995 in the District Court of Vavuniya. The basis for this action was that the Plaintiff was in possession of the land described in the Schedule to the Plaint one year and one day before the grievances against the 1st Defendant commenced; that the Plaintiff was forcibly dispossessed by the 1st Defendant on 25.07.1994 and that in terms of Section 4 of the Prescription Ordinance, the Plaintiff should be restored to possession of the land described in the Schedule to the Plaint. The Schedule to the Plaint mentions of Lots 10,11 and 12 depicted in Plan No. 94024 dated 25.03.1994 made by K. Karunaivel Licensed Surveyor. Two months later the Plaintiff amended the Plaint adding the 2nd Defendant and claiming that the Plaintiff was forcibly dispossessed from Lot 7 also by the 2nd Defendant and added a second Schedule to the Plaint describing the said Lot 7.

Altogether, the Plaintiff prayed for restoration of possession of Lots 7, 10,11 and 12 of Plan 94024 out of which he alleged that he was forcibly dispossessed.

The Defendants filed answer together on 30.11.1995 praying that the action filed against them be dismissed. They stated inter alia that the 1st Defendant was the power of Attorney holder of one Ravi Shangar and wife Naguleswary who had lived in Switzerland and had become the owners of the lands described in the Schedules I and II of the Plaint. The said husband and wife had bought the land by Deed 5070

dated 01.07.1994 attested by A. Ketheeswaran Notary Public. Thereafter they had constructed a house worth Rs. 500,000/- at that time on the said land. The 2nd Defendant is a licensee of Ravi Shangar and wife who is living with his family on the land which belongs to Ravi Shangar and wife. The Defendants state that when the Plan No. 94024 dated 25.03.1994 was done by the Surveyor, he had surveyed the land on 25.03.1994 and made allotments of the land from 1 to 12 and the said allotments were fenced as and when the survey was concluded on that date. It is the position of the Defendants that if at all, the Plaintiff was dispossessed from any part of that big land on the same date as the land was surveyed, i.e. on 25.03.1994, because the allotments were fenced then and there. The date of alleged dispossession had occurred on 25.03.1994.

I observe that the said Plan is marked as V3 and is contained in the brief before this Court at the bottom page number 184. The District Judge's signature is dated 28.02.2000. The allotments of land which is the **subject matter** of this Appeal are **Lots 10, 11 and 12 and Lot 7 in Plan No. 94024**. I find that Lots 10, 11 and 12 are of the extents of land respectively , of 16.5 Perches, 17.3 Perches and 18.0 Perches. I also find that Lot 7 is the roadway to all the said three blocks of land and it ends as a dead end with a curve opening into Lot 12. The roadway covers an extent of 16.0 Perches. This Surveyor has explained the boundaries to each and every allotment of land in detail within the four pages of the Plan No. 94024. Under the column for 'Remarks', this Surveyor has mentioned regarding the aforementioned Lots Nos. 10, 11 and 12 of the land thus: " Blocked out residential lot for obtaining development permit under the UDA Act. Part of property **claimed possessed and occupied** by **Subramaniam Vigneswaran** under and by virtue of Deed No. 4102 dated 1984.01.10 and attested by A.Ketheeswaran, Notary Public, Lot to be transferred Bounded on the North…….East…..South …..and West…."

On behalf of the Plaintiff, he himself gave evidence. He happens to be a qualified Draughtsman. Two Surveyors also have given evidence on his behalf. On behalf of the Defendants, the 1st Defendant gave evidence. The learned District Judge delivered judgment on 22.11.2001. It is in the Tamil language at pages 210 to 238 of the brief. The translation is available to this Court. According to the said Judgment, the Plaint was dismissed with costs. The District Judge has mentioned that **no credibility** can be given to the **Plaintiff 's evidence** and therefore he had come to the conclusion that the **Plaintiff had not proven** that he was dispossessed as set out in the Plaint.

Being aggrieved by the said judgment, the Plaintiff had appealed to the Civil Appellate High Court of Vavuniya and the High Court delivered its judgment on 03.06.2009 dismissing the Appeal with costs. The Plaintiff has now appealed to this Court against the Judgment of the Civil Appellate High Court and this Court has granted leave to appeal on the aforementioned questions of law.

Section 4 of the Prescriptions Ordinance 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 proceedings against the person dispossessing him at **any time within one year** of such dispossession. And in proof of such dispossession **within one year before action brought,** the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title.
Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

The Appeal before this Court is with regard to a 'possessory action' which was filed by the Plaintiff against the two Defendants, the first Defendant being the Power of Attorney holder of the rightful owners of the Lots 10, 11 and 12 of Plan 94024 and the second Defendant being the person who is looking after the said Lots on behalf of the owners of the said allotments of land while living with his family on the land at the request of the owners.

The amended Plaint dated 25.07.1995 discloses in paragraph 3 thereof that " On or about the 25th day of July, 1994, the 1st Defendant abovenamed along with others wrongfully, unlawfully and forcibly entered the land in the possession of the Plaintiff described in the schedules hereto and dispossessed the Plaintiff. In paragraph 4 of the Plaint, it is stated that " Since the dispossession of the Plaintiff, the 2nd Defendant who came along with the first Defendant for the purpose set out in paragraph 3 had put up a house on or about August, 1994 and is staying presently on the land out of which the Plaintiff was dispossessed." The Plaintiff prayed that he **be restored to the possession of the land described in the schedules to the Plaint by ejecting the Defendants their servants agents and all others holding under them.**

According to Section 4 of the Prescription Ordinance, the person who claims to have got dispossessed from the land should prove that he was forcibly dispossessed by the person who did so. The date of dispossession is important because he has to file action for restoration within one year of dispossession. The Plaintiff states in the Plaint that he was dispossessed on **25.07.1994** and the Defendants state that if at all if the Plaintiff was dispossessed of the land, it has to be the date on which the land was surveyed to make the Plan 94024 dividing the whole big land into allotments**, i. e. on 25.03.1994**. The first Plaint was filed on **19.05.1995** and thereafter it was amended and the date of the amended Plaint is 25.07.1995. If the date of dispossession was 25.07.1994, the Plaintiff had come to court on 19.05.1995, i.e. before one year had lapsed. If the date of dispossession was on 25.03.1994, the Plaintiff had come to court on 19.05.1995 i.e. after one year had lapsed. **The Plaintiff had the burden of proving that he was dispossessed within one year before 19.05.1995.**

To decide the date, it is necessary **to analyze the evidence** before the trial judge. The Plaintiff had filed action in the District Court of Vavuniya under case number L/184 against some other persons allegedly trying to trespass the whole land (including the allotments of land in the present case) stating that he was occupying the whole land as a lessee and that he had cultivated the land and also ran a poultry farm in a portion of the same land. However the Defendants in that case had not turned up in Court and the **Plaintiff had given evidence as the Plaintiff at the ex-parte trial**. Even though it had proceeded ex-parte, the learned District Judge had disbelieved the Plaintiff and **dismissed his Plaint in L/184**. It was a case based on a lease of the whole land and when action is dismissed , the end result can be identified as that the Judge rejected the Plaintiff's position that 'he was possessing the land which he was claiming to hold as a lessee' when he gave evidence on **24.07.1996**.

It could be that the Judge decided that he was not in possession of the whole land at all. It could be that the Judge decided that he was not on a lease as well as not in possession and therefore he cannot claim that any other person is trying to trespass the land. This judgment in L/184 demonstrates that the Plaintiff cannot claim to have had any hold of the whole land, the least of it being in possession. However, in the present case, the Plaintiff has **confessed that he gave false**

evidence in L/184 stating that he was a lessee because he was threatened by others that he should portray as a lessee.

Here, giving evidence in L/254, he states that he has never been a lessee but he was on the whole land from 1992 and cultivated and also ran the poultry farm since then and that he has been in possession of the whole land when the 1st and 2nd Defendants came along and forcibly dispossessed him from Lots 10 , 11, 12 and 7 on 25.07.1994. Anyway it is surprising that the Plaintiff has explained in his Plaint about the land from which it is alleged that the Defendants dispossessed him forcibly, by **making use of a Plan** which was not done by any surveyor on his behalf but **by a surveyor who had done a survey at the instance of the owners of the land, namely Plan 94024 dated 23.06.1994.** Surely, it would have been more suitable and proper if the Plaintiff placed before Court the boundaries of the land he claimed to have been in possession as claimed by him from 1992.

It raises a question mark as to the reason why the Plaintiff did so. It is obvious that he had in mind an approximate area from which he was allegedly ousted from, and thereafter , having looked at the owner's plan, he had made himself certain that he was ousted from Lots 10,11,12 and 7. That seems to be the way he had identified ' the land he was in possession of ' in his Plaint.

There is evidence before the trial court regarding the criminal case number 4673 in the Magistrate's Court of Vavuniya marked as P4. The 2nd Defendant had lodged a complaint in the Police Station that the Plaintiff trespassed the land on 08.07.1994. There had been another case under number 3359, marked as P5 where Vigneswaran Ihaparameswary had complained that the Plaintiff had encroached the land on 06.06.1994. P6, P7, P8 and P9 also were documents regarding trespassing of the land. What can be gathered by these documents is that the Plaintiff in the case in hand before this Court **had not been in possession** by the date 08.07.1994. Yet in the Plaint he claims to have been ousted only on 25.07.1994.

However, it can be gathered that the Plaintiff had been in possession of the whole land of about 1 ½ Acres of land, knowing that the owners were abroad. He had cultivated the land as well as had run a poultry farm on the land. There is no doubt that he was in possession of the land including the area of Lots 7,10,11 and 12 in

Plan 94064 but the **question regarding the date he was dispossessed / ousted is the obvious problem.**

The Plaintiff's counsel submitted that the documents P8 and P9 were extracts from the Police Information Book and that the District Judge had stated that they were not proven. The Plaintiff's position is that they need not be proven as they are certified copies obtained from the Police station according to Section 440A of the Civil Procedure Code. The counsel for the Plaintiff contended that those documents ought to have been accepted as proven documents and admitted as marked documents.

The Plaintiff had filed the other action No. 184/L against Thuvaraka Ketheeswaran and Vigneswaran Ihaparameswary stating that they formed an unlawful assembly with the common objective of causing destruction and damages to the property which was possessed by the Plaintiff. The subject matter was the big property including the allotments named in the present case in hand, i.e. L/254. The damages claimed was Rs.250000/- . The defendants had not come to court and the Plaintiff had given evidence at the ex-parte trial. However, the District judge had not granted any relief prayed for because, as specially mentioned by the Judge, that he did not believe the evidence given in Court by the Plaintiff. Anyway, the purported date that others had disturbed his possession was stated by him as 20.06.1994. Is it possible for this Court to take into consideration that the Plaintiff had been in possession of the whole land on 20.06.1994? This Court cannot take that date as correct due to the fact that the District Judge had specifically not granted relief prayed for by the Plaintiff even at the ex-parte trial since he was disbelieved. There is no way that the Supreme Court can say that he should be believed and his possession on 20.06.1994 should be taken as correct.

It is unfortunate that two judges of the District Court in two different cases have disbelieved the same person who was the Plaintiff in both cases. This Court being an Appellate Court should be slow to disturb the factual findings of the lower courts. It was so held in the case of ***Alwis Vs Piyasoma Fernando 1993 1 SLR 119 by G.P.S.de Silva CJ*** thus: " It is well established that findings of primary courts……are not to be lightly disturbed in Appeal. "

Possessory actions are a special kind of legal actions. If a person had been in possession of any immovable property, whether he was aware that it belonged to

another person or not or whether he was on the property on lease or on rent , it does not make a difference. What matters is only "being in possession". If that person is dispossessed or ousted otherwise than by process of law, from the place he was in possession by any other party whomsoever it may be, by using force on him, then he is entitled to bring a possessory action against the person who forcibly dispossessed him. Section 4 of the Prescription Ordinance provides relief for such a person , to get a decree against the defendant for the restoration of such possession without proof of title only if the court action is filed within one year of such dispossession.

In ***Silva Vs Dingiri Menika 13 NLR 179***, it was held that " To succeed in a possessory action, all that is necessary for the plaintiff to prove is that he was in possession and that he was dispossessed otherwise than by process of law. It is not necessary to prove possession for a year and a day before ouster."

In ***P. Edirisuriya Vs M. Edirisuriya 78 NLR 388,*** it was held that;

1. The essence of the possessory action lies in unlawful dispossession committed against the will of the Plaintiff and neither force nor fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses.
2. To succeed in a possessory action the Plaintiff must prove that he was in possession ut dominus . This does not mean possession with the honest belief that the Plaintiff was entitled to ownership. It is sufficient if the Plaintiff possessed with the intention of holding and dealing with the property as his own.

In the case in hand, the Plaintiff gave evidence on 18.01.2001. He answered in the following manner when he was cross examined;

Q. In L/184 what were the relief you prayed in the plaint?
A. I need not disclose that now.
Q. Who prepared the survey plan?
A. Karunaivel.
Q. Did he say the purpose of his visit?
A. He said that he came to survey the land.
Q. Did you allow him to survey?

A. I cannot prevent a Government Surveyor from surveying the land.
Q. Didn't it strike you that you must assert your right by saying that this is your Land?
A. No.
Q. How long did he take to survey?
A. I do not know. I left the place on some other business.

It is obvious that the Plaintiff had allowed the surveyor who surveyed the land on 25.03.1994 to do so without any problem. It is hard to believe that the Plaintiff who is so very keen to get himself restored into possession by stating that he was dispossessed on 25.07.1994, i.e. 4 months later, would have allowed the surveyor who came to the land to survey at the direction of the owner, without any trouble or without any disagreement or without even complaining to the police or without resisting such action at all. It sounds worse when the Plaintiff stated that he left the place on some other business. Any person who had any cultivation on the land done by him and who had hens and cocks on the land as claimed by the Plaintiff, would not have walked out of the scene but stayed on the land to see what would take place while the survey was going on. That peaceful attitude, if it is true, might have been the reason why he had obtained the Plan done by the owner's surveyor and filed his own action against the owner, quoting the allotments from the owner's Plan.

In examination in chief, the Plaintiff said that the defendants entered the land forcibly on 20.06.1994 for the first time but in the Plaint he states that the defendants forcibly dispossessed him on 25.07.1994. There is a discrepancy on the dates mentioned by him. He prays only for restoration into possession.

I have myself gone through the English translation of the Plaintiff's evidence. His evidence reveals that he had obtained an enjoining order from the same court in case L/184 by having given false evidence that ' he had been a lessor of the owner', with regard to part of the same land. He says that he said the untruth as he was told to do so under a threat by others. He had not proved anything about any threat from anybody at all. The evidence given by him is not consistent with the short amended Plaint or the original Plaint with regard to the date that he was ousted by the Defendants.

Once in his evidence, he admitted that he agreed to leave the land on payment of money by the new owners. The land had been surveyed first and allotted and fenced and thereafter only the new owners had built a new house. According to the Plaintiff, before he filed action against the defendants, the house was built by the owners and their old mother was occupying the said house at the time action was filed.

I fail to find that there exists any evidence to prove that the Plaintiff was ousted and/or dispossessed by the Defendants if at all, within one year from the date of the survey, i.e. 25.03.1994, on which date the Plaintiff admitted that he was there but did not oppose the survey and he left the scene on some other business. The date of dispossession has not been established. The use of force also has not been established.

I hold that the conditions to be proved according to Section 4 of the Prescription Ordinance to claim 'to be restored into possession' of the allotments of land as mentioned in the Schedules to the Plaint have not been proven by the Plaintiff. I answer the questions of law enumerated above in the negative against the Plaintiff Appellant Appellant.

I do hereby affirm the judgment of the Civil Appellate High Court dated 03.06.2009 and the judgment of the District Court dated 22.11.2001. The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B.Dehideniya J.
I agree.

Judge of the Supreme Court

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

1. Hettige Don Tudor, 142, Lanka Porcelain,Katuwawala,Boralesgamuwa.
2. Hettige Lakshman Sandasiri,117, Udupeella, Matale.
3. Hettige Dona Seetha Padmini Sandasiri, 142 B, Katuwawala, Borelesgamuwa.

Plaintiffs

SC (APPEAL) 134/16
SC/HC/CALA 435/2015
WP/HCCA/KAL 132/2010(F)
DC Panadura 429/P

Vs

Hettige Don Ananda Chandrasiri,
82C,Katuwawala, Boralesgamuwa.

And Others

Defendants

AND THEN BETWEEN

11. Hettige Dona Lalitha
12. Hettige Don Sunila,
Both of, No. 142/2A, Katuwawala,
Boralesgamuwa.

11th and 12th Defendant Appellants

Vs

1.Hettige Don Tudor,142B, Lanka Porcelain, Katuwawala, Boralesgamuwa.
2.Hettige Lakshman Sandasiri, 117, Udupeella, Matale.
3.Hettige Dona Seetha Padmini Sandasiri, 142, Katuwawala, Boralesgamuwa.

Plaintiff Respondent

AND

1.Hettige Don Ananda Chandrasiri,
82C, Katuwawala, Borelesgamuwa.
2.Hettige Don Edwin alias Edman, Abhaya
Niwasa, Katuwawala, Borelesgamuwa.
(Deceased)
2A. Hettige Dona Lalitha, 142/2A,
Katuwawala, Boralesgamuwa.
3. Hettige Dona Emanona,
220/7, Glunberg Place,
(Off Dambahena Road),
Maharagama.
(Deceased)
3A. W.A.Nandasena,
323/6, Pelanwatta, Pannipitiya.
4.Hettige Dona Jane Nona, 220/7,
Glenburg Place, Dambahena Road
Maharagama.
5.D.M.D. Biyatris, 785, Etul Kotte, Kotte.
6. D.M.D. Herbert, 785, Etul Kotte, Kotte.
7. D.M.D. Clarice, 785, Etul Kotte, Kotte.
8. D.M.C. William,785, Etul Kotte, Kotte.
9. D.M.D. Sunil, 785, Etul Kotte,Kotte.
10. D.S.Rupasinghe,142B, Katuwawala,
Borelesgamuwa. (Deceased)
10A.Hettige Don Ananda Chandrasiri,
82C, Katuwawala, Boralesgamuwa.

Defendant Respondents

AND NOW BETWEEN

1.Hettige Don Tudor,142B, Lanka Porcelain,
Katuwawala, Boralesgamuwa.
2.Hettige Lakshman Sandasiri, 117,
Udupeella, Matale.
3.Hettige Dona Seetha Padmini Sandasiri,
142 B, Katuwawala, Boralesgamuwa.
.

Plaintiff Respondent Appellants

Vs

11. Hettige Dona Lalitha
12. Hettige Don Sunila,
Both of, No. 142/2A, Katuwawala,
Boralesgamuwa.

11th and 12th Defendant Appellant Respondents

And

1.Hettige Don Ananda Chandrasiri,
82C, Katuwawala, Borelesgamuwa.
2.Hettige Don Edwin alias Edman, Abhaya Niwasa, Katuwawala, Borelesgamuwa. (Deceased)
2A. Hettige Dona Lalitha, 142/2A, Katuwawala, Boralesgamuwa.
3. Hettige Dona Emanona,
220/7, Glunberg Place,
(Off Dambahena Road),
Maharagama.
(Deceased)
3A. W.A.Nandasena,
323/6, Pelanwatta, Pannipitiya.
4.Hettige Dona Jane Nona, 220/7,
Glenburg Place, Dambahena Road
Maharagama.
5.D.M.D. Biyatris, 785, Etul Kotte, Kotte.
6. D.M.D. Herbert, 785, Etul Kotte, Kotte.
7. D.M.D. Clarice, 785, Etul Kotte, Kotte.
8. D.M.C. William,785, Etul Kotte, Kotte.
9. D.M.D. Sunil, 785, Etul Kotte,Kotte.
10. D.S.Rupasinghe,142B, Katuwawala, Borelesgamuwa. (Deceased)
10A.Hettige Don Ananda Chandrasiri,
82C, Katuwawala, Boralesgamuwa.

Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PC, Acting CJ,**
PRIYANTHA JAYAWARDENA PCJ. &
H. N. J. PERERA J.

COUNSEL : Ranjan Suwandaratne PC for the Appellants.
Chathura Galhena with M. Gunawardena for the Respondents.

ARGUED ON : 13.11.2017.

DECIDED ON : 19.02.2018.

S. EVA WANASUNDERA PCJ.

Leave to Appeal was granted by this Court in this Appeal on the following questions of law:-

1. Have the Honourable High Court Judges of the Civil Appellate High Court of the Western Province holden at Kalutara erred in law by totally failing to consider the fact that the parties had no dispute with regard to the plan marked X bearing number 843 prepared by Gamini Malwenna, Licensed Surveyor at the trial or till the pronouncement of the judgment in the original court case in arriving at their final conclusion?

2. Have the Honourable High Court Judges misdirected themselves by adopting the findings and observations contained in Sumanasena Vs Premaratne's case without considering the background facts of the case before Court where the parties have acted without any objection for the

acceptance of Plan number 843 as a preliminary plan in arriving at their final conclusion?

3. Have the Honourable High Court Judges by setting aside the said judgment on a highly technical matter based on an observation made in a judgment and thereby to frustrate the proceedings which has been taken place before the original court for a period of about two decades?

The 3rd question of law as stated above poses the said question, stressing on the fact that the proceedings in the District Court which had taken two decades was frustrated due to the High Court having set aside the District Judge's Judgment on a " highly technical matter" , "based on an observation made in **a judgment**". The judgment referred to therein is **Sumanasena Vs Premaratne** which was referred to in the 2nd question of law. Therefore both the second and the third questions are connected to each other and based on the references made by the High Court Judges to the observations made by Justice Salam who had written the Court of Appeal Judgment, Sumanasena Vs Premaratne **(CA 1336& 1337/F Court of Appeal Minutes of 06.03.2014 by Salam J and Rajapaksha J**.). As such it has become essential to consider the judgment of Sumanasena Vs Premaratne.

The 1st question of law, however, is on the **Plan X** numbered as **843** done by Licensed Surveyor Gamini Malwenna. The argument of the Counsel for the Appellants , was that the High Court has erred in law when it failed to consider that it was the Plan on which both parties had no dispute until the end of the District Court trial.

On 25.05.1992 the Plaintiff Respondent **Appellants** (hereinafter referred to as **Plaintiffs**) had filed action to **partition the land** in the second schedule to the Plaint of an extent of 3 Acres and 2 Roods. The Plaintiffs claimed that the said land is a portion of the land described in the first schedule to the Plaint which is of an extent of 8 Acres and named as Nagahawatta. **The 2nd, 11th and 12th Defendants** in the District Court filed their Statement of Claim dated 30.05.1994 stating that the Plaintiff has wrongfully included their land of an extent of 2 Acres 1 Rood 23.5 Perches, into the corpus of the second schedule to the Plaint and they have peacefully enjoyed the blocks of land surveyed and apportioned by themselves from 1958. They had pleaded their deeds and explained their title and possession further stating that **their houses also were built** and enjoyed by them

for a very long time. They prayed for a **dismissal of the action** filed by the Plaintiffs and/or for a commission to identify the corpus and carve out their land and exclude the same from the corpus. The 11th and the 12th Defendants are the ' **11th and 12th Defendant Respondent Respondents'** (hereinafter referred to as the **11th and 12th Defendants**) in the present case before this Court.

The other Defendants also had filed their statements of claim and the District Judge, at the end of the trial had concluded granting shares of the land to the Defendants in which the relief to the 11th and the 12th Defendants were only compensation for improvements. The said 11th and 12th Defendants appealed to the Civil Appellate High Court and the judgement of the High Court **allowed the Appeal with costs** and held that the District Judge **had erred in not identifying the corpus** properly, by having gone **against the provisions of the Partition Law** and concluded that the District Court should proceed with the trial de novo. The Plaintiffs have appealed therefrom to this Court. Leave was granted on the aforementioned questions of law.

The Plaintiffs **contended t**hat the Plan X bearing number 843 made by Licensed Surveyor Gamini Malwenna was **agreed upon by both parties** and therefore it was **proper** for the District Judge to proceed to accept the said Plan. The trial judge in the District Court also had made his conclusions on partitioning the land in question on the said Plan X. The High Court Judges have made their observations and arrived at the findings, exercising Civil Appellate jurisdiction pertaining to the corpus of the action in their judgment to the effect that the District Judge had not identified the corpus and acted against the provisions of the Partition Law, which judgment is now impugned by the Appellants in this Appeal.

The High Court **held** after hearing both parties that, **"** In view of the forgoing determinations made by the Court of Appeal and Section 16 of the Partition Law, it appears that the **learned District Judge erred in disregarding the commissioner's plan and accepting Malwenna's plan as the Preliminary Plan in this case**. As such, it is the considered view of this court that, the learned **District Judge has acted in violation of the imperative provisions of the Partition Law**, and therefore, the impugned judgment is liable to be **dismissed only on this ground alone**. **"**

Section 16(1) of the Partition Law No. 21 of 1977 reads as follows:

Where the court orders the service of summonses on the defendants in a partition action, the court **shall forthwith order the issue of a Commission to a Surveyor** directing him to survey the land to which the action relates and to make due return to his Commission on a date to be fixed therein, which date shall be a date earlier than thirty days prior to the date specified in the summons.
Provided that the court may on application made by the Commissioner and for reasons to be recorded, extend from time to time, the date fixed in the Commission for the return thereof, so however, that each such extension shall not exceed sixty days.

Section 16(2) reads as follows:

The Commission issued to a Surveyor under Sub Section (1) of this Section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the Registered Attorney for the Plaintiff. The Court may, on such terms as to costs of survey or otherwise, issue a Commission at the instance of any party to the action, authorizing the Surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action.

According to the provisions of Section 16, the Commission issued to the very first Surveyor by Court is the only Commission that can be issued by Court to survey the land pointed out by the Plaintiff **and** at the instance of any other party out of the Respondents to the Partition Action, the Court may issue a Commission to **the same Surveyor** to survey any larger or smaller land than that pointed out by the Plaintiff. It is a well known fact that, in practice, the Court Commissioner, the Surveyor goes on to superimpose, on the land surveyed as pointed out by the Plaintiff, the plans brought before Court and make the Report to Court on the Commission.

Section 18(1) of the Partition Law reads as follows:
The Surveyor shall duly execute the Commission issued to him and in doing so shall where any boundary of the land surveyed by him is undefined, demarcate

that boundary on the ground by means of such boundary marks as are not easily removed or destroyed and shall, on or before the date fixed for the purpose, make due return thereto and shall transmit to court, (a) a report…….(b) a plan…..(c) a certified copy of his field notes and (d) the acknowledgement of the receipt of notice served…..

Section 18(2) reads as follows:
The documents referred to in paragraphs (a), (b) and (c) of Subsection (1) of this Section, may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action.
Provided that the court shall, on the application of any party to the action and on such terms as may be determined by the court, order that the Surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.

According to the aforementioned Sections 18(1) and (2), it is obvious that after the first Commission on the first Surveyor's survey, he should file the Report and the Preliminary Plan in Court and then **if the parties are dissatisfied on the plan and the report,** they can get the court to summon the said Court Commissioner Surveyor and examine his findings orally on any matter arising out of such Report and the Plan. There is **no provision to allow another Surveyor** being appointed at the instance of the Plaintiff or any other party. If Court allows any application to get another surveyor to do the same work done and completed once by an order of court, there would be no end to such applications. In a partition action there are many parties and if every party keeps on applying to court that the survey be done over and over again as and when each party is dissatisfied, then a partition action would never get on with proceeding to partition the land. This is the reason why the Partition Law has made provision for only one Commission to survey be done and that Surveyor to come before Court and give evidence so that he can be cross examined and matters can be verified on the Preliminary Plan done by the Court Commissioner Surveyor.

However, Section 18(3) grants a solution when any party or the Court feels that the Court Commissioner has failed to do a perfect job of surveying the land.

Section 18(3)(a) reads as follows:
Notwithstanding anything in Subsection (2) of this Section, the Court, either of its own motion or on the application of a party to the action, may, before using the copy of the Surveyor's field notes and the plan, cause them to be verified and to be certified as correct or where such field notes and plan are incorrect, cause fresh field notes **and a fresh plan to be made by the Surveyor General or by any officer of his department authorized by him in that behalf**, and may for that purpose issue a Commission to the Surveyor General.

Accordingly, it is seen that the Partition Law has provided for an occasion what to do when the Plaintiff or any other party or Court is dissatisfied with the Preliminary Plan and Report done by the Commissioner Surveyor. The Court should issue a Commission on the Surveyor General. The Surveyor General will do the needful as provided for in the other sub sections of Section 18 (3) (b) to (g). It is clear that the Court cannot issue another Commission to any second Surveyor other than to the Surveyor General.

At the very outset, in the case in hand, according to Sec. 16, a commission has been issued to the licensed surveyor **H.A.G. Jayawickrema** who returned the commission with the survey plan number **6766 dated 16.09.1992** as at page 87 of the brief with his report. The said plan was the **preliminary plan** done by the court commissioner Jayawickrema as provided by **Sec. 16** of the Partition Law. Thereafter, the Plaintiffs being dissatisfied with this Preliminary Plan had made **another application** to court to issue a commission on **another surveyor named Gamini Malwenna** which was allowed by Court. Surveyor Malwenna had surveyed the land and made Plan 843, marked as X dated 28.10.1996 and had submitted the same with another report. Court has acted on that Plan 843 and after hearing the witnesses from the contesting parties had given judgment at the end of the trial.

The provisions under Sec. 16 does not recognize any second plan in a partition action. In any single partition action there should be only one preliminary plan that is made by the court commissioner and all the plans relied upon by the parties are to be superimposed on the said preliminary plan. After the preliminary plan is made and filed in Court, if necessary, the trial Court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or at the instance of the parties to the action. If the necessity

arises to survey any larger or smaller land than that pointed out by the plaintiff, **where a party claims that such survey is necessary** for the adjudication of that action, such commission can be issued **to the same commissioner who made the preliminary plan.** It cannot be issued to another surveyor.

In the case in hand the Court had issued another commission to another surveyor which is quite contrary to the provisions of the Partition Law.

An action for partition of land is an action in rem. When the decree in a partition action is entered, it is a decree in rem which binds the whole world and not only the parties to the partition action. It will be effective at all times. That is the vital point and the basis for the Partition Law being enacted. The provisions are imperative. Going beyond the provisions of the Partition Law is **not a technical matter as alleged by the Appellants counsel in his written submissions.** The fact that parties to the action had agreed to go ahead with the second plan done by another commissioner, when the application to do so was made by the Plaintiffs of the case at the trial and the court had allowed the same, is no reason to be regarded to support the judgment of the trial court. It was erroneous to accept the second plan. The District Court was wrong in having accepted the second plan done by a different surveyor. The provisions of the Partition Law are mandatory and should be followed in every step of the way in any partition action before the District Court. The argument of the Appellants that it is only a technical matter fails.

The second question of law raised by the Appellants is a matter of observations by the High Court Judges in the impugned judgment, with regard to the case decided by the Court of Appeal in the case of **Sumanasena Vs Premaratne (CA 1336 & 1337/F – Court of Appeal Minute dated 06.03.2014 – Salam J and Rajapaksha J).**
It is a case quite similar to the present case where the District Judge had identified the corpus upon plan number 653A made by Gunasinghe Licensed Surveyor, of consent of the parties to the action, and the preliminary plan number 516 made by the Commissioner was disregarded. The High Court Judges had enumerated the observations of Justice Salam who had written the quoted judgment of Sumanasena Vs Premaratne in point form numbering the said observations from 1 to 6 . It is only thereafter that the judges of the Civil Appellate High Court in the present case had put down their conclusions,

following the said judgment of the Court of Appeal. I find that it was done quite correctly to support the rationale drawn by the High Court Judges in the impugned judgment. I totally agree with them and cannot find at all any misdirections on their part in having arrived at the conclusion in the judgment to set aside the District Court Judgment and the Appeal in the present case was allowed with costs by the High Court Judges.

I would like to stress that according to the provisions of law contained in the Partition Law, that after the preliminary survey is done, any further commissions, if at all, under Sec. 16(2) should be issued to the same surveyor who carried out the original commission under Sec. 16(1). If it is necessary to survey a larger or smaller land in the same partition case, after the preliminary plan is done, then the Court is bound to issue any second commission, to the same surveyor who did the preliminary survey and no other. The consent of parties cannot confer any power or authority or jurisdiction to Court to deviate from the substantial law which includes an imperative procedural step. If and when the parties or any party is not satisfied with the preliminary plan, the Court may direct the same surveyor to survey the larger or smaller land or to superimpose any title plan tendered to court by the said parties. If by any chance, the court is of the opinion that the commissioner is not in a position to carry out the commission issued by court, then, a fresh commission can be issued to the Surveyor General to prepare a plan. Then such plan and the report of the Surveyor General would be the preliminary plan in the case. Issuing another commission to another **second surveyor** other than the commissioner who did the preliminary plan is **contrary to the partition law** and is erroneous.

Moreover, I find that the Plaint which was filed in the District Court by the Plaintiffs contain two Schedules, the first Schedule of an extent of land of 8 Acres and the second Schedule of an extent of 3 Acres and 2 Roods. The Plaintiffs had moved court to partition the land in the Second Schedule to the Plaint. The deeds numbers 6160 and 12011 which were led in evidence relating to the averments in paragraphs 5 and 6 of the Plaint **refers to the land in the first Schedule** and not to the land described in the second Schedule. The undivided shares of 8 Acres is surely distinctly different from the undivided shares of 3 Acres and 2 Roods (3 ½ Acres). However, even though the deeds referred to in paragraphs 5 and 6 demonstrate that the undivided shares devolved according to the said deeds, in

the next paragraph which is paragraph 7 of the Plaint, the Plaintiffs submit that it relates to only one Acre of the whole land. It reads thus :

“ ඉහත කී අංක.6160 සහ 12011 දරණ ඔප්පු දෙකම, මෙහි පහත පළමුවන උපලේඛණයේ දැක්වෙන ඉඩමේ මායිම් අනුව ලියවී ඇති නමුත්, මෙම පැමිණිලිකරුවන් කියා සිටින්නේ, එකී ඔප්පුව මගින් නිසි ලෙස පැවරී ඇත්තේ, මුල් අයිතිකාර එබ්‍රහම්ට මෙහි පහත උප ලේඛණයේ දැක්වෙන ඉඩමෙන් හිමිව තිබූ අයිතිවාසිකම්වලින් නොබෙදූ අක්කර එකක් පමණක් බවය.”

Thus it is obvious that paragraphs 5, 6 and 7 are misleading and insensible. The Court cannot be expected to partition such a land claimed on such baseless and irrational pleadings. Therefore I do not find any basis to get any Court to try the said District Court case once again. I make order dismissing the Plaint. The District Court Action is hereby dismissed.

I answer the questions of law enumerated above in the negative against the Appellants. The Appeal is dismissed. 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

SC/Appeal/134/12

SC/HCCA/LA/118/2011

WP/HCCA/Mt./03/02(F)

DC/Moratuwa/21/P

Shirley Anthony Fernando
14A, 8th Lane, Borupana, Ratmalana
Place of employment
Colonne Filling Station, Galle Road, Ratmalana

4th Defendant - Appellant – Appellant

Vs

Hewa Narandeniyage Jinadasa
No.164/D,1/2 De Zoysa Flats,
Galle Road,
Moratuwa

Plaintiff – Respondent – Respondent

1. Paragahadurage Ratnapala
164/D, Galle Road, Angulana
Moratuwa.
2. Nageshwari Thambiah
3. Rita Thambiah
Both of No.2/40, Dunbrune Street, Hulsto, Poric, New South Wales, 2193, Sydney, Australia.
5. Pathirage Indika Anuradha Delwita Perera
14, 8th Cross Lane, Ratmalana

Defendants – Respondents-Respondents

Before : Hon. Priyasath Dep PC, CJ

Hon. B.P. Aluwihare PC, J &

Hon. L.T.B. Dehideniya, J

Counsel : Rohan Sahabandu, PC with Ms. Hasitha Amarasinghe for the

4th Defendant – Appellant – Appellant

W. Dayaratne, PC with Navinda Pathirage for the

Plaintiff – Respondent – Respondent

Argued on : 23rd March 2018

Decided on : 23rd July 2018

Priyasath Dep, PC, CJ

This is an appeal preferred against the judgment of the High Court (Civil Appellate) held in Mount Lavinia dated 07/03/2011 affirming the judgment of the District Court of Moratuwa in Case No. 21/P/ which ordered partition of the land as prayed for by the Plaintiff and rejected the claim made by the 4th Defendant-Appellant-Appellant (hereinafter sometimes referred to as the "Appellant") that he had prescribed to the land.

The Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as the "Plaintiff-Respondent") instituted action in the District Court of Moratuwa seeking inter alia to terminate the co-ownership and partition amongst the Plaintiff and the 1st. 2nd and 3rd Defendants the allotment of land marked Lot B depicted on Plan 11 dated 27.09.1955 made by S. Kumaraswamy, Licensed Surveyor described morefully in the Second Schedule to the plaint dated 17/12/1993. The extent of the land is given as A0.R1.P0.

In this action, the Plaintiff is claiming 10 perches, 1st Defendant 16/18 shares less 10 perches and 2nd and 3rd Defendants 1/18 shares each. 2nd and 3rd Defendants are living abroad. Though summons were served through the Foreign Ministry they did not participate in the proceedings. The 5th Defendant was cited as he is alleged to have encroached a portion of the land. He also did not participate in the proceedings. There was no contest between the Plaintiff and the 1st Defendant.

4th Defendant (Appellant) filed his statement of claim seeking to dismiss the action and claimed prescriptive title to the corpus of the case. Further the 4th Defendant contested the genuineness/validity of the deeds that the Plaintiff was relying on to prove his title to the land. At the trial Plaintiff raised issues No. 1- 5 and issues No.6 – 9 were raised by the 4th Defendant. Issues No.10 and 11 were subsequently raised by the 4th Defendant after conclusion of evidence.

The trial commenced on 18/05/1998 and following admissions were recorded

(1) Jurisdiction
(2) Land proposed to be partitioned is referred to in the second schedule of the Plaint.
(3) Paragraph 1 of the Plaint admitted.
(4) There was a case in District Court of Mr. Lavinia Case No.2184/L between the 1st Defendant and the 4th Defendant. The 1st Defendant withdrew the case with liberty to file a fresh case and the case was dismissed.

The Plaintiff raised 5 issues at the trial in the District Court and they are as follows:

Issue No. 1.

Are the parties entitled to the undivided shares of the land as averred in paragraph 14 of the Plaint?

Issue No. 2.

Has the Plaintiff and the 1st to 3rd Defendants acquired prescriptive title to the corpus as stated in para 15 of the plaint?

Issue No. 3

(a) Has the deeds referred in the plaint registered at the land registry

(b)If so can the Plaintiff has a right to claim priority by registration?

Issue No. 4

On what basis the entitlement of parties to the buildings and the plantations referred to in the preliminary plan be determined.?

Issue No. 5

If the Issue Nos. 1 to 4 are answered in the affirmative, is the Plaintiff, entitled to the reliefs prayed for in his plaint to partition the land?

The 1st Defendant did not raise any issue. There is no contest between the Plaintiff and the 1st Defendant. The 4th Defendant raised 4 issues at the commencement of the trial.

Issue No. 6

Has the 4th Defendant prescribed to Lot 1 depicted in the Plan No. 11?

Issue No. 7

Are the Deeds referred in paragraph 6 and 7th of the statement of claim of the 4th Defendant are forged?

Issue No. 8,

Is the dispute between 1st Defendant and 4th Defendant stands as res-judicata.

Issue No. 9

If all or some of the above issues are answered in the affirmative is the 4th Defendant/Appellant entitled to the reliefs prayed for in his statement of claim.

After the conclusion of evidence the 4th Defendant raised additional issues numbered 10 and 11.

Issue No 10

Is the preliminary plan attached to the plaint does not depict the land referred to in the schedule to the plaint?

Issue No. 11

If it is so, could the Plaintiff maintain this action to partition the land referred to in the plaint?

The Plaintiff commenced his case giving evidence to establish his title to the shares claimed by him. He produced several deeds to prove the pedigree and also produced plans and other documents and called witnesses from the land registry and the Municipality. In the

course of his evidence the Plaintiff marked document P1 to P16 subject to proof and the document marked 'P 17' (a police entry made by the 1st Defendant) through a police officer who gave evidence for the Plaintiff, which document the Court allowed to be marked without further proof.

The Plaintiff Respondent states that Suppaih Thambyah was the original owner of the land which is morefully described in the 1st schedule of the plaint which is in extent of one Rood (A0 R1 P0). He became the owner of this land under and by virtue of Deed No. 203 dated 19.03.1953 attested by T. Sri. Ramanadan, Notary Public. (marked as P1).The said Suppaih Thambiah caused this land surveyed and subdivided into two allotments as Lot A and Lot B by Plan No. 11 dated 27/09/1955which is marked as P2 made by S. Kumaraswamy Licensed Surveyor.(Being a subdivision of lot No 217 in Plan No.33 dated 25th December1952 made by S.Ambalavaner licenced surveyor) The said Suppaiah Thambyah died on or about 27/05/1958 and his estate devolved on his wife namely Yvonne Thambyah and 9 children. (including 2nd and the 3rd Defendant/Respondents). Thus Yvonne Thambyah, the wife of deceased Suppaih Thambyah became entitled to undivided 9/18 shares and nine children became entitled to 1/18 shares each. The intestate estate was duly administered in DC Colombo Case No. 24736/T and the said property morefully described in the 1st schedule was devolved among the heirs.

The said Yvonne Fernando as administratrix of the intestate estate by deed No.332 dated 20th September 1970 attested by C.V. Wigneswaran marked P3 transferred 9/18 shares unto herself and 1/18 shares each to the children. The said Yvone Thambyah and seven children other than 2nd and 3rd Defendants transferred their 16/18th share to Hazel Elsie Joachim under and by virtue of Deed No. 2572 dated 10/07/1973 attested by E. Gunarathne Notary Public which is produced marked P4.The said Hazel Elsie Joachim transferred the same to one Manel de Silva by Deed No. 2649 dated 10/12/1973 attested by the same Notary marked P5.The said Manel de Silva transferred the same to the 1st Defendant by Deed No. 51 dated 21/07/1989 marked P6 attested by Tissa Yapa Notary Public. The 1st Defendant under and by virtue of Deed No. 38 dated 05/08/1993 marked P7 transferred undivided 10 perches to the Plaintiff-Respondent. Therefore, according to paragraph 14 of the Plaint the Plaintiff is entitled to undivided 10 perches. The 1st Defendant /Respondent be entitled to 16/18th share less 10 perches, and 2nd and 3rd Defendants/Respondents be entitled to 1/18th share each.

Dudley Rajapakse of the Land Registry produced the extracts of the register marked P8 and P9 to prove that deeds marked P1, P3, P5, P6, and P7 are duly registered at the Land Registry.

It was revealed that deed No. 2572 dated 10/07/1973 marked P4 was registered on 31/12/1979 six years after the execution of the deed. Deed No. 2649 dated 10/07/1973 marked P5 was registered on 20/07/1989 nearly 16 years after the date of execution.

Deed No. 51 marked P6 attested by Tissa Yapa Notary Public under which Manel de Silva transferred the land to the 1st Defendant was dated 21/07/1989, a day after the registration of P5.

P10 is a statement dated 18.5.1990 made to the police by the 1st Defendant against the 4th Defendant complaining that the 4th defendant had forcibly entered the land.P11 is the statement made by the 4th Defendant dated 21-5-1990 stating that one H.S. Perera permitted him to occupy the land.P12 is a statement dated 14.05.1990 made by the 4th Defendant regarding house breaking and theft of jewellery.
P13, P13 A,B,C are extracts produced to prove that the 4th Defendant and his wife's names were included in the Electoral Register under Raja Mawatha Road, Moratuwa which is a different address for the years 1984. 1985 and 1986. P14 and 14A are the extract of the electoral register which shows that in the years 1990 and 1991 the 4th Defendants name was entered under No. 12, 8th Cross Street.(present address.)

The Plaintiff led the evidence of H. Gayani attached to Dehiwela- Mt. Lavinia Municipal Council to prove that the 1st Defendant submitted a Plan to construct a house within the land depicted in Plan No. 11 dated 27.09.1955made by S.Kumaraswamy licensed Surveyor and the plan was approved on 8th November 1989.

Witness Neville Dammika Perera, Clerk attached to Dehiwela-Mt. Lavinia Municipal Council who produced receipts for the payment of rates for the premises bearing assessment Nos. 14A 8th Cross Street, Ratmalana for the years 1989- 1990 marked P15 A and B. Payments were made by T. Manel de Silva and P.D. Ratnapala (1st Defendant) . Rates register was marked as P16 wherein P.D. Ratnapala/T. Manel de Silva' names are entered as claimant.

P17 is a statement date 13.05.1990 made by the 1st defendant to the police for his future reference that unknown persons have constructed a hut in his land and that he intends to demolish it. Plaintiff closed his case reading in evidence P1-P17.

The 4th Defendant filed his statement of claim seeking the dismissal of the action and further has challenged the genuineness of the Deeds referred to in paragraph 9,10,11 in the Plaint, and in his evidence stated that he has prescribed to the Lot B morefully described in the 2nd schedule of the plaint.

The Learned District Judge delivered judgment on 20/12/2001 in favour of the Plaintiff- and made order to partition the land as prayed for by the Plaintiff. Accordingly the Plaintiff is entitled to 10 perches of the land shown in the 2nd Schedule to the plaint and the 1st Defendant is entitled to 16/18th less 10 perches and the 2nd and 3rd Defendants are entitled to 1/18th share each.

The 4th Defendant being aggrieved by the said order made an appeal to the Court of Appeal and the said appeal was subsequently transferred to the High Court (Civil Appellate) held in Mount Lavinia and the learned judges of the High Court on 07/03/2011 dismissed the appeal.

The honorable High Court Judges held that the corpus to be partitioned has been properly identified given that the Plaintiff has clearly described the corpus as lot B in Plan No.11 dated 27/09/1955 where boundaries are clearly divided and defined. This Plan is notably more than 30 years old at the time of the action.

Further the Appellant in his statement of claim has not referred to any other plan to describe the land he claimed prescription and has only relied on the aforementioned plan.

The honorable High Court Judges have also noted that in the preliminary plan marked 'X' the Court Commissioner has surveyed the land described in the 2nd Schedule and that during the course of the trial, the Appellant has also admitted the fact that the land to be partitioned is the land described in the 2nd schedule to the plaint.

Being aggrieved by the judgment of the High Court (Civil Appellate), the 4th Defendant Appellant filed a Special Leave to Appeal Application and obtained leave from this court on the following questions of law:

a) Did the District Court and the High Court err in law in holding that, the corpus has been identified?

b) Are the inferences drawn on a consideration of inadmissible evidence and after excluding admissible evidence and relevant evidence?
c) Are the inferences drawn by the High Court and the District Court supported by legal evidence?
d) Are the conclusions drawn from relevant facts rationally possible and or perverse?
e) In any event was the question of the prescriptive rights of the 4th Defendant considered in the correct perspective?
f) Are the two judgments in the High Court and the District Court made according to law?
g) Did the High Court err in law in stating that, the non-answering of issues 10 and 11 did not cause material prejudice to the 4th Defendant?

4th Defendant- Appellant-Appellant was permitted to raise the following additional issue:

"Did the High Court erroneously place the burden of proof to prove the deeds on the Defendant?"

When considering the issues raised at the trial and the questions of law raised in the appeal this Court has to consider the following matters:

1. Whether land proposed to be partitioned is properly identified or not?
2. Whether the 4th Defendant had prescribed to the land or not ?
3. Whether the failure of the trial judge to answer issue No. 10 or 11 is a serious omission that affects the validity of the Judgement?.
4. Are the inferences drawn on a consideration of inadmissible evidence and not supported by legal evidence ? Did the trial Judge properly examine the title?

Whether land proposed to be partitioned is properly identified or not?

According to the Second Schedule of the deed marked P1 refers to Lot No. 217 of Plan No. 33 dated 25th December 1952 made by S. Ambalavaner Licensed Surveyor. The original owner Suppaiah Thambyah caused this lot 217 subdivided into Lot A and Lot B by Plan No. 11 dated 25th September 1955 made by S. Kumaraswamy , Licensed Surveyor. Each block consists perches 20.20. After the demise of Suppaiah Thambyah his wife Yvonne Thambayah by administratrix conveyance transferred land to herself and her children as

heirs of Suppaiah Thambayah. The schedules to subsequent Deeds marked as P3-P7 refers to the same plan No. 11 dated 27-9-1955 made by Kumaraswamy .

When the surveyor visited the land to prepare the preliminary plan, the Plaintiff, 1st and the 4th Defendant showed the boundaries of the land. The Surveyor made use of Plan No.11 dated 25th September 1955 to prepare the preliminary plan. He superimposed his plan marked X on plan No.11 dated 25th September1995 and found that the boundaries tallied. The difference in the extend is P 00.20 which is negligible. Due to encroachment over the years there is a possibility of extend being reduced. (The 5th Defendant was included as a Defendant as it was alleged that he had encroached a portion of the land). The surveyor was satisfied that the land he surveyed is the land referred to in plan No.11 dated 27th September 1955 (P 2).

The trial judge had carefully considered this matter and came to a finding that the corpus is the land which was referred to in plan No.11 dated 25th September 1955 and the land was properly identified. I am of the view that the land is properly identified.

Whether the 4th Defendant had prescribed to the land ?

It is the position of the 4th Defendant that he entered this land prior to 1980 at the request of his brother and since then he was in occupation of this land.

The 4th Defendant got his name registered under a different address in the years 1985-1987. Plaintiff produced extracts of the electoral register marked P13, P13 A,B,C, to prove that the 4th Defendant and his wife's names were included in the electoral register under Raja Mawatha Road, Moratuwa which is a different address for the years 1985,1986 and 1987. 4th Defendant stated that he did so to get his children admitted to a school in Moratuwa. P14 and 14A are the extracts of the electoral register which shows that only in the years 1990 and 1991 the 4th Defendants name was entered under No. 12, 8th Cross Street.(present address.)

The 1st Defendant in his statement to the police dated 18.5.1990 marked P10 made a complaint against the 4th defendant that he had forcibly entered the land. The 4th Defendant in his statement dated 21-5-1990 which is marked as P11stated that one H.S. Perera permitted him to occupy the land. He stated that he made this statement under duress. In his

evidence 4th defendant stated that his brother who was in occupation of this land requested him to occupy this land. Further he has not paid taxes in relation to this land. He applied for electricity only in 1991.Therfore it is established that he entered the land in 1990 as alleged by the Plaintiff. 4th Defendant failed to establish that he had independent and adverse possession of the land for more than ten years. The trial judge had correctly rejected his claim that he had prescribed to the land proposed to be partition.

Whether the failure of the trial judge to answer issue No. 10 or 11 is a serious omission that affects validity of the Judgement?.

Issue No 10

Is the preliminary plan attached to the plaint does not depict the land referred to in the schedule to the plaint?

Issue No. 11

If it is so could the Plaintiff maintain this action to partition the land referred to in the plaint?

These issues 10 and 11 were raised after the conclusion of the evidence.. The learned judge considered in his judgement whether the land was properly identified or not and came to a finding that the land was properly identified. . Further the 4th Defendant in the admissions admitted the corpus. The trial judge had accepted the evidence given by the surveyor. Though trial judge did not answer this issue specifically he had considered this issue As these issues were properly considered the failure to specifically answer issues No. 11 and 12 did not cause any prejudice to the 4th Defendant

Are the inferences drawn on a consideration of inadmissible evidence and not supported by legal evidence. Did the trial judge properly examine the title?

In a partition case a duty is cast on the trial judge to properly examine the title. Question that arises is whether he discharged his duty. The trial judge is required to act on admissible evidence when deciding whether the title is proved or not. Therefore it is necessary to consider sections 25, 68 of the Partition Act and section 68 of the Evidence Ordinance.

Section 25 of the Partition Act states thus:.

'On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made'.

When acting under this section trial judge should act on legally admissible evidence. The main issue is whether the trial judge had acted on legally admissible evidence to establish the title to the land and thereby ordering the partition of the Land.

It was decided in series of cases that Section 25 of the Partition Law imposes on the Court the necessity and the obligation to examine the title of each party and shall hear and receive evidence in support of the claim.

In the case of *Peiris vs Perera* 1NLR 246, the Supreme Court held that:

"the Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned. After the court is satisfied that the Plaintiff has made out his title to the share claimed by him.

In the case of *Mather Vs Thamotharam Pillai* 6 NLR 246 it was held that

"a partition suit is not a mere proceeding inter-parties, to be settled of consent, or by the opinion of the Court upon such points as they chose to submit to it in the shape of issues. It is a matter in which Court must satisfy itself that the Plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed."

"In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge".

Layard CJ stated the principle in the following terms :-

"Now the question to be decided in a partition suit is not merely matters between parties which may be decided in a civil action;,… The court has not only to decide the matters in which the parties are in dispute but to safeguard the interest of others who are not parties to the suit, who will be bound by a decree for partition".

Layard CJ stressed the importance of the duty cast on the Court to satisfy itself "that the Plaintiff has made out a title to the land sought to be partitioned and that the parties before the court are those solely entitled to such land"

In the case of "*Gnanapandithen and Another Vs. Balanayagam and Another* 1998 (1) SLR 391, G.P.S.Silva CJ cited with approval the case of *Mather Vs Thamotharam Pillai* (supra)decide as far back as 1903.G.P.S. De Silva CJ observed that "it seems to me that this is not a case where the investigation of title by the trial judge was merely inadequate. In my opinion there was total want of investigation of title. The circumstances were strongly indicative of a collusive action in the result there was a miscarriage of justice……..".

The next issue is whether the Plaintiff proved the deeds in accordance with the provisions of section 68 of the Partition Act and section 68 of the Evidence Ordinance.

> Section 68 of Evidence Ordinance reads thus:
> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution , if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence".

Section 68 of the Partition Act reads thus:

'It shall not be necessary in any proceedings under this law to adduce formal proof of execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof'

It is relevant at this stage to refer to two cases which deals with the identical issue.

In *Muthumenika et al Vs Appuhamy* (1948.50.N.L.R 162) Dias J, at p.165 stated:-

"It is next contended that there was no proper investigation of title in the partition action, and that consequently the final decree is not conclusive. Assuming that the deeds produced in that action have not been proved by calling the notary and one attesting witness as required by the Evidence Ordinance, the onus was still on the appellants to show that the oral evidence adduced did not establish title. For example the claimants in a partition action may have no deeds or documents. Their title may be based exclusively on prescriptive possession and inheritance. It cannot be assumed in the absence of proof that the evidence led was defective. It was for the appellants to produce certified copies of the evidence led in the partition case to show that there was no proper investigation of title. In the absence of such evidence it cannot be said that they have succeeded in rebutting the presumption of regularity attaching to judicial acts.

In *Perera V Elisahamy* 65 C.L.W. 59 which is a Partition action where deeds adduced in proof of title were impeached as being a forgery. Basnayake C.J. held that:

"As both attesting witnesses are dead in the instant case, there should be evidence that the attestation of, at least, one attesting witness is in his handwriting and that the signature of the person executing the document is in her handwriting. Marcus Perera has not stated nor does his evidence prove that the attestation of one attesting witness to the deed P3 is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. As its genuineness was impeached by the Appellant the document P3 should not have been used as evidence in the case without formal proof. Section 68 of the Partition Act is of no avail in the instant case as that section does not apply to cases in which the genuineness of a deed is impeached or the Court requires its proof. Although no objection was taken to the document at the time when its contents were first spoken to by the witness, the fact that its genuineness was impeached rendered formal proof necessary regardless of whether objection was taken or not. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance."

In the case before us, the 4th Defendant alleged that the deeds marked and produced as P1, P3 –P7 are forgeries. In the statement of claim, the 4th Defendant had taken up the same position P1 is a deed attested in 1953 which is more than 30 years old. All the other deeds are less than 30 years. The Plaintiff produced copies of the deeds and also led evidence of the officials of the Land Registry to establish that deeds were registered. However, the Plaintiff failed to prove that those deeds are duly executed. When objections are taken as to the genuineness of the deeds, the plaintiff should have taken steps to prove that it is duly executed. As these deeds are not proved in accordance with the provisions of the Evidence Ordinance these documents will be inadmissible and irrelevant.

The Plaintiff is seeking to establish his title to the land based on deeds. If these deeds are excluded, the Plaintiff cannot establish his title and his action will necessarily fail. In view of the allegations made by the 4th Defendant it will be necessary to examine the sequence of events. Under and by virtue of Deed No 2649 marked P5, Manel de Silva became the owner Though the said deed was executed on 10/12/73 was registered in the Land Registry on 20/07/1989, 16 years later. The 1st Defendant purchased this land from Manel de Silva very next day by deed no 51 dated 21/07/1989 which is marked as P6. There is no evidence to establish that Manel de Silva was in possession of the land.

The 1st Defendant on 18/05/1990 made a complaint against the 4th Defendant for illegally entering his land. The 4th Defendant denied the allegations and stated that the matter has to be decided by a court of law. Thereafter 1st Defendant made a statement dated 13.05.1990

for his future reference to the police that unknown persons have constructed a hut in his land and that he intents to demolish it.

Failing in his attempt to obtain possession, the 1st Defendant filed an action in District Court of Mt. Lavinia for declaration of title and also to evict the 4th Defendant. However, he withdrew this action stating that as there are other owners an action will be filed by including the other owners. It is to be observed that a co-owner can institute action against a trespasser without including other co-owners as a co-owner has an interest in the whole undivided land. By deed No. 38 dated 05/08/ 1993 marked P7 1st Defendant sold 10 perches of undivided land to the Plaintiff who happens to be his brother-in-law. Thereafter brother-in-law instituted this partition action on 17-12-1993. In the partition action there was no contest between the Plaintiff and the 1st Defendant. 2nd and 3rd Defendants were living abroad and they did not participate in this action. The conduct of the 1st Defendant appears to be suspicious. This Court has to consider whether this action is a collusive action or not. The first defendant after obtaining the paper title resorted to various methods to obtain the possession of the land. Having failed in his endeavors sold 10 perches of the undivided property to his brother in law (Plaintiff) who filed this partition action.

There is no evidence to establish that the Plaintiff or predecessors in title, the 1st defendant and Manel de Silva were in possession of the land. Therefore the issue raised by the Plaintiff that the Plaintiff and the other co-owners prescribed to the land should be answered in the negative.

It should be observed that the 1st Defendant and Manel de Silva ,predecessor in title who could have explained the material facts did not give evidence.

Hence following observations could be drawn from the evidence of this case. The Plaintiff was remis in not calling attesting witness to prove the deeds when it was specifically challenged by the 4th Defendant. Plaintiff's as well as 1st Defendant's title depend on the proof of the deeds. Therefore an adverse inference could be drawn under section 114 of the Evidence Ordinance which states ' The evidence which could be and is not produced would if produced, be unfavourable to the person who withhold it;

In a partition case the burden is on the plaintiff to establish title to obtain a decree for partition. The trial judge is required to properly examine the title as this is an action in rem. Partition action is different from an action to set aside a deed on grounds such as duress,

fraud etc. In such a case burden of proof lies in the person who allege fraud or duress. In this case the 4th defendant impeached the genuineness of the deeds. Therefore section 68 of the Partition Act is irrelevant and Court has to act under section 68 of the Evidence Ordinance. It has to consider the admissibility and credibility of the evidence.

If the execution of the deeds are not proved it has to be disregarded. The learned trial judge as well as the learned High Court judges did not address their minds to this important issue.

I am of the view that the Plaintiff failed to prove the deeds marked P1, P2-P7 to establish title to the land. Therefore, he is not entitled to an order to partition this land.

Therefore, I set aside the judgment of the District Judge to partition the land and also the judgement of the High Court which affirmed the judgement of the District Court. Accordingly partition action filed in the District Court stand dismissed.

The Appeal allowed. No costs.

Chief Justice

B.P. Aluwihare, PC. J,

I agree.

Judge of the Supreme Court

L.T.B. Dehideniya.

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.

S.A.C.Ranawaka.
No. 206, Panselgodella,
Galamuna.
Plaintiff

SC APPEAL No. 135/2012
SC HC CA LA No. 50/2012
High Court [North Central Province]
Appeal No. NCP/HCCA/ARP/878/2010
Polonnaruwa D.C. No. 10645/Damages/2005

Vs

1. Upali Chandrawansha,
   Revenue Administrator,
   C/O Lankapura Pradeshiya
   Sabha, Lankapura,
   Thalpotha.
2. Pradeshiya Sabha,
   Lankapura,
   Thalpotha.

Defendants

AND THEN

Upali Chandrawansha,
Revenue Administrator,
C/O Lankapura Pradeshiya
Sabha, Lankapura,
Thalpotha.
Defendant Appellant

Vs

S.A.C. Ranawaka,
No.206, Panselgodella,
Galamuna

Plaintiff Respondent

AND NOW BETWEEN

S.A.C. Ranawaka,
No.206, Panselgodella,
Galamuna

Plaintiff Respondent
Appellant

Vs

Upali Chandrawansha,
Revenue Administrator,
C/O Lankapura Pradeshiya
Sabha, Lankapura,
Thalpotha

Defendant Appellant
Respondent

BEFORE **: S. EVA WANASUNDERA PCJ,**
K. T. CHITRASIRI J. &
V. K. MALALGODA PCJ.

COUNSEL : Senany Dayaratne with Eshanthi Mendis
for the Plaintiff Respondent Appellant.
Lasitha Chaminda with Hasitha Amarasinghe
for the Defendant Appellant Respondent.

ARGUED ON : 25.09.2017.
DECIDED ON : 05.04.2018.

S. EVA WANASUNDERA PCJ.

I have read over and considered the draft judgment written by my brother Hon. Justice V.K.Malalgoda PC with which I disagree. As such I write this judgment in this Appeal.

The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court of Polonnaruwa, against two Defendants, namely U. Chandrawansha **and** the Pradeshiya Sabha of Lankapura. When the trial commenced, after the admissions and issues, the Plaintiff had withdrawn the case against the 1st Defendant, Pradeshiya Sabha and it was discharged from the proceedings. Therefore U. Chandrawansha was the only Defendant against whom the Plaintiff proceeded with the trial. He is the Defendant Appellant Respondent (hereinafter referred to as the Defendant) in this Appeal.

The case was filed on the cause of action based on an **alleged defamatory statements** contained in the written and typed **record of proceedings** held at a Pradeshiya Sabha Meeting of the Members on **31.01.2005** in the auditorium, into which the Revenue Administrator, U. Chandrawansha, the Defendant was called upon and questioned regarding the recovery of lease rentals. The alleged defamatory 'recorded written statement' which was recorded as having said by the said Chandrawansha is as follows:-

"ලංකාපුර ප්‍රාදේශීය සභාව මගින් පැවරූ නඩුවක චිත්තිය වෙනුවෙන් පෙනී සිටි නීතිඥවරිය ගැන විශ්වාසය තබා ගැනීම අසීරුයි....."

The Plaint dated 21.04.2005 in paragraph 4 states that consequent to the said recorded paragraph contained in the proceedings of the Pradeshiya Sabha Meeting of the Members, in the news paper 'Dinamina' of 31.03.2005 in page 18, it was published that the Defendant had mentioned that 'it is difficult to trust the lady lawyer who works for the Pradeshiya Sabha and appears for the defence party against whom the Pradeshiya Sabha had filed action to recover the unpaid lease rentals.' The newspaper 'Dinamina' was marked in evidence as P7 and it is in

the brief before this Court. In that newspaper article, the **name** of the lady lawyer is **not mentioned** any where but the Plaintiff submits that those who know her as the lawyer who works for the Pradeshiya Sabha could identify her as the said person and damages should be paid for the mental pain and loss of face in the society etc.

However, the newspaper employee who had given evidence as the journalist namely Gunadasa Galappatti who **was called by the Plaintiff to give evidence on behalf of the Plaintiff**, at page 153, in **examination in chief**, has stated that he reported the news regarding what had happened at the Pradeshiya Sabha monthly Meeting in the Dinamina newspaper as it was requested to be published in the newspaper by the **Pradeshiya Sabha Member, Sirisena Ranawaka.** He added in evidence that the said **Sirisena Ranawaka who is the father of S.A.C. Ranawaka, the Plaintiff, had called him to come and take the news report regarding the monthly meeting of the Pradeshiya Sabha and directed him to publish the same in the newspapers.**

I find that this is proof of the fact that this publication had been done through the influence made by the father of the Plaintiff, probably in collusion with his daughter the Plaintiff, with the intention of **getting it published** so that the Plaintiff could follow it up with a 'claim for damages' by way of an action to be filed in the District Court.

In the circumstances, I find that no Court could point the finger at the journalist who reported of what had happened at the Pradeshiya Sabha because publishing was done at the request of the Plaintiff's father. Surprisingly, **the publisher** of Dinamina newspaper was **not made a party**. The trial Court judge cannot point at the Defendant in this case for only having answered the questions of the members of the Pradeshiya Sabha, to have had **any intention of defaming the Plaintiff at all** for the conspicuous reason that, the act of publishing also had been at the instance of the Plaintiff's father. ***Actus Injuriarum is apparently absent*** in the mind of the Defendant when he had uttered whatever the sentences (which have not been quoted at any time) , within the Auditorium of the Pradeshiya Sabha.

The Plaintiff alleged that the said statement is **defamatory and insulting** and that she became an **unworthy character of unethical conduct** and therefore she was

entitled to **claim damages** from the Defendants in a sum of **Rs. 25 lakhs**. Prior to filing action two letters of demand had been sent to each Defendant claiming Rs. 25 Lakhs from each of them. Having received the letters of demand and summons to the Pradeshiya Sabha, making the said Pradeshiya Sabha as a defendant of this case, it had been decided by the Pradeshiya Sabha not to continue with the Plaintiff as the Pradeshiya Sabha's law officer and **her services were discontinued**. The father of the Plaintiff, namely, R.A.S. Ranawaka was a member of the same Lankapura Pradeshiya Sabha at the particular period the said incident. The services had been discontinued since the Pradeshiya Sabha did not want to have a law officer as an employee because she had filed a court action against it. Both the Defendants had filed answer in the District Court and denied the allegations and moved to dismiss the action. The Plaintiff cannot be heard to say reasonably that her services were discontinued just because the Defendant had uttered things against her at the Pradeshiya Sabha Meeting.

The Plaintiff as well as some other witnesses had given evidence at the trial and marked documents P1 to P10. The **1st Defendant who was the only Defendant** against whom the trial continued, also had given evidence along with some other witnesses and had marked documents V1 to V8. The **District Judge** had given judgment in **favour of the Plaintiff** granting as damages of an amount of **Rs. 15 lakhs to** be paid by the Defendant, Chandrawansha. Then the Defendant appealed to the Civil Appellate High Court against the judgment of the District Court. The **High Court set aside the judgment of the District Court** and **dismissed the Plaint**.

Then a leave to Appeal Application was preferred by the Plaintiff against the said judgment of the Civil Appellate High Court. This Court has granted leave to appeal on 30.07.2012 on four questions of law. The said questions can be summarized as follows:-

Did the High Court **err** in holding that;

1. The statement complained of was a **privileged** statement and hence not defamatory?
2. The ***animus injuriandi*** was not attributable to the Defendant in respect of the statement complained of?
3. The Defendant could **not be held responsible** for the publication of the said statement complained of?

4. The Plaintiff's claim of loss and damage to reputation, good name and professional standing and prospects, due to the statement complained of was **not substantiated by evidence?**

The facts pertinent can be narrated thus: On 31.01.2005, the monthly meeting of the Pradeshiya Sabha was held at the Auditorium. There was a query about the recovery of the lease rentals of the lessees to whom certain premises of the Pradeshiya Sabha was leased out. The letters of demand had been sent out to five lessees but the members did not know the progress of recovery thereafter. The Defendant was summoned to clarify matters as he was the Revenue Administrator. The Defendant had come to the Auditorium and explained to the members that prior to initiating legal action against the lessees who had failed to pay the lease rentals, it was necessary to send letters of demand to them through an Attorney at Law.

He had then told the Members that the law officer, meaning the **Plaintiff** , had appeared for **the defence** against the Pradeshiya Sabha, in cases **filed by the Pradeshiya Sabha against some persons** and due to that fact, it had become **difficult to have trust** on her. As a result, the Defendant had got letters of demand sent to the defaulting lessees through another Attorney at Law for a lesser fee than what was paid to the Plaintiff. The recorded detail is as aforementioned in Sinhala language and it is not a statement recorded as the Defendant's direct statement in his own words. However first of all, it has to be looked into through the evidence before the trial court, whether there is any truth in what is contained in that written recorded sentence alleged to be defamatory.

The particulars of the relevant case in which the Plaintiff is supposed to have appeared for the defense against the Pradeshiya Sabha is as follows: The case No. 98860 was filed on 27.08.2004 in the Magistrate's Court, Polonnaruwa by the Pradeshiya Sabha Revenue Administrator, the Defendant, Chandrawansha against one Renuka Jayasooriya of Ideal Pharmacy, Pulasthigama. The said case record was marked as P1. The said Renuka Jayasooriya had paid the money due from her to the Pradeshiya Sabha later on, after the case was filed against her, but to withdraw the case, she had paid Rs. 300/- to the Plaintiff as requested by the Plaintiff. There is an **affidavit to that effect marked as V1**. That document has **not been challenged**. Even though the said Renuka had got another lawyer,

named Bandara to file a motion and inform Court that money has been paid, the said Renuka had to pay a fee of Rs. 300/- to the Plaintiff, for the Plaintiff to grant her consent in open court to the fact that the due money had been paid to the Pradeshiya Sabha.

Therefore it can be concluded that the Defendant had not uttered a complete false statement before the Pradeshiya Sabha. The Affidavit of the said Renuka had been marked without any objection and read in evidence at the end of the case without any objection by the Plaintiff's counsel. It can be easily understood that the truth is that the Plaintiff had taken a fee of Rs. 300/- from the person against whom the Pradeshiya Sabha had filed action to recover the lease rentals.

Anyway, the contention of the Defendant is that he had never stated anything defamatory against the Plaintiff at any time and all what he stated was within the Pradeshiya Sabha Auditorium in the course of his duties as Revenue Administrator in that capacity and that **he was entitled legally to tell nothing but the truth in answering the queries of the Members.** Accordingly, the Defendant is in a position to have the cover of the defense of "Truth" available in an action on defamation.

The Plaint of the Plaintiff is based on the fact that ' the statement of the Defendant as recorded in the proceedings of the Pradeshiya Sabha was published in the newspaper Dinamina'. The Plaint does not complain that the statement as recorded per se is defamatory. Paragraph 4 is a long paragraph in the Plaint and it states how the cause of action has arisen. It distinctly states that " The Defendant has said about the Plaintiff at the Pradeshiya Sabha monthly Meeting on 31.01.2005 that it is difficult to trust the lady lawyer who serves the Pradeshiya Sabha because she appeared for the defendant party in a case filed by the Pradeshiya Sabha." It is alleged that the Defendant has acted by stating so, **with an intention to take revenge from the Plaintiff and with animosity.** Court has to consider the allegations not against the publisher because the publisher is not made a party but only against the Defendant who had stated thus.
Then, according to the argument of the Plaintiff herself, what is left for this Court to decide is ' whether the recorded portion of the proceedings as what has been said by the Defendant inside the Auditorium at the monthly Pradeshiya Sabha Meeting would amount to defamation.'

The learned Judges of the High Court have held that the statement complained of was a **privileged statement and hence it is not defamatory.**

In that regard both the contesting parties have directed the attention of Court to **R.G.McKerron in the Law of Delict, 7th Edition. At page 188**, it reads thus:

" Privilege is the name given to the protection which the law affords to a person who makes a defamatory communication in the exercise of a right or the discharge of a duty. It is customary to refer to such a communication as a privileged communication. But it is to be observed that this expression, though sanctioned by usage, is not strictly accurate; for **it is the occasion on which the communication is made and**, not the communication itself, **that is privileged**."

In the case in hand, the Defendant had made the communication which is alleged to be defamatory**, only when the members of the Pradeshiya Sabha had summoned him to the meeting that was going on.** I find that the Defendant had made the communication at **the occasion of the meeting of the members** which **meeting was a privileged one**. If the same kind of statement was communicated at another place other than that special place at the auditorium , such as at the market place or at the canteen of the work place, it could have been defamatory depending on the construction of the words. When queries were made from the Defendant who was the Revenue Administrator of the institution, by the Members, he had a **duty to answer** and he could not have waited without giving the reason for having sent letters of demand through another lawyer other than through the Plaintiff Attorney at Law of the Pradeshiya Sabha. **The Defendant could not have avoided telling the real reason** and that is why the communication which is alleged as defamatory had been uttered. So, it can be concluded that it was a **privileged occasion.**

In the case of **Molpe Vs Achterberg 1943 A.D. 85**, it was held that " If the communication **is not relevant to the purpose of the occasion**, the privilege does not extend thereto and **the communication will not be protected**." In the case in hand, the communication is quite relevant because the Defendant had to explain

the reason why the letters of demand were sent through another lawyer other than through the Defendant. The purpose of the occasion was to find out the position of collecting revenue and how it was going. **The communication was quite relevant to the purpose of the occasion.** It is clear that the communication of the Defendant is protected as it was relevant to the purpose of the occasion.

In the case of **M.G.Perera Vs A.V.Pieris 50 NLR 145**, which is a decision of the Privy Council it was held thus:

" In Roman Dutch Law ***animus injuriandi*** is an **essential element** in proceedings for defamation and where the **words used are defamatory**, the burden of negativing animus injuriandi **is on the defendant**. **If malice** in the publication of a particular report of any body **is not present** and the **public interest** is served by the publication**, such publication must be taken**, for the purpose of the Roman Dutch Law, as being directed to serving that interest and **will be privileged and the animus injuriandi will be negative. "**

If in the case in hand, the allegedly defamatory words such as ' it is difficult to trust the lady lawyer' was used with malice, then it could be held defamatory. I do not find in the evidence of all the witnesses for the Plaintiff and in the documents marked by the Plaintiff that malice has been proved. It is only the evidence of the Plaintiff which simply states that it was revengeful. There is no proof of malice. There is no proof of revenge. The words used had spelt out the truth without any adjectives or adverbs. It is common sense that if a prosecuting lawyer takes a fee from the party against whom action is filed, then it is difficult to trust that particular lawyer. There is no malice in what the Plaintiff had mentioned. It was said so, within a privileged place as well established from the evidence. The public interest is served. The animus injuriandi is negative.

I answer the questions of law raised by the Plaintiff Respondent Appellant in the negative against the said Plaintiff Respondent Appellant and in favour of the Defendant Appellant Respondent. I affirm the judgment of the learned High

Court Judges dated 14.12.2012 and set aside the judgment of the learned District Judge dated 18.10.2010.

The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

K.T.Chitrasiri
I agree with the judgement of the Hon. Justice
S. Eva Wanasundera PC while disagreeing with
the judgement of Hon. Justice V.K.Malalgoda PC.

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 Judgment of the Provincial High Court (Civil Appellate) of the North Central Province in case No. NCP/HCCA/ARP/878/2010, under and in terms of the High Court of the Provinces (Special Provisions) (Amendment) Act, No 54 of 2006

Supreme Court Appeal 135/2012

R.A.C. Ranawaka,
No. 206, Panselgodella,
Galamuna

Plaintiff

High Court (North Central Province)
NCP/HCCA/ARP/878/2010
Polonnaruwa District Court
Case No. 10645/Damages/2005

Vs,

Upali Chandrawansha,
Revenue Administrator,
C/O Lankapura Pradeshiya Sabha,
Lankapura, Thalpotha.

Defendant

And,

Upali Chandrawansha,
Revenue Administrator,
C/O Lankapura Pradeshiya Sabha,
Lankapura, Thalpotha.

Defendant-Appellant

Vs,

R.A.C. Ranawaka,
No. 206, Panselgodella,
Galamuna

Plaintiff-Respondent

And now between

R.A.C. Ranawaka,
No. 206, Panselgodella,
Galamuna

Plaintiff-Respondent-Appellant

Vs,

Upali Chandrawansha,
Revenue Administrator,
C/O Lankapura Pradeshiya Sabha,
Lankapura, Thalpotha.

Defendant-Appellant-Respondent

Before: **S.E. Wanasundera PC J**

K.T. Chitrasiri J

Vijith K. Malalgoda PC J

Counsel: Senany Dayaratne for the Plaintiff –Respondent-Appellant

Lasith Chaminda for the Defendant-Appellant-Respondent

Argued on **25.09.2017**

Decided on **05.04.2018**

Vijith K. Malalgoda PC J

Plaintiff Respondent Appellant Ranawaka Arachchige Chandrakanthi Ranawaka had filed the present appeal against the decision of the Provincial High Court (Civil Appellate) of the North Central Province holden in Anuradhapura in Appeal Case No. NCP/HCCA/ARP/ 878/2010 dated 14.12.2011.

When this matter was supported for leave, the Supreme Court after considering the material placed on behalf of the Plaintiff Respondent Appellant had granted leave to appeal on the questions set out in paragraph 7 (f) (g) (h) and (k) of the petition, and re-numbered those issues as 1,2,3,4, in the journal entry dated 30.07.2012 which reads as follows;

1. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that the statement complained of was a privileged statement, and hence not defamatory?
2. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that *animus injuriandi* was not attributable to the Respondent in respect of the said statement complained of?
3. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that the Respondent could not be held responsible for the publication of the said statement complained of?
4. Did the Learned Judges of the Provincial High Court (Civil Appellate) of the North Central Province err in law, by holding that the Petitioner's claim of loss and damage to reputation, good name, and professional standing and prospects, due to the statement complained of was not substantiated by evidence?

As revealed before this court the Defendant Appellant Respondent (hereinafter referred to as the Respondent) to the present appeal was the Revenue Administrator at Lankapura Pradeshiya Sabha in the North Central Province. The Plaintiff Respondent Petitioner (hereinafter referred to as the Petitioner) who is a legal practitioner in the Polonnaruwa and Hingurakgoda Courts, was engaged by the said Lankapura Pradeshiya Sabha to attend to all legal matters of the said Pradeshiya Sabha.

The Petitioner had initiated legal proceedings initially against two Defendants namely the Respondent above named and the Lankapura Pradeshiya Sabha claiming damagers of Rs. 2,500,000/- in the District Court of Polonnaruwa. The events that lead to initiate the said proceedings before the District Court can be summarized as follows;

a) On or about 31st January 2005 the monthly meeting of the Pradeshiya Sabha was held at its Auditorium
b) During the said meeting, certain issues were raised with regard to the recovery of lease rentals by initiating legal proceedings
c) When the said issues were raised, certain queries were made from the Respondent who is the Revenue Administrator of the Pradeshiya Sabha with regard to initiating proceedings before the Magistrate's Court
d) Answering the said issues raised, the Respondent made a statement to the effect that the Appellant appeared on behalf of the opposing party in a Magistrate's Court proceeding against the interest of the Pradeshiya Sabha, and therefore steps were taken to retain a new Attorney at Law in order to send letters of demand at a lower fee.
e) The said reply given by the Respondent at the meeting of the Pradeshiya Sabha was reported in the "Dinamina" Daily Sinhala News Paper on 31st March 2005

f) Whilst initiating the proceedings before the District Court, the Petitioner had claimed that, as a consequence of the said publication based on the utterances made by the Respondent, the Petitioner suffered loss and damage to her reputation, good name, professional standing and prospects

As revealed before us, the Petitioner had withdrawn her case against the 2nd Defendant Pradeshiya Sabha and proceeded only against the 1st Defendant who is the Respondent to the present application.

The trial before the District Court of Polonnaruwa was commenced after recording 07 admissions, 06 issues in favour of the Plaintiff and 09 issues in favour of the Defendant. At the conclusion of the District Court Trial, the learned District Judge of Polonnaruwa answering the 1st to the 6th issues in favour of the Plaintiff had granted damages in sum of Rupees 15 lacks to the Plaintiff.

Being dissatisfied with the said decision of the District Judge, the Respondent appealed to the Provincial High Court (Civil Appellate) of the North Central Province. During the said appeal, the judges of the Provincial High Court (Civil Appellate) of the North Central Province, by the judgment dated 14.12.2011, set aside the judgment of the District Judge of Polonnaruwa.

The instant appeal is against the said decision of the Provincial High Court, and when the matter was supported for leave, this court had granted leave, on the questions of law referred to above.

When considering the appeal before us it is important for this court to first satisfy, whether the statement referred to above had in fact been made by the Respondent and whether it was made to or published to some person other than the person defamed. This position was discussed by R.G. McKerron as follows;

> "By publication is meant the act of making known the defamatory matter to some person or persons other than the person defamed."

(***R.G. McKerron, Law of Delict 7th Edition at page 183***)

In the case of the ***Independent News Papers Ltd V. Devadas (1983) 2 Sri LR 505*** it was held that,

> "It is an essential element of defamation that the words complained of should be published of the plaintiff. Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to"

As revealed before the trial court the statement referred to as defamatory against the Appellant was made by the Respondent at a meeting of the Pradeshiya Sabha held at its auditorium attended by its members. During the trial before the District Court, in addition to the News Paper referred to above, minutes of the Lankapura Pradeshiya Sabha dated 31.01.2005 was produced marked P-1. In the said minute, at page 6 the statement said to have made by the Respondent was recorded as follows;

> "එම අවස්ථාවේදී ආදායම් පරීපාලක මහතා සභාවට කැඳවා වඩාත් විස්තර දැනගැනීමට සභාව තීරණය කරන ලදී" ආදායම් පරිපාලක ඒ.පී. උපාලි චන්ද්‍රවංශ මහතා කඩකාමර හිඟ අයකරගැනීමට ඇති ප්‍රමාණය සඳහන් කරමින් පළමුව උසාවි දැමීමට පෙර පළමු පියවර වශයෙන් නීතීඥවරයෙකු මාර්ගයෙන් එන්තරවාසි යැවීම සිදුකල බව පැවසීය. සභාව මගින් පත් කර ගත් නීතීඥවරිය සභාව මගින් පවරන ලද නඩුවක විත්තිය වෙනුවෙන් පෙනීසිටීම නිසා එම නීතීඥවරිය විශ්වාසය තැබීම අසීරුවී ඇති හෙයින් වෙනත් නීතීඥවරයෙකු හරහා අඩු නීතීඥ ගාස්තුවක් යටතේ එන්තරවාසි යැවීමට කටයුතු කල බව පැවසීය.

When going through the said minute it appears that, what was reported in the News Paper was the correct proceeding of the Lankapura Pradeshiya Sabha taken place on 31.01.2005. However as

transpired before us, the Plaintiff in the District Court proceedings (the Appellant before us) has decided not to proceed against the News Paper which published the said news item, but decided to proceed against the maker of the said statement. As further transpired, the Petitioner got to know about the said statement when it was reported in the News Paper but, the Appellant whilst giving evidence before the trial court had further said "that the members of the Pradeshiya Sabha had telephoned her and asked whether she is not ashamed to accept money from both sides." The said statement made by the witness clearly indicates that the members of the Pradeshiya Sabha had taken note of the statement made by the Respondent and confronted the same with the Petitioner.

When considering the matters referred to above this court is satisfied that the statement said to have made by the Respondent had been published within the meaning of the term 'Publication'.

However as observed by the Judges of the Provincial High Court of Civil Appeal as well as by the District Judge, Polonnaruwa, the most important matter to be resolved is to consider whether the said publication comes within privilege communication or not.

The possible defences in a case of this nature was discussed by Lord Uthwatt of the Privy Council in the Privy Council decision of ***M.G. Perera Vs, A.V. Peiris 50 NLR at page 159,*** as follows;

> "Their Lordships' attention has not been drawn to any case under the Roman Dutch Law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an inquiry whether the proceedings before the Commissioner fell within one or other of these categories. Their Lordships do not propose to enter upon that inquiry. They prefer to relate

> their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather than to debate the question whether the case falls within some specific category.
>
> The wide general principle was stated by their Lordships in *Macintosh V. Dun*[1] to be the "common convenience and welfare of society" or "the general interest of society" and other statements to much the same effect are to be found in *Stuart V. Bell*[2] and in earlier cases, most of which will be found collected in Mr. Spencer Bower's Valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary-viewed as isolated facts- but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to *Rex V. Wright*[3] where the basis of the privilege is expressed to be "the general advantage to the country in having these proceedings made public", and to *Davison V. Duncan*[4] where the phrase used is "the balance of public benefit from publicity"; while in *Wason V. Walter*[5] the privilege accorded to fair reported of parliamentary proceedings was on the same basis as the privilege accorded to fair reports of judicial proceedings- the requirements of the public interest."

In the said decision Lord Uthwatt had further observed, the importance of malice in relevant publication as follows;

> "As regard the News Paper the Report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish–that would in their Lordships opinion be relevant only if malice were in issue…."

When going through the facts of the case in hand as discussed above and the evidence given by the Respondent before the trial court it appears that the Respondent was summoned before the monthly meeting by the members of the Pradeshiya Sabha and questioned him with regard to the recovery of arrears money and steps taken to recover those monies. When the Respondent explained the steps taken, it was transpired that the services of a new Attorney at Law was obtained by the Respondent in order to send letters of demand to the respective tenants and the Respondent had justified his decision to retain a new Attorney at Law of his choice without obtaining the prior approval of the Pradeshiya Sabha by making the statement in question.

As observed earlier in this judgment the Petitioner has decided not to prosecute the News Paper which published the news item but decided to prosecute the maker of the statement. When considering the circumstances under which the Respondent had made the above statement, it is important to consider whether the said statement was made strictly within his employment and therefore his statement comes within a privilege statement.

In this regard, it is also important to consider the facts transpired before the District Court from the evidence by both parties.

The Appellant whilst giving evidence, had denied the fact that she appeared for an accused person in a case filed by the Pradeshiya Sabha and produced the certified proceedings of the case in question namely Magistrate's Court, Polonnaruwa case No 98660 as P-1. According to the evidence of the Appellant, the case was called on a motion filed by Nalaka Bandara Attorney at law on 17.12.2004. Since the accused Renuka Jayasuriya of Ideal Pharmacy produced the payment receipt, the Appellant who represented the Pradeshiya Sabha admitted the payment and the accused was discharged accordingly by court. The said fact was confirmed by Nalaka Bandara AAL when he was called as a witness for the Plaintiff.

Upali Chandrawansa the Respondent when giving evidence before the District Court whilst challenging the above position had confirmed the fact that the Petitioner appeared for an accused person in the Magistrate's Court as follows;

(Examination in chief of witness Chandrawansa proceedings at pages 8-9 dated 21.01.210)

"98660 කියන නඩුවට වර්ෂ 2004.12.17 වන දින මහේස්ත්‍රාත් අධිකරණයේදී තිබුන නඩුවට සහභාගී වුනේ නෑ. මේ අධිකරණයේ වෙනත් නඩුවක් තිබුනා. 98412 කියන නඩුව තිබුනේ. එදින විත්තිකාරිය අධිකරණයට ආවා. අංක 02 උසාවියේ නඩුව ගන්නකොට මම හිටියේ නෑ. මම මේ දිස්ත්‍රික් උසාවියේ හිටියේ. මම එදින ලංකාපුර ප්‍රාදේශීය සභාව වෙනුවෙන් පෙනී සිටින්න කියලා මේ පැමිණිලිකාර මහත්මියට උපදෙස් දීලා තිබුනේ නෑ. ඒ නඩුවේ විත්තිකාරිය රේණුකා ජයසූරිය. ඒ නඩුවේ විත්තිකාරිය වෙනුවෙන් හිටිය නීතීඥවරිය වන්නේ රණවක මහත්මියයි. රණවක මහත්මිය මේ විත්තිකාරිය එක්ක මගේ ලඟට ආවා. විත්තිකාරිය වෙනුවෙන් පෙනී සිට නඩුවක් දැම්මා කියලා මට සාක්ෂි දෙන්න කීවා උසාවියට ඇවිල්ලා. ඊට පස්සේ මම ගියේ නෑ මම මෙතනම හිටියා. මෙදින විත්තිකාරිය විසින් 98660 කියන මෙම නඩුවේ පැමිණිලිකාර මහත්මියට පෙනී සිටින්න කියලා මුදල් දෙනවා මම දැක්කා. මේ විත්තිකාරිය එක්කගෙන එහා පැත්තට යනවා මම දැක්කා. මුදල් ප්‍රමාණයක් මම දැක්කේ නෑ. මුදල් ගණුදෙනුවක් කලා මම දැක්කා. එදින 2004.12.17 වන දින මීට කලින් සාක්ෂි ලබා දුන්න නීතීඥ නාලක බංඩාර මහතා පෙනී සිටියේ නෑ. වි. 05 පෙන්වා සිටී. (2005 ජූලී 12 වන දින දාතමින් යුතු දිවුරුම් ප්‍රකාශයක් පෙන්වා සිටී.) සාක්ෂිකරු එය හඳුනා ගනී. එය වි. 05 ලෙස ලකුණු කර ඉදිරිපත් කරයි. මේ දිවුරුම් ප්‍රකාශය රේණුකා ජයසූරිය කියන විත්තිකාරිය මට දුන්නේ. මේ දිවුරුම් පත්‍රයේ අධිකරණයට ඉදිරිපත් කරන්න කියලා වරෙන්තු කරා කියලා තිබෙනවා. 03 වන ඡේදයේ නීතීඥ රණවක මහත්මිය රුපියල් 300ක මුදලක් ගෙවා මේ නඩුව අවසන් කර ගත්තා කියලා තියෙනවා."

As referred to in the said evidence the Respondent had seen one Ms. Jayasuriya giving some money to the Appellant and in support of his version he had submitted an affidavit from the said Renuka Jayasuriya as well.

However under cross examination this witness's credibility was challenged and at one stage witness had to admit that he was in a different court house on that day and some of the answers were given by going through the proceedings of that day.

Some of the important questions put to the Respondent and answers given by him are referred to as follows;

(Cross examination of witness Chandrawansa proceedings at pages 16-19 dated 21.01.2010)

ප්‍රැ 98960 කියන නඩුව තිබුනේ කොයි උසාවියේද?

උ: එහා එකේ

ප්‍රැ ඒක මෝෂමකින් කතාකල එකක්ද වරෙන්තු කල නඩුවක්ද?

උ: උත්තරයක් නැත

ප්‍රැ එදින පෙනී සිටියේ කව්ද?

උ: මම නෙමෙයි

ප්‍රැ විත්තිකාර මහත්මිය වෙනුවෙන් කව්ද පෙනී සිටියා කීවේ කව්ද?

උ: නීතීඥ රණවක මහත්මිය

ප්‍රැ කව්ද තමුන්ට කීවේ? දිසා අධිකරණයේ ඉඳලා මහේස්ත්‍රාත් අධිකරණයේ වෙච්ච දේවල් දන්නේ කොහොමද?

උ: මම දැක්කා මෙතනින් එක්ක යනවා විත්තිකාරිය තමයි රණවක නෝනා එක්කගියේ

ප්‍රැ උසාවියේ පෙනී සිටියා කියලා දැක්කද?

උ: උත්තරයක් නැත.

මේ අවස්ථාවේදී සාක්ෂිකරු අසන ලද ප්‍රශ්නවලට උත්තර නොදෙන බැවින් අසන ලද ප්‍රශ්නවලට නිවැරදි පිළිතුරු දෙන ලෙසට නියම කරමි.

ප්‍රැ තමුන් දැක්කද උසාවියේ ඉන්නවා?

උ: මම දැක්කේ නෑ.

ප්‍ර: තමුන් කොහොමද කියන්නේ පෙනී සිටියා කියලා?

උ: කාර්ය සටහන් අනුව මම කීවේ.

ප්‍ර: මොකක්ද සටහන්වල තියෙන්නේ?

උ: විත්තිකාරිය වෙනුවෙන් නීතිඥ රණවක මහත්මිය පෙනී සිටියා කියලා.

ප්‍ර: නීතිඥ මහත්මිය කවුරු වෙනුවෙන් පෙනී සිටියා කියලද හිතන්නේ?

උ: රේණුකා වෙනුවෙන් පෙනී සිටියා කියලා.

වි. 03 පෙන්වා සිටී.

ලංකාපුර ප්‍රා. සභාව වෙනුවෙන් පෙනී සිටින නීතිඥ මහත්මිය වගඋත්තරකරු..... කියවා සිටී.

ප්‍ර: මේකේ සටහන් වෙලා තියෙනවද නීතිඥ මහත්මිය වගඋත්තරකාර පාර්ශවය වෙනුවෙන් පෙනී සිටියා කියලා?

උ: මෙතන එහෙම නෑ.

ප්‍ර: මේ සටහනේ නීතිඥ මහත්මිය කවුරු වෙනුවෙන්ද පෙනී සිටියේ කියලා තියෙනවද?

උ: නෑ.

ප්‍ර: මම තමුන්ට කියන්නේ තමුන් සටහන් බලලා මේ ගරු අධිකරණයට බොරු කියන්නේ කියලා කියනවා?

උ: මම පිළිගන්නේ නෑ.

ප්‍ර: මේ නීතිඥ මහත්මිය සමඟ තියෙන අමනාපය නිසා තමයි මේ බොරු කියන්නේ කියලත් යෝජනා කරනවා?

උ: පිළිගන්නේ නෑ.

An affidavit and a letter said to have prepared by one Renuka Jayasuriya had been produced marked “වි-5” and “වි-6” respectively during the trial in the District Court. Even though several objections were raised with regard to the admissibility of the said affidavit, I don’t think it is necessary to consider them at this juncture, since the document itself is contradictory to the testimony of witness Renuka Jayasuriya. In her affidavit affirmed on 12.07.2005 and the letter dated 26.03.2005 addressed to the Chairman Lankapura Pradeshiya Sabha, she had taken up the position that she paid Rs. 300/ to the Petitioner in order to withdraw the case filed against her. However whilst giving evidence on behalf of the Respondent the witness had explained as to what happened in the Magistrate’s Court, when her evidence being led by the counsel on behalf of the Respondent as follows;

> “අංක 2 දරණ මහේස්ත්‍රාත් අධිකරණයේ ලංකාපුර ප්‍රාදේශීය සභාවට පවරන ලද නඩුවක් තිබුනා. ඒ නඩුව මට පවරලා තිබුනේ ප්‍රාදේශීය සභාවේ බදු ගෙව්වේ නෑ කියලා. රු. 450/ ක මුදලක් ගෙවන්න තිබුනේ. ඒ මුදල මම ප්‍රාදේශීය සභාවට ගෙව්වා. අධිකරණයට නෙමෙයි ගෙව්වේ. මම නීතීඥ රණවක මහත්මියට කතාකලා. නීතීඥ මහත්මිය කීවා එයාට ඒක භාරගන්න බෑ. උසාවියට එන්න කීවා අපිට නීතීඥ වරයෙක් හඳුන්වලා දෙන්නම් කීවා.
>
> මම ලංකාපුර ප්‍රාදේශීය සභාවට ලිපියක් ඉදිරිපත් කලා. ඒ අකුරු මගේ. මට මේ ලිපියේ කොපියක් දුන්නා. ප්‍රාදේශීය සභාවේ රාජමන්ත්‍රී මහත්මයා මට කීවා මේ බදු මුදල් වලට අමතරව නීතීඥ රණවක මහත්මියට මුදල් දුන්නා කියලා නෑ මේ ලිපියේ නෑ. නාලක මහතාටත් මුදල් දුන්නා කියලා ඒ විදිහට ලියලා දෙන්න කීවා. (මේ අවස්ථාවේදී විත්තියේ නීතීඥ මහතා විත්තියේ සාක්ෂි කරුවන්ගෙන් යෝජනා කරමින් ප්‍රශ්ණ අසන හෙයින්, සාක්ෂි ආඥා පනත යටතේ එලෙස ප්‍රශ්ණ කිරීමට නොහැකි බව නීතීඥ මහත්මාට දන්වා සිටිමි.) මට මේ විදිහට සාක්ෂි දෙන්න කියලා කව්රුත් උපදෙස් දුන්නේ නෑ. මේ දිවුරුම් ප්‍රකාශයේ තිබෙන්නේ මගේ අත්සන. මේ දිවුරුම් ප්‍රකාශය ගැන මම දන්නේ නෑ. මේ ස්වාමීණ්වහන්සේ ඉදිරිපිට මම අත්සන් කලේ නෑ.”

When considering the above evidence with the two documents referred to above, the affidavit and the letter produced marked "වි-5" and "වි-6" respectively, it is clear that the Respondent had made an attempt to introduce some evidence in support of his version. The said attempt by him clearly indicates his intention to mislead the court to cover up his position which appears to be untrue. The said conduct of the Respondent indicates the fact that the Respondent when making the statement in question had acted in malice against the Petitioner.

In the case of ***David V. Bell 16 NLR 319*** it was held that,

> In the case of defamation malice in modern English Law is no more than the absence of just cause or excuse and similarly an actual intention or desire to *injuria* is not under the Roman Dutch Law necessary to continue the animus *injuriandi*. Rackless or careless statements may be taken as proof of animus *injuriandi* and while English Law malice can only be refuted by showing the occasion was privileged or that the words were no more than honest and fair expression of opinion or matters of public interest and general concern, the Roman Dutch Law allows proof not only of such circumstances that the occasion was privileged but of any other circumstances that furnish a reasonable excuse for the use of words explained of"

The position taken up by the Respondent when he was subject to cross examination and the evidence of witness Jayasuriya clearly establish that the statement referred to was made not only with malicious intent towards the Appellant but was also made recklessly.

In the said circumstances I observe that the Judges of the Civil Appellate High Court err in law when they conclude that the statement made by the Respondent was a privilege statement since it was made at the monthly meeting to some questions raised from him within the four walls of the committee hall, even though it was found to be a untrue statement.

The Petitioner whilst testifying before the District Court had explained the embarrassment she had to undergo when the statement was made by the Respondent at the meeting as well as it was later published in the News Paper. The above evidence was sufficiently considered by the trial judge in her order when granting compensation.

It is further revealed that the said Pradeshiya Sabha had promptly taken steps with regard to the complaint made by the Respondent to the effect that the Petitioner had appeared in a case filed by the Pradeshiya Sabha against the interest of the Pradeshiya Sabha and taken steps to remove her from the work assigned to her.

The above position clearly shows that the statement made by the Respondent was considered by the Lankapura Pradeshiya Sabha as a statement made by the Respondent in his official capacity as the revenue administration of the said Pradeshiya Sabha and decided to act upon the said statement.

When considering whether the statement made by the Respondent was defamatory on the Appellant the Judges of the High Court of Civil Appeal had further observed that there wasn't sufficient material before the District Court to conclude that the said statement was made with malice or with the intent of defaming her or with the intent of putting her in difficulty.

In this regard the Judges of the High Court of Civil Appeal have referred to the decision of ***Pittard V. Oliver (1981) 60 L.J.Q.B. 219*** where it was observed that an answer given to a quarry made by the members of a Local Authority does not amount to defamation on a third party but as observed by me, the matters elicited before the District Court had clearly indicated that the Respondent had made the said statement with the intention of harming the Petitioner and the necessary animus *injuriandi* was present in the case in hand.

In the case of ***Dahanayake V. Jayasekara 5 NLR 257*** it was held that the Plaintiff in a defamation case must be given the opportunity to establish that the alleged statement was untrue and that it was made with improper motive.

Considering all the matters referred to above, I answer the questions of Law raise before this court in favour of the Petitioner and allow the appeal before us. I therefore make order setting aside the judgment of the Provincial High Court of Civil Appeal of the North Central Province dated 14.12.2011 in Appeal Case No. NCP/HCCA/ARP/878/2010 and affirm the judgment of the District Judge of Polonnaruwa in case No. 10645/Damages/2005, dated 18.10.2010.

However, I make no order with regard to cost.

Appeal allowed no costs.

Judge of the Supreme Court

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

In the matter of an Appeal

Tropical Island Commodities (Private) Limited of

First Floor, State Bank of India Building, Fort,
Colombo-01.

Plaintiff-Appellant.

SC Appeal 137/2015
LA No: SC/HC/LA/02/2015
High Court (Civil) No: HC (Civil) 204/2014/MR

Vs-

Mediterranean Shipping Company S.A. 12-14,
Chemin Rieu, CH 1208, Geneva,
Switzerland.

Carrying on business through its office of Sri Lanka,
Dr. Danister de Silva Mawatha,
Colombo-08.

Defendant-Respondent

Before: Sisira J. de Abrew, J

Vijith Malalgoda, PC, J &

Murdu Fernando, PC, J

Counsel: Dr. Harsha Cabral PC with Thishya Weragoda and Sachira Arsakularathne for the Plaintiff-Appellant.
Manoj Bandara with Thidas Herath for the Defendant-Respondent instructed by Sudath Perera Associates

Argued on : 02.05.2018

Decided on: 03.12.2018

Sisira J. de Abrew, J

The Plaintiff-Appellant filed action against the Defendant Company seeking a judgment against the Defendant Company in a sum of Rs.40 Million.

The Defendant Company which is a foreign company based in Switzerland and carrying on business through its office in Sri Lanka filed proxy. The Plaintiff-Appellant objected to the proxy on the basis that it was a defective proxy and move for an ex-parte judgment against the Defendant Company. The learned High Court Judge by his order dated 18.12.2014 overruled the objection. Being aggrieved by the said order of the learned High Court Judge, the Plaintiff-Appellant has appealed to this court. This court by its order dated 3.8.2015, granted leave to appeal on questions of law set out in paragraphs 15(a) and 15(c) of the petition of Appeal dated 5.1.2015 which are stated below.

1. Has the learned High Court Judge erred in law in concluding that there was a valid proxy filed of record albeit defective as of 28th August 2014 and therefore rectifiable?

2. Has High Court Judge erred in law in failing to conclude that,

   (i) Mr.Jan Christian Severin was not a lawfully appointed Agent/Attorney of the Respondent as of 19th August 2014 and

therefore not a Recognized Agent within the meaning of Section 24 of the Civil Procedure Code?

(ii) The purported proxy tendered to court on 28th August 2014 signed by Mr.Jan Christian Severin as the Attorney of the Respondent was null and void ab initio?

(iii) As of 28th August 2014 (i.e. the Summons Returnable date), there was no appearance in court by the Respondent or any recognized agent or an Attorney-at-Law within the meaning of Section 24 or 27 of the Civil Procedure Code?

Mr. Glanluigi Aponte President of the Defendant Company by document dated 8.11.2013(page 228 of the brief) appointed Mr.Jan Christian Severin as Defendant Company's lawful 'Attorney of fact'. Mr.Jan Christian Severin on 19.8.2014 signed the proxy on behalf of the Defendant Company. The seal of the company has been placed on the proxy. This proxy was filed in the high Court on 28.8.2014. On 14.10.2014 the Plaintiff-Petitioner objected to the proxy on the basis that it was a defective proxy.

Learned counsel for the Plaintiff-Petitioner contended that Mr. Glanluigi Aponte has no authority to sign the letter appointing Mr.Jan Christian Severin as'Attorney of fact'; that Mr.Jan Christian Severin has no authority to sign the proxy on behalf of the Defendant Company; and that therefore the proxy filed on behalf of the Defendant Company is not a valid proxy. I now advert to this contention. Although learned President's Counsel for the Plaintiff-Petitioner contended so, Geneva trade Register (page 57) states that Mr. Glanluigi Aponte has been empowered to sign on behalf of the company. Therefore the document (at 228 of the brief) appointing

Mr.Jan Christian Severin as company's 'Attorney of fact' is a valid document. Therefore Mr.Jan Christian Severin has the authority to sign a proxy on behalf of the Defendant Company.

Who can sign a proxy on behalf of a company? To answer this question it is necessary to consider Section 59(5) of the Civil Procedure Code which reads as follows.

> " Where a defendant is represented by a registered attorney, the attorney shall in the proxy tendered on behalf of the defendant, state the number of the identity card or the passport, as the case may be, of the defendant and shall also make an endorsement thereon certifying the identity of such defendant, where a proxy is tendered on behalf of a company or a body corporate it shall be tendered under the seal of such company or the body corporate, as the case may be."

But when Sinhalese version of the above section is considered it appears that after the words 'such a defendant' there should be a full-stop instead of a coma. Article 23(1) of the Constitution reads as follows:

> "23. (1) All laws and subordinate legislation shall be enacted or made and published in Sinhala and Tamil, together with a translation thereof in English ;
>
> Provided that Parliament shall, at the stage of enactment of any law determine which text shall prevail in the event of any inconsistency between texts ;
>
> Provided further that in respect of all other written laws the text in which such written laws were enacted or adopted or made, shall prevail in the event of any inconsistency between such texts."

Section 16 of Civil Procedure Code (Amendment) Act No.14 of1997 reads as follows:

> "In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail."

According to this section, in the event of an inconsistency the Sinhala text should prevail. Therefore it is the Sinhala version of Section 59(5) of the Civil Procedure Code which should prevail. Therefore in Section 59(5) of the Civil Procedure Code there are two sentences. The 1st sentence is as follows.

> "Where a defendant is represented by a registered attorney, the attorney shall in the proxy tendered on behalf of the defendant, state the number of the identity card or the passport, as the case may be, of the defendant and shall also make an endorsement thereon certifying the identity of such defendant."

The 2nd sentence is as follows.

> "Where a proxy is tendered on behalf of a company or a body corporate it shall be tendered under the seal of such company or the body corporate, as the case may be."

The 1st sentence of Section 59(5) of the Civil Procedure Code deals with a natural person and the 2nd sentence of the said section deals with a juristic person. According to the 2nd sentence of Section 59(5) of the Civil Procedure Code, when a proxy is filed on behalf of a company, placing of the seal of the company is sufficient and there is no requirement in Section 59(5) of the Civil Procedure Code for any other person to place his signature on the proxy authenticating the company seal. This view is supported by the judgment of Justice Amartaunga in the case of Pinto Vs Trelleborg Lanka (Pvt) and Others [2003] 3 SLR 214 wherein His Lordship at page 218 held thus:

> "The placing of the seal of the company is sufficient for this purpose as the company can be made answerable when the proxy contains its seal. Since there is no requirement in the Code for any other person to sign authenticating the company seal, it is not necessary to show on the face of the proxy that the two signatures appearing on the proxy were the signatures of those who were empowered to authenticate the seal and to certify their identity by the Attorney-at-Law."

In the present case, seal of the company has been placed on the proxy. When I consider the above matters I hold that the proxy filed on behalf of Defendant Company was in conformity with section 59(5) of the Civil Procedure Code and was therefore valid. For the above reasons, I answer the aforementioned questions of law in the negative.

For the above reasons, I hold that the learned High Court Judge was correct when he overruled the objection of the Plaintiff-Appellant. I affirm the order of the learned High Court Judge dated 18.12.2014. I therefore dismiss the appeal of the Plaintiff-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

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

SC Appeal No.139/2014

SC (SPL) LA Application No.105/2014

CA Appeal No. CA21-22/2009

High Court Colombo Case No.861/2002

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

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Panangalage Don Nilanka
2. Kodituwakkulage Pradeep Samantha *alias* Fredie

Accused

And Now

1. Panangalage Don Nilanka
2. Kodituwakkulage Pradeep Samantha alias Fredie

Accused-Appellants

Vs.

The Hon. Attorney General,

Attorney General's Department,
Colombo 12.

Respondent

And Now Between

Kodituwakkulage Pradeep
Samantha alias Fredie

Presently at

Welikada Prison
Baseline Road
Borella.

2nd Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

Before: Eva Wanasundera, PC, J
Buwaneka Aluwihare, PC, J &
Vijith K. Malalgoda, PC. J

Counsel:	Amila Palliyage with Upul Dissanayake for the accused-Appellant-Petitioner instructed by Eranda Sinharge
	Thusith Mudalige, DSG for AG.
Argued on:	21.07.2017
Decided on:	21.11.2018

Aluwihare PC.J.,

The 2nd Accused-Appellant-Appellant (hereinafter referred to as the accused-Appellant) was indicted along with another for the murder of one A. D. Dilrukshan Silva (hereinafter referred to as the deceased) before the High Court of Colombo. At the conclusion of the trial, both the accused were convicted of the offence as indicted on the basis of joint liability under Section 32 of the Penal Code, (Common intention).

The accused-appellant aggrieved by the judgment, appealed against the conviction and the sentence to the Court of Appeal. Their Lordships by their judgment of 30.05.2014 affirmed the conviction of both the accused. However, the sentence of death imposed on the accused-appellant was substituted with a sentence of life imprisonment by invoking provisions of the Code of Criminal Procedure Act and the Penal Code, to which I shall advert later.

Aggrieved by the judgment of their Lordships of the Court of Appeal the accused-appellant sought special leave to appeal and special leave to appeal was granted on the following questions of law.

(1) Was the death sentence imposed by the learned trial judge contrary to the provisions of Section 281 of the Code of Criminal Procedure Act as amended by Act No.52 of 1980 read with Section 53 of the Penal Code.

(2) Can the Court of Appeal decide that the sentence is a life imprisonment in terms of Section 281 of the Code of Criminal Procedure Act as amended by Act no. 52 of 1980 read with Section 53 of the Penal Code, when the discretion is vested with his Excellency the President.

In view of the nature of the questions of law on which special leave was granted, I do not see a necessity to address the facts of the case, but suffice it to state that the accused-appellant was a boy of 16 years of age at the time the offence was committed.

It was the contention of the learned counsel for the accused-appellant that the learned trial judge erred in imposing the death sentence, which was violative of Section 281 of the Code of Criminal Procedure Act and Section 53 of the Penal Code. Section 281 of the Code of Criminal Procedure Act No.15 of 1979 as amended (hereinafter, the Code of Criminal Procedure) stipulates that-

"Where any person convicted of an offence punishable with death, appears to the court to be under the age of eighteen years, the court ***shall pronounce*** *on that person in lieu of the sentence of death,* ***the sentence provided by the Section 53 of the Penal Code."*** (emphasis added)

Section 53 of the Penal Code reads as follows:

Sentence of ***death shall not be pronounced*** *on or recorded* ***against any person*** *who, in the opinion of the court, is* ***under the age of eighteen years;*** *but in lieu of that punishment, the court shall sentence such person to be detained during the President's pleasure.* (emphasis added)

In the context of the above provisions, it was argued on behalf of the accused-appellant that the power of sentencing is vested with the head of State and that the court has no power to decide on the sentence when the offender was under 18 years of age.

As far as the imposition of the sentence of death was concerned, the issue stands resolved; as their Lordships of the Court of Appeal have set aside the sentence of death and *in lieu* of that, a sentence of life imprisonment had been imposed—the legality of which I shall advert to, in answering the second question of law on which special leave to appeal was granted.

Although, it may not be directly relevant to the issue, it would be pertinent to consider Sections 75 and Section 76 of the Penal Code which governs the capacity for criminal liability. According to these provisions (***as they stood as at the date relevant to this case***) a child under the age of 8 years has absolute protection from culpable liability (Section 75) while a child who is, between 8 and 12 years of age has qualified protection from criminal liability (Section 76). Thus, when the capacity of criminal culpability of an accused is not disputed, all accused must be treated equally as far as criminal liability is concerned. The tender age, however, of an accused could be considered by the court as a mitigatory factor in deciding the appropriate sentence that is to be imposed. This, however, is only in instances where the penal sanction prescribed for the crime, vests the judge with a discretion

and not in instances where the law has prescribed a sanction without vesting any discretion in the judge. The offence of murder is one such offence for which death is prescribed as the only punishment under the law. Hence once an accused is found guilty of the offence of murder, the court has no discretion other than imposing the death penalty.

The only exception to this requirement is Section 53 of the Penal Code.

In the present case, the accused-appellant was 23 years at the time the sentence was imposed, although he was 16 years and a few months when the offence was committed. It was the contention of the learned counsel for the accused -appellant that the reference made to the 'age of the person convicted' in Sections 281 of the Criminal Procedure Code and Section 53 of the Penal Code, is the age of the accused at the time the offence was committed.

The learned Deputy Solicitor general on the other hand, argued that the provisions are without any ambiguity whatsoever and that, what is material with regard to the application of the statutory provisions aforesaid is the age of the accused at the point of imposition of the sentence and not the age of the accused at the time offence was committed.

Section 53 of the penal Code to my mind is without any ambiguity as it clearly states that: sentence of death shall not be **pronounced on any person who is under 18 years of age**, thus what is relevant is the age of the offender at the point of imposition of the sentence and not at the point of the commission of the offence.

As such, I see no impediment for the learned High Court Judge to have imposed the death sentence and in that context the learned High Court Judge cannot be said to have erred.

On the other hand, in the absence of any ambiguity, this court cannot go beyond the literal construction of the statutory provision, which is the primary rule of interpretation. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and on natural meaning of the words and sentences. (Per Lord Fitzgerald in the case of ***Bradlaugh v. Clerk*** 1883 8 App. cases 354.) The rule of construction is "*to intend, the legislature to have meant what they have actually expressed*." ***R v. Banbury (Inhabitants)*** 1834 1A and E 136 *per* Park J.

What Section 53 of the Penal Code prohibits is the **pronouncement** of death on any person who is under 16 years. In the present case, as referred to earlier, the appellant was 23 years at the time the death sentence was pronounced on him and as such I see no illegality in the order made by the learned High Court Judge in passing the death sentence.
On the other hand, recourse to Section 53 of the Penal Code must be had, in terms of section 281 of the Criminal Procedure Code, when a person is **convicted with an offence punishable with death.** Here again the emphasis is, the point of conviction and not the point at which the offence was committed.

Considering the above, I see no merit in the argument of the learned counsel for the Appellant as to the first question of law on which special leave was granted.

With regard to the 2nd question of law on which special leave was granted, the learned counsel for the appellant contended that the Court of Appeal erred, when their lordships substituted the death sentence imposed by the learned High Court Judge with a sentence of life imprisonment.

The learned counsel contended that in terms of Section 53 of the Penal Code, it is the prerogative of the Head of the State to decide on the period of detention under Section 53 of the Penal Code and the court has no jurisdiction to impose a sentence.

The learned counsel relied on the wording of Section 53 of the Penal Code, which reads; "The court shall **sentence** such person to be detained during the President's pleasure..."

By the use of words **"the court shall sentence"** in that section, the power of the court for sentencing has not been taken away; the issue, however, is the determination of the period of detention.

The origins of the phrase "at her majesty's pleasure" could be traced back to United Kingdom where it was based on the concept that all legitimate authority for the government comes from the Crown. The phrase was used throughout the Commonwealth realms where the monarch was represented by, Governor-General, Governor or Administrator and was modified to read as "Governor's pleasure" as the Monarch's representative in the British colonies. The words "**governor's pleasure**" is found in the original Penal Code, Ordinance No.2 of 1883, an Ordinance to provide a general Penal Code for the Island (Ceylon).

According to William Blackstone, the term is used to describe detention in prison for an indefinite length of time (Blackstone, William (1836) Commentaries on the Laws of England – Volume 2)

This position is reflected in Section 53 of the Penal Code, as the section stipulates "the court shall **sentence** such person to be detained during the **Governor's** pleasure, which was modified to read as Governor-General upon Ceylon ceasing

to be a British colony in 1948 and subsequently to be read as "the **President**" with the promulgation of the Republican Constitution.

A similar provision (to that of section 53) is found in the "Powers of Criminal Courts (Sentencing) Act 2000 (United Kingdom). Section 90 of the said Act lays down that:

> *"Where a person convicted of murder appears to court to* ***have been aged 18 at the time the offence was committed,*** *the court shall sentence him to be detained during Her Majesty's pleasure.* (Emphasis added)

It is interesting to note the contradistinction of the statutory provision referred to above *vis a vis* Section 53 of our Penal Code. The U.K. statute makes explicit reference to the age of the person at the time the offence was committed; (**"aged 18 at the time the offence was committed")** whereas Section 53 in our Penal Code refers to the prohibition of **pronouncing of the death sentence on a person under the age of eighteen**.

As such the jurisprudence developed in the United Kingdom on this issue is not helpful to resolve the issue before this court.

I wish to express the view that, this is a matter for the legislature to consider, particularly in view of the directive principles of State policy embodied in chapter VI of the constitution, in particular sub article 13 of Article 27 which expresses the state policy in the following terms;

"the state shall promote with special care the interest of children and youth, so as to ensure their full development, physical, mental, moral and social, and to protect them from exploitation and discrimination"

The state also has an international obligation in view of the UN Convention on the Rights of the Child, General Comment No. 10 by the Committee on the rights of the Child, on "Children's rights in juvenile justice" (2007), United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') (1985) and Administration of Juvenile Justice ('Vienna Guidelines') (1997) to treat child offenders in a manner consistent with the promotion of the child's sense of dignity and worth, which takes into account the child's age and the desirability of promoting the child's reintegration in society.

In the United States, the constitutionality of executing persons for crimes committed when they were under the age of 18 is an issue that the Supreme Court has evaluated in several cases since the death penalty was reinstated in 1976.

In the case of ***Thompson v. Oklahoma*** 487 U.S. 815 (1988) , the Supreme Court of the United States recognized that the age of the offender was an important consideration when trying to determine how the individual should be punished. The Court endorsed the proposition that less culpability should be attached to a crime committed by a juvenile than to a comparable crime committed by an adult:

The Court held "*Their inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult".*

As referred to earlier this court, however, is required to give effect to the legislative provision and I quote with approval Henry Cecil (The English Judge, Hamlyn Lectures, 1970, pg. 125), who expressed the view that,

> *"The object of every court must be to do justice within the law. Admittedly the law sometimes forces an unjust decision. If there is no way about it, it is for Parliament to alter the law if the injustice merits an alteration."*

In the case of ***Attorney-General and Others v Sumathipala*** 2006 2 SLR 126 Her ladyship Justice Dr. Shirani Bandaranayke (as she then was), in considering the impact of Section 47 (1) of the Immigrants and Emigrants Act on the liberty and freedom of an individual held that;

> "*However, it is to be noted that although the liberty and freedom of an individual is thus restricted in terms of the provisions of section 47 (1) of the Immigrants and Emigrants Act, that injustice cannot be cured by this Court as it is for the legislature, viz., the Parliament to make necessary amendments if there is a conflict between the specific provisions and individual liberty.*

As expressed in the American case of ***Thompson V. Oklahoma*** (supra), it may be desirable to visit, offences committed by persons below the age of 18, with a lessor culpability; the applicable statutory provisions in force, however, leave no room for that.

Considering the above, I see no merit in the argument of the learned counsel with regard to the second question of law on which special leave was granted and I answer the second question on which special leave was granted also in the negative.

I do not, however, wish to disturb the commutation of the death penalty imposed on the Appellant to one of life imprisonment by the Court of Appeal, although I have expressed the view that the learned Judge of the High Court had not erred.

Appeal Dismissed.

Judge of the Supreme Court

Justice Eva Wanasundera P.C

I Agree

Judge of the Supreme Court

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 application for Special Leave to Appeal under and in terms of Section 9 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

SC. Appeal No. 140/2010

Special Leave to
Appeal No. 118/10

High Court Colombo HCMCA 127/07

MC Colombo Case No. 71986/04

Amarasinghe Kankanamlage
Kamal Rasika Amarasinghe
Inspector of Police,
Welikada.
Accused-Appellant-Petitioner

Vs.

Officer-in-Charge
Special Investigation Unit,
Police Headquarters,
Colombo 01.
Complainant-Respondent-Respondent

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

BEFORE : Sisira J. de Abrew, J.
Prasanna S. Jayawardena, PC, J. &
L. T. B. Dehideniya, J.

COUNSEL : Nalin Ladduwahetty, PC, with Lakni Silva for the Accused-Appellant-Petitioner.

Lakmali Karunanayake, SSC, for the Attorney General.

ARGUED & DECIDED ON : 18.07.2018

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

In this case the Accused was charged in the Magistrate's Court for an offence under Section 314 of the Penal Code. After trial, the learned Magistrate convicted the Accused-Appellant and sentenced him to 01 year Rigorous Imprisonment and to pay a fine of Rs. 1000/-.

Being aggrieved by the said conviction and the sentence the Accused-Appellant appealed to the High Court and the learned High Court Judge by his judgment dated 18/05/2010 dismissed the appeal affirming the conviction and the sentence. 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 25/10/2010 granted leave to appeal on questions of law set out in paragraphs 23 (b), (e) and (f) of the petition of appeal dated 28/06/2010. The said questions of

law are set out below:-

1). Did the learned High Court Judge err in concluding that the contradictions and omissions marked do not go to the root of the case for the prosecution, when the said contradictions and omissions seriously affect the credibility of the witnesses?

2). Did the learned High Court Judge misdirect himself when he failed to consider that the medical evidence did not support the version of the prosecution?

3). Did the learned High Court Judge fail to consider that the charge preferred against the Petitioner was illegal in that the charge framed against the Petitioner is bad for duplicity and no valid trial could have been held on such a charge?

The facts of this case may be briefly summarized as follows: the Complainant, Nishantha Vidura Kumarawadu, his wife and his brother were travelling in a car on 25th of August 2001. The name of the brother is Banu Kumarawadu. Banu Kumarawadu who drove the car overtook a double cab. Thereafter double cab overtook the car and stopped the double cab in a way that the car could not move. Thereafter inmates of the double cab got down from the double cab and the Accused who is a police officer assaulted both Nishantha Vidura Kumarawadu and Banu Kumarawadu. Thereafter they were taken to the Welikada Police Station.

Version of the Accused-Appellant is quite different from

the version of the prosecution. The Accused-Appellant in his evidence took up the position that the vehicle driven by Banu Kumarawadu failed to stop when he was signaled to stop by a police officer at a road block and as such the said police officer gave chase to the car driven by Banu Kumarawadu and stopped the car. Later the inmates of the car were taken to the Welikada Police Station. After they were taken to the Welikada Police Station they were produced before the Judicial Medical Officer. The Judicial Medical Officer in his report has stated that Nishantha Vidura Kumarawadu had received two abrasions.

Learned President's Counsel appearing for the Accused-Appellant submits that contradictions in the evidence had not been considered by the learned Magistrate. He submits that Nishantha Vidura Kumarawadu in his evidence has stated that he was in a hurry to meet a doctor regarding his mother's surgery but his brother has said that they were coming from hospital. Therefore learned President's Counsel submits that this is a serious contradiction that goes to the route of the case.

Learned President's Counsel brought to our notice a contradiction with regard to the place where the assault took place. One witness says it is near the double cab and the other witness says it is near the car. Learned President's Counsel submits that this contradiction is a vital contradiction.

In considering the submissions of learned President's Counsel with regard to the contradiction, I am guided by the judgment in **Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753 wherein Indian Supreme Court held as follows:-**

"By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

. Ordinarily it so happens that a witness is overtaken by events. The Witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attuned to absorb the details.

The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. "

We note that learned Magistrate who heard the case has considered all the above contradictions and the learned High Court Judge has also considered the said contradictions. We note that the learned Magistrate who heard the case has convicted the Accused. Therefore the learned Magistrate who saw the deportment and demeanor of the witnesses has the opportunity to assess the evidence. In this regard I would like to consider a judgment of the Privy Counsil reported **in 20 NLR page 282 Fradd V. Brown & Co. Ltd. wherein the Privy Counsil held as follows:-**

> "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 Alwis V. Piyasena Fernado [1993] 1 SLR 119 His Lordship Justice G. P.S. de Silva, Chief Justice made the following observation; "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"

When I consider the above judicial literature and the contradiction that had been brought to the notice of this Court, I hold that the contradictions submitted by learned President's Counsel are not vital and they do not go to the root of the case. For the above reasons, I reject the said contention of learned President's Counsel.

Learned President's Counsel next contended that the charge leveled against the Accused is defective. Learned President's Counsel contended that name of two persons had been stated in the charge sheet as injured persons and therefore charge was defective. The Accused-Appellant has not raised an objection to the charge at the trial. In the first place we note that at page 97, the Accused-Appellant has admitted that he knows about the charge. As I pointed out earlier

the Accused-Appellant has failed to raise any objections to the charge at the trial. In this regard I rely on the judgment of **the Court of Criminal Appeal in 45 NLR page 82 in King V. Kitchilan wherein the Court of Criminal appeal held as follows:**

> "The proper time at which an objection of the nature should be taken is before the accused has pleaded"

It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception.

In this connection I would like to consider **Section 166 of the Criminal Procedure Code which reads as follows**:-

> "Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omissions."

In Wickramasinghe V. Chandradasa 67 NLR 550 His Lordship Justice Sriskandarajah observed the following facts;

> "Where in a report made to Court under Section 148(1) (b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal provision was not mentioned. His Lordship held as follows:- The omission to mention in a charge sheet the penal Section is not a fatal irregularity if the accused has not been

misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable."

In this case has the Accused been misled? As I pointed out earlier Accused-Appellant in his evidence at page 97 admitted that he understood the charge. Therefore I hold that Accused had not been misled by the said defect in the charge sheet.

For the above reasons I reject the contention of learned President's Counsel.

Learned President's Counsel next contended that the medical evidence has not supported the version of the prosecution. But we note that the Judicial Medical Officer in his report has stated that Nishantha Vidura Kumarawadu has received two abrasions. Further at page 69 of the brief, learned Counsel who appeared for the Accused-Appellant at the trial has admitted the medico legal report without the doctor being called. PW1 in his evidence has referred to injuries which he received in his both arms. Therefore we hold that the evidence relating to injuries stated by witness Nishantha Vidura Kumarawadu has been corroborated by medical evidence.

When I consider all the above matters, I am unable to agree with the contention of learned President's Counsel. For the above reasons I reject the contention of the learned President's Counsel.

Relying on the above judicial literature stated in Frad Vs. Brown and Alwis Vs. Piyasena Fernando 1993 1 SLR 119, we hold that the findings of the trial Judge who had the opportunity of

observing demeanor and deportment of witnesses should not be easily disturbed.

When I consider all the above matters, I answer the questions of law raised by the Accused-Appellant in the negative. For all the above reasons I hold that there is no ground to interfere with the judgment of the learned High Court Judge and the learned Magistrate. We affirm the judgment of the learned High Court Judge and the learned Magistrate. We affirm the conviction and the sentence and dismiss this appeal.

Registrar of this Court is directed to send certified copies of this Judgment to the relevant High Court, Magistrate's Court, Hon. Attorney General and the Inspector General of Police forthwith.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya, J.

I agree.

JUDGE OF THE SUPREME COURT

Ahm

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

In the matter of an Appeal from an Order of the Civil High Court.

SMB Leasing PLC,
(Previously Seylan Merchant Bank Ltd.)
No. 110, D.S.Senanayake Mawatha,
Colombo 08

Plaintiff

Vs

SC APPEAL 147/2015
SC/ HCLA/ 37/2015
HC (Civil) 291/2004(01)

1. Hewapathiranage Don Cletus Jeyrad Senanayake, No. 40, Epitamulla Road, Pitakotte.
2. Oliver Bennete Jayanethi, No. BIR/3/9, Manning Town Housing Scheme, Colombo 08.
3. Solanga Arachchige Vindya Perera, No. 299, A, Kotte Road, Nugegoda.
   And also of No. 40, Epitamulla Road, Pitakotte.
   And at the Business address:
   No. 62, 1/1, Park Street, Colombo 02.

Defendants

AND THEN BETWEEN

SMB Leasing PLC,
(Previously Seylan Merchant Bank Ltd.)
No. 110, D.S.Senanayake Mawatha,
Colombo 08

Plaintiff Judgment Creditor

Vs

Solanga Arachchige Vindya Perera,
No. 299, A, Kotte Road,
Nugegoda.
And also of No. 40, Epitamulla Road,
Pitakotte.
And at the Business address:
No. 62, 1/1, Park Street, Colombo 02.

3rd Defendant Judgment Debtor

AND NOW BETWEEN

SMB Leasing PLC,
(Previously Seylan Merchant Bank Ltd.)
No. 110, D.S.Senanayake Mawatha,
Colombo 08

Plaintiff Judgment Creditor Appellant

Vs

Solanga Arachchige Vindya Perera,
No. 299, A, Kotte Road,
Nugegoda.
And also of No. 42, Epitamulla Road,
Pitakotte.
And at the Business address:
No. 62, 1/1, Park Street, Colombo 02.

3rd Defendant Judgment Debtor Respondent

BEFORE : **S. EVA WANASUNDERA PCJ**
H. N. J. PERERA J &
MURDU FERNANDO PCJ.

COUNSEL : Dhanya Gunawardena for the Plaintiff Judgment Creditor Appellant.
The 3rd Defendant Judgment Debtor Respondent is absent and unrepresented.

ARGUED ON : **05.07.2018.**

DECIDED ON : **05. 10. 2018.**

S. EVA WANASUNDERA PCJ.

When the Petition dated 3rd July, 2015 which was filed by the Plaintiff Judgment Creditor Petitioner was supported before this Court , leave to appeal from the Order of the Commercial High Court was granted on the following question of law on 14th August, 2015:

" In view of Clause 8 of the settlement between the parties and the consent decree dated 08.12.2005 which clearly stipulates that the Petitioner can obtain Writ without notice to the 3rd Defendant, did the learned High Court Judge **err when** he ordered that **notice** of writ be issued on the 3rd Defendant Judgment Debtor Respondent? (as referred to in sub paragraph K of paragraph 19 of the Petition of the Plaintiff Judgment Creditor Petitioner dated 03.07.2015) ?

In this matter SMB Leasing PLC had filed a case before the Commercial High Court of Colombo exercising civil jurisdiction against the 1st Defendant, Hewapathiranage Don Cletus Jerard Samaranayake, the 2nd Defendant, Oliver Benette Jayanetti and the 3rd Defendant, Solanga Arachchige Vindya Perera for recovery of all monies due to the SMB Leasing PLC on account of non payment of a financial facility granted

to the 1st Defendant to buy a Ford Mondea vehicle on 21.01.2003 by way of a lease agreement and a guarantee bond. Answer was filed by all the three Defendants.

It was fixed then for trial and the case was **amicably settled** between the leasing company on one side and the 1st Defendant, 2nd Defendant and the 3rd Defendant, on the other side on 08.12.2005. The decree was entered according to the terms of settlement and it is at page 348 of the brief before this Court. The 1st and 3rd Defendants had agreed to pay rupees 2.7 million to the leasing company. They had to pay rupees 6 lakhs on or before 31.12.2005 and the balance amount in 21 monthly instalments of rupees 1 lakh and conclude the payment on or before 31.01.2006. The said Defendants had agreed **for writ to issue without notice,** even after the expiry of one year, if terms of settlement are not complied with. Consent Decrees were entered in Court.

The 1st and the 3rd Defendants did not honour and/or comply with the obligations under the decree entered in court in terms of the settlement. The Petitioner, the leasing company filed an Affidavit in Court regarding the breach of settlement and sought to take steps to execute writ against the said Defendants. Application for writ was filed on 02.03.2006 and **writ of execution against property was issued dated 20.06.2006.**

According to the journal entries Nos. 15 and 16, the writ was issued against the 1st and the 3rd Defendants. The Plaintiff Judgment Creditor Appellant (hereinafter referred to as the Plaintiff) filed a motion on 25.09.2006 seeking to auction the property of the 3rd Defendant which was seized subsequent to the execution of the writ against the 3rd Defendant. The Plaintiff took steps under Sec. 227 of the Civil Procedure Code on 05.10.2006 to register the relevant seizure notice in the Homagama Land Registry in which the relevant land seized was situated.

The case was called before the Court on 28.11.2007 to show cause why the writ was not executed against the 1st and 3rd Defendants. Court made order that the registered Attorney at Law of the said Defendants be noticed to appear in Court on 17.01.2008. The said registered Attorney at Law appeared before Court and submitted to Court that she had no instructions to appear. She also confirmed that the said Defendants were informed by her that she will not be representing them in this matter. Yet, it appears from the journal entries of that day, that the Judge had recorded that " the writ to be issued against the 1st Defendant" and there is

no mention about the 3rd Defendant. There is no other explanation for doing so except that it is due to **inadvertence.**

The writ of execution was again extended later on with effect from 16.11.2012. Then again, the writ was renewed against the 3rd Defendant by one more year on 30.04.2015. Later on, the court on its own motion had discovered that writ of execution was issued only against the 1st Defendant on 17.01.2008 and not against the 3rd Defendant. The Court noticed the Appellant's Attorney at Law to be present in Court on 18.05.2015 and show cause as to whether writ had been executed against the 3rd Defendant after 18.05.2015.

The Counsel for the Plaintiff Judgment Creditor had wanted more time to go through the record and make submissions. Court granted time till 18.06.2015.

On behalf of the Appellant, an Application was made under **Section 337(3)(b)** for a **fresh writ against the 3rd Defendant** on **18.06.2015**. The Court **refused to grant a fresh writ** but issued only **notice of writ to be served on the 3rd Defendant**. The Appellant has marked this order as 'K' and pleaded as part and parcel of the Petition filed in this Court.

The Appellant pleads that the said Order is erroneous and wrong as well and that it is contrary to law and procedure.

Section 337(3) reads as follows:-

Subject to the provisions contained in subsection (2) , a writ of execution, if unexecuted, shall remain in force for one year only from its issue, but –

(a) Such writ may at anytime before its expiration, be renewed by the judgment creditor for one year from the date of such renewal, and so on from time to time; **or**

(b) a fresh writ may at anytime after the expiration of an earlier writ be issued,

till satisfaction of the decree is obtained.

The Order written by the Judge in his own handwriting in the Journal Entry No. 93 dated 18.06.2015 reads in Sinhalese as follows:-

JE 93
18/05/2015

කා.ස. 92 අනුව කැඳවන ලදී.

ඉල්ලීම තහවුරු කලා.

සි.න.වි.ස 337 (3) (ආ) ඉල්ලීම පිළිබඳව 3 වන විත්තිකරුට ඇස්කීසි නොතීසි නිකුත් කිරීමට නියම කරමි. එය 3 විත්තිකරුට හා 3 විත්ති නීතිඥට භාර දී වාර්තා කැඳවන්න.

2015.04.30 දින නියෝගය ඉවත් කලා. කැඳවන්න 2015.07.16.

මහාධිකරණ විනිසුරුගේ අත්සන

According to Section 337(3) when a writ of execution has been **issued once** by Court at the application by the Judgment Creditor, **thereafter**, if it is unexecuted for whatever the reason, **shall remain in force** for one year only from the date of issue. It may be renewed at any time before its expiration by the Judgment Creditor for one year from the date of such renewal. What has to be understood is that when the one year is passing, before one year passes by, the Judgment Creditor should make an application to Court and get the writ of execution extended by another year. Then that one year is effective from the date of extension granted by the Judge. The Judgment Creditor can keep on extending the writ of execution from time to time. By any chance, if he could not get the writ of execution extended within each year, the Judgment Creditor is entitled in law, according to Section 337(3)(b), to **get a fresh writ be issued** by Court until satisfaction of decree is obtained, subject to Sec. 337(1).

As such , the wording in the aforementioned provision of law is clear on how to get a writ of execution issued by Court at any time from the date of the first issue until

satisfaction of decree is obtained. In the case in hand, when the extension of the one year had lapsed, after it lapsed on 16.11.2013, the Judgment Creditor had supported the application for a fresh writ of execution and obtained the same on 30.04.2015 again for one more year.

Thereafter, the Judge had by himself placed another journal entry (JE No. 91) on 08.05.2015 for the sake of the record that he has observed that according to Journal Entry 41, a writ of execution has been issued only against the 1st Defendant and according to the proceedings of the day of Journal Entry No. 37, Court has not issued a writ of execution against the 3rd Defendant after 17.01.2008. At the end of the said Journal Entry No. 91, the Judge **had directed the Registrar to send a notice to the Plaintiff's Attorney at Law and call the case in open Court on 18.05.2015.** He had also **stayed the order made by Journal Entry No.90,** which is the fresh writ which was issued by Court against the 3rd Defendant for one more year from 30.04.2015.

On 18.05.2015 the Judgment Creditor Plaintiff had moved for time to study the record and make submissions which was allowed by Court. The date for submissions was 18.06.2015.

It is on this date that the Judge had issued **notice on the 3rd Defendant** without granting the application of the Judgment Creditor a fresh writ of execution. This is the impugned Order marked as 'K'.

The Section 337(3)(b) is clear in its words. The Court can issue a **fresh writ anytime after the expiration of an earlier writ be issued until satisfaction of the decree is obtained.**

The argument of the Counsel for the Plaintiff, who is the Judgment Creditor Appellant is that the Court need not send any notice to any Judgment Debtor when such an application for a fresh writ is made to Court by the Judgment Creditor.

In the case of ***Samad Vs Zain (Bar Association Law Journal 1985 Vol I part V page 190***), it was held that "Section 337 has to be broadly interpreted and should not be interpreted unduly harshly so as to deny relief for Judgment Creditor".

However, in the case in hand, it was agreed by the terms of settlement entered between the Plaintiff on one part and the 1st and 3rd Defendants on the other that writ can be issued **without notice** to the said Defendants, even after one year from the date of the settlement. Therefore the Court need not have issued notice as a pre-requisite to granting a fresh writ of execution as and when another one year's time was sought for execution by the Judgment Creditor.

It is at a very late stage that Court had realized that writ has not been issued against the 3rd Defendant by inadvertence on the part of the Court. Thereafter to see that it is corrected, the Court had decided to call the 3rd Defendant to appear before Court. The Court should correct the order made per incuriam by inadvertence on the part of Court at any time, thereafter.

The provisions of procedural law contained in Section 337 of the Civil Procedure Code does not call upon the Judge to give notice to the Judgment Debtor at any time. Yet in the normal course of hearing cases before a Court, the Judge always has the discretion of sending notice to the other party before the Judge makes an order at the instance of any party making any application against the other party.

Even though the Judgment Debtor had **voluntarily agreed** that the Judgment Creditor holds the right to execute the decree **without any notice to him**, I find that the Judge wanted to correct something which had occurred due to inadvertence of Court and at such a time, the Judge has the discretion of whether to notice him or not and the obvious decision to notice the 3rd Defendant would not harm the Judgment Creditor at all.

I am of the view that the learned High Court Judge's Order marked 'K' is not against the provisions of procedural law and as such there is no reason warranting that the said order be set aside. I answer the question of law aforementioned in

the negative in favour of the 3rd Defendant Judgment Debtor Respondent and against the Plaintiff Judgment Creditor Appellant.

I do hereby affirm the Order dated 18.06.2015 of the learned High Court Judge.
I direct the High Court of the Western Province (holden in Colombo and exercising Civil Jurisdiction) to issue notice to the 3rd Defendant Judgment Debtor Respondent in the High Court Civil Appeals Case No. 291/2004(01) prior to considering the application of the Plaintiff Judgment Creditor Appellant.

The 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

Murdu Fernando 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
The Commercial High Court
Of Colombo.

1. Chanaka Thilan Rodrigo, 12/5, Dutugemunu Street, Kalubowila, Dehiwala.
2. Anitha Sharmini John nee Rodrigo, 19, Lillington Road, Remuera, Auckland 1050, New Zealand.

Petitioners

SC APPEAL 147/2017
SC HC LA No. 40/2017
Commercial High Court
Case No. HC(Civil) 75/2016/CO

Vs

1. Cyril Rodrigo Restaurants Ltd., No. 85, Pepiliyana Road, Nugegoda.
2. Tarini Rodrigo, 68/8A, 2nd Lane, Senanayake Avenue Nawala.
3. Ruvini Devasurendra, No. 17, Spathodea Avenue, Colombo 5.
4. Kantha de Silva, No. 5, Spathodea Avenue, Colombo 5.
5. Nexia Corporate Consultants (Pvt.) Ltd., No. 181, Nawala Road, Colombo 5

Respondents

AND THEN

In an application for revocation and/or variation of the ex parte interim order.

3. Ruvini Devasurendra, No.17, Spathodea Avenue, Colombo 5.
4. Kantha de Silva, No. 5, Spathodea Avenue, Colombo 5.

3rd and 4th Respondent Petitioners

Vs

1.Chanaka Thilan Rodrigo, 12/5, Dutugemunu Street, Kalubowila, Dehiwala.
2. Anitha Sharmini John nee Rodrigo, 19, Lillington Road, Remuera, Auckland 1050, New Zealand.

1st and 2nd Petitioner Respondents

1. No. 85, Pepiliyana Road, Cyril Rodrigo Restaurants Ltd., Nugegoda.
2. Tarini Rodrigo, 68/8A, 2nd Lane, Senanayake Avenue, Nawala.
5. Nexia Corporate Consultants(Pvt) Ltd., No. 181, Nawala Road, Colombo 5.

1st, 2nd and 5th Respondents Respondents

AND NOW BETWEEN

3.Ruvini Devasurendra,
No.17, Spathodea Avenue,
Colombo 5.
4.Kantha de Silva, No. 5,
Spathodea Avenue,
Colombo 5.

3rd and 4th Respondent Petitioner Petitioners

Vs

1. Chanaka Thilan Rodrigo,
   12/5, Dutugemunu Street,
   Kalubowila, Dehiwala.
2. Anitha Sharmini John nee Rodrigo,
   19, Lillington Road, Remuera,
   Auckland 1050, New Zealand.

1st and 2nd Petitioner Respondent Respondents

1. Cyril Rodrigo Restaurants Ltd.,No. 85, Pepiliyana Road, Nugegoda.
2. Tarini Rodrigo, 68/8A, 2nd Lane, Senanayake Avenue, Nawala.
5. Nexia Corporate Consultants(Pvt) Ltd., No. 181, Nawala Road, Colombo 5.

1st, 2nd and 5th Respondents Respondents

BEFORE : **S. EVA WANASUNDERA PCJ,**
K. T. CHITRASIRI J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Romesh de Silva PC with Harith de Mel for the 3rd and 4th Respondent Petitioner Appellants
Chandaka Jayasundera PC with Shivan Kanag-Iswaran for Petitioner Respondent Respondents.

ARGUED ON : 24.10.2017.

DECIDED ON : 22.02.2018.

S. EVA WANASUNDERA PCJ.

In this matter this Court has granted leave to Appeal on the questions of law set out in Paragraph 8(a) to 8(g) of the Petition. The impugned order is dated 30.03.2017. The questions can be narrated as follows:-

(a) Is the order contrary to law and the material placed before Court?
(b) Has the High Court erred in not revoking and/or varying the interim order issued on 16th December, 2016?
(c) Has the High Court erred in not providing any reasons whatsoever for not revoking the interim order?
(d) Has the High Court erred in understanding the ambit of inquiry in an Application under Section 233(5) of the Companies Act?
(e) Has the High Court erred in not even considering as to whether a prima facie violation of the Articles of Association has been established by the original Petitioners?
(f) Has the High Court erred in not considering and/or reproducing Article 15 of the Articles of Association which is the most relevant Article at the root of the dispute?
(g) Has the High Court erred in considering that the conduct of 'transferring shares' is not a conduct which can be restrained under Section 233 of the

Companies Act and in any event not conduct of Directors and/or the Company?

This is an Appeal preferred by the 3rd and 4th Respondent Petitioner Appellants (hereinafter referred to as the **3rd and 4th Respondent Appellants**) against the 1st and 2nd Petitioner Respondent Respondents (hereinafter referred to as the **1st and 2nd Petitioner Respondents**) when the Commercial High Court Judge had made **order refusing to set aside an interim order** which was granted in favour of the 1st and 2nd Petitioners in an action before the said High Court under the Companies Act No. 7 of 2007.

The High Court Order is dated 30.03.2017. The said High Court had **granted an ex parte interim order** on 16.12.2016 against the 3rd and 4th Respondents and others on the application for the same made by the 1st and 2nd Petitioners which reads as follows:
" Issue an interim order restraining the 1st to the 5th Respondents their agents, servants and representatives from transferring the shares as contemplated in documents marked P4 and P6 to the Petition in contravention of the Articles of Association of the 1st Respondent Company pending the final determination of this Application".

The 3rd and 4th Respondent Appellants came before Court and pleaded to **revoke the said interim order but the High Court refused to do so.** The 3rd and 4th Respondents have come to this Court against the said refusal order. This Court granted Leave to Appeal on the questions of law as aforementioned and thus this Appeal was argued before this Court.

Cyril Rodrigo Restaurants Ltd. is a private family owned company which had commenced its business a long time ago and was registered as a limited liability company in the year 1966. The share holding proportions, had been kept, in a way that a single share holder would not obtain the majority controlling share of the company and the Articles of Association of the company states that **the Board of Directors would have the final discretion as to how a share transfer should be carried out.**

On 22nd November,2016, FJ&G de Saram Attorneys at Law wrote a letter to the Chairman, Cyril Rodrigo Restaurants (Pvt.) Limited [hereinafter referred to as CRR]

proposing a transfer of shares by some of the existing shareholders, seven in number, namely, Shiranthi Fernando, Ayoma Nirmalene De Alwis, Liyanage Nirmal De Silva, Nawalage Sriyan Suresh Cooray, Nawalage Sujeewa Cooray, Ranil de Silva and Sinthamani Cooray who are shareholders of CRR to Ruvini Devasurendra, an existing shareholder and Director of the said Company CRR. The letter also informed the Chairman that they had already entered into a share sale and a purchase agreement with Ruvini to sell all their shares to her. This letter sought from the Chairman to place the proposal before the Board of Directors of the company and get the approval for the same. On the 2nd of December, 2016 , another share holder sent another letter to the Chairman stating that she also had entered into an agreement to sell 58500 ordinary shares held by her to Ruvini Devasurendra and also sought approval of the Board of Directors. The Chairman, Chanaka Rodrigo thereafter sent a letter dated 9th December,2016 to the Attorneys at Law and Tarini Rodrigo that he proposed to **defer the tabling** of the said proposals at the next meeting of the Board of Directors.

On 15th December 2016, the Chairman, Chanaka Rodrigo and Anitha Sharmini John nee Rodrigo had filed action in the Commercial High Court of Colombo against CRR, Tarini Rodrigo, Ruvini Devasurendra, Kantha de Silva and the Nexia Corporate Consultants (Pvt.) Ltd. , the Company Secretaries. It was an application under and in terms of Sec. 233 of the Companies Act No. 7 of 2007 and they were granted **interim relief** in terms of prayer (a) to the Petition restraining the proposed conduct of the parties who were trying to sell their shares to Ruvini Devasurendra. As such the transfer of the shares were restrained mainly on the basis that **such a transfer is against Article 15 of the Articles of Association of the Company.**

The Respondents filed objections and moved that the interim order be set aside. The learned High Court Judge by his order dated 30.03.2017 refused to set aside the interim order. The **3rd and 4th Respondent Petitioner Appellants** have now appealed to this Court **against the order of refusal to set aside the interim order by the High Court.**

The arguments by the Appellants are that such a proposal to transfer the shares are not against the Articles of Association of the Company and the arguments by the Respondents are that such a transfer is against the Articles.

Article 13 contained in document P1B, the Articles of Association reads as follows:
" No transfer of any share shall be valid or effectual unless the Board of Directors approve of and consent to a transfer of the same being effected."

Article 15 reads as follows:
In any case**,** no share shall be transferred by a member or the legal representative of a member or by his assignee in bankruptcy to a person who is not a member so long as any member is willing to purchase the same at the fair value thereof. The Directors, in conjunction with the Company's Auditors, shall determine the fair value of a share as and when necessary and shall also determine as to the member or members and the number of share or shares, that each such member shall purchase.

The interim order dated 16.12.2016 issued under Sec. 233(5) of the Companies Act reads as – "Issue an interim order restraining the 1st to the 5th Respondents their Agents, servants and representatives from transferring the shares as contemplated in documents marked P4 and P6 to the Petition in contravention of the Article of Association of the 1st Respondent Company pending the final determination of this application."

I find that according to Article 13 of the Articles of Association of the CRR, any transfer of any share shall not be valid or effectual unless the Board of Directors approve the same. The proposal to transfer the shares have not yet been placed before the Board of Directors. So, the proposal can be turned down by the Board, if it thinks that the transfer of shares as proposed is not for the betterment of the company or to the detriment of the company. But in this instance, some of the shareholders have come before court and obtained ex parte, a restraining order not to transfer the shares as proposed until the final determination of the matter before court. The basis for granting such a restraint has to be 'acting against the Articles' and none other.

Article 15 reads: " In any case, no share shall be transferred by a member or the legal representative of a member or by his assignee in bankruptcy to a person who is not a member so long as any member is willing to purchase the same at the fair value thereof. The Directors, in conjunction with the Company's auditors, shall determine the fair value of a share as and when necessary and shall also

determine as to the member or members and the number of share or shares, that each such member shall purchase."

The Application to the Commercial High Court was tendered according to the provisions of Section 233 of the Companies Act.

Section 233 of the Companies Act No. 7 of 2007 reads as follows:

(1) The Court may on an application made under this section, make an order restraining a **Company** that, or **a Director of a Company** who, proposes to engage in a **conduct** that would **contravene the Articles** of the Company or any provision of this Act, from engaging in that conduct.

According to this Section, first and foremost, there has to be a " contravention of the Articles." It has to be looked into, then, whether it is by a Director of the Company or by the Company. It is alleged that the conduct of the 3rd Respondent Appellant in this instance was in the capacity as a Director. The 3rd Respondent is factually a Director. **The Court has to be able to see prima facie whether there is a contravention of the Articles by the said Director**.

At the time the transfer of shares proposed are tabled before the Board of Directors, the Board has a right to approve the same or to disapprove the same. The parties have no alternative but to await that time according to the provisions contained in the Articles of Association.

Going through all the clauses in the Articles of Association of the Cyril Rodrigo Restaurants Limited dated 20th July, 1966, I find that the founding members of the Company had the intention of protecting the company to hold a balance between the share holders in the family without the balance tilting on to one side with a big majority of shares. This intention obviously serves to hold the peace amongst the family members and for the family to run the business with unity without a rift and enjoy the benefits with a sense of togetherness. In law, when a court looks at the private company which is before court to solve a problem regarding the shares of the company, the court has to look at the big picture of the whole

scenario and not a narrow point of argument limited to a specific incident which has taken place. Court has to consider the totality of the provisions in the Articles of Association of the Company and ascertain the situation according to the objective of the company in running its business properly as intended and guided by the Articles of Association of the company.

In Charlesworth 's Company Law, (17th edition at page 80) under the Interpretation of Articles, it is mentioned thus:
" As a general proposition, the articles (and the memorandum) will be construed in accordance with the established rules for the interpretation of contracts, viz. giving the words used their ordinary meaning derived from the context in which they appear. The Court will exclude from the admissible background the previous negotiations of the parties and their declarations of subjective intent. It will not imply any terms into the articles other than those which are needed to give effect to the language of the articles, for questions of business efficacy or otherwise. Nevertheless, the interpretation of the contract is not carried out in vacuum and has to be conducted against the background knowledge which would reasonably have been available to the contracting parties at the time of the contract. Accordingly, as part of the relevant background , it has been held to be legitimate to have regard to the original form of the articles of association of a plc."

The Articles of Association as a whole is the contract between the company and the shareholders. I find that the language used in the whole of the Articles of Association should be taken into account in interpretation of what is contained therein.

Article 13 of the Articles of Association of CRR Ltd. reads:

" No transfer of any share shall be valid or effectual unless the Board of Directors approve of and consent to a transfer of the same being effected."

Documents P4, P5 and P6 and the annexure to P6 indicates that some of the shareholders of the Company have entered into different sale of share agreements which could, if at all, bind only the parties to the said agreements without any approval or consent of the Board of Directors. Any sale of share would be valid without the consent and approval of the Board of Directors. It was brought to the notice of court that such a proposed transfer of shares, would

have a combined total effect of 51% of the shares of the Company to come into the hands of 'a mother and two sons', namely the 3rd and 4th Respondent Appellants and shareholder Rajiv de Silva who is the 3rd Respondent Appellant's brother. The attempt, it is alleged , is to get the control of the company tilting the balance which holds peace and unity of the members of the family who are the shareholders of the company.

The 3rd and 4th Respondent Appellants are before this Court from an order of the Commercial High Court dated 30.03.2017 which is an interim order pending before the said High Court. When any original court is faced with a pleading which begs court to grant an interim relief, the court ensures that the status quo is maintained until a final determination is made by the same court. In this matter also the Commercial High Court has made order granting the interim relief to keep the status quo, until the Court looks at the complete circumstances of the case which has brought about the legal problem.

The learned High Court Judge in his order refusing to vacate the earlier order which was an ex parte order, states as follows:

" In the circumstances, I find that the interpretation of the relevant Articles which permits the right to transfer shares with the approval of the Board of Directors is a substantive application, which the Court should look into at an inquiry."

I quite agree with that position as he has made sure that the status quo would remain undisturbed until the legal rights of the parties are looked into by Court, affording the parties to present their respective cases before a Court of law which would go into the evidence and the documents relevant to the case and resolve the matter on merits.

I also find that **if** any court grants the revocation of the interim order which is effective from the date it was obtained from court, up to date, then the proposed sale of shares would follow and thereby, the case brought before court by the aggrieved parties who are share holders and members of the family running the business together will definitely have no case to be pursued. The effect of such a revocation of the interim relief order would serve as, or bear the effect of, the final relief being granted.

I answer the questions of law in the negative against the Appellants and in favour of the Respondents. I affirm the order of the learned High Court Judge dated 30.03.2017 refusing the revocation of the order made by the High Court dated 16.12.2016. The Commercial High Court should proceed to hear the case on its merits.

The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

K. T.Chitrasiri J.
I agree.

Judge of the Supreme Court

V.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

Piyasena Nuwarapaksha,
No.434, Pita Kotte,
Kotte

Plaintiff

SC Appeal 149/2015
Provincial High Court Case No
WP/HCCA/COL/382/2007(F)
DC Colombo Case No.11564/MR

Vs

Singer (Sri Lanka) Ltd,
No.320,Union Place,
Colombo 2

Defendant

AND BETWEEN

Piyasena Nuwarapaksha,
No.434, Pita Kotte,
Kotte

Plaintiff-Appellant

Vs

Singer (Sri Lanka) Ltd,
No.320,Union Place,
Colombo 2

Defendant-Respondent

AND NOW BEWEEN

Piyasena Nuwarapaksha,
No.434, Pita Kotte,
Kotte

Plaintiff-Appellant-Petitioner-Appellant

Vs

Singer (Sri Lanka) Ltd,
No.320,Union Place,
Colombo 2

Defendant-Respondent-Respondent-Respondent

Before : Sisira J de Abrew J
Priyantha Jayawaedena PC J
Vijith Malalgoda PC J

Counsel : Faiz Musthapa with Keerthi Tilakaratne for the
Plaintiff-Appellant-Petitioner-Appellant
Gomin Dayasiri with Minoli Jinadasa and Lasantha
Thiranagama for the Defendant-Respondent-Respondent-Respondent

Argued on : 15.3.2018

Written Submission
Tendered on : 2.9.2015 by the Plaintiff-Appellant-Petitioner-Appellant
6.10.2015 by the Defendant-Respondent-Respondent-Respondent

Decided on : 18.7.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court dated 20.10.2011 wherein the said High Court affirmed the judgment of the District Court. The learned District Judge by judgment dated 18.9.2007 dismissed the Plaintiff's case and granted relief claimed by the Defendant in paragraphs (a),(b),(c) and (d) of the prayer of the answer. The Civil Appellate High Court affirmed the judgment of the learned District Judge.

Being aggrieved by the judgment of the Civil Appellate High Court, the Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) has filed this appeal. This court by its order dated 22.7.2015 granted leave to appeal on the question of law set out in paragraph 20(a) the Petition of Appeal dated 29.11.2011 which is set out below

"Did the Honourable Judge of the Civil Appellate High Court err in law by not judicially analyzing the evidence and the documents produce at the trial?"

The Plaintiff-Appellant was appointed the dealer of the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) by agreement dated 20.10.1975 marked 'A' to the plaint. The Defendant-Respondent terminated the agreement. The Plaintiff-Appellant takes up the position that the termination of the agreement was wrong and claimed damages. The Defendant-Respondent takes up the position that the termination of the agreement was done under clause 12 of the agreement. Under Clause 12 of the agreement the Defendant-Respondent has the power to cancel the agreements on one of the following grounds.

1. On the approved dealer committing a breach of his duties or being guilty of misconduct

The most important question that must be decided in this case is whether the Plaintiff-Appellant is guilty of misconduct or dishonesty. The Plaintiff-Appellant on 10.9.1991 handed over a letter marked V1 which is supposed to have been signed by the Chairman of the Co-operative Society Pagoda to the Defendant-Respondent and sought discount for several items which are sold through the Plaintiff-Appellant. The letter V1 states that the items mentioned therein were to be sold to the Janasavi Recipients. The Plaintiff-Appellant in his evidence admits that he handed over the letter marked V1 to Kasthuriarachchi who is an officer of the Defendant-Respondent. The said letter V1, according to it, has been signed by Wimalasiri Perera, the Chairman of the aforementioned Co-operative Society. But the question is whether Wimalasiri Perera has in fact signed it. Wimalasiri Perera in his evidence states that he never issued the letter marked V1 and the signature found in V1 is not his signature. The date of the letter marked V1 is 10.9.1991. Wimalasiri Perera in his evidence further states that he was the Chairman of the said Co-operative Society on 10.9.1991. From the above evidence it is very clear that the letter marked V1 is a false document. The Plaintiff-Appellant in his evidence states that he does not know how he got the said document. If that is so he should have contacted the Chairman of the said Co-operative Society and ascertained whether such a letter had been issued. He has not done so. He (the Plaintiff-Appellant) has submitted this letter to the Defendant-Respondent. Thus the Plaintiff-Appellant has used a false document as a genuine document. The above evidence clearly establishes the fact that the Plaintiff-Appellant was dishonest.

When I consider the above evidence it is very clear that Plaintiff-Appellant was guilty of misconduct and dishonest acts being committed. The Plaintiff-Appellant is the dealer of the Defendant-Respondent. When the Defendant-Respondent finds that

his dealer is dishonest, he cannot continue to have contractual relationship with his dealer.

For the above reasons, I hold that the Defendant-Respondent was entitled to terminate the agreement marked 'A' and the Defendant-Respondent is correct when it (the Defendant-Respondent) terminated the contract.

For the above reasons, I hold that the learned District Judge was correct when he dismissed the action of the Plaintiff-Appellant and that the Civil Appellate High Court was correct when it affirmed the judgment of the learned District Judge. In view of the conclusion reached by me, I answer the above questions of law in the negative.

For the above reasons, I dismiss this appeal with costs.

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

In the matter of an Appeal

Horathal Pedi Durayalage
Nimal Ranasinghe
Ambagahagedera, Nagollagoda.

Accused-Appellant-Appellant

SC Appeal 149/2017
SC(SPl.L.A) 50/2017
HC Kuliyapitiya HCA 03 /2016
MC Hettipola 51052

Vs

Officer-in-Charge
Police Station
Hettipola

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

Respondent-Respondents

Before : Sisira J De Abrew J
V.K. Malalgoda PC J
L.T.B. Dehideniya J

Counsel : W. Dayaratne PC for the Accused-Appellant-Appellant.
Suharshi Herath SSC for the Respondents

Argued on : 4.4.2018

Written Submission
Tendered on : 5.3.2018 by the Accused-Appellant-Appellant.
23.2.2018 by the Respondent-Respondent

Decided on : 21.6.2018

Sisira J De Abrew J

In this case the accused-appellant-appellant (hereinafter referred to as the accused-appellant) was convicted for an offence punishable under Section 386 of the Penal Code (disposing of stolen property) and sentenced to a term of 15 months rigorous imprisonment (RI) and to pay a fine of Rs.1500/- carrying a default sentence of 3months simple imprisonment (SI). In addition to the above punishment, he was ordered to pay a sum of Rs.7500/- to the complainant carrying a default sentence of 3months simple imprisonment (SI).

Being aggrieved by the said conviction and the sentence, the accused-appellant appealed to the High Court. The learned High Court Judge by judgment dated 8.2.2017 affirmed the conviction and the sentence and dismissed the appeal.

Being aggrieved by the said judgment of the High Court, the accused-appellant has appealed to this court. This court by its order dated 17.7.2017 granted leave to appeal on questions of law set out in paragraph 15(c) and 15(f) of the Petition of Appeal dated 20.3.2017 which are set out below.

1. Did the learned High Court Judge fail to consider that according to the prosecution case Vajira Pushpa Kumara was totally involved in the disposal of the stolen property of five water motors in which event he becomes an accomplice who should be charged for the 3rd offence, but the complainant has not made him as an accused and police have used him as a witness which is the power given to the honourable Attorney General and not the police?

2. Did the learned High Court Judge seriously misdirect himself when he affirmed the custodial sentence of 15 months rigorous imprisonment when it is mandatory to impose a suspended sentence to the accused as he is a first offender?

This court also granted leave on the following question of law.

3. Has the prosecution failed to establish the charge No.3 with regard to the date of the commission of the offence?

Facts of this case may be briefly summarized as follows.

The water motor installed near the well of the complainant Mahinda Dharmasena disappeared from his garden on 25.8.2008. Police discovered the said water motor from the possession of Gamini Gunathilake who stated in evidence that he purchased the said water motor from Puspakumara.

Puspakumara in his evidence stated that the accused-appellant gave him the water motor; that he sold it to Gamini Gunathilake for Rs.6000/-; and that he gave the said Rs.6000/- to the accused-appellant. The water motor was produced in court and was identified by all the aforementioned witnesses. One of the main contentions of learned President's Counsel was that Puspakumara was an accomplice and that therefore the learned Magistrate could not have acted on the evidence of Puspakumara. In considering the above contention, the most important question that must be considered is whether Puspakumara is an accomplice or not. Who is an accomplice? Basnayake CJ in Peiris Vs Dole 49 NLR 142 at page 143 made the following observation. "An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is, admittedly, not every participation in a crime which

makes a party an accomplice in it so as to require his testimony to be confirmed." Basnayake CJ in the above judgment considered the following passage of the judgment in the case of Emperor Vs Burn 11 Bombay Law Reports which reads as follows. "No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such a hand. If the evidence of a witness falls short of these tests, he is not an accomplice; and his testimony must be judged on principles applicable to ordinary witnesses."

Pushpakumara in his evidence states that he sold the water motor to Gamini Gunathilake for a sum of Rs.6000/- and gave the same amount to the accused-appellant. There is no evidence to suggest that Puspakumara knew that the water motor was a stolen item. It appears from the above evidence that Puspakumara had not kept any commission or had gained any profit from the sale of the water motor. When I consider the above evidence and the legal literature, I am unable to conclude that Puspakumara was an accomplice. For the above reasons, I reject the above contention of learned President's Counsel.

Prosecution leveled three charges against the accused-appellant. The 1st charge was that on 25.8.2008 the accused-appellant by entering the land of Mahinda Dharmasena, committed the offence of criminal trespass. The 2nd and 3rd charges were that on the same day in the course of the same transaction the accused-appellant committed the theft on water motor of Mahinda Dharmasena and sold it. The accused-appellant was acquitted from the 1st and the 2nd charges. Learned PC contended that since the accused-appellant was acquitted from the 1st and 2nd charge, he could not be convicted on the 3rd charge as the date of offence in the 3rd charge was on the same day (25.8.2008). Police recovered the water motor

on 24.5.2009. Therefore the selling of water motor should have taken place prior to 24.5.2009. Puspakumara says that the sale of water motor took place in 2008 or 2009. The 1st charge states that the offence of trespass was committed on or **about** 25.8.2008. It does not state that the offence was committed only on 25.8.2008. Since the 1st charge states that the offence of trespass was committed on or about 25.8.2008, the date of offence can be any closer date (however within one year) to 25.8.2008. For the above reasons, I reject the above contention of learned President's Counsel.

Learned President's Counsel for the accused-appellant next contended that although the accused-appellant was charged for disposing of stolen property, penal section according to the charge sheet is section 394 of the Penal Code which deals with offence relating to retention of stolen property and that the proper section should have been Section 396 of the Penal Code. He therefore contended that the conviction could not be permitted to stand. I now advert to this contention. Although according to charge No.3, the Penal Section is 394, the wording of the charge is in conformity with Section 396 of the Penal Code. The learned Magistrate has also, in his judgment, stated that he convicted the accused appellant for selling stolen property. The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect. In this connection judicial decision in the case of Wickramasinghe Vs Chandradasa 67 NLR 550 is important. Justice Sri Skanda Rajah in the said case observed the following facts.

"Where in a report made to Court under Section 148(1)(b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal section was not mentioned."

His Lordship held as follows.

"*The omission to mention in a charge sheet the penal section is not a fatal irregularity if the accused has not been misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable."*

In considering the argument of learned President's Counsel Section 166 of the Criminal Procedure Code is important. It reads as follows

> *"Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."*

There is nothing to indicate that the accused-appellant was misled by the above defect. Considering all the above matters, I reject the above contention of learned President's Counsel.

Learned President's Counsel next contended that imposition of a custodial sentence on the accused-appellant who did not have previous convictions is wrong. But this argument is nullified by the observations made by the learned Magistrate at page 26. The learned Magistrate has observed that the accused-appellant has one previous conviction. I therefore reject the above contention. When I consider all the above matters, I hold that the conclusion reached by the learned High Court Judge is correct. In view of the conclusion reached above, I answer the question of law raised above in the negative.

For the above reasons, I affirm the judgment of the High Court Judge and dismiss this appeal.

Judge of the Supreme Court.

V.K. Malalgoda J

I agree.

Judge of the Supreme Court.

L.T.B Dehideniya J

I agree.

Judge of the Supreme Court.

IN THE SUPREMECOURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal in terms of Article 127 of the Constitution read with Section 5(c)(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 152/2011

SC (HC) CA LA No. 152/2011

WP/ HCCA/ Kaluthara No.13/2007(F)

DC Panadura No.1842/M

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara (being a minor, through her next friend, her father; the 2nd Defendant)

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara (the next friend of the above mentioned Plaintiff minor)

   Both of 295/15, Sri Somananda Mawatha,

   Arukgoda, Alubomulla.

PLAINTIFFS

-Vs-

1. E. Chandrani alias Chandrani Epitawala,
   Dias Memorial Hospital (Kethumathi),
   Panadura.

2. Western Provincial Council,
   Western Provincial Council
   Office,
   Colombo.

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

And others

DEFENDANTS

And then

1. E. Chandrani alias Chandrani
   Epitawala,
   Dias Memorial Hospital
   (Kethumathi),
   Panadura.

2. Western Provincial Council,
   Western Provincial Council
   Office,
   Colombo.

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

DEFENDANT- APPELLANTS

-Vs-

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara

Both of 295/15, Sri Somananda Mawatha,

Arukgoda, Alubomulla.

PLAINTIFF- RESPONDENTS

And Now Between

1. E. Chandrani alias Chandrani Epitawala,
Dias Memorial Hospital (Kethumathi),
Panadura.

2. Western Provincial Council,
Western Provincial Council Office,
Colombo.

1ST AND 2ND DEFENDANT-APPELLANT- PETITIONERS

-Vs-

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara

   Both of 295/15, Sri Somananda Mawatha,

   Arukgoda, Alubomulla.

PLAINTIFF- RESPONDENT-RESPONDENTS

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

3RD DEFENDANT-APPELLANT- RESPONDENT

And now between

1. E. Chandrani alias Chandrani Epitawala,
   Dias Memorial Hospital (Kethumathi),
   Panadura.

2. Western Provincial Council,
   Western Provincial Council Office,
   Colombo.

1ST AND 2ND DEFENDANT-PETITIONER - APPELLANTS

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara

Both of 295/15, Sri Somananda Mawatha,

Arukgoda, Alubomulla.

1ST & 2ND PLAINTIFF – RESPONDENT – RESPONDENTS

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

3RD DEFENDANT – APPELLANT – RESPONDENT

Before: Priyasath Dep, PC, CJ

Buwaneka Aluwihare, PC, J

Priyantha Jayawardena, PC, J

Counsel: Viraj Dayaratne DSG with Ashen Fernando for the Appellants

Mahinda Nanayakkara for the Respondents

Argued on: 20th of November, 2014

Decided on: 11th of October, 2018

Priyantha Jayawardena PC, J

Facts of the case

This is an appeal filed against the Judgment dated 24th of March, 2011 delivered by the Provincial High Court of the Western Province Holden in Kaluthara, affirming the Judgement of the District Court of Panadura dated 14th of February, 2007.

The 1st Plaintiff - Respondent – Respondent, being a minor, instituted an action in the District Court of Panadura, through her next friend, the 2nd Plaintiff - Respondent - Respondent (hereinafter referred to as the 1st Respondent and 2nd Respondent respectively) seeking damages from the 1st and 2nd Defendant - Petitioner – Appellants, the 3rd Defendant-Appellant-Respondent (hereinafter referred to as the 1st Appellant, 2nd Appellant and the 3rd Respondent respectively), the Director of Health Services and the Chief Minister of the Western Province.

The 1st and 2nd Respondent pleaded *inter alia* that, the 1st Respondent was admitted to the Kethumathi Hospital of Panadura on or about the 24th of April, 1999 and was in the said hospital until she was transferred to the National Hospital of Colombo on the 1st of May, 1999.

Further, while she was in the care of the Kethumathi Hospital, the 1st Appellant inserted a cannula to the left arm of the 1st Respondent on or about the 29th of April, 1999. During the process of cannulation, an artery of the 1st Respondent was pierced and that resulted in the amputation of her left arm.

Further, it was averred that the 2nd Appellant and the 3rd Respondent are vicariously liable for the negligence of the 1st Appellant.

Accordingly, a sum of Rupees 4 Million was claimed as special damages and a further sum of Rupees 1 Million was claimed as general damages.

The Appellants filed a common answer denying the said allegations and stated *inter alia*;

(i) whilst the 1st Plaintiff – Respondent was at Kethumathi Hospital, she was not in the exclusive care of the 1st Appellant,

(ii) due diligence and care was exercised when the cannula was inserted to the 1st Respondent, and the 1st Appellant is not responsible for the alleged wrongful conduct, and

(iii) therefore, the 2nd Appellant and 3rd Respondent are not vicariously liable for the alleged negligence of the 1st Appellant.

The Director of Health Services and the Chief Minister of the Western Province had moved to be discharged from the case, as a cause of action had not been disclosed against them in the Plaint.

After the trial, the learned District Judge, delivered the judgement in favour of the 1st and 2nd Respondents and held that the 1st Appellant was negligent in cannulating the 1st Respondent which resulted in the amputation of her left arm. Further, it was held that the Appellants and the 3rd Respondent are liable for the damages caused to the 1st Respondent. Accordingly, the learned District Judge awarded a sum of Rupees 3.5 Million as special damages and a further sum of Rs. 500,000/- as general damages for the pain and suffering that the 1st Respondent endured for a period of 3 months at the Kethumathi Hospital as well as at the National Hospital of Colombo.

However, the learned District Judge discharged the Director of Health Services and the Chief Minister of the Western Province, who were the 4th and 5th Defendants, from the case as no cause of action was disclosed against them.

Being aggrieved by the said judgement of the District Court, the 1st Appellant preferred an appeal to the Provincial High Court of the Western Province Holden in Kaluthara and stated *inter alia* that;

"(i) It was not established on a balance of probability that it is the single injury on the artery of the left hand of the 1st Plaintiff, that caused the prevention of circulation of blood to the relevant area of the said hand;

(ii) It was not established on a balance of probability that the alleged insertion of the said cannula caused the said injury;

(iii) It was not established on a balance of probability that the alleged injury was caused by the attempt made by the 1st Defendant at about 8.00 p.m. on 29 – 04 – 1999 to insert the said cannula on the hand of the 1st Respondent, and

(iv) Subject to the above that it was not established on a balance of probability that the 1st Defendant was negligent in inserting the said cannula."

The 2nd Appellant and the 3rd Respondent filing a separate appeal in the Provincial High Court stated *inter alia* that, the judgement of the District Court was contrary to law and against the evidence led at the trial and sought to have the said judgement set aside.

Both the appeals were consolidated and taken up for hearing. The Provincial High Court delivered the judgement and held that only the 2nd Appellant was vicariously liable for the conduct of the 1st Appellant and discharged the 3rd Respondent. Subject to the above, the said appeals were dismissed.

Being aggrieved by the judgement of the Provincial High Court, the Appellants sought leave to appeal from this court and leave was granted on the following questions of law;

"(i) The Provincial High Court erred in law in holding that the 1st Petitioner's (1st Appellant's) act of negligence resulted in the amputation of the hand of the 1st Plaintiff – Respondent, and

(ii) The Provincial High Court erred in law when it failed to appreciate that the said judgement (of the District Court) is contrary to law and against the evidence presented in the case."

Submissions by the Appellants

The Appellants submitted that the 1st Appellant had exercised due care and diligence when the cannula was inserted to the left arm of the 1st Respondent and denied that the arterial injury was caused by her negligence. Therefore, it was submitted that the 1st Appellant is not liable for the damages claimed by the Respondents. In the circumstances, it was submitted that the 2nd Appellant is not vicariously liable for the alleged negligence of the 1st Appellant.

In support of their contention, the Appellants cited the case of *Wasserman v. Union Government* 1934 AD 228 at 231 which stated;

> "A person must take precautions against harm happening to another if the likelihood of such harm would be realized by the reasonably prudent person. He is not however bound beyond that. He need not take precautions against a mere possibility of harm not amounting to such likelihood as would be realized by the reasonably prudent person."

Furthermore, the Appellants contended that the High Court and the District Court had failed to appreciate the difference between medical negligence and medical misadventure. Therefore, it was submitted that the learned District Judge arrived at a conclusion which is against the evidence led before the District Court and the applicable legal principles.

The Appellants stated that the amputation of the forearm of the 1st Respondent child had evoked tremendous sympathy and drew the attention of court to the words of Dheeraratne J in the case of *Prof. Priyani Soysa v. Rienzie Arsecularatne* (2002) 2 SLR 293;

> "Sympathy is not the valid basis for determination of the important issues in this case, and as judges it is our responsibility to do justice between the parties accordance to law."

Submissions by the 1st and 2nd Respondents

The 1st and 2nd Respondents submitted that, the 1st Respondent who was three weeks old at the time, was suffering from high fever and fits and was admitted to Kethumathi Hospital in Panadura on the 24th of April, 1999. The 1st Respondent was diagnosed with Meningitis and drugs were administered to her by way of intravenous cannulation. On the 29th of April, 1999 the 1st Appellant had made several attempts for a span of 30 minutes, to insert the cannula to the left arm of the 1st Respondent.

On the 30th of April, 1999, the mother of the 1st Respondent observed a paleness in the area around the infusion of the left arm of the 1st Respondent, and notified the 1st Appellant. However, the 1st Appellant had disregarded her complaint.

It was further submitted that according to the medical records the paleness of the 1st Respondent's arm was observed on the morning of the 01st of May, 1999 by Sister Leelarathne and the cannula was removed. Moreover, Dr. Kalyani Guruge, Consultant Paediatrician who was attached to the said unit, suspected that the left arm of the 1st Respondent was forming blood clots and provided treatment to arrest the situation. However, the treatment given to the 1st Respondent failed to produce positive results. Therefore, the 1st Respondent was transferred to the National Hospital of Colombo on the evening of the 01st of May, 1999.

Professor Abdul Sheriffdeen, a vascular surgeon at the National Hospital, had diagnosed that the paleness of the left arm of the 1st Respondent was due to the formation of blood clots and performed a surgery on the 1st Respondent to remove the said clots on the 01st of May 1999.

However, by the 06th of June, 1999, the fingers of the 1st Respondent had blackened due to a development of gangrene, as a result of the blood clotting. Therefore, the said arm was amputated from the forearm by Professor Sheriffdeen, in order to prevent the spreading of the continued development of gangrene.

It was submitted that the formation of blood clots in the 1st Respondent's arm was a result of a damage caused to an artery by the negligence of the 1st Appellant whilst attempting to insert the cannula on the 29th of April, 1999.

The 1st and 2nd Respondents further submitted that as a result of the said injury to the artery the blood circulation to the left arm of the 1st Respondent had been affected, causing gangrening in the area which eventually led to the amputation of the forearm of the 1st Respondent.

Moreover, it was submitted that the 1st Appellant failed to exercise due care and diligence expected from a nurse. Further, had the 1st Appellant acted with due care and diligence when inserting the cannula, and monitored the 1st Respondent, the damage caused to the 1st Respondent could have been avoided.

The Counsel further submitted that, Professor Sheriffdeen who testified on behalf of the 1st and 2nd Respondents, had stated in evidence that the artery would have been pierced as a result of medical negligence of the staff of the Kethumathi Hospital. Further, the damage could have been avoided if the staff in the unit in question, were more diligent.

The 1st and 2nd Respondents cited the case of *Bolitho v. City & Hackney HA* (1997) 4 All ER 771 in support, which held that;

> "A doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct, where it has not been demonstrated to the Judge's satisfaction that the body of opinion relied on was reasonable or responsible."

Did the 1st Respondent suffer the alleged arterial damage whilst taking treatment at the Kethumathi Hospital?

The 1st Respondent had been admitted to the Special Baby Care Unit of the Kethumathi Hospital of Panadura on or about the 24th of April, 1999 and was in the said unit, till she was transferred to the National Hospital of Colombo on the 01st of May, 1999.

The care provided at this unit was for children under one month, with medical emergencies. The unit had eight nurses and 24 hour care was provided for the patients. Further, Dr. Guruge, Consultant Paediatrician who was attached to the said unit had stated that the nurses of this unit have undergone special training to diagnose changes in the children at an early stage and to inform a doctor. They have also been trained to insert cannulas. The unit is well-lit on a 24 hour basis, so that the nurses could see each child from a distance.

The bed head tickets, nurses' notes and other documents maintained at Kethumathi Hospital were marked at the trial. According to the evidence given by Dr. Guruge, the 1st Respondent who was 21 days old at the time, was admitted to the Kethumathi Hospital on the 24th of April, 1999 with a history of high fever and fits. At the time of admission to the hospital the 1st Respondent had no injuries on her left arm, but exhibited tremors in the fingers of her left hand.

Further, the 1st Respondent was given medication by using a cannula on the date of admission, due to the recurring fits. The 1st Respondent had been administered with medication every 12 hours through the cannula until the 26th of April, 1999. However, on the 27th of April, 1999 medication was administered every 6 hours. Dr. Guruge had stated that according to the medical records the fever of the 1st Respondent had increased on the 28th of April, 1999 and returned to normal by the 29th of April, 1999.

Moreover, according to medical records, the 1st Respondent did not suffer from fits or fever on the 29th of April, 1999. Further, she was breast fed by the mother. On the evening of the 29th of April, 1999 the 1st Appellant along with another nurse had inserted a cannula to the 1st Respondent.

According to the testimony of the 1st Appellant, she had taken about 30 minutes to insert the cannula as the veins of the 1st Respondent were not visible and had caused difficulties to insert the cannula. Further, the 1st Appellant admitted that she had not requested for the assistance of a senior staff member or the doctor of the ward. She had further stated that the 1st Respondent was in normal condition on the 30th of April, 1999.

On the morning of the 01st of May, 1999, the cannula had been removed after noticing that the left arm of the 1st Respondent was pale and cold. Upon doctor's instructions, the arm was massaged and medication was administered through a new cannula that was inserted to a vein in a different limb. Dr. Guruge had stated that the colour of the arm had slightly returned to normal after giving medication. However, as the arm did not completely return to its normal condition, the 1st Respondent was transferred to the National Hospital of Colombo on the same day.

Professor Sherifdeen who operated on the 1st Respondent stated that the initial effects of an arterial damage could take place within a period of six hours from the injury. Further, there is no connection between the meningitis condition for which the 1st Respondent was admitted to the hospital and the amputation of her arm.

The staff of the hospital was under an obligation to exercise due care and diligence in respect of all the patients under their care at all times. In addition to the said collective duty, each member of the medical and para medical staff which include nursing staff are personally responsible for their conduct while they treat patients.

Considering that there were no injuries to the arm of the 1st Respondent at the time of being admitted to the Kethumathi Hospital, and the fact that the arterial injury was not related to the illness of the 1st Respondent as stated by Professor Sherifdeen, I am of the opinion that the 1st Respondent suffered an injury to an artery whilst she was being treated at the Kethumathi Hospital which led to the amputation of her arm. Further, the said damage was not related to her illness.

In view of the above finding I shall now consider whether Kethumathi hospital had a duty of care towards the 1st Respondent.

Did Kethumathi Hospital owe a Duty of Care?

A duty of care arises when one owes a duty to another. Further, the duty of care may arise under the common law or as a result of a contract between the parties. It may be breached by commission or omission of a duty.

In the case of *Attorney – General v Smith* 8 NLR 229 at 239 it was held that;

> "The Plaintiff's action is undoubtedly and admittedly founded on contract, and I think that the admission of a person into the General Hospital for treatment involves an implied undertaking on the part of the Government that due and reasonable skill will be exercised by the staff of the hospital, *i.e.*, by the servants of the Government, in the treatment, nursing, and care of the person so admitted into the hospital."

National Guidelines for New Born Care by the Ministry of Health 2014, Volume I, page 52 stipulates the following guidelines in respect of the process of monitoring of babies receiving IV fluids;

"(i) Inspect the infusion site <u>every hour</u>.

(ii) Look for redness and swelling around the insertion site of the cannula, which indicates that the cannula is not in the vein and fluid is leaking into the subcutaneous tissues.

(iii) If redness or swelling is seen at any time, stop the infusion, remove the cannula, and establish a new IV line in a different vein…." [Emphasis added]

Thus, the Special Baby Care Unit of the Kethumathi Hospital, was required to follow the above guidelines. According to the evidence of Dr. Guruge who worked in the said unit, the nurses of the unit are trained for emergencies, and should have been more attentive to the 1st Respondent.

As such, the nurses of the unit should have monitored the 1st Respondent on a regular basis. Had they complied with the stipulated guidelines they would have noticed the changes that were taking place and would have taken immediate steps to prevent the 1st Respondent's condition from being aggravated.

In the circumstances, I am of the opinion that when a patient is admitted to a hospital a contract is formed between the patient and the hospital, not only to treat the patient but also to exercise due care for the said patient. Accordingly, necessary treatment and care should be provided by the hospital through its medical staff and para medical staff. Therefore, the hospitals owe a duty of care to the patients whilst they are in the hospital.

Thus, I hold that Kethumathi Hospital owed a duty of care to the 1st Respondent when she was admitted to the said hospital.

Was the arterial damage a medical misadventure or negligence on the part of the 1st Appellant?

The Appellants submitted that the amputation of the arm of the 1st Respondent was not due to the medical negligence of the staff at Kethumathi hospital but due to a medical misadventure. Hence, this court has to determine whether the said injury to an artery had been caused due to the negligence of the 1st Appellant or if it was a medical misadventure.

Medical misadventure is considered as personal injury resulting from medical error or medical mishap, or an unintended outcome of an intended action.

The term negligence denotes the absence of due care where there is a duty to exercise due care and the failure to exercise such care. The conduct could be wrongful or carelessness arising from an omission or commission of an act.

The mother of the 1st Respondent, in her testimony, stated that the 1st Respondent was admitted to the Kethumathi hospital on the 24th of April, 1999 and received treatments at the Special

Baby Care Unit. She further stated that on the 29th of April, 1999, the 1st Appellant with another nurse inserted a cannula to the left arm of the 1st Respondent. She stated that she noticed the 1st Appellant attempting to insert the said cannula to several places and it took about 30 minutes for her to succeed.

Professor Abdul Haleem Sheriffdeen, Consultant Vascular Surgeon of the National Hospital, Colombo, stated that injuries to arteries and external pressure on an artery are among the most probable causes for blood clotting. He stated that an arterial injury could be caused in three circumstances;

1. When cannulating a patient who is unconscious when admitting to the hospital due to the collapsed blood vessels,
2. while cannulating at any time after being admitted to the hospital, and
3. when a cannula is mistakenly inserted into an artery.

According to the evidence of the Proffessor, during the first surgery performed on the 1st Respondent, he observed an injury to an artery in the affected area and identified it as the root cause for the 1st Respondent's condition. He was of the opinion that the anti-biotics given to the 1st Respondent for meningitis had entered into the blood stream through the said injury which caused the blood clotting.

Three medical officers and seven members of the nursing staff including the 1st Appellant gave evidence on behalf of the 1st Appellant.

All the members of the nursing staff who had testified in court admitted that the cannula removed from the 1st Respondent's arm after noticing the paleness on the 1st of May, 1999 was inserted on the 29th of April, 1999 by the 1st Appellant.

The 1st Appellant in her testimony, admitted that she inserted the cannula to the 1st Respondent on the 29th of April, 1999 and that it took about 30 minutes to insert the cannula. She had further stated that she was aware of the sedative drug that has been administered to the 1st Respondent which made it difficult to locate the veins. She admitted that she did not seek the assistance of the medical officer on-call when she found it difficult to locate a vein.

The 1st Appellant had stated that she did not injure an artery in her attempt to insert the cannula into the 1st Respondent. The 1st Appellant stated that an arterial injury could be caused in four different instances, i.e. when taking blood for testing, while cannulation, while giving saline and while injecting the drugs.

Dr. Kalyani Guruge, stated that after noticing the paleness in the 1st Respondent's hand on the 1st of May, 1999 she consulted the doctors at the National Hospital, Colombo to obtain the necessary instructions and treated the patient accordingly. As the condition of the 1st Respondent was deteriorating, she was transferred to the National Hospital on the same day.

According to Professor Sheriffdeen, the 1st Respondent's left forearm had to be amputated due to the gangrene that developed in the affected area as a result of the blood clotting in the affected area. His conclusion was that the effect of the antibiotics given for meningitis which had entered into the blood stream via the arterial injury had caused the blood clotting. He was of the opinion that the negligence of the staff who cared for the 1st Respondent in cannulating and monitoring led to the amputation of the left arm of the 1st Respondent.

Furthermore, the 1st Appellant had failed to request for assistance in cannulating the 1st Respondent, when it became apparent that it was difficult to insert the cannula. This was followed by the failure to monitor the arm of the 1st Respondent after the cannula was inserted. In the circumstances, I am of the opinion that the 1st and 2nd Respondents have established the negligence on a balance of probability.

Taking into consideration the evidence led at the trial, I hold that the amputation of the arm was not due to a medical misadventure but due to negligence. In this regard I wish to mention, had the staff of the Kethumathi hospital monitored the 1st Respondent they could have avoided the amputation of the arm.

Was the 1st Appellant Negligent?

According to R. G. McKerron in 'The Law of Delict' at page 26;

> "Considered as an objective fact, negligence may be defined as conduct which involves an unreasonable risk of harm to others. It is the failure in given circumstances to exercise that degree of care which the circumstances demand. It is a relative, not an absolute, conception, and may consist either in omitting to do something which a prudent and reasonable man would do in the circumstances or in doing something which a prudent and reasonable man would not do in the circumstances."

Charlesworth & Percy on Negligence (9th Edition) at page 16 refers to three essential components that needs to establish negligence;

"a. The existence of a duty to take care, which is owed by the defendant to the complainant;

b. The failure to attain that standard of care, thereby committing a breach of such duty; and

c. Damage which is both casually connected with such breach, has been suffered by the complainant."

(a) Was a duty of care owed by the 1st Appellant to the 1st Respondent?

In order to establish negligence, there has to be a duty of care owed by the 1st Appellant to the 1st Respondent. A duty arises when the law recognizes a relationship between two people where one owes a duty of care to the other. Charlesworth & Percy on Negligence page 19 (9th Edition) states that the word 'duty' indicates a relationship between one person and another, imposing an obligation on one person, for the benefit of the other, in order to take reasonable care in all the circumstances.

The 1st Appellant was a nurse by profession, working at the Special Baby Care Unit at the Kethumathi Hospital. It was common ground that the 1st Appellant, inserted a cannula to the 1st Respondent on the evening of the 29th of April, 1999.

It was held as follows in *Rex v. Bateman* (1925) 19 Cr App R8 at 12;

> "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that service be rendered for reward…… The law requires a fair and reasonable standard of care and competence……."

It was held in *Achutrao Haribhau Khodwa v State of Maharashtra* AIR [1996] SC 2377 at 2383,

> "A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge, which he is to exercise a

> reasonable degree of care. This is the least which a patient expects from a doctor."

I am of the opinion that the degree of care set out in the above cases are not only applicable to the doctors but also to all para medical personnel which includes nurses. The 1st Appellant was on duty from the 29th of April, 1999 to the 30th of April, 1999 and thus owed a duty of care towards the 1st Respondent who was a patient entrusted in her care.

Further, the 1st Appellant had a duty of care towards the 1st Respondent when she inserted the cannula and to monitor her thereafter. Particularly given the fact that the 1st Respondent was only 15 days old, the veins were not visible and it had taken about 30 minutes to insert the cannula. The 1st Appellant had a duty to comply with the said guidelines and she should have monitored the 1st Respondent on an hourly basis.

(b) Did the 1st Appellant breach the duty of care owed to the 1st Respondent?

A duty of care may be breached by failing to exercise reasonable care in fulfilling a duty. Breach of a duty of care is decided on facts and circumstances of each case.

It was held in *Poonam Verma v Aswin Patel* AIR (1996) SC 2111 at 2116,

> "The breach of duty may be occasioned either by not doing something which a reasonable man, under a given set of circumstances would do, or, by doing some acts which a reasonable and prudent man would not do"

Thus, to succeed in a case of negligence, the Plaintiff must prove that the Defendant was in breach of his duty of care. The standard of care and what constitutes a breach of that standard ought to be determined based on the facts of each case.

In *Lanphier v Phipos* [1838] 8 C & P 419 at 420, it was held;

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantage than he has, but he undertakes to bring a fair, reasonable and competent degree of skill ……"

The standard of care can be assessed in an objective manner according to the task undertaken by the professional, irrespective of his qualification and job title. The standard of care has to be judged as to what ought to have been done and the requirement to have foresight is to be assessed as to what ought to have been foreseen in the particular circumstances. Hence, the standard of care of the 1st Appellant owed to the 1st Respondent who was an infant of three weeks is of a higher degree than to a normal patient.

In *Glasgow Corporation v Muir* [1943] 2 All ER 44 at 48 referring to the standard of care it was held;

> "The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life."

It was alleged by the Respondents that the 1st Appellant acted in breach of her duty of care while inserting the cannula to the 1st Respondent on the 29th of April, 1999.

Professor Sheriffdeen had stated that while performing the surgery to remove the blood clot, he noticed an injury to an artery where the blood clotting had taken place. Professor Sheriffdeen was of the opinion that the said injury had happened when the cannula was inserted into the artery while the 1st Respondent was treated at the Kethumathi hospital. He specifically denied the possibility of an artery being injured by a cannula during a state of fits suffered by the 1st Respondent because a cannula cannot pierce through substances as it is made of plastic.

Professor Sheriffdeen, in his testimony further stated that the effects of an arterial injury on a patient stabilizes within twenty-four hours from its causation.

The last time a cannula was inserted into the 1st Respondent was at around 7.00 pm on the 29th of April, 1999 while she was at the Kethumathi hospital which was inserted by the 1st Appellant. Therefore, it is reasonable to assume that the said arterial injury was caused during the said cannulation.

The 1st Appellant while giving evidence, admitted that she inserted a cannula into the 1st Respondent's arm at around 8.00 pm on the 29th of April, 1999. Further, the witnesses from the nursing staff attached to the Special Baby Care Unit of the hospital who testified on behalf of

the 1st Appellant admitted that the said cannula inserted by the 1st Appellant was the same cannula which was removed on the 1st of May 1999, after noticing the change of colour around the infusion site of the affected arm of the 1st Respondent.

The 1st Appellant further admitted that she took about 30 minutes to insert the cannula as it was difficult to locate a vein. She also admitted that she was aware of effects of the sedative drug named Phenobarbital administered to the baby, which makes it difficult to locate the veins.

The 1st Appellant stated that she inserted the cannula only once and she took a long time for cannulation because she was being extra attentive and diligent. However, she admitted that she found it difficult to locate a suitable vein to insert the cannula and that she did not call the medical officer on duty for assistance.

In the circumstances, I am of the opinion that after realizing the difficulty in locating the veins of the 1st Respondent who was an infant of three-weeks administered with sedative drugs along with other drugs, the 1st Appellant ought to have sought the assistance of the senior nurse or the doctor who were at the ward at the time the cannula was inserted to the 1st Respondent.

The test is whether a reasonable man would not do, and not doing something a reasonable man would do. I am of the view that a reasonable person would have sought the assistance of a doctor when it was not possible to insert a cannula for about 30 minutes specially when the baby was only 21 days old. Further, was it not too much to expect from a reasonable person to monitor the hand of a baby after a cannula was inserted after a struggle of 30 minutes.

Thus, taking into consideration the age, the medical condition of the 1st Respondent and particularly the long span of time that the 1st Appellant took to insert the cannula and the fact that the hand got disfigured only after the cannula was inserted by the 1st Appellant on the 29th of April, 1999, I hold that an artery had got damaged whilst inserting the cannula by the 1st Appellant.

Further, the 1st Respondent had failed to monitor the 1st Respondent after the cannula was inserted. This conduct cannot be accepted from a reasonable person. Especially from a trained nurse.

In the circumstances, I am of the opinion that the 1st Appellant has breached the duty of care owed to the 1st Respondent when the danger was clearly foreseeable and obvious. It cannot be considered as an accident or a medical misadventure, but negligence.

Did the 1st Respondent suffer damages as a result of the negligence of the 1st Appellant?

The damage caused to the 1st Respondent should be a proximate cause of the breach of duty of care and the 1st and 2nd Respondents should prove it on a balance of probability.

Hence, the nexus between the damage and the alleged negligence must not be remote. Further, the Respondents must prove that the injury was not a result of the cause of the disease or an accepted and inevitable complication of treatment given with skill and care. Further, the injury or damage should have been foreseeable.

The 1st Appellant was a nurse attached to the Special Baby Care Unit of the Kethumathi Hospital and she has had 26 years of experience. She was the second most senior at the said ward and was trained to handle emergency situations. The care offered in this ward is for infants below 30 days of age and the nurses are specially trained to provide special care for such babies.

According to the testimony of the 1st Appellant, on the evening of the 29th of April, 1999 she had taken about 30 minutes to insert the cannula to the 1st Respondent's arm. She had stated that a long time was taken as the veins of the 1st Respondent were not visible and the skin had to be cleaned to insert the cannula. However, she admitted that she did not request the assistance from a senior nurse or the doctor even though they were present at the ward. Further, she failed to monitor the arm of the 1st Respondent after the cannula was inserted.

According to the evidence led at the trial, at the time the 1st Respondent was admitted to the hospital on the 24th of April, 1999, the 1st Respondent was only suffering from fever and fits which was later diagnosed as meningitis.

According to Professor Sheriffdeen, the left arm of the 1st Respondent had to be amputated because of the gangrene that developed in the arm, due to the interrupted blood circulation. The said interruption was caused by the blood clotting that had taken place in the artery which supplied blood to her left arm.

As discussed above, the left arm of the 1st Respondent was amputated due to a damage caused to an artery whilst she was in the said hospital. Taking into consideration the long span of time the 1st Appellant took to insert the cannula and the failure to seek the assistance of the senior nurse or the doctor who were available in the ward and the failure to monitor the 1st Respondent after the cannula was inserted, I hold that the 1st Appellant failed in the duty of care that she owed to the 1st Respondent. As discussed above, I am of the view that the 1st Appellant was negligent in her duty and as a result the left arm of the 1st Respondent was amputated below

the left forearm. As stated above the said amputation was due to medical negligence that took place whilst the 1st Respondent was in Kethumathi Hospital.

As discussed, the 1st Appellant has failed to exercise due care at the time she inserted the cannula and to monitor the 1st Respondent. Thus, I hold that she was negligent when she treated the 1st Respondent and thus, she suffered damages as a result of the said negligence.

Vicarious liability of the 2nd Appellant

Vicarious Liability as defined in 'The law of delict in Ceylon' by E. R. Wickramanayake at page 30 states as follows;

> "The general rule of the Roman Dutch Law is that a person is liable only for his own negligence. Under that law therefore a husband is not liable for his wife's torts any more than she is liable for his. This general rule is however subject to one exception, namely, that a master is liable for the acts of his servant operating within the sphere of the duty or service entrusted to him.
>
> Two conditions must be satisfied before one man can be held liable for the delict of another. i.e.
>
> (i) The latter must be his servant and not an independent contractor.
> (ii) The delict must be committed in the course of the master's employment."

According to the letter of appointment issued by the Western Provincial Council, marked as 'V1', the 1st Appellant worked within the scope of the 2nd Appellant as a nurse in the Kethumathi Hospital of Panadura at the time of the incident. The 1st and 2nd Respondents proved that the 1st Respondent suffered the arterial damage whilst being a patient at the special baby care unit of the Kethumathi Hospital. Therefore, the 2nd Appellant is vicariously liable for the actions of the 1st Appellant.

In any event the 1st and 2nd Respondents proved that the 1st Respondent suffered a damage to an artery which led to the amputation of the left arm below the forearm, whilst she was at Kethumathi Hospital due to the negligence of the staff. As discussed in the case of *Attorney – General v Smith* (supra) the admission of a person into the hospital for treatment involves an implied undertaking on the part of the hospital that due and reasonable skill will be exercised

by the staff of the hospital. Hence, I am of the view that it is not necessary to prove which member of the staff was negligent.

Is the Judgement of the District Court perverse?

The learned District Court Judge had the advantage of seeing and hearing the witnesses who gave evidence in the case. He has given cogent reasons for his findings of fact.

I am of the opinion that the learned District Judge had adequately considered and evaluated the evidence led at the trial. Evaluation of the facts is a matter for the trial court. Any reasonable person with a trained legal mind would have arrived at the same conclusions that he arrived at, in the instant appeal. The judgement of the District Court is not perverse. An appellate court will not interfere with the finding of facts and substitute with a preferred version unless the judgement of the District Court is perverse.

As discussed above, I am also of the opinion that the 1st and 2nd Respondents have proved their case on a balance of probability. Further, the judgement of the District Court is not perverse and thus, the question of setting aside will not arise.

Conclusion

I hold that the 1st Appellant had a duty to take care when she inserted the cannula to the 1st Respondent and she breached the said duty of care. As a result of the said breach the 1st Respondent suffered damages. Thus, the 1st Appellant and her employer who is the 2nd Appellant are liable for the damages suffered by the 1st Respondent.

Accordingly, the following questions of law are answered as follows;

i. The Provincial High Court erred in law in holding that the 1st Petitioner's (1st Appellant's) act of negligence resulted in the amputation of the hand of the 1st Plaintiff – Respondent? No

ii. The Provincial High Court erred in law when it failed to appreciate that the said judgement (of the District Court) is contrary to law and against the evidence presented in the case? No

In view of the aforementioned findings I dismiss the appeal with costs fixed at Rs.50,000/-. Accordingly, The Appellants should pay the said sum of Rs. 50,000/- to the 1st and 2nd Respondents in addition to the costs ordered by the lower courts.

Judge of the Supreme Court

Priyasath Dep, PC, CJ

I agree **Chief Justice**

Buwaneka Aluwihare, PC, J

I agree **Judge of the Supreme Court**

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

In the matter of an Appeal

Danthasinghe Patabendi
Hangidigedera Abeyrathna
No.29, Pannawa, Ganewatta.

Plaintiff

SC Appeal 156/2015
SC/HCCA/LA/556/2012
NWP/HCCA/KUR/135/2005(F)
DC Kurunegala Case No.5442/L

Vs

B.G. Nimal Kumara Hemasiri of
Kumbukgate

Defendant

And

B.G. Nimal Kumara Hemasiri of
Kumbukgate

Defendant-Appellant

Vs

Danthasinghe Patabendi
Hangidigedera Abeyrathna
No.29, Pannawa, Ganewatta.

Plaintiff-Respondent

AND NOW BEWEEN

B.G. Nimal Kumara Hemasiri of
Kumbukgate

Defendant-Appellant-Petitioner-Appellant

Vs

Danthasinghe Patabendi
Hangidigedera Abeyrathna
No.29, Pannawa, Ganewatta.
(Deceased)

1a. Danthasinghe Patabendi
Hangidigedera Mangalika Abeyrathna

2a. Danthasinghe Patabendi
Hangidigedera Lakshman
Prasad Abeyrathna
Both of No.29, Pannawa, Ganewatta.

Substituted Plaintiff-Respondent-Respondent-Respondents

Before : Sisira J de Abrew J
Prasanna Jayawardena PC J
L.T.B.Dehideniya J

Counsel : Athula Perera with Nayomi N Karunaratne for the
Defendant-Appellant-Petitioner-Appellant
Kamal Dissanayake instructed by Samadi Seneviratne for the
1(a) and 1(b) substituted Plaintiff-Respondent-Respondent-Respondents

Argued on : 14.2.2018

Written Submission
Tendered on :11.12.2015 by the
Defendant-Appellant-Petitioner-Appellant
13.1.2016 by the Substituted Plaintiff-Respondent-Respondent-Respondents

Decided on : 21.6.2018

Sisira J de Abrew J

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed case No.5442/L in the District Court of Kurunegala against the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) asking for a declaration that he is the lawful lessee of the lands described in the plaint and to eject the Defendant-Appellant. The learned District Judge by his judgment dated 1.9.2005 granted relief sought by the Plaintiff-Respondent. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellant appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 8.11.2012 dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has appealed to this court. This court by its order dated 22.9.2015, granted leave to appeal on questions of law set out in paragraphs 17(a),(b) and (c) of the petition of appeal dated 20.12.2012 which are set out below.

1. In the circumstances of the case, has the plaintiff established before court the ownership of the two lands in dispute vested with Maha Vishnu Dewalaya of Kandy and the plaintiff is the lawful tenant/lessee of the lands in dispute?

2. Has the plaintiff identified the land in dispute to obtain a declaration that he is the tenant of the lands?

3. In the circumstances pleaded, are the judgments of the learned District Judge as well as the Civil Appellate High Court according to law and according to the evidence adduced in the case?

The Plaintiff-Respondent in his plaint and evidence claims that he, on a permit issued by Vishnu Dewalaya Kandy marked P4, was in possession of the lands described in the plaint; that he is the lawful lessee of the said property; that in October 1997 the Defendant-Appellant forcibly entered the said property; that on 13.10.1997 he made a complaint to Gokarella Police Station complaining of the said unlawful acts of the Defendant-Appellant; and that he is the lawful lessee of the said property.

The Defendant-Appellant in his answer and the evidence takes up the position that he is the owner of the property described in the plaint. He relies on Deed No. 16016 dated 20.11.1997 (V1) attested by Padma Kumari Wanigasuriya, Notary Public.

On an application made by the Plaintiff-Respondent, District Court issued a commission on H.M. Karunaratne Licensed Surveyor who prepared Plan No.24899. The said plan was produced at the trial marked as P1. H.M.

Karunaratne Licensed Surveyor in his evidence states that he surveyed the lands described in the plaint and that the lands described in the plaint are depicted in his Plan No. 24899. The Defendant-Appellant too made an application for a commission and the District Court issued a commission on H.B.Abeyratne Licensed Surveyor who prepared Plan No.2885. The lands described in the plaint according to the evidence of the Plaintiff-Respondent and H.M. Karunaratne Licensed Surveyor are situated in a village called Kumbukgate and the names of the lands are Dalupothyaya and Paluwatta. Are these the same lands claimed by the Defendant-Appellant? When H.B.Abeyratne Licensed Surveyor surveyed the land, the Defendant-Appellant has shown the land. But the land shown by the Defendant-Appellant is not situated in a village called Kumbukgate. It is situated in a village called Waliharagedera. The distance between Kumbukgate and Waliharagedera is about one kilometer. Further the name of the land shown by the Defendant-Appellant is Galkamathagawa Godapillaawa Dambagahamulahena. It has to be noted here that the land described in the plaint is situated in Kumbukgate. Further the Plaintiff-Respondent too had been present when the when H.B.Abeyratne Licensed Surveyor surveyed the land. The Plaintiff-Respondent had told H.B.Abeyratne Licensed Surveyor that this was not the land in dispute. The above evidence has been given by H.B.Abeyratne Licensed Surveyor. When the above evidence is considered, it is clear that the land described by the Defendant-Appellant is not the land described in the plaint. The Defendant-Appellant relies on Deed No.16016 dated 20.11.1997 marked (V1). The said deed too described the land situated in a village called Waliharagedera and the name of the land is

Galkamathagawa Pillaawa Dambagahamulahena. When I consider all the above matters, I am of the opinion that the Defendant-Appellant's claim that he is the owner of the lands described in the plaint cannot be accepted and should be rejected. When I consider all the above matters, the contention of learned counsel for the Defendant-Appellant that the corpus had not been identified has to be rejected and is hereby rejected.

The Land Officer of the Vishnu Dewalaya Kandy K.B.Piyasiri states in his evidence that the land described in the permit marked P4 was leased to the Plaintiff-Respondent; that the Plaintiff-Respondent has been paying yearly rent to the Vishnu Dewalaya Kandy; and that permit marked P4 was issued by Basnayake Nilame of the Vishnu Dewalaya Kandy. When I consider all the above matters, I hold that the judgment of the learned District Judge giving relief to the Plaintiff-Respondent is correct and the judgment of the Civil Appellate High Court dismissing the appeal of the Defendant-Appellant too is correct. In view of the conclusion reached above, I answer the 1st question of law as follows.

The Plaintiff-Respondent has established that he is the lawful lessee of the lands in dispute.

The 2nd question of law is answered as follows.

The Plaintiff-Respondent has identified the lands in dispute to obtain a declaration that he is the lessee of the lands described in the plaint.

The 3rd question of law is answered as follows.

Both judgments of the District Court and the Civil Appellate High Court are correct.

For the above reasons, I affirm the judgments of the District Court and the Civil Appellate High Court and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

L.T.B.Dehideniya J

I agree.

Judge of the Supreme Court.

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

In the matter of an appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006

SC Appeal No : 159/2010

SC/HC/CALA No : 95/2010

NWP/HCCA/KUR No : 05/2009 (Revision)

DC Kurunegala Case No : 6228/M

Anuradhapura Nandawimala Thero,

Viharadhipathi, Dolukanda

Rankothhena Aranya Senasasanaya,

Wedeniya, Hunupola,

Nikadalupotha

Defendant-Petitioner–Appellant

-Vs-

R M Dharamatissa Herath

Hunupola, Nikadalupotha

Plaintiff-Respondent-Respondent

Before : Hon. Priyasath Dep PC, CJ

Hon. S.E. Wanasundera PC, J and

Hon. Prasanna Jayawardena PC, J

Counsel : H. Withanachchi for Defendant – Appellant – Petitioner

G. Alagaratnam, PC with B. lleperuma for Plaintiff – Respondent- Respondent

Argued on : 01.02.2017

Decided on : 08.10.2018

Priyasath Dep PC, CJ

The Plaintiff – Respondent - Respondent (hereinafter referred to as the "Plaintiff-Respondent") instituted action on 05.11.1999 in the District Court of Kurunegala against the Defendant – Petitioner – Appellant (hereinafter referred to as the "Defendant-Appellant") seeking damages in a sum of Rs. 2.5 million for instigating the police to institute criminal proceedings against him in the Magistrate's Court (malicious prosecution) without any reasonable or probable cause whatsoever.

The Police instituted criminal proceedings in the Magistrate Court of Kurunegala in Case No. 26018/87 pursuant to a complaint made by Herath Mudiyanselage Wimalasiri, the Secretary of the 'Dayaka Sabha' of the Defendant-Appellant's hermitage in Dolukanda at the instance of the Defendant-Appellant. The Complaint was to the effect that the Plaintiff-Respondent, his wife and five others introduced items of ladies garments to a chamber in Defendant-Appellant's hermitage with the objective of bringing the Appellant to disrepute. The Plaintiff-Respondent was charged with offences punishable under Sections 440 of the Penal Code for lurking house trespass or housebreaking in order to commit an offence and under section 291B of the Penal Code for deliberately and maliciously outraging the religious feelings of any class by insulting its religion or religious beliefs. The Respondent was thereafter arrested and later released on bail on 08.11.1997.

When the case was first taken up for trial in the Magistrate's Court, the Defendant-Appellant who was the 1st witness in the case was not present in Court and has tendered a medical certificate. The trial was thereafter postponed to 15.02.1998 and the Defendant-Appellant failed to appear even on that day and has not furnished any plausible reason for his absence. The case was postponed to 15.02.1999 and when the case was taken up on that day another medical certificate was produced on behalf of the Defendant- Appellant. The learned Magistrate refused to accept the same and proceeded to acquit the Plaintiff-Respondent

observing that the Appellant is intentionally evading Court and that the other prosecution witnesses were not interested in the case.

The Plaintiff-Respondent after the acquittal instituted action against the Defendant-Appellant in the District Court of Kurunegala in Case No.6228/M claiming damages in a sum of rupees 2.5 million for malicious prosecution. The Defendant-Appellant in his answer stated that the said Magistrate Court case was instituted by the police and not on a complaint made by him and that he was only a witness for the prosecution. The Defendant- Appellant set up a claim in reconvention claiming damages in a sum of Rs. 2.5 million for the vexatious conduct of the Plaintiff- Respondent in filing this action which resulted in tarnishing his reputation and the good name.

The trial in the District Court was fixed for 22.09.2000 and on that date the Defendant-Appellant failed to appear and the learned judge allowed the application for postponement subject to cost and the case was re fixed for 15.12.2000. The Defendant-Appellant failed to appear on that day also and his Attorney – at – Law informed the Court that he had no instructions to appear. Thereafter the learned judge proceeded to hear the case ex-parte allowing the Plaintiff-Respondent to lead evidence. Thereupon having evaluated the evidence led, the learned judge entered an ex-parte judgment in favour of the Plaintiff-Respondent as prayed for in the plaint .The decree was duly served on the Appellant on 27.06.2001.

The Defendant- Appellant filed an application on 03.07.2001 under Section 86(2) of the Civil Procedure Code seeking to set aside the ex-parte judgment stating that the judgment had been entered without a proper adjudication. It should be noted that the Defendant-Appellant did not seek to purge his default through the said application by furnishing a plausible explanation for the default but merely canvassed the merits of the said ex-parte judgment. The inquiry into the said application was disposed of by way of written submissions and the learned District Judge made order dated 30.05.2002 dismissing the Defendant-Appellant's application as the Defendant -Appellant failed to purged his default. The Defendant-Appellant filed a Petition of Appeal bearing No. NWP/HCCA/51/2002 in the High Court (Civil Appellate) of the North Western Province against this order seeking to set aside the same. However this action was abandoned by the Defendant-Appellant having caused substantial expenses to the Plaintiff-Respondent.

After a lapse of eight years, Defendant- Appellant filed a revision application bearing No. NWP/HCCA/ KUR/05/2009 (Revision) before the same court stating that he has received

fresh legal advice that he would not be able to canvass propriety/validity of the ex-parte judgment in the earlier appeal. The High Court delivered its judgment on 25.02.2010 dismissing the appeal and holding that inordinate delay in filing the application, absence of a reasonable excuse and his culpable conduct in the proceedings disentitles him for a relief in revision. The Court also noted that even though the District Judge has not specifically evaluated the evidence, the evidence adduced by the Respondent in the ex-parte trial is sufficient to prove his case.

Questions of Law

The Defendant-Appellant being aggrieved by the said order sought Leave to Appeal from this Court against the said order of the High Court and obtained leave on following questions of law;

a) Has the High Court erred in law in its reasoning that the evidence adduced at the ex-parte trial was sufficient to establish the Respondent's case?
b) Did the Civil Appellate High court err in law by its failure to consider that what was in issue was not sufficiency of evidence alone but whether the Respondent has made out the constituent elements in an action for malicious prosecution?

The first question of law

It is pertinent to refer to the submissions made by both parties regarding the sufficiency of evidence adduced at the ex-parte trial to establish the case of the Plaintiff –Respondent.

The Defendant- Appellant submitted that the learned District Judge proceeded to grant reliefs prayed for in the Plaintiff-Respondent's plaint on the basis that the evidence of the Plaintiff-Respondent has not been controverted. There should be proper evaluation of facts and the law even in an ex-parte trial.

Unlike in an inter parte trial, the trial judge will not have the benefit of the cross examination which will test the credibility of the witnesses and the admissibility of the documents. This is due to conduct of the defaulting party. In any civil case whether trial is an ex- parte or inte-parte judgement should be in accordance with section 187 of the Civil Procedure Code.

Section 187 reads thus:
'The judgement 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 judgement and signed by such assessors respectively'.

In the case of *Sirimavo Bandaranaike Vs Times of Ceylon Ltd* (1995)1 Sri L.R pp 22-44 Justice Mark Fernando held that:

> "Even an E*x 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* judgement cannot be entered without a hearing and an adjudication."

> "Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the judge's opinion is that the entirety of the relief claimed cannot be granted. 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".

> "There are two distinct issues. The first is whether the ex parte default judgment was procedurally proper and this depends on whether a condition precedent had been satisfied, namely whether a proper order for ex parte trial had been made and whether the defendant had failed to purge his default. The second is whether , apart from the default, the ex parte default judgment was, on the merits i.e.in respect of its substance, vitiated by lack of jurisdiction, error and the like".

.

Submissions of the Parties

Defendant-Appellant submitted that it is manifest from the ex-parte judgment that the learned trial judge has failed to observe the requirements under Section 85(1) an 85(2) of the Civil Procedure Code. Defendant- Appellant submitted that the learned judges of the High Court, even after observing such deficiency in evidence has held that such deficiency has not resulted in a miscarriage of justice. Defendant-Appellant has further submitted that although

the learned judges of the High Court had come to a conclusion that the evidence led on behalf of the Plaintiff-Respondent was sufficient to establish his claim, Plaintiff-Respondent has not proved the elements required for an action in malicious prosecution.

The Plaintiff- Respondent on the other hand had submitted that there is no basis for interfering with the judgment of the District Judge as the ingredients for malicious prosecution and the basis for the award of damages are sufficiently evidenced by the material on record notwithstanding that the learned District Judge has not gone into details in analyzing evidence.

In support of his position the Plaintiff- Respondent has cited several cases including two Court of Appeal Judgments. In the case of *Rev. Minuwangoda Dhammika Thero vs Rev Galle Saradha Thero 2003(3) SLR* 247 it was held that *Though there is no evaluation of the evidence led, on an examination of the evidence led at the ex-parte trial, it appears that the trial judge was correct*."

In *Victor and Another Vs Cyril De Silva 1998 (1) SLR.* where court held that where there was sufficient material on record the appellate court will not interfere.

These judgments have considered whether mere absence of reasons or failure to evaluate evidence in ex-parte judgement would vitiate the judgment or not, where there was sufficient material on record

These judgments have also considered the requirements set out in Section 187 of the Civil Procedure Code (requisites of a judgment) together with Article 138 (1) of the Constitution including the proviso which reads as follows; "*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 Plaintiff-Respondent has also emphasized the fact that the learned High Court judges have affirmatively held that there is sufficient evidence on record. It was submitted that failure to evaluate evidence or give reasons should not affect the validity of the judgment if there is sufficient evidence to satisfy the Judge.

Second Question of Law

The Second question of law in this appeal is whether the Plaintiff-Respondent has proved the constituent elements in an action for malicious prosecution or not.

The action of the Plaintiff -Respondent is an action for recovery of damages for malicious prosecution which is governed by the principles of Roman Dutch law. It is the submission of the Defendant-Appellant that the Plaintiff-Respondent had failed to prove necessary elements required in an action for malicious prosecution.

R.G.Mckerron (Law of Delict -6th Platinum Re-Print 2009 at page at 259) stated :

> "Every person has a right to set the law in motion, but a person who institutes legal proceedings against another maliciously and without reasonable and probable cause abuses that right and commits an actionable wrong. Although the rule is directly traceable to the influence of English Law it has its origin in principles which are common to our law and the law of England"

('Our law' referred to the judgment is South African Civil law which is based on Roman Dutch Law').

In the case of *Karunaratne Vs Karunaratne 63 NLR 365*, in which Basnayake J has observed as follows;

> "*To succeed in an action of this nature, the Plaintiff must establish that the charge was false and false to the knowledge of the person giving the information that it was made with a view to prosecution, that it was made 'animo injuriandi' and not with a view to vindicate pubic justice and that it was made without probable cause…*"

The substantive requirements of the action for malicious prosecution can be described as follows;

a) The institution of proceedings
b) The absence of reasonable and probable cause
c) Malice
d) The termination of proceedings in Plaintiff's favour.
e) Damages.

I. Institution of proceedings

The Defendant-Appellant's contention is that the said proceedings in the Magistrate's Courts were instituted by the police based on investigations conducted by the police and that the Defendant- Appellant merely made a statement in the course of the investigations. The Defendant- Appellant submitted that the report filed by the police in the Magistrate's Court in Case No. 26018/91 discloses that the complaint has been made by one Herath MudiyanselageWimalasiri and based on that complaint the Officer- in –Charge conducted investigations and that the investigations revealed that ladies' garments have been introduced to one of the rooms in the Defendant-Appellant's hermitage. According to the Defendant-Appellant this investigation provided sufficient material to charge the suspects in the Magistrate's Court. Defendant- Appellant has further submitted that other than getting the said Wimalasiri to report the incident to the Police, he has not instigated and/or set in motion the prosecution and that the police was justified in instituting the action on the material which was revealed in the course of the investigations.

The Defendant- Appellant has cited the case of *Saravanamuttu Vs Kanagasabai 43 NLR 357* where Howard CJ expressed the view that:

"*In an action for malicious prosecution in order to establish that the defendant set the criminal law in motion against the plaintiff that there must be something more than a mere giving of information to the police or other authority who institutes the prosecution. There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings*."

The Privy Council judgment in *Tewari Vs Bhagat Singh 24 TLR 884* which has been quoted with approval in *Hendriack Appuhamy Vs Matto Singho 44 NL459* is relevant to the facts of the present case. It states thus:

> "If a complainant did not go beyond giving what he believed to be correct information to the Police and the Police, without further interference on his part (except giving such honest assistance as they might require) thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge was false to the knowledge of the

complainant, if he misled the Police by bringing suborned witnesses to support it, if he influenced the Police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be – Who was the prosecutor ? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion, the conduct of the complainant, before and after making the charge, must also be taken into consideration."

The Plaintiff- Respondent maintains the position that it was Defendant- Appellant who instigated the police to institute proceedings in the Magistrate's Court. Plaintiff-Respondent states that there are contradictions between the statements made by the Appellant and Wimalasiri who gave the first information to the police, He further submitted that it was at the instance of the Appellant, Wimalasiri made the first complaint to the police. Further the Plaintiff-Respondent has submitted that the complaint was a false complaint made to tarnish his reputation and image.

Plaintiff-Respondent submitted that he was falsely implicated in the case because of campaign he led to protect the Dolukanda forest reserve from the illegal constructions of the Appellant and consequently the ill will that the Appellant bore towards the Respondent. It is abundantly clear that the Defendant -Appellant instigated the police to institute proceedings. Having instituted proceedings the Defendant -Appellant kept away from Courts and his conduct is reprehensible.

II. Failure of Prosecution

In the Magistrate's Court proceedings, the Plaintiff-Respondent was discharged under section 188(1) of the Code of Criminal Procedure Act as the Defendant-Appellant and other witnesses repeatedly failed to appear on the given dates. However the Appellant attributes the failure of the prosecution to the Police and not to him and maintains the view that he was merely a witness in the said proceedings. Therefore it is the contention of the Defendant-Appellant that the failure of the prosecution in the said case was attributable to the lethargic conduct of the Police for not securing the presence of the complainant Wimalasiri and witness Karunaratna.

It is the failure on the part of the Defendant- Appellant and his witnesses to attend Courts that led to the discharge of the Plaintiff-Respondent. (the Magistrate in his order referred to it as an acquittal). Police did not reopened the case within one year and under section 188(2) of the Code of Criminal Procedure Act an order of discharge operates as an acquittal. The proceedings have terminated in favour of the Plaintiff-Respondents.

III. Malice and the absence of reasonable and probable cause.

The Defendant-Appellant has submitted that the Police after conducting investigations had a probable and reasonable cause to institute action. In relation to the element of malice, Defendant -Appellant's position is that when he made the statement to the police on 07.11.1997, the police had already commenced their investigations. He came to know of the involvement of the Plaintiff-Respondent in the course of the investigations.

The Plaintiff-Respondent submitted that his evidence and the documents marked and produced as P1, P2, P3, P4, P11, P13, P14, P15, P16, P17, P18, P19,P20 shows the motive to falsely implicate him due to the fact that he has played an active role in protesting and canvassing public authorities and officers against the Appellant's illegal destruction of valuable forest reserve as well as causing environmental degradation.

R.G. Mckeron, Law of Delict (supra) at pages 263-264 states that

> "*The Plaintiff must prove that the defendant actuated by malice. By malice it is to be understood not necessarily personal spite and ill will, but any improper or indirect motive some motive other than a desire to bring to public a person who one honestly believes to be guilty*" He goes on to explain that "*the existence of malice can be established either by showing what the motive was and that it was wrong or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. Malice may be inferred from want of reasonable and probable cause, but it is not a necessary inference….."*

The Plaintiff- Respondent by giving evidence and producing documents proved that he campaigned against the activities of the Defendant -Appellant that resulted in ill will and personal animosity towards the Plaintiff- Respondent.

With regard to reasonable and probable cause, Respondent has cited the definition provided by *Hawkins J in Hicks Vs Faulkner (1878) 8 QBD 167* pg 171 "to be *an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.*"

Plaintiff-Respondent submits that these ingredients are lacking in Defendant. Appellant who had acted with malice without reasonable and probable cause.

Damages

The next question is whether the Plaintiff is entitled to the damages claimed for or to the part of the claim. Malicious prosecutions belong to class of actions falling under Actio Injuriarum. In such an action the Plaintiff can claim damages for pain of mind, injury to feelings and reputation and also for patrimonial loss. Plaintiff- Respondent has testified that he was getting a monthly profit of Rs. 150,000/- to 200,000/- and since the criminal case was instituted he was prevented from properly conducting his business causing him a loss of Rs. 2.5 million to Rs.3 million. However Defendant-Appellant submitted that no documentary proof of accounts of the business have been produced apart from the evidence of the Plaintiff-Respondent who had given evidence of his business, its earnings and the losses .

Plaintiff-Respondent on the other hand has submitted that considering the unchallenged evidence produced in court, the judgment for a sum of Rs. 2.5 million cannot be alleged as arbitrary or excessive. Citing Gatley-Libel and Slander (11th Edition) pp 265-270 stated that Malicious prosecution involves hurt to reputation and feelings and this is not something that can be technically or arithmetically calculated/quantifiable but is based on policy considerations depending on the status, position of the person affected and the nature of the prosecution. Compensation unlike in other cases is not merely to repair damages but punitive and deterrent.

Plaintiff-Respondent is a long standing resident of the area, a businessman involved in social work and politics , Member of the Pradeshiya Sabha .Due to the institution of the Criminal proceedings he was arrested and remanded and was subjected to much humiliation and pain of mind. The proceedings before the Magistrate's Court has taken more than 15 months.

Conclusions

In order to succeed in his action, the Plaintiff- Respondent is required to prove that in fact and in law he is entitled to the relief claimed for. The Plaintiff -Respondent gave evidence and produced documents marked P1-P20 and satisfied the Court that he is entitled to judgment in his favour. His evidence alone and document he produced are sufficient to prove his case. It was alleged that the District Judge failed to evaluate the evidence and thereby failed to comply with section 183 of the Civil Procedure Code.

The learned Judges of the High Court observed that even though the District Judge has not specifically evaluated the evidence, the evidence adduced by the Respondent in the ex-parte trial is sufficient to prove his case. The High Court in its judgment dismissing the appeal held that the inordinate delay in filing the revision application, absence of a reasonable excuse and the Plaintiff -Respondents culpable conduct in the proceedings disentitles him for a relief in revision.

I hold that failure to give reasons or to evaluate evidence in ex parte trial will not affect the validity of the judgment if there is sufficient evidence on record to satisfy the judge that the Plaintiff -Respondent is entitled to the relief claimed for. Proviso to Article138(1) of the Constitution could be applied to section 183 of the Civil Procedure Code. Therefore the Appellate Court should not interfere with the Judgment if the evidence placed before the Court is sufficient to satisfy the Judge and the judgment is correct and "*has not prejudiced the substantial rights of the parties or occasioned a failure of justice*"

I hold that the High Court (Civil Appeals) did not err in law in its reasoning that the evidence adduced at the ex-parte trial was sufficient to establish the Respondent's case.

The next question is whether the Plaintiff -Respondent established the necessary elements of malicious prosecution. In the Magistrate's Court, Police instituted criminal proceeding under section 136(1) B of the Code of Criminal Procedure Act. The virtual Complaint is Wimalasiri, the secretary of the Dolukanda Hermitage. He was instigated by the Defendant -Appellant to make the complaint and thereby the Defendant -Appellant became the accuser in this case. The proceeding instituted in this case ended in an acquittal and the proceedings terminated in favour of the Plaintiff- Respondent. The Plaintiff -Respondent established that the Defendant -Appellant acted maliciously and without reasonable and a probable cause.

Plaintiff -Respondent had proved the necessary elements of malicious prosecution. The damages awarded is not excessive.

High Court (Civil Appellate) did not err in law when it held that the Plaintiff -Respondent has made out the constituent elements in an action for malicious prosecution.

The next question is whether Plaintiff -Respondent is entitled to the damages claimed for and if so the amount (quantum) of damages to be awarded.

Due to the institution of criminal proceeding, the plaintiff suffered damages. His reputation as a politician, social worker and businessman was tarnished. He was humiliated and insulted . His business was affected. The Plaintiff's evidence and the documents produced is sufficient to prove damages. The conduct of the Defendant - Appellant is deplorable and damages should be punitive and deterrent. I am of the view that the damages awarded is reasonable and not arbitrary or excessive.

I affirm the judgment of the District Court and the Judgment of the High Court of Civil Appellate.

The Appeal dismissed. The Defendant-Appellant is ordered to pay Rs. 100,000/= (one hundred thousand) to the Plaintiff-Respondent as Costs. Further the Plaintiff-Respondent is entitled to cost in the District Court and in the High Court (Civil Appellate).

Chief Justice

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

I agree.

Judge of the Supreme Court

Prasanna Jayawardena P.C., J.

I agree

Judge of the Supreme Court

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

In the matter of an application for Special Leave to appeal

Ponnadura Shantha Silva
Ridee Mawatha, Kalamula
Kalutara.

Accused-Appellant

SC Appeal 163/2014
SC (Spl) LA.143/2014
High Court Kalutara
Appeal No.546/2011
Magistrate's Court Kalutara
Case No.97938

Vs.

1. Officer-In-Charge,
   Police Station,
   Kalutara South.
2. The Attorney General
   Attorney General's
   Department,
   Colombo 12.

Complainant-Respondents

And Now Between

Ponnadura Shantha Silva
Ridee Mawatha, Kalamulla
Kalutara.
(Presently in Kalutara
Prison)

Accused-Appellant-Petitioner

Vs.

1. Officer-In-Charge,
   Police Station,
   Kalutara South.
2. The Attorney General
   Attorney General's
   Department,
   Colombo 12.

<u>Complainant-Respondent-Respondents</u>

BEFORE: Buwaneka Aluwihare, PC, J
Priyantha Jayawardena, PC, J &
Nalin Perera, J.

COUNSEL: Shanaka Ranasinghe, PC, with N.Mihindukulasooriya and Sandamali Peiris for the Accused-Appellant-Appellant.
Madhawa tennakoon, SSC for the Complainant-Respondent-Respondents.

ARGUED ON: 29.08.2017

DECIDED ON: 03.08.2018

ALUWIHARE, PC, J:

The Accused-Appellant-Appellant (hereinafter referred to as Accused-Appellant) had been charged before the Magistrate's Court of Kalutara under the following counts:-

(1) Committed an offence punishable under Section 149(1) of the Motor Traffic Act by failure to avoid an accident and thereby

(2) By rash or negligent act as to endanger human life, caused grievous hurt to one Kandadurage Lalithangani Rani, an offence punishable under Section 329 of the Penal Code.

(3) Failed to report an accident and thereby violated Section 161(1)A(iv) of the Motor Traffic Act.

Consequent to the accused appellant pleading not guilty to the charges aforesaid, the case against the accused-appellant proceeded to trial. At the conclusion of the trial, the learned Magistrate found the accused-appellant guilty on counts 2 and 3 aforementioned and proceeded to convict and sentence the accused-appellant.

The learned Magistrate imposed a term of imprisonment of three months and a fine of Rs.1000/- on count No.2 and proceeded to suspend the operation of the term of imprisonment for a period of five years.

With regard to the 3rd count the accused-appellant was imposed a fine of Rs.1,500/- and a default term of one-month simple imprisonment was also imposed.

Aggrieved by the conviction and the sentence imposed by the learned Magistrate the accused-appellant appealed against the judgment to the High Court.

The learned High Court Judge by his judgment dated 28th July,2014 affirmed the conviction of the accused-appellant.

At the hearing of the appeal before the High Court it had been submitted on behalf of the state that the sentence imposed by the learned Magistrate is inadequate when one considers the rashness and the negligence on the part of the accused-appellant and the State moved to have the sentence imposed by the learned Magistrate enhanced.

The learned High Court Judge thereupon had called on the accused-appellant to show reasons as to why the application of the State should not be allowed.

Having heard the accused appellant on the issue of sentence, the learned High Court Judge having set aside the sentence imposed by the learned Magistrate on count 2, substituted the same with a custodial sentence of imprisonment of one year.

When this matter was supported, the court granted special leave on the following questions of law: (Sub-paragraphs (b) (g) (i) and (j) of paragraph 17 of the Petition.)

(i) Has the Provincial High Court erred in Law by failing to appreciate that the Prosecution failed to establish the degree of proof required in establishing a charge of criminal Negligence?

(ii) Has the Provincial High Court erred in Law by affirming the conviction without considering that the Learned Magistrate failed to evaluate the evidence of the defence witnesses as required by the Law?

(iii) Did the Learned High Court err in Law by imposing a custodial sentence of 1-year rigorous imprisonment on the Petitioner contrary to the principles of sentencing?

(iv) In any event was the sentence imposed to the Petitioner is excessive?

At the hearing of this appeal the learned President's Counsel for the accused-appellant confined his submissions to the questions of law referred to in paragraph (i) and (j) of paragraph 17 of the Petition [(i) and (ii) above].

It was contended on behalf of the accused-appellant that he had been employed as a driver with the Sri Lanka Transport Board and that he had no previous convictions. It was also contended that he is a father of three children and two of them were engaged in higher studies.

It was also strenuously argued on behalf of the accused-appellant that the learned High Court Judge misdirected himself with regard to the degree of negligence that is needed to establish criminal negligence and submitted that the principles laid down by courts suggests that the prosecution has to establish a high degree of negligence on the part of the accused, if the accused is to be found guilty for criminal negligence and the prosecution had not adduced sufficient evidence to establish the degree of negligence required to convict a person for criminal negligence.

The facts albeit briefly can be narrated as follows;

The injured who was a teacher; in order to reach the school at which she was teaching, had taken the bus driven by the accused to come to Katukurunda junction. Before the bus could reach the destination, however, the accused-appellant had indicated that the bus will not proceed beyond a particular point and wanted all the passengers to disembark. There had been about 15 passengers, and she was also in the process of getting off the bus as it was announced that the bus would not proceed further.

As she was about to get off, the bus had pulled out and as a result the injured had got thrown off the bus. Due to the impact of the fall, she had suffered a fracture of her left wrist, among other injuries. The bus, however, had proceeded without stopping.

In the case before us the only issue that needs to be addressed is as to whether the learned High Court Judge was justified in enhancing the sentence. Prior to that, the Court must first look to see whether the burden of proof has been discharged by the Prosecution, since that is the predicate for enhancing the sentence.

The requirement of high degree of negligence to establish criminal negligence, referred to by the learned President's Counsel for the Appellant, no doubt, was a reference to the decision in **King Vs. Leighton 47 NLR 283.**, where it was held that "[…] *in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving punishment.*?" a standard which was articulated by Hewart CJ in ***R v Bateman (1925) 19 Cr App R 8*** - later explained in ***Andrews v DPP [1937] AC 576***—and followed by our Courts in ***Lourenz v Vyramuttu 42 NLR 472*** and in ***King v Leighton*** (*supra*).

However, as explained by Atkins J. in ***Andrews v DPP [1937] AC 576*** and later by Lord Mackay of Clashfern LC in ***Regina V Shulman, Regina V Prentice, Regina V Adomako; Regina V Hollowa [1995] 1 AC 171, [1994] UKHL 6, [1994] 3 WLR 288, [1994] 3 All ER 79*** the circumstances in which negligence has to be considered may make an elaborate and rather rigid directions inappropriate. Trying to achieve a 'spurious precision' in a branch of law, *i.e*,

criminal negligence, which extends not only to acts causing death but also hurt and grievous hurt, the degree of circumspection as is expected of the average man must necessarily be considered vis a vis the circumstances under a particular situation. Although decided in the latter part of 19th century words of O'Brian J in the case of ***R Vs. Elliot (1889) 16 Cox 710*** would be of relevance even of today. O'Brian J observed that, "*the degree of care to be expected from a person, the want of which would be gross negligence or less than that, must in the necessity of things, which the law cannot change, have some relation to the subject and the consequences"* ... What O'Brian J referred to, appears to be, the want of care required, must relate to the act and the consequences.

Whether a person was negligent or not has to be considered taking into account the facts and circumstances of each case and upon consideration of the duty of care expected of him under the circumstances of the case. The seriousness of the breach of duty must be judged based on the circumstances in which the defendant was placed when it occurred. As Lord Mackay of Clashfern LC observed in relation to the charge of manslaughter in ***R v Adamako*** (*supra*) "*The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal. […] The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.*" This is similar to what O'Brien J said *"the want of care required must relate to the act and the consequences to some degree"*. He went on to state that ***"if the prisoner was absorbed in the business and interests of the company as to give no heed to their (passengers) safety, that might be considered as negligence". (Elliot supra at page 714).*** It appears here, that O'Brian J referred to an inadvertent state of mind as opposed

to recklessness. Particularly when one is entrusted with a responsibility such as carrying passengers, he is expected, at all times to be mindful of the duty cast on him and there is no room for inadvertence.

In the case before us, the accused-appellant was entrusted with the responsibility of carrying passengers in an omnibus and had a duty of care that by his conduct, he does not expose the passengers to any danger that would result in any injury or harm being caused to them. Pulling away in the middle of passengers disembarking, to say the least is grossly a rash act and, in my view, goes beyond inadvertent state of mind that Judge O'Brian spoke of in the case of **Elliot** *(supra)*.

According to the accused-appellant's own admission under oath he had seen the injured falling. The position taken up by the accused-appellant was that the passenger fell after she got off the bus and that was the reason for him to drive off.

The learned Magistrate had accepted the evidence of the injured and had rejected the version of the accused-appellant and had come to the conclusion that the bus driven by the accused-appellant had pulled off before she could disembark and this resulted her fall, an act imminently dangerous that there was every likelihood of a passenger falling off the bus and coupled with that, the accused-appellant had no excuse for his course of conduct. The accused-appellant had a duty of care to ensure safety of the passengers he carried. The conduct of the accused-appellant is reprehensible to say the least and sufficiently grave to fall within the ambit of criminal negligence.

Under these circumstances I am of the view that the learned High Court Judge was correct in enhancing the sentence imposed on the accused-appellant by the

Magistrate and I see no reason to interfere with the same. One must bear in mind that punitive action is not only to reform the offender but should serve as a deterrence as well.

Chief Justice Basnayake in the case of ***A.G v. H. N De Silva [1955] 53 C.L.W 49*** observed;

"In assessing a punishment that should be passed on an offender. A judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the point of view from the angle of the offender. A judge should in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys public confidence that must be taken into account in assessing the punishment […] I have mentioned where public interest or welfare of the state (which are synonymous) outweigh the previous good character, antecedence and the age of the offender. Public interest must prevail…."

For the reasons set out above, I answer all the questions of law on which leave was granted in the negative and accordingly this appeal is dismissed.

In the Petition filed before this court the accused-appellant has averred that before he could invoke the jurisdiction of this court by way of special leave to appeal, the learned High Court Judge directed the Magistrate concerned to

carry out the sentence which appears to have been complied with by the learned Magistrate.

The court directs the learned Magistrate to ascertain from the Prison authorities, whether the accused-appellant had served any part of the sentence imposed by the learned High Court Judge and if so, to give necessary direction to the Prison authorities that the accused-appellant is required to serve only the balance part of the one-year sentence imposed, after discounting the period of said sentence the accused-appellant had already served.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA, PC

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 Special Leave to appeal in terms Article 154 (P) of the Constitution read with section 31DD of the Industrial Disputes Act (as Amended) and section 9 of the High Court of the Provisions (SPL) Act No. 19 of 1990

G. Kothandan,
"Bethany"
Golf Links Road,
Bandarawela

Applicant

SC Appeal 164/2011
SC Appeal 165/2011
HC/ALT/55/2008
HC/ALT/63/2008
LT/36/19462/2006

Vs,

Agarapatane Plantations Limited,
No. 53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 01

Respondent

And

Agarapatane Plantations Limited,
No. 53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 01

Respondent -Appellant

Vs,

G. Kothandan,
"Bethany"
Golf Links Road,
Bandarawela

Applicant-Respondent

And now between

Agarapatane Plantations Limited,
No. 53-1/1, Sir Baron Jayatilleke Mawatha,
Colombo 01

Respondent-Appellant-Appellant

Vs,

G. Kothandan,
"Bethany"
Golf Links Road,
Bandarawela

Applicant- Respondent -Respondent

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

Prasanna Jayawardena PC J

Vijith K. Malalgoda PC J

Counsel: Uditha Egalahewa with Damitha Karunarathne,

for the Respondent-Appellant-Appellant

Rohan Sahabandu PC with Ms. Hasitha Amarasinghe,

for Applicant- Respondent -Respondent

Argued on: 10.09.2018

Decided on: 18.10.2018

Vijith K. Malalgoda PC J

SC Appeal 164/2011 and SC Appeal 165/2011 are appeals filed by the Respondent in Labour Tribunal Case No. 36/19462/2006 which was pending before the Labour Tribunal of Bandarawela.

The Applicant G. Kothandan who was initially employed by the Agarapathane Plantations Company, as a Secretary (security) was working as an internal auditor at the time he was sent on retirement, reaching the age of 55 years. The Applicant, who was not happy with the said decision of the Respondent, to send him on retirement by reaching 55 years, went before the Labour Tribunal.

At the conclusion of the inquiry before the Labour Tribunal, the President of the said Labour Tribunal by his order dated 25.03.2008 directed the Respondent to pay the Applicant one year's salary as compensation.

Being dissatisfied with the said decision, both the Applicant and the Respondent had preferred appeals to the High Court of the Uva Province- holden in Badulla. By his order dated 20.05.2011 the learned High Court Judge had allowed the appeal filed by the Applicant-Appellant and directed the Respondent-Respondent to pay the Applicant-Appellant 05 years' salary as compensation.

The Respondent-Respondent in the said appeal and the Respondent-Appellant in the cross appeal namely, Agarapathane Plantations Company Limited, being dissatisfied with the said orders of the High Court of Uva Province, had preferred two Special Leave to Appeal applications before the Supreme Court.

When the said Special Leave to Appeal applications were supported before this court on 18.10.2011, parties agreed to support only one matter, i.e. SC SPL LA 125/2011 and this court after considering the matters placed before court in the said application had granted special leave on the questions of law containing in paragraph 13 (b) (c) (d) and (e) to the effect that;

b) Did the Honourable Judge of the High Court misdirected himself in the interpretation of the terms and conditions of employment more specifically the grant of extension of service?

c) Did the Honourable Judge of the High Court misdirected himself with regard to the duty of the workman to mitigate his losses?

d) Did the Honourable Judge of the High Court err in evaluating and analyzing the provisions of the letter of appointment and circulars applicable in this matter?

e) Did the Honourable Judge of the High Court fail to consider "just and equitable jurisdiction" vested in the Labour Tribunal?

Since the parties agreed to support only one matter and to abide by the decision in the said appeal, at the time the leave was granted, question of considering both appeals will not arise at this stage.

As admitted by both parties before this court the Applicant-Respondent-Respondent (hereinafter referred to as Applicant-Respondent) who commenced his career as a secretary (security) in a lower grade in the year 1992 was subsequently promoted to a post of Assistant Manager in the year 1995. Parties relied on three main documents during the arguments before us. The Respondent-Appellant-Appellant (hereinafter referred to as Respondent-Appellant) heavily relied on the document marked A-9, whilst the Applicant-Respondent heavily relied on documents marked A-3 and A-5.

Whilst referring to document A-9 which is the letter of appointment issued to the Applicant-Respondent when he was promoted as the Assistant Manager in the year 1995 the Respondent-Appellant argued that, the said letter of appointment categorically provided that the workman would be automatically retired at the age of 55.

Under clause 11 of the said letter, retirering age of the employee is referred to as follows;

11 retirements: You will stand automatically retired on reaching the age of 55.

Whilst relying on the said document, the Respondent-Appellant further submitted that the document relied by the Applicant-Respondent, namely A-3 was a document issued in January 1994, one and a half years prior to the issuance of the letter of appointment to the Applicant-Respondent and therefore A-3 could not supersede the specific conditions set out in the letter of appointment marked A-9.

As a further argument, the Respondent-Appellant had submitted that there is a pre-requisite for the workman to claim the benefit under paragraph 2 of A-3, and the Applicant-Respondent is not entitled to claim the said benefit due to his own conduct, by failing to give notice prior to six months of his retirement date. The Respondent-Appellant denied A-5 and took up the position that it has no bearing of his employees since it was issued by the State Plantation Corporation.

Even though I see no merit in the 1st argument of the Respondent-Appellant that A-3 could not supersede A-9, I would like to go into more detail about the 2nd argument referred to above.

As referred to above in this judgment, the Applicant-Respondent had relied on two documents A-3 and A-5. A-5 which referred to the outcome of a discussion between the Minister-in-Charge of the Plantation Industries and some Trade Unions in the same sector, issued by the Sri Lanka State Plantation Corporation, in October 1991.

In the said document, the extension of the employment beyond the retirering age is referred as follows;

1.1 ……explained the following policy that will be adopted in regard to extensions of service of the workers and the other staff beyond the optional age of retirement (55 years)

Estate workers- workers will be allowed extensions up to 60 years

Other members of the staff- extension beyond 55 years of age will be given if the employees work and conduct have been satisfactory and if he is in good health provided no surplus on the particular grade/s

1.2 Request for extension of service should be made six month prior to the date on which such extension fall due

Even though the learned President's Counsel who represented the Respondent-Appellant, challenged the validity of the above documents with regard to the employees of the Agarapathane Plantations Limited, it is observed by this court that the decisions referred to in the said circular with regard to the extension of service beyond 55 years had been adopted by the Agarapathane Plantations Limited by A-3 dated 06.01.1994. In the said circumstances it is

observed by this court that the provisions referred to above will have a bearing on the employees of the Agarapathane Plantations Limited up to the point it had been adopted by the Respondent-Appellant Company.

However between the above documents, namely A-3 and A-5, A-3 is the most important one which has direct bearing on the employees of the Respondent-Appellant Company.

As further observed by this court, document A-5 is more general in its nature, since it refers not only to the extension of service beyond the age of 55 but also referred to several other issues in the estate sector but A-3 is a specific document which deals only with the subject, "Extension of service of employees- beyond 55 years"

Even though the learned President's Counsel who represented the Respondent-Appellant had mainly relied on paragraph 2 of the said circular, raising the 2nd objection referred to above, it is necessary to consider paragraphs 2-5 of the said circular to understand the policy adopted by the employer by the said circular. In the said circumstances I would like to first reproduce the paragraphs 2-5 of the circular dated 06.01.1994 which reads as follows;

> "It is therefore mandatory on the employees concerned to make applications of their intention to continue in employment beyond the age of 55 years. Such application should be made six months prior to reaching 55 years and subsequent applications for such extensions should also be made annually six months before the expiry of their current extension.
>
> Irrespective of whether the employee concerned make an application of his intention to continue in employment, it would be in the interests of the management to give an employee one year's notice and also indicate clearly to him the necessity to handover vacant position of the official quarters occupied by him and any other assets belonging to the estate in his charge, on or before the date of his/her retirement. In the event, the management decides to terminate the employment of an employee after he/she reaches 55 years and it is the intention of the management to limit such extension to one year only, this should be intimated in writing to the employee together with the necessity to handover vacant position of the official quarters on or before such date of retirement.

> Similarly, in the event of any further extensions beyond one year are granted and depending on whether or not it is the intention of the management to retire such employee after each such extension written notice, as appropriate of the managements intention should be conveyed. This will facilitate the employee, to make alternative arrangements as regards his/her housing, schooling for his/her children and also plan for his/her future commitments consequent to retirement."

Even though there is a mandatory requirement for the employee concerned to make such application six months in advance, (not followed by the employee in the present case) the next paragraph of the same circular had provided, in the interest of the management, the management to give one year's notice indicating the date on which he has to hand over the official quarters etc.

As correctly observed by the learned President of the Labour Tribunal, in the absence of such notice being given, there is a legitimate expectation by the Applicant-Respondent that his services will be extended for one year when he reaches the age of 55 years, since the requirement under the above circular had not been followed by the employer giving him notice that he should vacate the official quarters etc. on completion of 55 years. In the said circumstances, I observe that the learned President of the Labour Tribunal is correct in granting compensation of one year's salary to the Applicant-Respondent.

When the above decision was challenged before the High Court of Provinces holden in Badulla the learned High Court Judge had decided to increase the compensation to 5 years' salary merely for the reason that the appeal has taken more than 4 years and the Applicant-Respondent has now reached 60 years, and therefore he will not be able to find alternate employment.

As observed by me the document A-3 or A-5 had not provided an extension of the employment of an employee who reached the age of 55 years by 05 years. The extension if it to be granted, will only be for one year and to be considered once again by adhering to all the requirement in the circular for one more year. In the said circumstances question of granting compensation computed for 5 years will not arise and therefore I hold that the learned High Court Judge had erred when he decided to award compensation for a period of 5 years based on his last drawn salary.

I therefore answer the questions of law raised before this court in favour of the Respondent-Appellant and set aside the order of the learned High Court Judge of the Uva Province dated 20.05.2011 and affirm the order dated 25th March 2008 by the learned President of the Labour Tribunal Bandarawela.

Appeal allowed no costs.

Judge of the Supreme Court

Sisira J. de. Abrew 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 REPU BLIC OF SRI LANKA

In the matter of an Appeal with Leave to Appeal obtained from this Court.

SC Appeal No.169/2011
SC/HCCA/LA No. 169/2011
WP/HCCA/Mt. Lavinia No. 170/07(F)
D.C. Mt Lavinia Case No. 734/03/RE

YASOMA CHAMPA NILMINI ABEYGUNAWARDENA
No.80/5, "Nilmini", Athurugiriya Road, Homagama.

PLAINTIFF

VS.

SUNIL GOTABAYA LAMABADUSURIYA
No. 50A, Bellantara Road, Nikape Dehiwela and /or No.50/1 Abeywickrema Avenue, Mt. Lavinia.

DEFENDANT

AND

SUNIL GOTABAYA LAMABADUSURIYA
No. 50A, Bellantara Road, Nikape Dehiwela and /or No.50/1 Abeywickrema Avenue, Mt. Lavinia.

DEFENDANT-APPELLANT

VS.

YASOMA CHAMPA NILMINI ABEYGUNAWARDENA
No.80/5, "Nilmini", Athurugiriya Road, Homagama.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

SUNIL GOTABAYA LAMABADUSURIYA
No. 50A, Bellantara Road, Nikape
Dehiwela and /or No.50/1
Abeywickrema Avenue, Mt.Lavinia
DEFENDANT-APPELLANT
PETITIONER/APPELLANT

VS.

YASOMA CHAMPA NILMINI ABEYGUNAWARDENA
No.80/5, "Nilmini", Athurugiriya Road,
Homagama.
PLAINTIFF-RESPONDENT - RESPONDENT

BEFORE: Sisira J. De Abrew J.
Priyantha Jayawardena, PC, J.
Prasanna Jayawardena, PC, J.

COUNSEL: Rohan Sahabandu, PC with Diloka Perera for the Defendant-Appellant-Appellant.
Ranjan Suwandaratne with Anil Rajakaruna for the Plaintiff- Respondent-Respondent.

WRITTEN SUBMISSIONS FILED: By Defendant-Appellant- Appellant on 13th February 2012 and 29th December 2016.
By the Plaintiff-Respondent-Respondent on 08th March 2012.

ARGUED ON: 05th December 2016

DECIDED ON: 06th April 2018

Prasanna Jayawardena, PC, J.

The premises bearing Assessment No. 50A, Bellanthara Road, Nikape, Dehiwela, consists of a house standing on an area of land which is A: 0 R: 0 PL 38.6 in extent [hereinafter referred to as "the premises"]. This is a residential area.

The Plaintiff-Respondent-Respondent ["the plaintiff"] instituted this Action, in the District Court of Mt. Lavinia, praying to eject the Defendant-Petitioner-Petitioner/ Appellant ['the defendant"] from the premises and for the recovery of damages for the period during which the defendant has remained in possession of the premises after being given notice to quit on 31st January 2003.

The plaintiff's case, as pleaded in the plaint, was that: (i) she had leased the premises to the defendant, for a period of two years from 01st January 2000 onwards, by a Lease Agreement No. 9448 dated 27th January 2000, which was produced at the trial marked **"**අ‍ැ 1**"**; (ii) the premises are residential premises; (iii) the premises were *'occupied"* by the *"owner"* on 01st January 1980 and, therefore, the provisions of the Rent Act No. 07 of 1972 do not apply to the premises by operation of section 2 (4) (c) of the said Act; (iv) after the expiry of the aforesaid Lease Agreement No. 9448, the defendant was given notice, on 16th December 2002, to quit the premises on or before 31st January 2003; (v) however, the defendant has wrongfully and unlawfully remained in occupation of the premises after that date and is, thereby, causing loss and damage to the plaintiff.

By his answer, the defendant admitted that the premises are residential premises and admitted entering into the Lease Agreement No. 9448 and that he was the tenant of the premises. However, the defendant denied that the premises were *'occupied"* by the *"owner"* on 01st January 1980 and pleaded that, the provisions of the Rent Act No. 07 of 1972 did apply to the premises. On that basis, the defendant pleaded that, the plaintiff's action should be dismissed since, under and in terms of the provisions of Rent Act, the plaintiff was not entitled to terminate the defendant's tenancy.

At the commencement of the trial: the defendant admitted entering into the Lease Agreement No. 9448; admitted that the premises are residential premises; and admitted that he received the letter, dated 16th December 2002, by which the plaintiff sent him notice to quit the premises on or before 31st January 2003. Thereafter, the parties framed issues based on their pleadings.

The only question to be decided in this appeal is crystallized in both the plaintiff's first issue and the defendant's first issue - *ie:* the plaintiff's first issue which was whether the premises were *'occupied"* by the *"owner"* on 01st January 1980 and, therefore, the provisions of the Rent Act No. 07 of 1972 do not apply to the premises by operation of section 2 (4) (c) of the said Act and the defendant's first issue which was whether the provisions of the Rent Act No. 07 of 1972 do apply to the premises.

Section 2 (4) (c) of the Rent Act No. 07 of 1972 reads as follows:

" So long as this Act is in operation in any area, the provisions of this Act shall

apply to all premises in that area, other than -

> *(a) excepted premises;*
> *(b) residential premises constructed after January 1, 1980, and let on or after that date;*
> ***(c) residential premises occupied by the owner on January 1, 1980, and let on or after that date;***
> *(d) residential premises in the occupation of ……."* [emphasis added].

Thus, in terms of the clear wording of section 2 (4) (c) of the Rent Act, a "residential premises" will not be subject to the provisions of the Rent Act if those "residential premises" were *"occupied"* by the *"owner"* on 01st January 1980 and were let on or after 01st January 1980.

At the trial, the District Court held that, the plaintiff was entitled to succeed in the action because it had been established that, the premises were not subject to the Rent Act and that the defendant had failed to vacate the premises after the plaintiff had duly terminated the contract of tenancy.

The defendant appealed to the Provincial High Court of Appeal. The learned High Court judges dismissed the defendant's appeal holding that, the premises were not subject to the provisions of the Rent Act because the plaintiff had established the aforesaid criteria required by section 2 (4) (c) of the Rent Act - *ie:* proved that, the premises were "residential premises" which were *"occupied"* by the *"owner"* on 01st January 1980 and had been and let on or after 01st January 1980.

The defendant sought leave to appeal to this Court from the order of the High Court. This court has granted the defendant leave to appeal on the following two questions of law, which are set out *verbatim:*

> (i) Is the premises in question governed by the provisions of the Rent Act No.2 of 1972 as amended ?
>
> (ii) Did the defendant become a monthly tenant after the expiry of the said lease agreement on 31st December 2001?

Answering these two questions of law requires a recounting of the facts of this case.

Prior to October 1962, the premises were owned by Martin Perera, who resided in the premises together with his wife, Mary Dias. By Deed of Gift No. 4392 dated 07th October 1962, Martin Perera, gifted the premises to his daughter, Somawathie Perera, subject to a life interest in favour of himself and his wife, Mary Dias. This Deed of Gift No. 4392 was produced at the Trial marked "පැ 8" and is undisputed.

Martin Perera and his wife, Mary Dias continued to reside in the premises, in the exercise of their aforesaid life interest, after gifting the premises to their daughter - *ie:* to Somawathie Perera - by the Deed of Gift marked "පැ 8". Martin Perera died prior to 01st January 1980. After his death, Mary Dias continued to reside in the premises, in the exercise of her aforesaid life interest, until her death on 10th December 1984. Thus. Mary Dias resided in and occupied the premises on 01st January 1980.

Prior to 1984, Somawathie Perera had married Jinadasa Abeygunawardena. Their daughter - Yasoma Abeygunawardena - is the plaintiff.

Somawathie Perera died in 1995 and, thereafter, her husband transferred all the right, title and interest in the premises to his daughter, the plaintiff. This took place by a Deed No. 923 which was executed in 1996. The defendant admitted that the plaintiff has had title to the premises from 1996 onwards. The fact that, the plaintiff has title to the premises is also specifically stated in the Lease Agreement No. 9448 marked "පැ 1" entered into by and between the plaintiff and the defendant by which the plaintiff, admittedly, leased the premises to the defendant.

At the trial, the plaintiff gave evidence and stated that her grandmother - *ie:* Mary Dias - resided in the premises on 01st January 1980 and until the time of her death on 10th December 1984. This evidence was supported by the Electoral Lists marked "පැ 3" to "පැ 6" and the Death Certificate marked "පැ7". Later, when the defendant gave evidence and was cross examined by learned Counsel appearing for the plaintiff, the defendant admitted that, Mary Dias resided in the premises on 01st January 1980.

The first question of law set out above asks whether the premises in question are governed by the provisions of the Rent Act No.2 of 1972, as amended. In other words, whether the learned High Court judges were correct when they held that, the premises were not subject to the provisions of the Rent Act by operation of section 2 (4) (c) of that Act, because the plaintiff had established that, the premises which are the subject matter of the act are `residential premises' which were *"occupied"* by the *"owner"* on 01st January 1980.

In this connection, firstly, it was admitted that, the premises are `residential premises' within the meaning of the Rent Act.

Secondly, it is not in dispute that the premises were let, for the first time, after 01st January 1980.

Thus, the only dispute is whether the premises were *"occupied"* by the *"owner"* on 01st January 1980, as stipulated in section 2 (4) (c) of the Rent Act.

When considering that issue, a preliminary question arises since the evidence established that the *plaintiff* in this action was *not* the *"owner"* of the premises as at 01st January 1980 and did *not "occupy"* the premises on that date. In fact, as admitted by the parties, the plaintiff obtained title to the premises only in 1996. It was the plaintiff's predecessors in title, who owned the premises on 01st January 1980.

In these circumstances, it is relevant to consider whether the provisions of section 2 (4) (c) of the Rent Act require that, the *plaintiff* in this action should have also been the *"owner"* of the premises as at 01st January 1980, in order to entitle the plaintiff in this action to claim the benefit of the exemption provided by section 2 (4) (c) of that act.

That question is easily answered by a reading of section 2 (4) (c) of the Rent Act since the plain and simple words of this statutory provisions make it clear that, all that is required to satisfy the criteria set out therein is that, whoever was the *"owner"* of the premises as at 01st January 1980, must have *"occupied"* the premises on that date. If that requirement is satisfied, those premises are not subject to the provisions of the Rent Act by operation of section 2 (4) (c) of the Rent Act, from 01st January 1980 onwards. Therefore, a subsequent change of ownership [*ie:* occurring on some day after 01st January 1980] which results in the *"owner"* who *"occupied"* the premises as at 01st January 1980, ceasing to have title to the premises or ceasing to occupy the premises, does not affect the fact that, the premises are exempted from the provisions of the Rent Act from 01st January 1980 onwards.

In this connection, it is pertinent to observe that, there is no justification for a Court to impose on the words used in section 2 (4) (c) of the Rent Act, an `added' requirement that, the *"owner"* who *"occupied"* the premises as at 01st January 1980 must remain the owner and continue to occupy the premises for the exemption from the provisions of the Rent Act to continue. Adding such an extraneous requirement would be unwarranted and contrary to the established principles which guide the interpretation of statutes. In this connection, it is apt to cite Maxwell on the Interpretation of Statutes [12th ed. at p.33] who states, *"It is a corollary to the general rule of statutory construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said: `it is strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'.[Thompson vs. Goold & Co.] 'We are not entitled' said Lord Loreburn L.C. 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.".*

In passing it may be also mentioned that, adding the aforesaid extraneous requirements to the words used in section 2 (4) (c) of the Rent Act would not only be wrong in law but would also be contrary to common sense since an artificial

imposition of these requirements will result in an anomalous position where a premises which are exempt from the Rent Act on 01st January 1980 because the owner was in occupation on that day, will later become subject to the provisions of the Rent Act upon the death of the owner or when the owner transfers his ownership to another or moves out of the premises.

It may also be said that, such an anomalous result would be contrary to the apparent intention behind the enactment of section 2 of the Rent (Amendment) Act No.55 of 1980, which was to repeal the stringent disposition of section 2 (4) of the Rent Act No. 07 of 1972 which had made the provisions of the Rent Act apply to all `residential premises' (other than those of which the Landlord was the Commissioner of National Housing) which are situated within areas where the Rent Act operated, irrespective of when the premises were constructed or first let on rent. In its place, Section 2 of the Rent (Amendment) Act No.55 of 1980 introduced, *inter alia*, section 2 (4) (b) and section 2 (4) (c) which exempted, from the provisions of the Rent Act, all `residential premises' which were constructed after 01st January 1980 or which were occupied by the owner on 01st January 1980. Further, the introduction of section 2 (4) (d) and section 2 (4) (e) in 1980, provided for the Commissioner of National Housing to exempt from the Rent Act `residential premises' which were let to a person who had been issued a valid *visa* under the Immigrants and Emigrants Act and whose total income exceeded Rs.1,000/- per month or which were let to a non-resident Company.

The aforesaid position - *ie:* that section 2 (4) (c) only requires that the *"owner"* should have *"occupied"* the residential premises as at 01st January 1980- was recently enunciated by my learned brother, Justice H.N.J. Perera in his judgment in S.C. Appeal 82/2014 delivered on 22nd March 2018. That position is also reflected in De Silva CJ's observation in **HETTIARACHCHI vs. HETTIARACHCHI** [1994 2 SLR 188 at p.190], that, *"Turning now to the wording in section 2 (4) (c) of the Rent Act, it seems to me that the distinction drawn is between premises occupied by the owner on 1st January 1980, and premises which had been let to a tenant on the said date, as submitted by Mr.Samarasekera for the plaintiff-appellant. Mr.Samarasekera rightly stressed that the section is concerned with the nature of the occupation and the question of title is irrelevant"*. It should be mentioned here that, the aforesaid question of whether or not a subsequent change of ownership [*ie:* on some day after 01st January 1980] which results in the *"owner"* who *"occupied"* the premises as at 01st January 1980, ceasing to have title to the premises or ceasing to occupy the premises, affects the exemption of the premises from the provisions of the Rent Act, did not come up for consideration in that case because the plaintiff remained the *"owner"* from 01st January 1980 up to the time of the institution of the action. It should also be understood that, the headnote of the report of the decision in this case as reported in 1994 2 SLR 188, is based on the specific facts of that case.

It fact, it was accepted by both learned President's Counsel who appeared before us in this appeal that, the *plaintiff* not being the *"owner"* who *"occupied"* the premises on 01st January 1980 and, instead, being the successor in title of that *"owner"*, did not affect the plaintiff's *locus standi* to claim the benefit of section 2 (4) (c) of the Rent Act provided the plaintiff could establish that, on 01st January 1980, the premises were *"occupied"* by the then *"owner"*.

Thus, the only area of dispute in this appeal, is whether the premises were *"occupied"* by the person who was the *"owner"* of the premises as at 01st January 1980.

Both in the High Court and before us, Mr. Sahabandu, PC appearing for the defendant submitted that, although Mary Dias *"occupied"* the premises as at 01st January 1980, she was not the *"owner"* of the premises since her daughter, Somawathie Perera was the person who had title to the premises under and in terms of the Deed of Gift No. 4392 marked "පැ 8". In support of his position, learned President's Counsel submitted that, since the Rent Act does not define what is meant, for the purposes of the Act, by the word *"owner"*, this Court ***must***, when determining the meaning of the word *"owner"* used in section 2 (4) (c) of the Rent Act, apply the Roman Dutch Law description of Ownership as enunciated by Voet [6.1.1] and Grotius [2.3.9-10] - which is that a person is considered to have Ownership of a thing when he has the rights: to possess that thing, to use that thing, to consume or destroy that thing and to alienate that thing; namely, the *ius utendi*, *ius fruendi, ius abutendi* and *ius disponendi*. Mr. Sahabandu submits that, ***only*** a person who possesses *all* the aforesaid attributes of Ownership as contemplated by the classical Roman-Dutch Law - *ie:* the *ius utendi*, *isu fruendi*, *ius abutendi* and *ius disponendi* in their totality - should be treated as an *"owner"* for the purposes of claiming the exemption under section 2 (4) (c). He then submits that, since a life interest holder does not have the right to alienate the premises or to destroy or consume the premises, a life interest holder cannot be regarded as the *"owner"* of the premises for the section 2 (4) (c) of the Rent Act.

In support of his contention, Mr. Sahabandu cites the decision in **JINAWATHIE vs. EMALIN PERERA** [1986 2 SLR 121] where, Ranasinghe J, as he then was, stated [at p.140] *"Ownership is the right which a person has in a thing to possess it, to use it and take the fruits, to destroy it, and to alienate it."*. Mr. Sahabandu submits that this Court is bound to apply Ranasinghe J's aforesaid description of Ownership to the present case when we determine the meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act in the course of deciding the appeal.

Learned President's Counsel goes on to submit that, if the Legislature had intended that, a *"life interest holder"* is to be regarded as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act, the Legislature would have expressly stated so. He

argues that, in the absence of such a specific stipulation in the Rent Act, a Court is not entitled to regard a *"life interest holder"* as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act. Mr. Sahabandu says that, a Court should accord a *"strict"* interpretation to the word *"owner"* used in section 2 (4) (c). He contends that, regarding a life interest holder as an *"owner"* for the purposes of section 2 (4) (c) would involve unduly stretching the meaning of the word *"owner"* and result in moving out of the proper realm of judicial interpretation of a statute and amount to an exercise in what he describes as `judicial legislation'.

Conversely, learned President's Counsel for the plaintiff submits that, a life interest holder is entitled to possess the property, as its owner, till his or her death and that, therefore, a life interest holder should be regarded as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act.

The learned High Court judges took the view that, the rights possessed by a life interest holder during his or her lifetime are equivalent to the rights of an *"owner"* and held that, a life interest holder should be regarded as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act.

Thus, it is clear that, the question now before us is to decide whether, in the absence of a definition of the word *"owner"* in the Rent Act itself, a life interest holder who *"occupied"* the premises on 01st January 1980, should be regarded as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act.

When answering this question, it will be useful to first briefly look at the concept of Ownership as it obtained in the Common Law.

In Roman Law, the word *dominium* was used to denote Ownership. Professor Max Radin, the renowned American jurist, who was an authority on the Roman Law, describing *dominium*, states [California Law Review Vol.13 Issue 3 p.209]: *"…..(it) is said to consist of the ius utendi fruendi abutendi, the privilege, that is, of using a res while keeping its corpus intact (utendi), of using it by diminishing its corpus or its outgrowths (fruendi), of completely consuming it and therefore ending its effective existence as a particular res (abutendi)"*.

However, as Professor Radin recognised, not all instances of *dominium* manifested the complete array of the *ius utendi fruendi abutendi.* Thus, Professor Radin observes [at p.210], *"However, dominium in this exclusive sense really existed only in respect of some objects and by no means all ….. Indeed it may be seen that the ius utendi fruendi abutendi, by virtue of its climactic arrangement, is rather an analysis of the idea of ownership than a real statement of what the elements of Roman dominium actually were. Not only did the elements of abstract dominium vary with the object on which it was exercised, but they varied with the relations of the persons affected."*.

In the Roman Dutch Law, Maarsdorp [Book 2 at p.33] states that the rights of Ownership *"….. are comprised under three heads, namely, (i) the right of possession, ownership having indeed been defined by some as consisting in the rights to recover lost possession; (2) the right of usufruct, that is the right of use and enjoyment; and (3) the right to disposition."*. Lee [Introduction to Roman-Dutch Law at p.111] states, *"Dominium or Ownership is the relation protected by law in which a man stands to a material thing which he is able to: (a) possess, (b) use and enjoy, (c) alienate."*.

However, the Roman-Dutch Law too recognised that all these three factors are not necessarily present in all instances of Ownership. Thus, as Maarsdorp observes [at p.33-34], *"These three factors are all essential to the idea of ownership, but need not be all be present in an equal degree at one and the same time. Thus, though there need not be actual use and enjoyment present in every case, the right of alienation, coupled with the legal means of effecting such alienation, is at all times necessary in order to constitute valid ownership; and perhaps a more correct definition of ownership would be that it is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating the same and coupled with the right to claim possession and enjoyment thereof.* Similarly, Lee comments [at p. 111], *"Where all the rights are vested in one person to the exclusion of all others, he is a sole owner. Where all those rights are vested in two or more persons to the exclusion of all others they are co-owners. If one or more of these rights is vested in one person, the remainder in another or others, the ownership of each such person is qualified or restricted. Thus, if you have by contract or otherwise acquired the right to: (a) possess, or (b) use, or (c) alienate my property, my ownership is, so far, restricted; and ownership is, so far, vested not in me but in you. But since to speak of us both as owner would be misleading, unless the degree of ownership of each of us were on every occasion exactly specified, it is usual to speak of one of us only as owner of the thing, and as having a restricted ownership in it, while the other is spoken of as owner of the right, and as having a right of possession, right of use and enjoyment, right of alienation, in or over the property of another. Hereupon the question arises which of the two or more such competitors is to be regarded as owner, which not as owner. The answer depends not so much on the extent of the right or of the profit derived from it as on the consideration where the residue of rights remains after deduction from full ownership of some specific right or rights of greater or lesser extent."*.

In more recent times, Wille [Principles of South African Law 9th ed. at p.470-471], citing Grotius [2.3.10] and Van Leeuwen [*CF* 1.2.13.1], describes the classical Roman-Dutch Law concept of Ownership, thus [at p.470]: *"In principle, ownership entitles the owner to deal with his or her property as he or she pleases within the limits set by the law. The comprehensive right of ownership embraces not only the power to use (ius utendi), to enjoy the fruits (ius fruendi) and to consume property (ius abutendi), but also the power to possess (ius possidendi), to dispose of (ius*

disponendi), to reclaim property from anyone who unlawfully withholds it (ius vindicandi) and to resist any unlawful invasion of property (ius negandi). The list is not necessarily complete, for if an owner grants all the listed entitlements to a third party, ownership is suspended only to the extent of the powers granted and, once the grant is extinguished, ownership automatically becomes unencumbered again, demonstrating the `elasticity'' of ownership and why ownership is sometimes called a `reversionary right'.'".

These observations by the renowned authors cited in the preceding paragraphs demonstrate that, in both the Roman Law and the Roman-Dutch Law, it was recognised that, there are instances where a person is considered to have a form or type of `Ownership' of a thing although, in fact, he did not enjoy all the aforesaid attributes of Ownership or he shared some of the rights of Ownership with another or the residual rights or reversionary rights of Ownership were vested in another.

In any event, the traditional concept of Ownership as existing where a person has the right and power to exercise all the attributes of Ownership over a thing - *ie:* the *ius utendi*, *ius fruendi, ius abutendi* and *ius disponendi* in their totality or, as is sometimes termed *plenum dominium* - has changed over time since the complexities and social pressures of modern society have modified and, in some cases, restricted these historical rights and attributes of Ownership. The statute books abound with enactments, particularly dealing with agriculture, protection of the environment, utilisation of land, urban development, town planning and other areas of social and economic significance - which restrict the exercise of the traditional rights of Ownership. The scope and reach of the ancient maxim *sic utere tuo ut alienum non laedas* [So use your own that you do no injury to that which is another's] have been significantly expanded in the modern Law to place a plethora of restrictions on the manner in which a person may use or exploit his own land or premises.

In this connection, Wille [at p. 471-472] sets out a succinct description of the evolution of the concept of Ownership in the modern Law and the several restrictions which needs of modern society have sometimes placed on the exercise of the aforesaid rights associated with the classical concept of Ownership and the resulting modifications to that concept which society has crafted to meet the requirements of the modern age. Wille observes [at p.471], *"Despite its potentially comprehensive nature, ownership has never been regarded as absolute and unencumbered."* Wille goes on to state [at p.471-472], *"Social, economic and political forces have led to the recognition that ownership includes social obligations, that the content of ownership is determined by the special characteristics of its object, and that ownership needs to be deconstructed and rendered more malleable to comply with the requirements of the day. Consequently, ownership is no longer perceived as a universal and timeless set of abstract and neutral principles based on the authority of rational (Grotius) and scientific (Pandectists) reasoning, but rather as a functional notion, subject to*

criticism on grounds of morality and expediency, and adaptable to the changing needs of society in which it functions".

In a similar vein, Professor G.L.Pieris has commented [Law of Property Vol.I at p. 298] *"The concept of plenum dominium as recognized by the Roman Law and involving the ius utendi, fruendi, abutendi has not been adopted by the modern law. On the contrary, the contemporary attitude is that rights of private ownership available to individuals must be controlled in the interests of the community, as a whole. The idea of social responsibility has influenced materially the resolving of conflicts between the individual interest and the social interest in this area."*.

Thus, as briefly set out above, it must be recognized that, the concept of Ownership has evolved over time and that the entire array of the classical law attributes of *ius utendi*, *ius fruendi, ius abutendi* and *ius disponendi* may not be present in all instances or forms or types of Ownership, in the modern context.

To that extent, it is evident that, the aforesaid submission made by Mr. Sahabandu that, the word *"owner"* in section 2 (4) (c) of the Rent Act can ***only*** or ***must*** be understood as meaning an Owner who possesses the full array of the *ius utendi*, *ius fruendi, ius abutendi* and *ius disponendi* in their totality or, in other words, as meaning an Owner who had *plenum dominium* in the fullest sense, is not correct. Instead, it appears to me that, the connotation of the word *"owner"* may, sometimes, have to be decided in the context of the circumstances in which it is used.

The conclusion reached in the preceding paragraph is supported by the decision in **AG vs. HERATH** [62 NLR 145] which is an example of an instance where the word *"owner"* in a statute was held to include a person who did not enjoy *plenum dominium* in the fullest sense. In that case, the plaintiff contended that a `paraveni nilakaraya' was not an *"owner"* within the meaning of section 3 of the Land Redemption Ordinance No. 61 of 1942 which enacted, *inter alia*, that the Land Commissioner was authorised to acquire an agricultural land which had been transferred by the *"owner"* to another person in satisfaction of a debt due from the *"owner"* to that person. The plaintiff's contention was that, since a `paraveni nilakaraya' held the property subject to the performance of services or payment of dues to the ninda lord, a `paraveni nilakaraya' cannot be regarded as an *"owner"*. The Privy Council stated that it agreed with the observation made by Ennis J in **APPUHAMY vs. MENIKE** [19 NLR 361 at p.363] that, *"In my opinion a paraveni nilakaraya holds all the rights which, under Maarsdorp's definition, constitute ownership, but he nevertheless does not possess full ownership in that the ninda lord holds a perpetual right to service, the obligation to perform which attaches to the land."*. Nevertheless, the Privy Council held [at p.150] that a `paraveni nilakaraya' can be correctly regarded as an *"owner"* within the meaning of section 3 of the Land Redemption Ordinance because *"**Considering the object and scope of the Land Redemption Ordinance** their Lordships do not think that `full ownership' in the*

sense in which the word is used in the passage quoted is necessary to come within the meaning of the word `owner' in that Ordinance.". [emphasis added]

With regard to Mr. Sahabandu's submission that, this Court must apply Ranasinghe J's aforesaid description of Ownership in **JINAWATHIE vs. EMALIN PERERA** when we determine the meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act, it has to be noted that, the said decision related to an action in the nature of a *rei vindicatio* where the plaintiff could maintain the action only if he had title to the land. As Ranasinghe J observed [at p.142], *"In a vindicatory action the plaintiff must himself have title to the property in dispute …. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence."*. It must be realised that, Ranasinghe J's description of the attributes of Ownership, which was cited by Mr. Sahabandu, was made in the context of the Court's efforts, in that case, to ascertain whether a person in whose favour a statutory determination had been made with regard to an allotment of land vested in the Land Reform Commission under the Land Reform Law No. 01 of 1972, had title to that land and, therefore, was entitled to maintain a *rei vindicatio* in respect of that land.

However, in the appeal before us, we are called upon to determine the meaning of the word *"owner"* used in section 2 (4) (c) of the Rent Act and it hardly needs to be said here that the Rent Act applies to and governs contracts for the letting and hiring of premises. Such contracts deal with a significantly different bundle of rights to those rights which are the subject matter of a *rei vindicatio*. Therefore, I do not think that Ranasinghe J's description in **JINAWATHIE vs. EMALIN PERERA** of the nature of Ownership required for the purposes of maintaining a *rei vindicatio* can be applied to determine the meaning of the word *"owner"* used in section 2 (4) (c) of the Rent Act *without first* considering whether it is *appropriate* to do so in the context of contracts for the letting and hiring of premises.

In this regard, this Court has to keep in mind the well-known principle that a person does not need to have Ownership of a premises in order to enter into a lawful and valid contract of letting and hiring of those premises to a tenant. Instead, all that is required is that the proposed landlord must be able to fulfill the obligation of placing the tenant in continued possession of the premises during the term of the tenancy. Thus, Choksy AJ observed in **ALLES vs. KRISHNAN** [54 NLR 154 at p.156],*" It is, of course, not necessary that the owner himself should be the landlord. The relationship of landlord and tenant can exist between the tenant and a third party who is not the owner of the premises let, so long as he fulfills the obligations of a landlord by putting his tenant into possession. He will then be the person entitled to receive the rent during the period of the tenancy."* and Fernando J said in **GUNASEKERA vs. JINADASA** [1996 2 SLR 115 at p.120], *"It is settled law that tenancy is a contractual relation, which may subsist even where the landlord is not the owner of the rented premises."*.

In these circumstances, it seems to me that, the observations made in **JINAWATHIE vs. EMALIN PERERA** with regard to the attributes of Ownership required to maintain a *rei vindicatio* should not be applied `lock, stock and barrel', to determine the meaning of the word *"owner"* used in section 2 (4) (c) of the Rent Act, which relates to contracts for the letting and hiring of premises where Ownership of the premises is not necessary to enable the creation of a valid contract. For that reason, I cannot agree with the submission that, we are bound apply Ranasinghe J's description of Ownership **JINAWATHIE vs. EMALIN PERERA**, when we determine the meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act.

Instead, I am of the view that, this Court should seek to determine what is meant by the word *"owner"* used in section 2 (4) (c), in the context of the Rent Act and contracts for the letting and hiring of premises.

Mr. Sahabandu's other submission is that, this Court is not entitled to regard a life interest holder as being a *"owner"* for the purposes of section 2 (4) (c) of the Rent Act, in the absence of a express legislative provision stating that, a life interest holder is to be so regarded. Learned President's Counsel contends that this Court should accord a *"strict"* interpretation to the word *"owner"* for used in section 2 (4) (c).

However, in the absence of definition of the word *"owner"* in the Rent Act and in the light of the aforesaid observation that the word *"owner"* may sometimes be used, in the modern context, to refer to a person who does not possess the full array of the rights cited by Mr. Sahabandu, I am of the view that this Court is entitled to determine the correct meaning to be accorded to that word for the purposes of section 2 (4) (c) of the Rent Act, in the context of the Rent Act and contracts for the letting and hiring of premises. We are not bound to apply a `strict' interpretation of that word as suggested by learned President's Counsel and nor are we obliged to construe that word liberally.

When seeking to determine the correct meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act, this Court should also look at the intention behind the enactment of section 2 (4) (c) of the Rent Act and seek to promote the purpose and object of the Legislature when it introduced section 2(4) (c) in 1980. As Bindra points out [Interpretation of Statutes 10th ed. at p. 793], *"In construing a statute, it is permissible to look for the purpose of the enactment, the mischief or defect to be prevented, the remedy and the reason of the remedy the legislature intended; and the scheme of the Act. A statute should be so construed as to prevent the mischief and advance the remedy according to the true intention of the makers of the statute."*.

In this background, it appears to me that, the aforesaid question in issue in this appeal - namely, whether a life interest holder who *"occupied"* the premises on 01st January 1980 should be regarded as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act - ought to be decided by determining whether Mary Dias, being the

life interest holder, enjoyed sufficient attributes of Ownership to be regarded as an *"owner"* for the purposes of section 2 (4) (c) of the Rent Act *or* whether only Somawathie Perera who had title to the premises could be regarded as the *"owner"* for the purposes of section 2 (4) (c) of the Rent Act.

In order to decide this question, it will be useful to compare the rights held by a life interest holder against the rights held by the person who has title to the premises which are subject to that life interest.

In this regard, a life interest holder has the right to possess the premises and to use the premises and to enjoy the income from the premises. Thus, he has the *ius utendi* and the *ius fruendi* in full measure in respect of the premises. As Maarsdorp states [Book 2 at p.160], *"In the first place, then, the usufructuary is entitled to the use, and therefore, the possession, administration and control of the usufructuary property, whether it be a single thing or an estate; and in the latter case he may sue for debts due to the estate, and may even call up mortgage bonds and sue for money due upon the same, whenever it is in the interests of the estate that this should be done."* and [at p.164] *" 'Civil' fruits, namely such as consist in rents, interest on investments, annuities and other money payments coming due upon the usufructuary property, accrue ipso jure to the usufructuary without any necessity on his part of first recovering payment of the same."*. Wille states [at p.606], *"The usufructuary is entitled to possession, administration, use and enjoyment of the property, and to its fruits both natural and civil."* and *"Civil fruits include rent, quitrent and interest."*.

Further, a life interest holder may sell, gift or let, to another, his usufructuary rights of possessing the premises and enjoying the benefits of the rent or other income receivable from the premises during his life time. He may mortgage or pledge his rights as life interest holder. Thus, it can be fairly said that, during his life time, he has the *ius disponendi* in respect of the rent or other income receivable from the premises. Maarsdorp states [Book 2 at p.165], *"….. there is nothing to prevent his disposing of his life-interest in the same, that is, the right of using and enjoying the fruits of the property until his own death, whether by way of sale, lease, loan, or leave to hold at pleasure, provided that any such arrangement does not bind the property beyond his own lifetime He may even pledge his right of usufruct, and his life interest in the same may be also taken in execution, or sold in his insolvent estate, unless this has been expressly provided against in the grant."*. Similarly, Wille states [at p.607], *"Thus, it has been held that the usufructuary may alienate pledge, mortgage, rent, lease or lend his usufructuary interest or suffer it to be sold in execution.*

Further, a life interest holder has the right to maintain an action *in rem* to enforce his rights against any person, including the person who holds bare title to the premises, who disturbs the life interest holder's right of possession and enjoyment of the premises. As Maarsdorp states [at p.168], *"During the currency of a usufruct the*

usufructuary will be entitled to an action in rem to enforce his usufruct against any possessor of the usufructuary property or against any person who interferes with or disturbs him in the possession or enjoyment of the same, and especially against the owner of the servient property.".

It has to be noted that, a life interest holder does not have the right of alienating [*ius disponendi*] the premises itself. That right remains with the person who has title to the premises. However, the title holder cannot alienate or mortgage the premises without the consent and cooperation of the life interest holder. Wille states [at p.608], *"The owner of usufructuary property may not prejudice the usufructuary's rights. He or she may not prevent, interfere with or diminish the usufructuary's right of use. Furthermore, he or she needs the consent and cooperation of the usufructuary for the sale, mortgage, granting of prospecting rights and other dealings with the usufructuary property, such dealing being concluded subject to the usufruct."*.

Thus, it is seen that, although the *ius disponendi* in respect of the premises itself remains with the person who has title to the property, that right is of significantly reduced significance whenever another enjoys a life interest over the premises.

Similarly, although a life interest holder does not possess the *ius abutendi - ie:* the right to demolish or diminish the premises - since that right remains with the person who has title to the premises, the title holder cannot exercise the *ius abutendi* during the lifetime of the life interest holder except with the consent of the life interest holder. Thus, it is seen that the *ius abutendi* which remains with the title holder is also of little significance whenever another enjoys a life interest over the premises.

The analysis set out above makes it evident that, as at 01st January 1980, Mary Dias, the life interest holder, who occupied the premises on that date, had and enjoyed the right to possess and occupy the premises and to use and enjoy the premises during her lifetime. She was entitled to rent the premises and was entitled to the rental income, during her lifetime. She was entitled to sell or gift those rights to another for possession, use and enjoyment during her lifetime and she was entitled to the income from such transactions. She was entitled to mortgage or pledge her aforesaid rights as life interest holder. She was entitled to enforce these rights against any person including her daughter, Somawathie Perera, who had title to the premises. Accordingly, it seen that Mary Dias had the *ius utendi* and the *ius fruendi* in full measure in respect of the premises and was also entitled to exercise the *ius disponendi* in respect of her rights as the life interest holder. Thus, Mary Dias had and enjoyed the totality of the first two attributes of Ownership cited by Mr. Sahabandu and had and enjoyed a significant extent of another.

On the other hand, although Somawathie Perera had title to the premises, she was not entitled to possess or occupy the premises on 01st January 1980. She was not entitled to any income from the premises during the lifetime of the life interest holder.

She could not sell or mortgage the premises without the consent of Mary Dias. She could not demolish or diminish the premises without the consent of Mary Dias. Thus, as at 01st January 1980, Somawathie Perera did not have even a trace of the *ius utendi and ius fruendi*. She was left with only a significantly circumscribed *ius disponendi* and a similarly reduced *ius abutendi*, during the pendency of the life interest.

Thus, it is seen that, as at 01st January 1980, Mary Dias, as the life interest holder, had and enjoyed a very substantial share of the attributes of Ownership cited by Mr. Sahabandu. However, Somawathie Perera had only *nuda proprietas* or, in other words, bare title to the premises.

No doubt, the residuary or reversionary rights of Ownership remained with Somawathie Perera as she had title to the premises. There is also no dispute that the rights of Mary Dias in respect of the premises were extinguished upon her death. Thus, there can be no argument that, Somawathie Perera remained the owner of the property insofar as questions of title to the premises are concerned, as observed by Maarsdorp [at p. 34] and Lee [at p.112]. But, as Lee observes [at p.112], referring to instances where a person has title to a property subject to a life interest in favour of another, *"The same applies if you have the usufruct property, the residuary rights over which are vested in me, or even if you have an inheritable right of the kind termed emphyteusis. In all these cases the dominium remains in me, but in the two last, being reduced to a mere shadow, at all events for the time, it is merely bare ownership (nuda proprietas) , i.e., ownership stripped of its most valuable incidents."*.

Next, it is clear that, for the purposes of the Rent Act and in the case of contracts for the letting and hiring of premises, the key attributes of Ownership are the right to possess and occupy the premises, the right and ability to fulfill the obligation of placing the tenant in continued possession of the premises during the term of the tenancy and the right to receive the rental income after having done so.

As at 01st January 1980, all those key rights were possessed and enjoyed exclusively by Mary Dias, as the life interest holder. It is significant that, as at 01st January 1980, Somawathie Perera did not have any of those rights

Thus, as far as the Rent Act and contracts for the letting and hiring of premises are concerned, the person who held the key rights of Ownership which are relevant to the scope and ambit of the Rent Act and to such contracts, was Mary Dias, as the life interest holder and not Somawathie Perera who had only *nuda proprietas* .

Thereafter, it has to be kept in mind that, the wording of section 2 (4) (c) introduced by the amended Act of 1980 contemplates the exemption of all `residential premises' which were *"occupied"* by the *"owner"* on 01st January 1980 and that, in the case of a

property subject to a life interest, the *only* person who is *entitled* to be in occupation of the premises on that day is the life interest holder.

Further, it should be kept in mind that, in cases such as the one before us, the life interest is an integral incident of the Ownership held by the person who has title to the premises and that, most times, this is not the result of a decision taken by that person to part with his right to occupy the premises by granting a life interest over the premises. Instead, on most occasions, the life interest is a condition of the grant or conveyance by which the title holder received the premises giving him only *nuda proprietas* subject to the life interest. That situation is very different to one where an absolute owner of a premises voluntarily decides to part with his right to the possession and occupation of a premises by renting it and, therefore, was not in occupation of the premises on 01st January 1980 and, consequently, became ineligible for the exemption provided by section 2 (4) (c) of the Rent Act.

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To my mind, in the aforesaid circumstances and in the background that, in the modern Law, the term *"owner"* may, in appropriate circumstances, be applied to describe a person who does not possess the entire array of the classical rights of Ownership cited by Mr. Sahabandu, it is reasonable and correct to take the view that word *"owner"* used in section 2 (4) (c) of the Rent Act can be properly applied to cases where a life interest holder *"occupied"* the premises on 01st January 1980 *and also* to cases (which, I would think are likely to be few) where the person who had *nuda proprietas* or bare title *"occupied"* the premises on 01st January 1980 with the consent of the life interest holder.

Therefore, I am of the view that, the word *"owner"* in section 2 (4) (c) of the Rent Act can be reasonably regarded as including a life interest holder who occupied the property on 01st January 1980.

This view is supported by Woodrenton J's observation, made *obiter*, in **SAMARADIWAKARA vs. DE SARAM** [13 NLR 353 at 358] that, *"In this Colony the words 'life interest' are frequently used as including the dominium. I may refer, as an illustration of this fact, to the judgment of Clarence J. in Joachinoe v. Robertu. [(1890) 9 S.C.C.101.]"*.

Further, it may be mentioned here that, section 26 (2) of the Rent Restriction Act No. 29 of 1948, which was repealed and replaced by the Rent Act No. 07 of 1972, stated, *"In subsection (1), `owner', in relation to any premises, means the person who would be entitled to possession of the premises if they were not let for the time being."* It seems to me that this statutory provision reflects the view taken in this judgment that, in the context of the Rent Act and contracts for the letting and hiring of premises, the identity of the person who had the sole right of possessing and occupying the premises and renting the premises is a key consideration when determining the person who is to be regarded as an *"owner"* within the meaning of

section 2 (4) (c) of the Rent Act. Although the Rent Restriction Act has been repealed and there is no comparable provision in the Rent Act No. 07 of 1972, the description of an *"owner"* in section 26 (2) of the Rent Restriction Act can be considered to shed some light on the meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act No. 07 of 1972 since there is no definition of that word in the Rent Act. In this connection, Maxwell states [at p. 66], *"Light may be thrown on the meaning of a phrase in a statute by reference to a specific phrase in an earlier statute dealing with the same subject-matter."*.

Further, it also has to be realised that, if one were to take the contrary view, urged by the defendant, that only the person who had bare title or *nuda proprietas* can fall within the ambit of section 2 (4) (c) of the Rent Act, the result would be that, all premises which are subject to a life interest on 01st January 1980 and were occupied by the life interest holder on that day (which, most likely, would include the majority of such premises) will not be exempted from the provisions of the Rent Act. That position would result despite the unarguable fact that the person who had bare title was *not* entitled, most times due to no conscious decision or fault of his own, to occupy the premises due to existence of the life interest which is an integral incident of his title to the premises. Further, as observed earlier, the title holder's non-occupation of the premises due to the existence of a life interest is very different to a situation where he has voluntarily decided to rent the premises to another as at 01st January 1980 and was, therefore, ineligible for the exemption granted by section 2 (4) (c) of the Rent Act. Thus, it seems to me that, adopting a stance that, where there is a life interest over a premises, only the person who had bare title or *nuda proprietas* can fall within the ambit of section 2 (4) (c) of the Rent Act, would defeat the purpose of that statutory provision and be contrary to the intention of the Legislature when it enacted section 2 (4) (c).

For the reasons set out earlier, I do not agree with Mr. Sahabandu's contention that, taking the view that the word *"owner"* in section 2 (4) (c) of the Rent Act can be reasonably regarded as including a life interest holder who occupied the property on 01st January 1980, unduly stretches the meaning of the word *"owner"*. It appears to me that, this course of action is within the proper realm of judicial interpretation of a statute and that it does not amount to a trespass into the field of `judicial legislation'. In this regard, it is apt to cite Ranasinghe J's observation in **JINAWATHIE vs. EMALIN PERERA** [at p. 136] that where a word in a statute can be reasonably interpreted in two ways, one of which will enable achieving the purpose and object of the statute and the other will negate that purpose and object, *"….. it is the duty of the Court to come down on the side of such an interpretation as would operate to promote the avowed purpose and object of the Legislature, and suppress and cure the mischief aimed against."*. Similarly, in **NOKES vs. DONCASTER AMALGAMATED COLLIERIES LTD** [1940 AC 1044 at p. 1022], Viscount Simonds stated, *"If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction*

which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.".

For the aforesaid reasons, the first question of law is answered in the negative and in favour of the plaintiff.

The second question of law asks whether the defendant became a monthly tenant after the expiry of the said lease agreement on 31st December 2001. The defendant did not pursue this issue when the appeal was argued before us. In any event, the evidence establishes that, even if there had been a monthly tenancy, notice was given to the defendant on 16th December 2002 to quit the premises on 31st January 2003. The second question of law is answered against the defendant.

For the aforesaid reasons, the appeal is dismissed. The judgment of the High Court is affirmed. In the circumstances of the case, each party will bear their own costs.

Judge of the Supreme Court

Sisira J. De Abrew J

Judge of the Supreme Court

Priyantha Jayawardena, PC J.

Judge of the Supreme Court

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

In the matter of an Appeal from the Court of Appeal.

Subasinghage Heenhamy,
Hinguraara, Embilipitiya.

SC APPEAL 171/2011 **Plaintiff**

CA Application No. 1050/95(F)
D.C.Embilipitiya No. 2878/L

Vs

Hewagamage Ariyarathne,
Near Yatiyana Kade,
Embilipitiya.
Presently of No. 31, Near the
Hospital, New Town, Embilipitiya.

Defendant

AND

Hewagamage Ariyarathne,
Near Yatiyana Kade,
Embilipitiya.
Presently of No. 31, Near the
Hospital, New Town, Embilipitiya.

Defendant Appellant

Vs

Subasinghage Heenhamy,
Hinguraara, Embilipitiya.

Plaintiff Respondent

AND NOW BETWEEN

Subasinghage Heenhamy,
Hinguraara, Embilipitiya.

Plaintiff Respondent Appellant
(Deceased)

Jayaweera Gama Ethige Gunaratne,
No. 1337, Godauda Waadiya,
Hinguraara, Embilipitiya.

Substituted Plaintiff Respondent Appellant

Vs

Hewagamage Ariyarathne,
Near Yatiyana Kade,
Embilipitiya.
Presently of No. 31, Near the Hospital, New Town, Embilipitiya.

Defendant Appellant Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
VIJITH K. MALALGODA PCJ. &
L. T. B. DEHIDENIYA J.

Counsel : Ranil Samarasooriya with Nalaka Samarakoon instructed by Upamalika Liyanage for the Plaintiff Respondent Appellant.

H. Withanachchi for the Defendant
Appellant Respondent.

ARGUED ON : 04.09.2018.

DECIDED ON : 19.10.2018.

S. EVA WANASUNDERA PCJ.

This Court has granted special leave to appeal in this matter on 25.10.2011 on the following question as set out in paragraph 31(a) of the Petition dated 04.08.2011:-

" Did the Court of Appeal err in holding that the element of detention was admittedly not with the Petitioner?"

The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) was a female named Heenhamy, living in the village named Hinguraara, Embilipitiya. She had been running a tea kiosk on an unauthorized tiny bit of land near the Court House in the year 1984. It was taken over by the Mahaweli Authority on the promise that another block of land will be given to run the business. Later on she was given a 5 Perch block of land near the hospital by the Mahaweli Authority in the year 1985. It was an allotment marked as Lot 31 in FVP 772. She had constructed a small building, had bought furniture and carried on the same business of a tea kiosk . The man named Nicholas was a person who had come to Embilipitiya from Aluthgama who used to be in and out of her tea kiosk. Heenhamy carried on life as his mistress.

Heenhamy was a person who could not read or write but could barely sign her name in Sinhalese. That was her educational level. But she was hard working and she had manually cut bricks out of clay and truly built this building with her own hands and with the help of neighbours and even bought some furniture including a standing fan which is used to remove husks of rice after grinding the paddy seeds. She had lived with Nicholas and she did the running of the tea kiosk as well as the vegetable stall near the tea kiosk, from time to time.

One day, when she had to attend an ordination of her grandson as a Buddhist monk in another village hermitage, she left the premises leaving everything to be done in the business and the household to the man in the house, i.e. Nicholas. She had stayed with them from around **10.10.1986** and returned home on or around **15.01.1987**. To her utter surprise, the Defendant, Ariyarathne was in the house and he had firstly told Heenhamy that Nicholas had given the place to him on a lease for a short time. Heenhamy's furniture had been inside the house. The next door lady had told Heenhamy that she had come to know that the place had got transferred through a lawyer, to the Defendant by Nicholas for consideration. Heenhamy also heard that the Defendant was getting ready to pull down the house and build another building on the said land.

Then, Heenhamy had gone to the Police and complained about her **being dispossessed** by the Defendant. Heenhamy had obtained a copy of that unregistered transfer deed from the lawyer and produced the same to Court when she gave evidence.

Heenhamy filed action against Ariyarathna and obtained an **enjoining order** against him refraining him from doing changes to the building and the place. She had not been able to find Nicholas at all. She alleges that Nicholas had taken money from the Defendant and vanished. She sought that she be **restored to possession** of her house and premises on Lot 31 of FVP 772 and be granted damages for loss of her furniture etc. which were in the house. Ariyatathna is the Defendant Appellant Respondent (hereinafter referred to as the Defendant) before this Court.

When the officers of Mahaweli Authority had arrived, to show the land and mark the boundaries of the five perch block of land allocated by the Mahaweli Authority to Heenhamy in place of her boutique she had been running near the Courts at Embilipitiya which land was at that time taken away from her by the Mahaweli Authority, it was her paramour who had posed as the legal husband and had come forward and taken note of the block of land and its boundaries. Heenhamy being the person who does not know how to read and write, did not know that her paramour Nicholas had given his name Wijeratne Mudiyanselage Nicholas as the person who had accepted the land. He had signed on 02.09.1985 as having accepted the " Temporary License " which is the document given prior to granting the permit proper for Lot 31 which was 5 Perches in extent.

According to the evidence led on behalf of the Plaintiff in the District Court, the neighbours explained how Heenhamy had cut the bricks by herself with the clay taken from the earth and how they also chipped in and put up the house the roof of which was made of tin. She had lived in that house and did her business of a tea kiosk once again. The person Nicholas was better known as 'rathuwan mudalali' and he had come to Embilipitiya from Aluthgama and lived with Heenhamy. Heenhamy claimed that she had spent more than Rs. 25000/- to build this house.

She had gone out of the house a few days before the due date of the function for the ordination of her grandson as a monk which was due to be held on 21.10.1986 outside Embilipitiya. When she came back only she realized that the Defendant had got into the house after having received the house and land from Nicholas. The **Defendant had got it by way of an unregistered Deed written by a lawyer. It was Deed No. 512 dated 11.10.1986** with the endorsement 'search dispensed with' from the vendor as mentioned as Wijeratne Mudiyanselage Nicholas. Her furniture and other belongings were also not given to her by the Defendant. It can be seen that she was confronted with **being dispossessed approximately on or around 10.10.1986.** She had complained to the Police and filed a civil suit against the Defendant soon thereafter.

As the land was state land, Nicholas had no legal right to sell it to another person. The paper which was with Nicholas was a temporary license given on his direction at the time the land was shown, pending the proper license to be issued. The proper license was not issued by the Mahaweli Authority.

This Deed of transfer executed by Nicholas bearing number 512 demonstrates that Nicholas' address is not " Lot 31, New Town" but it was 'Hinguruaara, Embilipitiya'. The Vendee, the Defendant Ariyaratne's address was " ' Thilakawasa', Pallegama, Embilipitiya". The consideration was only Rs. 15000/-. The date of the Deed was 11.10.1986.

I find that it looks like an act of Nicholas which he had planned to do as soon as Heenhamy had left the house to go for the ordination of the grandson. The Defendant has not got any legal title and it is a false claim to the title upon which he had wrongfully and illegally transferred the land which belonged to the state. He had entered the house which Nicholas had given him with the furniture of Heenhamy being within the house. Heenhamy prayed for restoration and damages

in her plaint. She obtained an enjoining order refraining the Defendant from doing any alterations to the building or putting up new buildings on the land.

The Defendant filed answer and claimed the land on the Deed 512. He further said that at the time Nicholas sold the land to him there was a tenant in part of the premises named Premasiri who had left after some time, leaving the whole house for the Defendant. This so called tenant **Premasiri or Nicholas never came to Courts** to give evidence on behalf of the Defendant.

The nature of the action instituted by the Plaintiff Heenhamy was a **possessory action.**

Section 4 of the Prescription Ordinance reads thus:

" It shall be lawful for any person who shall have dispossessed of any immovable property **otherwise than by process of law**, to institute proceedings against the person **dispossessing him at any time within one year of such dispossession**. And on proof of such dispossession **within one year before the action brought**, the plaintiff in such action shall be **entitled** to a decree against the defendant for the **restoration of such possession** without proof of it.
Provided that nothing herein contained shall be held to affect the other requirements of the land as respects possessory cases.**"**

Heenhamy was the person entitled to get Lot 31 in place of the unauthorized land in which she was running the tea kiosk near the Courts. When the Mahaweli Authority officers had come to show the new Lot 31 of 5 Perches due to be given to Heenhamy, her paramour, Nicholas , the more educated one out of the two of them, had given his name behind the back of Heenhamy after acknowledging the receipt of the land and recognizing the boundaries. He had signed the receipt given by the Mahaweli Authority which is the normal letter given prior to giving the proper 'license to do business'. It was marked as P1 and submitted by the Plaintiff Heenhamy at the trial. The officers of the Mahaweli Authority admitted that it is Heenhamy to whom the 5 Perch block of land was due to be given to. Even though Nicholas and Heenhamy were living together, it can be recognized that Heenhamy came into the land on 02.09.1985, i.e. the date of the Temporary License P1.

She had been on the land developing the land, building a house with clay bricks and a tin roof with her own hands and running the tea kiosk and vegetable stall, according to the evidence of the neighbours of Heenhamy until the date she left to attend the ordination ceremony of the grandson on or around 10.10.1986. From 02.09.1985 to 10.10.1986 , the time lapse is more than one year and one day.

The Plaintiff, Heenhamy had instituted action against the Defendant, Ariyarathna on 21.01.1987. The Defendant Ariyarathna dispossessed the Plaintiff Heenhamy from the land on or around 11.10.1986. i.e. the date on which Nicholas had taken money and signed the invalid Deed 512, dated 11.10.1986. It can be concluded that one year had not lapsed from 11.10.1986 to 21.01.1987. The time lapsed before filing action was only 3 months and 11 days.

Therefore I find that according **to Sec. 4 of the Prescription Ordinance, Heenhamy is entitled to be restored in possession if she was wrongfully dispossessed** by the Defendant.

The Defendant was possessing the land on an invalid Deed. When giving evidence he admitted that he knew that the proper owner is the Mahaweli Authority and that land belonging to the said Authority cannot be sold by any person. The Defendant had wrongfully and illegally engaged in trying to dispossess Heenhamy, the Plaintiff. The Defendant failed to get either the so called tenant Premasiri and the so called Vendor Nicholas to be present to give evidence.

The District Judge after going through the evidence and the documents produced before Court had delivered the judgment on 06.06.1995, **in favour of the Plaintiff** restoring her to possession of Lot 31, the subject matter of the case.

The Defendant had appealed from the said judgment to the Court of Appeal under the number C. A. Application No. 1050/95. The Defendant was absent and unrepresented in the Court of Appeal on the date of the hearing but it was heard on 04.05.2007 and the Counsel for the Plaintiff had made submissions. After hearing the submissions the Judges of the Court of Appeal had analyzed the submissions and made order dismissing the Appeal of the Defendant without costs.

However, the Defendant's Counsel had got the same case relisted for hearing and the Court of Appeal had heard the case for **the second time on 11.09.2009** with

both parties being represented and thereafter by a judgment dated 24.06.2011 the Court of Appeal had allowed the Appeal of the Defendant. Then the Plaintiff being aggrieved by that judgment has appealed to this Court. The Supreme Court had granted special leave to appeal on the **one question of law** as referred to above and thus this Appeal is considered.

In the impugned short judgment of the Court of Appeal, the Judge has mentioned in page 3 thus: " The Plaintiff, in order to institute this action should prove that the Plaintiff herself had lawful title, and that she held the title on her own as the owner, and not as a servant or agent of the owner." In the same page the Judge has stated that " I do not intend to deal with the validity of that transfer. That is a separate matter."

I observe that the said Judge had stated at the end of the judgment in page 4, that " the element of 'detentio' was admittedly not with the Plaintiff".

The present case in hand is a "possessory action". Having recognized the Roman Dutch Law principles, the Legislature has introduced Section 4 into the Prescription Ordinance. It gives a remedy to a person who is unlawfully dispossessed from any immovable property on which the person had been living for a year and a day or more in time. Any forcible dispossession or unlawful dispossession or any kind of dispossession otherwise than by process of law is the subject matter of Sec. 4 of the Prescription Ordinance.

In a possessory action, the title of the defendant against whom the action is filed, is not a defense which would be raised or considered. The lawful owner cannot invade the possession held by any possessor of the land in his absence from the land for a short while. This section grants a person who had been in possession of the property for one year and a day, not to be ousted all of a sudden by force or by any unlawful means.

In the case in hand Heenhamy never knew that Nicholas had got the temporary license in his name when he was shown the boundaries by the Mahaweli Authority officers. She knew that license to occupy the land was due from the Mahaweli Authority as promised in place of the tea kiosk she gave up to the Authority near the Courts in 1984. **Heenhamy continued to hold it in her mind as her own and developed the land by building a house spending more than Rs. 25000/-** from the

day she got the land. There was ample evidence to prove that she was of the belief that she was the person who got it from Mahaweli Authority and she was holding the same as her own property given to her from the Mahaweli Authority. The very next day she left the house to attend the ordination, i.e. on 11.10.1986 Nicholas had cunningly gone to a lawyer and transferred the said land to the Defendant. The transfer is illegal and not valid.

All that can be understood is that Nicholas had given the land and house to the Defendant Ariyarathna, and Ariyarathna had got into the house and the land, inside which all of Heenhamy's belongings were included. Coming home to see that her house and land were unlawfully occupied by the Defendant, **was an action of dispossessing the Plaintiff unlawfully by the Defendant.**

In the case in hand Heenhamy's physical possession or 'detentio' was not through any other person. She had 'ut dominus' or 'the intention of holding and dealing with the property as her own' with regard to the 5 Perch land and the house she built on it. It was not through Nicholas, her paramour. It was not any possession subordinate to the possession of Nicholas as had been argued before the Court of Appeal by the Counsel of the Defendant. Nicholas is not the person who had dispossessed Heenhamy. It is the Defendant, Ariyarathna, the person who got an unlawful and illegal deed of transfer and who is occupying the house without any lawful authority , who had dispossessed Heenhamy. Nicholas is the cunning person who made money out of the opportunity when his mistress went out of the house not to return soon according to his personal knowledge and vanished out of the area having passed the possession to the Defendant, Ariyarathna.

In the case of **Perera Vs Perera 39 CLW 100**, it was held by Gratian J that " The purpose of a possessory suit is not to adjudicate upon questions relating to title but to give speedy relief to a person who, claiming to be owner of property in his own right has been dispossessed otherwise than by process of law."

In the case of **Abdul Aziz Vs Abdul Rahim 12 NLR 330**, it was held that, " The Roman Dutch Law requires the plaintiff in a possessory action to have had quiet and undisturbed possession for a year and a day; and the requisites of possession are the power to deal with the property as he pleases, to the exclusion of every other person, and the *animus domini*, i.e., the intention of holding it as his own".

In the case of **Edirisuriya Vs Edirisuriya 78 NLR 388**, it was held that;

1. The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force nor fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses.
2. To succeed in a possessory action, the plaintiff must prove that he was in possession "ut dominus". This does not mean, possession with the honest belief that the Plaintiff was entitled to ownership. It is sufficient if the Plaintiff possessed with the intention of holding and dealing with the property as his own.

It is absolutely clear that a possessory action can be instituted without proof of title. The Plaintiff in a possessory action need not prove at all that he has lawful title to the subject matter of the action.

I therefore hold that the Court of Appeal has erred when it held that the Plaintiff in order to institute this action should prove that the Plaintiff herself had lawful title.

The Court of Appeal had failed to see how well the District Court had analyzed the evidence led before the trial court and therefore held wrongly that 'the element of detention was admittedly not with the Plaintiff'. The evidence was quite clear that the Plaintiff had detention or possession until she was unlawfully dispossessed by the Defendant after she had held possession for more than one year. In other words, detention of the land with the house was with the Plaintiff with the qualification of bearing 'ut dominus' along with the detention.

I answer the question of law raised at the commencement of this Appeal in the affirmative in favour of the Plaintiff Respondent Appellant and against the Defendant Appellant Respondent.

I do hereby set aside the Judgment of the Court of Appeal dated 24.06.2011. I affirm the Judgment of the District Court of Embilipitiya dated 06.06.1995.

The Appeal is allowed with costs.

Judge of the Supreme Court.

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court.

L.T.B.Dehideniya J.
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

Kusuma Sri Wanasinghe
No.4B/6/7, Mattegoda Hosing Scheme,
Mattegoda.

Plaintiff

SC Appeal 176/2016
SC/HCCA LA 23/2016
WP/HCCA/AV305/2013(Rev)
DC Homagama Case No.7621/RE

Vs

Princymala Abeysuriya.
No.9A/79/5, Mattegoda Hosing Scheme,
Mattegoda.

Defendant

IN THE MATTER OF AN APPLICATION
UNDER SECTION 328 OF
THE CIVIL PROCEDOURE CODE.

Appuhannadige Kotahewage Lesly Ariyasinghe.
No.125, Kirulapana Mawatha, Colombo 5.

Petitioner

Vs

Kusuma Sri Wanasinghe

No.4B/6/7, Mattegoda Hosing Scheme,
Mattegoda.

Plaintiff Judgment Creditor Respondent

Princymala Abeysuriya.
No.9A/79/5, Mattegoda Hosing Scheme,
Mattegoda.

Defendant Judgment Debtor Respondent

AND BEWEEN

Appuhannadige Kotahewage Lesly Ariyasinghe.
No.125, Kirulapana Mawatha, Colombo 5.

Petitioner-Petitioner

Vs

1. Kusuma Sri Wanasinghe
   No.4B/6/7, Mattegoda Hosing Scheme,
   Mattegoda.

   Plaintiff Judgment Creditor Respondent-Respondent

2. Princymala Abeysuriya.
   No.9A/79/5, Mattegoda Hosing Scheme,
   Mattegoda.

   Defendant Judgment Debtor Respondent-Respondent

AND NOW BEWEEN

Appuhannadige Kotahewage Lesly Ariyasinghe.

No.125, Kirulapana Mawatha, Colombo 5.

Petitioner-Petitioner-
Petitioner-Appellant.

Vs

1. Kusuma Sri Wanasinghe
   No.4B/6/7, Mattegoda Hosing Scheme,
   Mattegoda.

Plaintiff Judgment Creditor
Respondent-Respondent-
Respondent-Respondent

2. Princymala Abeysuriya.
   No.9A/79/5, Mattegoda Hosing Scheme,
   Mattegoda.

Defendant Judgment Debtor
Respondent-Respondent-
Respondent-Respondent

Before : Sisira J De Abrew J
NalinPerera J
Prasanna Jayawardena PC J

Counsel : Seevali Amithirigala for the Petitioner-Petitioner- Petitioner-Appellant.
Rohana Deshapriya with C Liyanage for the Plaintiff Judgment Creditor
Respondent-Respondent- Respondent-Respondent

Argued on : 26.1.2018

Written Submission
Tendered on : 11.11.2016 by the Petitioner-Petitioner- Petitioner-Appellant.

Decided on : 23.3.2018

Sisira J De Abrew J

Plaintiff Judgment Creditor Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action against the Defendant Judgment Debtor Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) to get a declaration that the Defendant-Respondent was holding property in dispute in trust for the Plaintiff-Respondent; that in the event of the Defendant-Respondent failing to execute a deed in favour of the Plaintiff-Respondent to direct the Registrar of the court to execute the deed in favour of the Plaintiff-Respondent; and to eject the Defendant-Respondent and her agents from the property in dispute. The case was decided ex-parte since the Defendant-Respondent did not respond to the summons. The ex-parte judgment was delivered on 13.6.2015. The writ against the defendant-Respondent was executed on 21.6.2006. The fiscal broke open the house (the property in dispute) which had been padlocked and handed over the possession of the property to the Plaintiff-Respondent. Thereafter on 4.7.2006 the Petitioner-Petitioner-Petitioner-Appellant (hereinafter referred to as the Petitioner-Appellant) filed a petition under Section 328 of the Civil Procedure Code (hereinafter referred to as the CPC) to restore him in possession. The learned District Judge by order dated 23.9.2013 refused the application of the Petitioner-Appellant. Being aggrieved by the said order of the learned District Judge the Petitioner-Appellant filed an appeal in the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 7.12.2015 dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Petitioner-Appellant has filed this appeal in this court. This court by its order dated 29.9.2016 granted leave to appeal on question of law set out in paragraph 24(iii) of the petition of appeal dated 14.1.2016 which is stated below.

Have the Honourable Judges of the Civil Appellate High Court not considered the possession of the Petitioner-Appellant in the form of constructive trust?

Facts of this case may be briefly summarized as follows:

The Defendant-Respondent by Deed No.186 attested by Gallage Indika Jayanth Perera Notary Public marked P9 sold the property in dispute to Wilfred Rohan Senaratne on 6.5.2004. Wilfred Rohan Senaratne by Deed No.228 attested by RD Attanayake marked P5 sold the property in dispute to Suresh Danial and Chandrika Bernard on 30.6.2004. Suresh Danial and Chandrika Bernard on the same day (30.6.2004) mortgaged it to a Finance Company. After redeeming the mortgage, said Suresh Danial and Chandrika Bernard by Deed No.235 attested by ND Hirimuthugala marked P1 sold the property in dispute to the Petitioner-Appellant on 20.3.2006. The Plaint was filed in the District Court on **6.7.2004** against the Defendant-Respondent Princy Mala Abeysooriya. Therefore it is seen that when the plaint was filed, the Defendant-Respondent (Princy Mala Abeysooriya) was not the owner of the property. As I pointed out earlier, the Defendant-Respondent Princy Mala Abeysooriya on **6.5.2004** had sold the property in dispute to Wilfred Rohan Senaratne. The writ issued by the District Court was executed on 21.6.2006. When the writ was executed the owner of the property was the Petitioner-Appellant by virtue of Deed No.235 dated 20.3.2006. The learned District Judge dismissed the application of the Petitioner-Appellant filed under Section 328 of the CPC. The most important question that must be decided in this case is whether the above conclusion reached by the learned District Judge is correct or not. Section 328 of the CPC 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 dispossessed 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."

In order to succeed in an application under Section 328 of the CPC, the person dispossessed must prove that he was in possession of the property when the writ was executed. The Petitioner-Appellant who was dispossessed from the property in dispute filed an application under Section 328 of the CPC. The learned District Judge dismissed the said application of the Petitioner-Appellant. The basis of the conclusion of the learned District Judge appears to be that the Petitioner-Appellant was not occupying the property in dispute at the time of execution of the writ (21.6.2006). The learned District Judge in his judgment has also observed that the Petitioner-Appellant was not in possession of the property in dispute. But the learned District Judge has, on the basis of the evidence of the Petitioner-Appellant, observed that the Petitioner-Appellant had received the keys of the property in dispute on 30.4.2006. The writ issued by the District Court was executed on 21.6.2006. This shows that he had obtained possession of the property in dispute

before the execution of the writ. It is an undisputed fact that on 21.6.2006 (the day of the execution of the writ) the Petitioner-Appellant was not in the country as he had gone abroad. If a person does not occupy a property, does it mean that he does not possess the property? In my view, occupation and possession are two different things. One can possess a property without occupying the same. To prove possession it is not necessary to prove that he or she lives in the property or occupies the property. In the present case, the Petitioner-Appellant purchased the property on 20.3.2006. The Petitioner-Appellant after purchasing the property, had made an application to the Ceylon Electricity Board (CEB) to convert electricity in his name. In the said application marked P14, the Grama Niladhari has made an endorsement on 11.5.2006 to the effect that the Petitioner-Appellant was the present occupier of the property in question. He has also made an endorsement to the effect that 'not in occupation'. The Grama Niladhari in her evidence has stated that she certified the said application marked P14 on the basis that the Petitioner-Appellant is the owner of the property and that she did so after examining the relevant deed. The CEB has after examining the said application P14 has converted the electricity in the name of the Petitioner-Appellant on 11.5.2006. The writ was executed on 21.6.2006 when keys of the property were with the Petitioner-Appellant. The Petitioner-Appellant in his evidence has clearly stated that when he purchased the property in dispute he received the keys from the previous owner; that thereafter repaired the house; that when the carpenters were repairing the house the doors of the house were opened; that he possessed the property in dispute on his own title; that he purchased the property after studying advertisement published in Silumina News Paper; that he purchased the property as an investment; and that when the Plaint was filed by the Plaintiff-Respondent, the Defendant-Respondent was not even the owner of the property. When I consider the above material, it is clear that the Petitioner-Appellant

was in possession of the property in dispute when the writ was executed and that he was dispossessed. The Petitioner-Appellant was not the judgment debtor or is not a person in occupation under the judgment debtor. When I consider all the aforementioned matters, I am of the view that the Petitioner-Appellant has no connection whatsoever with the judgment debtor in this case.

In order to succeed an application under Section 328 of the CPC the following matters must be established.

1. The person making the application is not the judgment debtor or is not a person holding the property under the judgment debtor.

2. The person making the application was in possession of the property at the time of execution of the writ.

3. The person making the application was dispossessed of the property as a result of the execution of the writ.

When I consider all the aforementioned matters, I hold that the Petitioner-Appellant has proved that he is not the judgment debtor or not a person occupying the property in dispute under him; that he was in possession of the property in dispute at the time of execution of the writ; that he was dispossessed of the property in dispute as a result of the execution of the writ; and that he was possessing the property at the time of dispossession on his own title derived from deed No.235 dated 20.3.2006 attested by ND Hirimuthugoda Notary Public. I therefore hold that the Petitioner-Appellant has satisfied the requirements under Section 328 of the CPC. Considering the all the aforementioned matters, I hold that the learned District Judge erred when he refused the application of the Petitioner-Appellant made under Section 328 of the CPC. The learned Judges of the Civil Appellate High Court have failed to consider

the above matters and have affirmed the order of the learned District Judge. I hold that the judges of the Civil Appellate High Court too misdirected themselves on facts and law when they affirmed the order of the learned District Judge. For the above reasons, I answer the above question of law as follows. 'The Petitioner-Appellant was in possession of the land on his own title and was not a judgment debtor or not a person holding the property under the judgment debtor.'

For the aforementioned reasons, I set aside the order of the learned District Judge dated 23.9.2013 and the judgment of the Civil Appellate High Court dated 7.12.2015. I hold that the Petitioner-Appellant has succeeded in the application under Section 328 of the CPC and that he should be restored in possession of the property in dispute forthwith. The learned District Judge is hereby directed to take all necessary legal steps to restore the Petitioner-Appellant in possession of the property in dispute. The Petitioner-Appellant is entitled to the costs from the Plaintiff-Respondent in all three courts.

The Petitioner-Appellant is restored in possession of the property.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

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

In the matter of an Appeal

1. Hewa Pedige Ranasingha
   No,30/16, Kegalla Road,
   Daluggala, Rambukkana.

2. Samagi Saman Widanagamage
3. Yodinge Ashoka Lakshman Eliwalatenna
4. R.K.A.D.Lalith Wasantha Ranaweera

Petitioner-Petitioners

SC Appeal 177 /2013
SC CA SPL.LA 44/2013
CA Writ Application No.505/2011

Vs

1. Secretary
   Ministry of Agricultural Development and Agri Services
   Battaramulla.
2. Director General of Agriculture
   Department of Agriculture
   Peradeniya.
3. Commissioner of Examinations
   Department of Examinations
   Battaramulla.
4. Hon. Attorney General
   Attorney General's Department
   Colombo.

Respondent-Respondents

Before : Sisira J de Abrew J
Nalin Perera J
Prasanna Jayawardena PC J

Counsel : Jagath Abeynayaka for the Petitioner-Petitioners
Arjuna Obeysekara Senior DSG with Shaheeda Mohamad Barrie SSC for the Respondent-Respondents

Argued on : 23.2.2018

Written Submission
Tendered on : 21.3.2018 by the Respondent-Respondents

Decided on : 18.7.2018

Sisira J de Abrew J

The Petitioner-Petitioners filed this case in the Court of Appeal seeking, inter alia, the following reliefs.

1. Issue a mandate in the nature of writ of Certiorari quashing the competitive examination held on 23rd and 24th of April 2010 for the recruitment of Agricultural Officers to the Sri Lanka Agricultural Service following the Gazette Notification contained in document marked P5.

2. Issue an interim order restraining the 1st Respondent from making appointments to the Sri Lanka Agricultural Service on the result of the above mentioned examination conducted by the 3rd Respondent held on 23rd and 24th of April 2010 until the final determination of this application.

The Court of Appeal by its judgment dated 21.1.2013 dismissed the petition of the petitioners. Being aggrieved by the said judgment of the Court of Appeal, the Petitioner-Petitioners have appealed to this court. This court by its order dated

17.12.2013 granted special leave to appeal on questions of law set out on paragraphs 16(a) and 16(b) of the Petition of Appeal dated 4.3.2013 which are set out below.

1. Can a mandate in the nature of writ of Certiorari be refused on a non-existent fact urged as a ground?

2. Can a mandate in the nature of writ of Certiorari be refused on assumption not founded by the facts urged by any of the parties?

3. In view of Article 61A of the Constitution, did the Court of Appeal have jurisdiction to hear the application of the Petitioner-Petitioners?

4. Have the Petitioner-Petitioners failed to name the necessary parties in their application to the Court of Appeal?

5. In view if the fact that the appointments have already been made, is the application of the Petitioner-Petitioners futile?

This court by the said order also granted special leave to appeal on the above mentioned 3rd and 4th questions of law raised by the learned Deputy Solicitor General.

The Petitioner-Petitioners are Agricultural Instructors. They contend that a competitive examination must be conducted by the 3rd Respondent for the purpose of recruiting people for the post of Agricultural Officers in terms of Service Minute published in the Government Gazette No.1235/21 dated 8.5.2002 which was later amended by Government Gazette No.1588/17 dated 11.2.2009 and Government Gazette No. 1619/25 dated 18.9.2009. Learned counsel for the Petitioner-

Petitioners brought to our notice paragraph 5(1) of the said Service Minute which reads as follows.

> *"Two separate competitive examinations will be held by the Commissioner General of Examinations for open and limited candidates for the purpose of filling vacancies in Class II grade II of the Sri Lanka Agricultural Service as at a specific date to be decided. Both open and limited candidates should sit the First (General) Question Paper indicated in the second schedule. As per Syllabus given in the second schedule, papers will be prepared separately for open and limited candidates and it will be compulsory for the candidates to sit one subject matter paper in relevance to the post applied for. Recruitment will be made by the Commission on the result of the said examination in terms of the provisions made under Section 06, 07 and 08 below."*

Learned counsel for the Petitioner-Petitioners contended that two separate question papers should be separately prepared for open and limited candidates as per the above service minute but two separate question papers were not prepared for the said examination; that the 1st, 2nd and 3rd Respondents have violated the above Service Minute; and that therefore writ of Certiorari should be issued to quash the above examination. I now advert to the above contention. Respondents admit that they conducted two separate examinations on 24th and 25th of April 2010. But there is no evidence to suggest that two separate question papers were prepared for the said examination. The learned SSC contended that according to the Service Minute referred to above the competitive examination should be conducted by the Public Service Commission and under the said Service Minute Secretary to the Ministry of Agricultural Development has the power to conduct

the said examination on behalf of the Public Service Commission and he conducted it. The learned SSC further contended that under Article 61A of the Constitution, the Court of Appeal has no jurisdiction to inquire into the said examination as it was conducted by the Secretary to the Ministry of Agricultural Development on behalf of the Public Service Commission. I now advert to this contention. When I examine the Service Minute published in the Government Gazette No.1235/21 dated 8.5.2002, the Secretary to the Ministry of Agricultural Development has the power to conduct the said examination on behalf of the Public Service Commission. It is clear from the material placed before court that the said examination was conducted by the Secretary to the Ministry of Agricultural Development on behalf of the Public Service Commission.

Article 61A of the Constitution reads as follows.

> "Subject to the provisions of paragraphs (I), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law."

This article was later amended by 19th Amendment which reads as follows.

> *"Subject to the provisions of Article 59 and Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law."*

When I consider Article 61A of the Constitution, I hold that the Court of Appeal has no power to inquire into the above examination conducted by the Secretary to the Ministry of Agricultural Development. Therefore the Petitioner-Petitioners could not have invoked the jurisdiction of the Court of Appeal to quash the said examination. In view of the conclusion reached above, I answer the 3rd question of law as follows. "The Court of Appeal did not have jurisdiction to hear the application of the Petitioner-Petitioners". The 1st,2nd,4th and 5th question of law do not arise for consideration.

For the above reasons, I dismiss this appeal. Considering the facts of this case I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

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

SC Appeal No. 177/2015
SC (Spl) No. 213/14
CA (Writ) Application No. 403/2008

In the matter of an Application for Special Leave to Appeal under and in terms of the provisions of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka from the Judgment of the Court of Appeal dated 30th September 2014.

Rajeswari Nadaraja,
6/1, Frankfurt Place,
Colombo 4.

Petitioner-Petitioner

-Vs-

1 (a) Hon. M. Najeeb Abdul Majeed

1 (b) Hon. Johnston Fernando

1c) Hon. Bandula Gunawardena

1(d)Hon.Gamini Jayawickrema Perera

1 (e) Hon. Rishard Badurdeen
Minister of Industry and Commerce and Co-operatives Development,
No. 73/1, Galle Road,
Colombo 03.

2. Hon. Mahipala Herath
Provincial Chief Minister,
Provincial Minister of Law & Peace, Finance & Planning, Local Government, Education & Technology, Estate Welfare, Public Transport Co-Operative Development, Housing, Sports, Electricity, Cultural and Youth Affairs
Sabaragamuwa Provincial Council,
Secretaries Complex,
New Town,
Ratnapura.

3 (a) Mr. A.P.G. Kitsiri

3 (b) Mr. D.D. Upul Shantha de Alwis

3 (c) Mr. Dhammika Rajapaksa

Present Commissioner Substituted 03rd Respondent

3 (d) Mr. D. Jeewanadan
Commissioner of Cooperative Development/ Registrar of Cooperative Societies
No. 330, Union Place,
Colombo 02.

4. Mr. Kapila Perera

Present Commissioner Substituted 04th Respondent

4 (a) Palitha Nanayakkara
Commissioner of Cooperative Development/Registrar of Cooperative Societies of Sabaragamuwa Province
New Town,
Ratnapura.

5.Yatiyanthota Multipurpose
Cooperative Societies Limited,
Main street,
Yatiyanthota.

Before: Priyasath Dep PC. CJ
Buwaneka Aluwihare PC. J
Sisira J. de Abrew J

Counsel: Palitha Kumarasinghe PC with Chinthaka Mendis for the Petitioner-Petitioner instructed by Palitha Mathew & Co.

Yuresha de Silva SSC for the 1st to 4th Respondents-Respondents

M. Kumarasinghe for the 5th Respondent-Respondent

Argued on: 24. 11. 2016

Decided on: 31. 08.2018

Aluwihare PC, J.

This Court granted Special Leave to Appeal on the following questions of law:

1) Did the Court of Appeal err in law in refusing an Application of the Petitioner for a Writ of Mandamus for a 'Derequisition order' derequisitioning the property which was requisitioned for the temporary use of the 5th Respondent by Requisitioning Order No. 101 dated 24th April 1974 made under Section 10 (1) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26th April 1974 and occupied by the 5th Respondent for over 35 years?

2) Did the Court of Appeal err in law in holding that a contract of tenancy exists between the Petitioner and the 5th Respondent who entered into the property under and by virtue of the Requisition Order No. 101 dated 24th April 1974 made under section 10 (1) of the Co-Operative Societies (Special Provisions) Act No. 35 of 1970, published in Government Gazette No. 108/9 of 26th April 1974, marked "P2"?

3) Did the Court of Appeal err in law in holding that the Petitioner is guilty of laches, in the circumstances of this matter?

4) Did the Court of Appeal err in law in holding failing to appreciate that the single judge bench of the Court of Appeal that delivered the impugned Judgment is bound by the judgment of the Two judge bench of the Court of Appeal in Case No. C.A. (PHC) 75/2008 Bandarawela Multi-Purpose Co-operative Society v Periannen Nadaraja and Others (decided on 9th September 2010) and the Application for Special Leave to Appeal against which judgment has been refused by the Supreme Court in Application No. SC. (SPL) L.A. 198/2010 decided on 8th September 2011?

5) Did the Court of Appeal err in law holding that the Petitioner has failed to show that a legal duty is owed to herself by the Respondents, in the circumstances of this matter?

A brief narration of the facts is as follows.

The Petitioner-Appellants's (hereinafter "the Petitioner") predecessor in title Kanther Sivagurunathan Nadarajah constructed the "Nathan Building" which is the premises in suit. Before the said Kanther Sivagurunathan Nadarajah could occupy the said building, the 5th Respondent, Yatiyanthota Multipurpose Cooperative Societies Limited (hereinafter the Cooperative Society) by a requisitioning order No. 101 dated 24th April 1974 made for "temporary use" under section 10 (1) of the Co-Operative Societies Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26. 04. 1974, came in to occupation of the property in question. Subsequently, the 5th Respondent Cooperative Society through the letter marked "AP5" informed the Petitioner's predecessor in title that the Department of Cooperative Development had forwarded the necessary documents to the Chief Valuer in order to assess the monthly compensation for the requisitioning of the Nathan Building. The letter further informed that the Petitioner will be paid Rs. 350/= per month as an advance payment of rent. This amount was later increased to Rs. 400/= per month following the Chief Valuer's assessment.

After a reasonable period of 'temporary use' by the 5th Respondent, the Petitioner's predecessor in title on several occasions requested the 5th Respondent Cooperative Society to hand over the premises in suit. On 1st August 1992, the Petitioner's predecessor in title through a letter (AP 8) requested the 5th Respondent to derequisition the premises in order to house his business since the family business

establishment which up to that point had been conducted in a rented place elsewhere was burnt down during the riots of 1983 and the owners of those rented premises had refused to rent out the said premises, once again.

The 5th Respondent Cooperative Society, by writing, dated 8th November 1992, (AP9), informed the Petitioner's predecessor in title that the 5th Respondent is in the process of constructing a new building and that his request would be considered upon the completion of the said new building. Once the buildings were constructed, the Petitioner's predecessor in title again requested the 5th Respondent to issue a derequisition order pointing out that the said new building had been completed and that the 5th Respondent Cooperative Society was earning an income of 8000/= rupees per month by renting out a portion of the Nathan Building to a third party while paying only 400/=per month to the Petitioner's predecessor in title. [AP 10]

Instead, however, of handing over the vacant possession of the premises, the 5th Respondent Cooperative Society then moved to have the Nathan Building acquired under the Land Acquisition Act by notice dated 4th January 2001. Thereupon the Petitioner's predecessor in title filed CA writ Application bearing No. 324/2001 against the proposed acquisition by Petition marked "AP12". The Court of Appeal by judgment dated 19th August 2002 issued a writ of certiorari quashing the said notice and also issued a writ of prohibition prohibiting the authorities concerned from taking over the premises under the provisions of the Land Acquisition Act.

Pursuant to the said judgement, the Petitioner's predecessor in title proceeded to institute legal action to have the property returned to him. However, prior to any further action being taken, the Petitioner's predecessor in title passed away.

Once the title to the property in suit had vested in her, the Petitioner by writing marked "AP22" to "AP26" demanded the 1st to the 5th Respondents to release the

property in suit to the Petitioner. The 4th Respondent and the secretary of the 5th Respondent Cooperative Society by writing (AP27) and (AP28) sought 2 further weeks to respond to the said letter of the Petitioner. Regrettably, they never replied. Thereafter the petitioner filed an application for a writ of *mandamus* in the Court of Appeal to compel the 1st and 2nd Respondents to derequisition the property on the basis that the 5th Respondent's continued occupation of the property requisitioned for temporary use in 1974 was *ultra vires* and grossly unreasonable and illegal *viz a viz* the provisions of the Cooperative Societies (Special Provisions) Act no. 35 of 1970.

The Respondents took up the position that the Petitioner's predecessor in title had entered into a tenancy agreement with the 5th Respondent Cooperative Society and that they had a legal right to remain in possession of the Nathan building in their capacity as a tenant. It was further pointed out that the 5th Respondent was in any event a tenant protected under the Rent Act and that the Cooperative Societies (Special Provisions) Act No. 35 of 1970 has been repealed or fallen into disuse. The Respondents also pointed out that the petitioner's application was time barred. It was further contended that the Petitioner was not entitled to seek a writ of mandamus as the Cooperative Societies Act vests the discretion in the minister, the 1(e) Respondent, to derequisition the property.

The Court of Appeal by a bench of a single judge in the judgment dated 30th September 2014 refused to issue a writ of mandamus and held that;

> *There is a valid tenancy agreement between the 5th Respondent and the Petitioner's predecessor in title, marked by the Respondents as "R6." The petitioner has failed to mention that there has been contract between the parties for the very reasons that if he did so a writ cannot lie.*

That the petitioner was guilty of laches in as much as she has moved only after 34 years to have the property derequisitioned. A writ of mandamus is a discretionary remedy and cannot be granted even when there is no other remedy available. And that the petitioner has failed to show that there is a legal duty owed to the petitioner by the respondents.

It is against the judgement of the Court of Appeal that the Petitioner has come before this court.

Of the 5 legal questions before us, it is pertinent to proceed to address the 2nd issue; first, whether there is a separate tenancy agreement between the parties. In my opinion, if this question is answered in favour of the Respondent, there would be no necessity to inquire into the other legal issues raised before us.

As mentioned above, the 5th Respondent came to occupy the Nathan Building following a requisitioning order No. 101 dated 24th April 1974 made under section 10 (1) of the Co-Operative Societies Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26. 04. 1974. Section 10 reads; "*the Minister may by order (in this Act referred to as a requisitioning order) published in the Gazette, requisition, with effect from such date as shall be specified in the order, any immovable property that it may be temporarily used by a principal society for the purposes of any business of such society*". According to the document marked "P2" the then Minister requisitioned the Nathan Building with effect from 8th May 1974 to be used by the Yatiyanthota Multi-Purpose Co-operative Society Limited.

It is the contention of the 5th Respondent Cooperative Society, however, that they possess the Nathan Building not only by virtue of the said Requisitioning Order but also by virtue of a Tenancy Agreement marked "R6" which the 5th Respondent and the Petitioner's predecessor in title had entered into in 1976. The 5th Respondent

strenuously argued that "R6" is a tenancy agreement, as it decisively uses the word "කුලිය (rent)" whereas under the Co-Operative Societies (Special Provisions) Act No. 35 of 1970 there is no monthly 'rent' payable but only "compensation" in terms of sections 13 to 19 of the Act.

In response, the Petitioner pointed out that the words "rent" and "compensation" had been used interchangeably and that the word 'rent' is in fact a reference to 'compensation.' The question that needs to be determined now is whether "R6" is a Tenancy Agreement that exists independently of the Requisitioning Order issued on 26. 04. 1974.

On the face of it, it is apparent that "R6" is not a tenancy agreement. Unlike in a normal tenancy agreement, there is no identification of the *corpus*, or any clauses pertaining to handing over the possession of the premises, determining the rights and liabilities of the parties in relation to the tenancy or the duration for which tenancy agreement is signed. The document only stipulates that "නාදන් ගොඩනැගිල්ලේ ගෙවල් කුළිය සම්බන්දයෙන් එකඟත්වයට පැමිණ 1976-12-15 දින යටියන්තොටදී අත්සන් තබන ලද ගිවිසුම් පත්‍රය" In terms of "R6", the 5th Respondent had undertaken to pay a sum of 400/= to the Petitioner's predecessor in title on a monthly basis till the Chief Valuer's Assessment was communicated to them. Furthermore, "R6" stipulates that any difference in the value that would be revealed pursuant to the said assessment would be reimbursed by the respective party. Plainly, "R6" is an agreement that regulates the payment of a sum of money and a condition pertaining to reimbursement. It cannot by any stretch of the imagination be construed being anything more than that. If "R6" is deliberately limited to the payment of rent for the Nathan Building, logically there ought to be another document which explains the genesis of this arrangement. At this point, it is helpful to peruse the document "AP 5" which is a letter sent by the 5th Respondent Cooperative Society to the Petitioner's predecessor in title. The letter

informed that the documents necessary for the calculation of the monthly sum for the requisitioned property 'Nathan Building' had already been sent to the Chief Valuer and that as there had been some delay in the assessment of the sum, the 5th Respondent co-operative society had decided to pay Rupees Rs. 350/= to the Petitioner's Predecessor in title on a monthly basis. It further stated that;

"එසේ අත්තිකාරම් මුදල් ගෙවීමේදී තක්සේරු කරන ලද මාසික කුළිය ගෙවනු ලබන රුපියල් 350/= ට වැඩ වැඩිවුවහොත් එම හිඟ මුදල සමිතියෙන් ගෙවීමත්, තක්සේරු කරන ලද මාසික කුළිය රුපියල් 350/=ට වැඩ අඩු වුවහොත් එම මුදල සමිතියට ගෙවන බවට පොරොන්දු පත්‍රයකට අත්සන් කිරීමෙන් පසුව එම ගෙවල් කුලී අත්තිකාරම් මුදල ලබා දිය හැකි බැවින් [...]"

This letter sent in September 1975 in my opinion forms the basis of the agreement "R6" signed and entered into on 15-12-1976. "R6" therefore was neither a tenancy agreement nor an agreement that determined the 'rent.' It was the aforementioned "පොරොන්දු පත්‍රය" whereby both parties expressly undertook to reimburse each other where there was a difference in the amount paid and the actual amount due for the value of the property.

It is also pertinent to note that "මාසික කුළිය" referred to in "R6" was not a sum which the parties had agreed mutually. It explicitly states that:

"දැනට ඉහත සඳහන් ගොඩනැගිල්ලේ, මාසික කුළිය තක්සේරුකරවා ගැනීම සඳහා අවශ්‍ය ලියකියවිලි, කෑගල්ල සමූපකාර සංවර්ධන උප කොමසාරිස් තුමා මඟින් තක්සේරු දෙපාර්තමේන්තුව වෙත ඉදිරිපත් කර ඇති බැවින් එකී ගොඩනැගිල්ල සඳහා මාසික කුළිය තක්සේරුකර එවන තුරු, පළමුවන පක්ෂයෙන් දෙවන පක්ෂයටත් ගොඩනැගිල්ලේ කුළිය වශයෙන් මසකට රුපියල් 400 ක් පහත සඳහන් කොන්දේසි මත පවරාගත් දින සිට (1974-06-24 දින සිට) ගෙවීමට කටයුතු කරනු ලැබේ."

According to the document itself the 'rent' or its semantic variations had been determined with the intervention of the Chief Valuer. This was also the position maintained in "AP5". In my opinion, these references reinforce the Petitioner's position that "R6" is not a tenancy agreement to pay a 'rent' but is in fact an agreement to pay 'compensation'. This is plainly understood by referring to the statutory provisions relating to 'compensation' for property requisitioned under the Co-Operative Societies (Special Provisions) Act No. 35 of 1970.

Determination of compensation.

Section 17.

(1) The Registrar shall refer to the Chief Valuer the determination of the compensation payable in respect of any property, and such Valuer shall submit his determination to the Registrar.

(2) The Chief Valuer shall, before making his determination of the compensation payable in respect of any property, give the person from whom that property was requisitioned for a principal society, as well as the Registrar, an opportunity to adduce before such Valuer, by himself or by a representative authorized by him in that behalf, evidence with regard to the value of that property.

(3) The Registrar shall communicate in writing to the person from whom any property was requisitioned for the principal society the determination of the compensation payable in respect of that property made by the Chief Valuer.

(4) The Registrar shall cause a notice to be published in the Gazette and in at least one Sinhala, one Tamil and one English newspaper, specifying the compensation that it proposes to pay in respect of any property, being the compensation determined by the Chief Valuer, and inviting any person who had any interest in that property, immediately before that property was requisitioned for the principal society and who claims any compensation in respect of that property, to communicate to such Registrar his claim in writing, stating the nature and the basis thereof, before such date as shall be specified in the notice.

According to these several provisions, where a property is requisitioned under the Special Provisions Act, determining the compensation for such property falls within the province of the Chief Valuer. Therefore, the reference to the chief valuer in agreement marked "R6" could only be deemed a deliberate insertion to highlight the statutory flavor of the agreement. Additionally, the words "මසකට රුපියල් 400 ක් පහත සඳහන් කොන්දේසි මත පවරාගත් දින සිට (1974-06-24 දින සිට) ගෙවීමට කටයුතු කරනු ලැබේ" is a cross reference to section 15 of the Act, which reads "*The compensation payable in respect of any property shall be considered as accruing due from the date on which that property was requisitioned for the principal society.*" Apart from this, the Petitioner has presented two Gazette notifications issued under the Co-operative Societies (special provisions) Act where the words "මාසික කුළිය" and "වන්දි" had been used interchangeably to refer to compensation. In light of these clear references, I am unable to agree with the contention that "R6" is a stand-alone tenancy agreement.

More fundamentally, "R6" comes into existence as a direct result of the Requisition Order issued by the Minister. This plainly rules out the possibility of construing "R6" as a 'contract' or an 'agreement' to let the premises. The predecessor to the property in question had no intention, at any point of time, of renting out his

building to the co-operative society. He, however had no choice but to comply with the Requisition order under section 10 (1). This negates the fundamental element of a contract—the element of voluntary meeting of minds. In terms of section 29 (2) of the Rent Act No. 7 of 1972, a tenancy agreement could only arise when the parties, in their private capacities, agree to let and occupy the premises on mutually agreed terms.

"*[…] it shall be lawful, with effect from the date of commencement of this Act, for the landlord of any residential premises and the person seeking to be the tenant thereof to enter into a written agreement whereby such premises are let to such person for a period specified therein […]*"

The statutory language bears no ambiguity that a situation of tenancy arises when the landlord and the tenant *agree* to let the premises. This view is also shared by C. J. Rustomjee in ***The Rent Act No. 7 of 1972*** at page 7;

"*A contract of tenancy is an agreement whereby one party agrees to give the use of immovable property on a rent to another for successive period until it is terminated by a notice given by either party*"

The Law of Rent and Ejectment *by* Dr. Wijedasa Rajapakshe, PC [2005] J.B.J.L., Vol. 1, 219-223 further confirms that a tenancy agreement is firstly and primarily a private agreement which arises outside the manacle of law. The intention of the parties, the enforceability of the agreement, the identification of corpus and other relevant terms are ascertained based on contractual principles.

The Rent Act only governs a tenancy agreement-it by no means creates one. Rather, it presupposes that an agreement is already in place. Thus, the Respondents cannot seek refuge in the Rent Act to colour themselves as tenants without firstly

establishing, based on contractual principles, that the predecessor in title to the property *intended* to let the premises. The evidence before us speaks of, no such agreement. In contrast, both parties agree that the 5th Respondent Cooperative Society came into occupation pursuant to the aforementioned order by the Minister.

The statutory nature of the payment is further amplified when one considers the language of Section 13 of the Act which says: *"In respect of any property requisitioned for a principal society, such society shall* **pay compensation** *equal to the amount which might reasonably expected to be payable for the temporary use of such property".*

In these circumstances, I observe that the Court of Appeal erred in holding that "R6" is a tenancy agreement that stands independent of the requisition order. "R6" is not a tenancy agreement. It is an ancillary agreement made for the purpose of paying and reimbursing the excess/shortfall of the compensation in respect of the "Nathan Building." As such, it cannot transform the 5th Respondent's position to that of a 'tenant'.

Since there is no private agreement that ousts the writ jurisdiction, this Court will proceed to consider the remaining legal issues in the chronological order. Firstly, it is pertinent to examine whether the Petitioner has failed to demonstrate that there is a legal duty owed to her by the Respondents.

The 5th Respondent urged that it is only when there is a duty owed to the Petitioner can a writ of mandamus be issued to compel the performance. Since in the present application, the Petitioner has failed to assert any such legal right, they contend, that a writ of mandamus should be refused. Citing **Perera v National Housing Development Authority 2001 3 SLR 50**, they argue that "*Mandamus is not*

intended to create a right, but to restore a party who has been denied his right to the enjoyment of said right".

The requirement of a legal right becomes necessary in the writ jurisdiction for the purpose of determining the *locus standi* of a Petitioner. While in the early days a writ of mandamus was available only to those asserting a legal right, Courts in Sri Lanka gradually moved away from taking this narrow approach. In **Dilan Perera v Rajitha Senarathna 2002 2 SLR 79** the court held that the "*in mandamus the petitioner must show that he is a person aggrieved of*". It has also been held, although in a different context, that "*on any view, the performance of that which is an essential ancillary to the performance of one's duty itself the performance of one's duty. To hold otherwise would be to give the word 'duty' an unduly restricted meaning as to defeat rather than promote the general principles of the ordinance*" **(Jayanetti v Mitrasena 71 NLR 385, 397)** Furthermore, in **Wickremaratne v Jayaratne 2001 3 SLR 161** *locus standi* for the writ jurisdiction was expanded to include legitimate expectations. U. De. Z. Gunawardena J. observed that "*the doctrine of inconsistency or of legitimate expectation prohibits decisions being taken which confounds or disappoints an expectation which an official or other authority or person has engendered in some individual except perhaps where some countervailing facet of the public interest so requires-this being judged in the light of harm being done to the applicant*".

In the present application, the Petitioner's premises in suit was requisitioned by the Minister in 1974 for 'temporary use'. The petitioner was entitled to legitimately expect that the property would be returned once the premises had been used for a particular period. In particular, once the 5th Respondent Cooperative Society moved to have a new building constructed, there was indeed no justification for refusing to issue an order derequisitioning the Nathan Building. The sketch marked "AP19" demonstrates that the 5th Respondent owns or occupies several other

buildings in Yatiyanthota Town which could be used for the purposes of the Co-operative society. In these circumstances, the Petitioner and the Petitioner's predecessor in title are justified in expecting that the property will be returned to them after a 'temporary period'. To that extent there was a duty cast on the 1st Respondent to order a derequisition of the property.

In any event, I am unable to see how the present application is different from the authorities relied on by the Respondents. [Perera v National Housing Development Authority 2001 3 SLR 50]. Undoubtedly, the Petitioner is the legal owner of the property., which fact had been not contested by any of the Respondents. She is thus fully entitled to all the benefits that accrue by virtue of her ownership. Nevertheless, she has been continuously deprived of enjoying the benefits of her ownership due to the excessively long period of possession by the 5th Respondent. She only seeks that the property-which is rightfully hers- be returned to her because the purpose for which it had requisitioned had been fulfilled. By the Respondent's own admission, this is a grievance captured by the writ jurisdiction as a writ of mandamus could '*restore a party who has been denied his right to the enjoyment of the said right*'. As such, I see no reason to reject the application on the basis that the petitioner lacks the locus *standi*.

Having considered Petitioner's *locus standi*, the Court must examine whether the circumstances alleged by the Petitioner fall within the jurisdiction of a Writ of Mandamus.

The Petitioner is pleading by a Writ of Mandamus for a 'Derequisition order' derequisitioning the property which was requisitioned under Section 10 (1) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26th April 1974 for the temporary use of the 5th Respondent in 1974.

In an application for a writ of mandamus, the first matter to be settled is whether or not the officer or authority in question has in law and in fact the power which he or she refused to exercise. As a question of law, it is one of interpreting the empowering statutory provisions. As a question of fact, it must be shown that the factual situation envisaged by the empowering statute in reality exists.

Under section 10 (1) of the Co-Operative Societies (special provisions) Act No. 35 of 1970 the Minister has the power to requisition any immovable property by publishing an order to that effect in the Gazette. The purpose of such requisition is to allow the property to be '***temporarily used by a principal society for the purposes of any business of such society***' Furthermore, section 10 (4) of the same Act also empowers the Minister to derequisition any such property by following the same procedure. The section reads as; "*Where any property is requisitioned by a requisitioning order, the Minister may, by Order (hereinafter in this Act referred to as derequisitioning order) published in the Gazette, derequisition such property with effect from such date as shall be specified in the derequisitioning Order.*"

Thus, there could be no question with regard to the Minister's competence to issue a derequisitioning order. What needs to be determined is whether the Minister's power is amenable to the writ jurisdiction of this Court. by Both sections 10 (1) and section 10 (4) the Minister '*may*' issue a requisitioning and derequisitioning order. The text of the Act does not contain any express guidelines regulating the exercise of the discretion. The issuance of the order therefore is a matter that has been left to the discretion of the Minister.

Where power is conferred by law to exercise it in a given factual situation, it may either be a duty or a privilege. Generally, it is only if there is a duty that the repository can be compelled to act by a writ of mandamus. If there is only a discretion (privilege) to act, the writ cannot compel the person to act. It was

pointed by the Counsel for the 1st to the 4th Respondent that "*the word 'may' ordinarily connotes a situation where the exercise of a power is permissive or discretionary as opposed to its exercise being obligatory or mandatory. Ordinarily the word 'may' connotes a discretionary power and the word 'shall' connotes that which is mandatory or in the nature of a duty the discharge of which is obligatory. […] And to use the words of Wade and Forsyth 'mandamus has nothing to do with the exercise of such discretionary power*".

However, it is a cardinal principle in Administrative law that no discretion is unfettered and absolute in the public sphere. In fact, **Wade** himself confirms that; "*Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act.*" **(5th Ed., page 353)**

G.P.S de Silva CJ in his much-quoted dictum in **Premachandra v Major Montegue Jaywaickrema 1994 2 SLR 90, 105** held that "*There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.*" This is also the position maintained by **Dr. Cooray** in **Principles of Administrative Law**; "*every discretion conferred by law is a public trust, to be exercised for the purposes for which it has been conferred by statute, and the proved factual situation in a given case may be such that, in keeping with the*

purpose for which such discretion has been conferred by the statute, the law discerns a duty to exercise that discretion in a particular manner and that duty will be enforceable by mandamus." (Volume II, 3rd edn, page 847).

Thus, even if the empowering statute does not expressly require any jurisdictional fact to be present for exercise of power, it will be held invalid if the public authority has acted in total disregard for the purpose for which such discretion/power was vested in him.

The object and the purpose of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 as gleaned from its long title is;

"To make special provisions for the implementation of a scheme of reorganizing the cooperative movement, in particular for the dissolution of societies and the amalgamation of societies and for the matters connected therewith or incidental thereto"

The Special Provisions Act was a legislative response to the economic policy that was in place in the 1970s. This economic policy gave primacy to the co-operative system and orders requisitioning private property were introduced solely to ***"reorganize the co-operative movement"*** and for ***"the dissolution of societies and the amalgamation of societies."*** However, as the Act itself makes clear, the requisitioning was to be made temporarily and catered to 'the purposes of any businesses of the principal society'. It was never meant to permanently dispossess legal owners of their property. This is confirmed by subsection (7) which states that a derequisitioning order has the effect of "*reviving any lease subsisting on the date on which the property was requisitioned.*" Unless the requisitioning of property was intended for a short period, section 10 (7) would have no meaning.

In the present case, the 5th Respondent Co-operative society has remained in possession of the property for a period of 35 years. Furthermore, they have sublet one floor of the Petitioner's building to the National Apprentice and Industrial Training Authority for computer training. It could not have been the intention of the legislature to permit permanent use of requisitioned property. Neither can it be said that this legislative enactment which gives primacy to '*reorganize the co-operative movement, in particular for the dissolution of societies and the amalgamation of societies'* would allow using the requisitioned property for financial ventures extraneous to the principal functions of the co-operative society. Particularly in the present case, the sketch marked "AP19" amply demonstrates that the 5th Respondent Cooperative Society owns or occupies several other buildings in Yatiyanthota Town which could be made use both for the purposes of the Co-operative society and for the aforementioned computer training facility.

Both the Petitioner and Petitioner's predecessor in title repeatedly brought these matters to the attention of the Respondents when they requested an order derequisitioning the property ["AP 22-AP26 and "AP8" "AP9"]. The Petitioner's predecessor in title implored as far back in 1992 to have the property derequisitioned as all his other property in the area was destroyed by the communal riots. However, there was a persistent failure on the part of the authorities to take cognizance of these grievances. When the petitioner again moved for a derequisitioning order, the secretaries to the 4th and 5th Respondents requested 2 weeks to respond but they never did so. To this day, there has been no response from the authorities. The factual situation in the present case is such that, in keeping with the purpose of the Act, an order derequisitioning the property should have been made a long time ago. The discretion vested in the Minister in this regard does not mean that he is empowered to withhold issuing the order as he pleases. Where circumstances warrant, in particular where the premises have been used for a period far exceeding the time frame contemplated in the

enactment , the law imposes a duty to exercise that discretion in a particular manner- which in the present case is a derequisitioning order. Where there is a failure in this regard, that duty would be made enforceable by a mandamus.

However, even if the circumstances qualify for the issuance of a writ of mandamus, the Court could refuse to issue the same in the event the Petitioner is guilty of laches.

The Court of Appeal in the judgment has held that "*the petitioner's premises were requisitioned in 1974 and only after 34 years the petitioner moved to de-requisition the premises. Even after the Court of Appeal judgment in the acquisition case which was given in favour of the Petitioner she did not move to get the premises derequisitioned. Only four years after the judgment the Petitioner has filed the instant application. The petitioner has not given a proper acceptable explanation for the very long delay. The only conclusion, this court can come to is that there has been a contract of tenancy between the parties. A writ of mandamus is a discretionary remedy which can be granted when there is no other remedy available*"

As rightly observed by the learned judge in the Court of Appeal, a writ of mandamus is an equitable discretionary remedy which could be denied if the Petitioner is guilty of inexplicable delays.

The traditional approach is that delay by itself is fatal to the application. However, courts generally do not apply the principle of laches mechanically, but take in to account the facts and the circumstances of the case. There is no criteria to determine what constitutes delay. Whether there has been undue delay and whether the explanation offered by the petitioner sufficiently excuses the delay is to be decided by the Court.

Sharvananda J. as he then was, in **Biso Menika v Cyril de Alwis [1982] 1 SLR 368, 380** observed as follows; "*if the delay can be reasonably explained, the court will not decline to interfere. The delay which a court can excuse is one which is caused by the application pursuing a legal remedy and not a remedy which is extra -legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by law*" These words were later cited with approval by Sripavan J. as he then was, in **Samaraweera v Minister of Public Administration [2000] 3 SLR 64, 66-67.** His Lordship further observed that "*Further, the predisposition of parties to explore other lawful avenues which hold out reasonable expectation of obtaining relief without incurring the expense of coming into Court cannot be overlooked or censored and any delay caused thereby cannot be characterized unjustifiable*"

In **Biso Menike v Cyril de Alwis**, Sharvananda J. Held that the delay caused by the Petitioner unsuccessfully making representation to a committee of inquiry appointed by the Minister to look into injustices caused to the parties by the past operation of the Ceiling Housing Property Law, No. 01 of 1973, under S. 17A (1) under which Law the Commissioner of National Housing had the power, with the approval of the Minister, to divest himself of the ownership of houses vested in him under the law, was justified.

As correctly observed by the court of Appeal, the Petitioner in the present application has invoked the writ jurisdiction of the Court to have the property derequisitioned after 34 years from the date of requisition. However, attempts to have the property derequisitioned commenced as far back as in 1992 by the Petitioner's predecessor in title making representation to the Respondents.

The initial attempt was made in 1992, wherein the petitioner's predecessor in title was promised that the request would be considered once the construction of a new building was completed ["AP8"] In 2000 the Petitioner's predecessor in title again made representation to relevant authorities to derequisition property ["AP10"] On the second occasion he drew attention to the completion of the new building and claimed that there could be no further use for his property. In addition to these representations, the Petitioner's predecessor in title also took prompt action to quash an order made by the Minister to acquire the building under the Land Acquisition Act. ["AP13"] Once the title was vested in the Petitioner, she too made representation to the Minister to issue an order of derequisition. Documents marked "AP22" to "AP26" demonstrate these efforts. It was only after failing in all these attempts that the Petitioner resorted legal action to have the property derequisitioned. As such, it is clear that neither the Petitioner nor the Petitioner's predecessor in title has slept on their rights for 34 years. They had continued, albeit unsuccessfully, to pursue their claims using other lawful avenues. In those circumstances, the Petitioner cannot be held guilty of laches as she has provided a justifiable explanation for delaying to invoke the writ jurisdiction.

The final question of law for determination is whether the single judge in the court of appeal was bound by the decision given by the court of appeal sitting by a bench of two judges.

The Petitioner has drawn our attention to a decision made by two judges of the Court of Appeal in C.A. (PHC) 75/2008 **Bandarawela Multi-Purpose Co-operative Society v Periannen Nadaraja and Others** (decided on 9th September 2010). The Petitioners in the said application prayed for a writ of mandamus directing the Minister to issue an order derequisitioning the property requisitioned under the Co-operative Societies (Special Provisions) Act. The Court of Appeal in a

unanimous judgment which dealt with an identical situation and identical statutory provisions held that:-

"*Minister under section 10 of the Act No. 35 of 1970 can requisition a building only for temporary use by a co-operative society. Such co-operative society cannot use it permanently. The order of requisition was made in 1975 and the action in the High Court was instituted in 2005. Then it is clear that the building has been used for well over a period of 30 years. Thus, it is clear that the use of the building by the co-operative society is not a temporary one. The co-operative society, the Petitioner in this case, has used the building almost permanently. The co-operative society has used the building beyond the purpose set out in the Act No. 35 of 1970. I therefore hold that the learned High Court Judge was right when he issued a writ of mandamus and certiorari prayed for by the Respondent*".

The present petitioner drew attention to this case when this application was first instituted in the Court of Appeal. However, she claims that the Court of Appeal failed to take cognizance of the judgment. A perusal of the Court of Appeal judgment marked "L" confirms this assertion.

It is settled law in Sri Lanka that a bench numerically inferior regards itself bound by a decision of a bench numerically superior. Basanayake CJ in **Bandahamy v Senanayake 62 NLR 313** elucidated;

"*We have in this country over the years developed a cursus curia of our own which may be summarised thus-*

(a) One Judge sitting alone as a rule follows a decision of another sitting alone. Where a Judge sitting alone finds himself unable to follow the decision of another judge sitting alone the practice is to reserve the matter for the decision of more than one Judge (88.38 & 48).

(b) A Judge sitting alone regards himself as bound by the decision of two or more Judges.

(c) Two Judges sitting together also as a rule follow the decisions of two Judges. Where two Judges sitting together find themselves unable to follow a decision of two Judges, the practice in such cases is also to reserve the case for the decision of a fuller bench, although the Courts Ordinance does not make express provision in that behalf as in case of a single Judge."

This was later followed by a bench of 5 judges in **Walker Sons & Co. Ltd v Gunatilaka & Others, 1978-79-80 1 SLR 231.**

In those circumstances, Her Ladyship in the Court of Appeal erred when she failed to give due regard to the unanimous judgement by a bench of two judges in C.A. (PHC) 75/2008 **Bandarawela Multi-Purpose Co-operative Society v Periannen Nadaraja and Others** (decided on 9th September 2010).

Having considered the questions of law referred to this Court and having answered them in the affirmative, I hold that the Petitioner in the present application is entitled to have her property derequisitioned under section 10 (4) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970.

Having considered the questions of law referred to this Court and having answered them in the affirmative, I hold that the judgment of the Court of Appeal is erroneous and set aside the same.

The court observes that the requisition had been made for "temporary use" of the 5th Respondent Cooperative Society and even after 43 years (1974 to 2017) the building still remains as requisitioned property. In these circumstances, I issue a *writ of mandamus* directing the 1 (e) Respondent forthwith to derequisition the land together with the buildings thereon, requisitioned by order 101 published in the gazette of the Republic of Sri Lanka dated 26th April 1974 bearing number 108/9 and the 5th Respondent to hand over vacant possession of the premises to the Petitioner.

Appeal Allowed with cost of Rs.75, 000/=

JUDGE OF THE SUPREME COURT

JUSTICE PRIYASATH DEP P.C
I AGREE

CHIEF JUSTICE

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 Appeal from a Judgment of the Civil Appellate HighCourt of Avissawella.

HallewaMudiyanselage Mangalika Jayasinghe, No. 161/2, "Sanka", Indolamulla, Dompe.

Plaintiff

SC APPEAL 183/ 2016
SC/ HCCA / LA 148/2016
WP/ HCCA / AV / 1567/15 (F)
D.C.Pugoda No. 969 / L

Vs

Nanayakkarawasam Gamgodage SunethraUdeniBandara Jayasinghe, No. 237/E, Weddagala, Thiththapaththara.

Defendant

AND BETWEEN

HallewaMudiyanselage Mangalika Jayasinghe, No. 161/2, "Sanka", Indolamulla, Dompe.

Plaintiff Appellant

Vs

Nanayakkarawasam Gamgodage Sunethra UdeniBandara Jayasinghe, No. 237/E, Weddagala, Thiththapaththara.

Defendant Respondent

AND NOW BETWEEN

HallewaMudiyanselage Mangalika Jayasinghe, No. 161/2, “Sanka”, Indolamulla, Dompe.

Plaintiff AppellantAppellant

Vs

Nanayakkarawasam Gamgodage Sunethra UdeniBandara Jayasinghe, No. 237/E, Weddagala, Thiththapaththara.

Defendant Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ,**
H. N. J. PERERA J &
MURDU FERNANDO PCJ.

COUNSEL : Kamal SunethPerera for the Plaintiff Appellant Appellant.
Ranjan Suwandaratne PC with Yuwin Mathugama for the Defendant Respondent Respondent

ARGUED ON : 13.07.2018.

DECIDED ON : 28.09.2018.

S. EVA WANASUNDERA PCJ.

In this matter leave to appeal was granted on the questions of law in paragraph 14 (a), (c), (d) and (f) of the Petition which read as follows:-

1. Did the learned Civil Appellate High Court Judges err in law by taking into consideration of the evidence of the Defendant, where she has evaded court at the trial stage, depriving the Plaintiff's lawyer to cross examine the Defendant?
2. Did the Civil Appellate High Court fail to observe that the Defendant did not specifically deny the lease agreement (P4) signed between the Plaintiff and the Defendant and in fact admitted it by the issue No. 7 raised by the Defendant herself?
3. Did the Civil Appellate High Court fail to follow the judicial precedent created by the Judgment of Your Lordship's Court in SC Appeal No. 146/2013, decided on 12.08.2015 where it was held that "*the moment that a lease agreement is admitted, the need to prove title to the premises in question does not arise?"*
4. Did the Civil Appellate High Court Judges and the learned District Judge err in law by requiring the Lessor to give ' Notice to Quit' to the Lessee even after the lease period was over?

The Plaintiff Appellant Appellant (hereinafter referred to as the Plaintiff) had filed action against the Defendant Respondent Respondent (hereinafter referred to as the Defendant) in the District Court of Pugoda on 02.10.2008, praying for a declaration of title for the property contained in the two Schedules to the Plaint, for ejection of the Defendant from the same as well as for damages caused to the Plaintiff due to the Defendant not having left the property, in a sum of Rs. 50,000/- upto the date of the Plaint and Rs. 7000/- per month thereafter.

The Schedules to the Plaint are two small allotments of land, one of which is 8 Perches with a partly built two storeyed building and another of 2 Perches. They are respectively , Lot 11B and Lot 17A of Plan No. 212 dated 25.02.1992 made by M.D.Edward Licensed Surveyor. The Defendant filed answer on 06.03.2009 stating that she has been in occupation of the said properties from the date that she

bought the same and that the Plaintiff is holding the properties under Deed No. 14512 dated 06.04.2006 **on trust** for the Defendant. She prayed for dismissal of the action and/ or for a direction from court that the properties be transferred to her from the Plaintiff.

By title Deed No. 12387 dated 02.02.2002 and attested by Lasantha G.A.Sthembu Notary Public, NanayakkarawasamGamgodageSunethraUdeniBandara Jayasinghe, (the Defendant) had become the owner of the properties in the Schedules to the Plaint. On 13.08.2005 she transferred the same to PindeniyageKanthiPremalatha by Deed No. 13840. The Notary Public who attested the said Deed 13840 states in the Attestation that the purchase price of Rs. 500,000/- was paid by the purchaser P. K. Premalatha to the seller N.G.S.UdeniBandara Jayasinghe, in his presence. Thereafter on 06.04.2006 the said P.K.Premalatha had transferred the same to HallewaMudiyanselageMangalika Jayasinghe,(the Plaintiff) by transfer Deed No. **14512 dated 06.04.2006** attested by I. M. DharmasenaIllupitiya, Notary Public.

On the same day, i.e. on 06.04.2006, the Plaintiff had executed a Lease Agreement in favour of the Defendant. The lease was for two years on record according to the clauses in this Deed No**. 14513 dated 06.04.2006** and the lease money for one year was Rs. 12000/- . The Defendant had agreed to pay in monthly instalments of Rs. 500/- on or before the 6th day of each month as part of the lease money. I would like to place a diagram below of these transactions as follows:

DefendantUdenitransferred to -------→**Premalatha** transferred to--------→**Plaintiff**Mangalika.

Then the **Plaintiff Mangalikaleasedthe property to the DefendantUdeni**for two years.

The Defendant had been in possession of the house and property at the time the Plaintiff had bought the same from Premalatha. When the **lease period was over by 06.04.2008 the Defendant had refused to leave.** The Plaintiff had filed action on 02.10.2008 for ejectment of the Defendant.

The trial commenced with 13 issues before Court. The Plaintiff as well as her husband gave evidence and marked documents P1 to P8. They were cross

examined by the lawyer of the Defendant. The Defendant gave evidence and marked documents V1 to V6 and was cross examined partly but **she did not face any further cross examination after the first date of having given evidence**. It had so happened because she had been absent on the next two dates of the case and had claimed that she was not well. The District Judge had however **without granting further dates** for her to be in Court to be **further cross examined**, had fixed the case for judgment.

The District Judge dismissed the Plaint but had **not granted relief as prayed by the Defendant either.** The Plaintiff had appealed to the Civil Appellate High Court and **the High Court had affirmed the judgment of the District Court**.

The position taken up by the Defendant is that the **Plaintiff** of this case has been holding the property **in trust for the Defendant**.

I observe that the Defendant had transferred the property to one Premalatha and received Rs.500,000/-. The Defendant states that she had not transferred the same with the intention of selling the property. She states that it was security for the loan of Rs.500000/- she obtained from Premalatha and she kept on paying interest to her. She submits that she had failed to pay the 'alleged loan' to Premalatha and get the same re-transferred to the Defendant. However in the evidence the Defendant states that the stamp money for the transfer Deed and the Notary's fees were **not paid by her**but**paid by Premalatha**.

The Defendant and Premalatha both admit that the beneficial interest stayed with the Defendant. According to Section 83 of the Trusts Ordinance, the transferor of the property can claim that the transferee has held the property in trust for the transferor by demonstrating that the transferor never intended to pass title to the transferee. So, in the case in hand , the Defendant **could have claimed** that **Premalatha** held the property in trust for the Defendant **if and when the Defendant demonstrates that she never intended to pass title.**

When Premalatha transferred the property to the Plaintiff,Mangalika Jayasinghe, by Deed No. 14512 as aforementioned, it has to be carefully looked into, legally , as to any grounds on which the third person Mangalika can be held, to hold the property in trust for the Defendant, Udeni, who had sold the land firstly by a deed of transfer to Premalatha? **There exists no transaction between Mangalika and**

Udeni. There cannot be any trust with a third person, even if there existed a trust between the first transferor and the transferee. The 'holding in trust' concept cannot pass from one person to another. It is a concept in law which does not have the quality of the said concept getting transferred from one person to another.

The entries in the Land Registry with regard to title to immovable properties are what matters to see whether any property is free of encumberances. The person who buys the property from the person who has paper title, has no possible way to find out whether the earlier transaction of transferring the title was security for a loan where it could be held that the transferee was holding the property in trust for the transferor. In the case in hand, the Defendant **Udeni has signed as the second witness** to the Deed of transfer from Premalatha to the Plaintiff Mangalika as obvious from document P3 at page 54 of the brief. The purchase price of 6 lakhs had been paid in the presence of the Notary. The Defendant had not called the Notary as a witness**. I find therefore that Udeni knew that Premalatha was selling the land to Mangalika**. If Udeni**had a mind set of not giving up her title**, could she ever have signed that transfer deed as a witness? She would never have signed as a witness if she had the **slightest intention** of **keeping the property as owner of the property for herself.**

Having done so, the Defendant had signed as lessee the Deed No. 14513 on the same day agreeing to take the same property and the house on lease from Mangalika who is the Plaintiff. Udeni has stated in her evidence that the Notary had taken her signature on a blank paper and she did not know that she was entering into a lease with Mangalika the ownerof the property as the lessor and herself as the lessee. Yet, I find that it is a **printed standard lease form** in which the blanks were filled. It is then not a 'blank paper' on which she has signed. She had signed a lease agreement with the knowledge that it was a lease agreement. It is in the Sinhalese language and captioned in Sinhala as a 'Lease'.

According to Section 116 of the Evidence Ordinance, I fail to understand how the Defendant can claim to hold on to the property under any circumstances, as the owner of the property.

Section 116 of the Evidence Ordinance reads as follows:

" No tenant of immovable property , or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and
No person who came upon any immovable property **by the license of the personin possession** thereof shall be **permitted to deny that such person had a title** to **such possession** at the time when **such license was given**."

In the case of ***Dr. Rasiah Vs Yogambihai, SC Appeal 146/2013***, decided on 12.08.2015, reported in 2016 Bar Association Law Journal at page 84, it was decided that the lessee cannot challenge the title of the lessor when the lessee had signed the lease agreement with the Plaintiff lessor. The Court held that " the moment that a lease agreement is admitted, the need to prove title to the premises in question does not arise. **The lessor is entitled to get the over holding lessee ejected from the premises."**

In the case in hand, the Defendant when cross examined on the first date, had admitted that she signed the transfer deed giving title to Premalatha marked as V2. She had also admitted that she does not have **any other documents to show that it was a transfer of title given as security for a loan**. In fact she had not called any other witnesses and not produced any other documents to prove that it was not a proper sale, but only a loan. The Notary was not called to give evidence at all at least to verify matters in her favour as alleged by her against the Plaintiff. The District Judge should have disregarded the evidence of the Defendant who did not present herself in Court for further cross examination. The High Court Judge also should not have given any weight to the evidence of the Defendant due to the same reason of not being available for further cross examination.

I find that the Plaintiff had patiently and quite correctly waited until the end of the period of lease of two years before action was filed to eject the Defendant. The Plaintiff had sent a letter informing that action will be filed against the Defendant, which was not replied by the Defendant.

In the case of ***Gunasinghe Vs Samarasundara 2004, 3 SLR 28***, it was held by Justice Dissanayake in the Court of Appeal, that " A licensee or lessee is estopped from denying the title of the licensor or lessor. His duty in such a case is first to restore the property to the licensor or the lessor and then to litigate with him as to the ownership. The Plaintiff Respondent in such instances , was entitled to institute action against the Defendant Appellant **without first giving notice of termination of the leave and license."**

The District Judge had wrongfully decided that 'a notice to quit' had not been sent by the Plaintiff to the Defendant prior to filing action. The position of the Plaintiff was that a letter was sent which was admitted received and not replied by the Defendant. The Defendant was a lessee of the Plaintiff. According to the authority quoted above, the Plaintiff was entitled to institute action against the Defendant without even first giving notice of termination of the leave and license.

The Civil Appellate High Court had simply affirmed the reasoning given by the District Judge in her judgment and dismissed the Appeal before the High Court.

In the case of ***Muttammah Vs Thiyagarajah 1961, 62 NLR 559***, at page 564, Basnayake CJ held, referring to Section 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 the 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 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."

In the case in hand, if at all, the attendant circumstances to show that Udeni did not have any intention to dispose of the property can be supported only on the transfer of the property to Premalatha. Udeni cannot show any attendant circumstances for the 'lease of the property' transaction between Udeni and a

third party, who had bought the property from Premalatha, namely Mangalika. If Premalatha refused to transfer the property back to Udeni, when she paid the alleged loan she took from Premalatha with interest, then, Udeni could have shown the 'attendant circumstances' which demonstrates that there was no intention to transfer the property to Premalatha. Nothing of that sort has happened in this case. When the third party , Mangalika had signed a lease agreement with Udeni, after two years, Udeni cannot be heard to say that the lessor had held the property in trust under Section 83 of the Prescription Ordinance on behalf of Udeni. Constructive trusts can be alleged only against the transferee by the transferor in cases where it is a 'transfer' of property.

The concept of constructive trust does not pass from one person to another. Udeni cannot contest the ownership of the third person, Mangalika on the basis that Mangalika was holding the property in trust for her.

According to the many legal authorities on the subject of trust under Section 83 of the Trusts Ordinance, in the present case, I hold that the Defendant had failed to place any material before Court to demonstrate that the Plaintiff Mangalikahad held the property in trust for the Defendant. The relationship between the Plaintiff and the Defendant are lessor and the lessee, where the Defendant had accepted the total legal ownership of the lessor. If the Defendant had some other documents which are not notarially executed but shows the intention between the parties contrary to accepting the lessor as the lessor and the owner of the property on which the lessee had been holding on to the property intending to be on the property as owner and not a lessee, then, the case would have been different.

The Defendant in this case has tried **to just submit in her evidence** that when she passed the property to Premalatha by way of a transfer, Premalatha had held it in trust for her and when Premalatha transferred the property to Mangalika, the concept of alleged trust also had passed on to Mangalika and therefore Mangalika had been holding the property in trust for the Defendant. I decline to hold that argument as legally correct.

I answer the questions of law enumerated above against the Defendant Respondent Respondent and in favour of the Plaintiff Appellant Appellant. I set aside the Judgement of the Civil Appellate High Court dated 02.03.2016 as well as the judgment of the District Court dated 24.10.2014.

I do hereby grant the reliefs prayed for by the Plaintiff in paragraphs (a) , (b) and (c) of the Plaint dated 02.10.2008. The Appeal is allowed with costs.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 from the judgment of the Court of Appeal under and in terms of Article 128 (2) of the Constitution of the Republic.

DHILMI KASUNDA MALSHANI SURIYARACHCHI
No. 42/3, Thambwiliwatha Road,
Piliyandala.

PETITIONER

S.C. Appeal No. 184/2017
S.C. SPL. L.A No. 41/2017
C.A. Writ No. 187/2016

VS.

1. **SRI LANKA MEDICAL COUNCIL**
   No. 31, Norris Canal Road,
   Colombo 10.

2. **SOUTH ASIAN INSTITUTE OF TECHNOLOGY AND MEDICINE LIMTED**
   No. 60, Suhada Mawatha,
   Millenium Drive, Off Chandrika Bandaranaike Kumaratunga Mawatha, Malabe.
   Colombo.

3. **LAKSHMAN KIRIELLA**
   Minister of Higher Education and Highways, Ministry of Higher Education and Highways, Ward Place, Colombo 7.

4. **THE SECRETARY, MINISTRY OF EDUCATION AND HIGHWAYS**
   Ministry of Higher Education and Highways, Ward Place, Colombo 7.

5. **THE UNIVERSITY GRANTS COMMISSION**
No. 20, Ward Place, Colombo 7.

6. **DR. RAJITHA SENARATNE**
Minister of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, No. 385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

RESPONDENTS

AND NOW BETWEEN

SRI LANKA MEDICAL COUNCIL
No. 31, Norris Canal Road,
Colombo 10.

1ST RESPONDENT- PETITIONER/ APPELLANT

VS.

DHILMI KASUNDA MALSHANI SURIYARACHCHI
No. 42/3, Thambwiliwatha Road,
Piliyandala.

PETITIONER-RESPONDENT

2. **SOUTH ASIAN INSTITUTE OF TECHNOLOGY AND MEDICINE LIMTED**
No. 60, Suhada Mawatha,
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No. 20, Ward Place, Colombo 7.

6. **DR. RAJITHA SENARATNE**
Minister of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, No. 385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

2ND TO 6TH RESPONDENTS-RESPONDENTS

7. **THE GOVERNMENT MEDICAL OFFICERS' ASSOCIAITON**
No. 275/75, Prof. Stanley Wijesundera Mawatha, Colombo 7.

INTERVENIENT PETITIONER-RESPONDENT

BEFORE: S.E. Wanasundera, PC, J.
H.N.J. Perera J.
Prasanna Jayawardena, PC, J.

COUNSEL: Manohara de Silva, PC with Rajitha Hettiarachchi for the 1st Respondent- Petitioner/Appellant.
Romesh de Silva, PC with Sugath Caldera and Niran Anketell instructed by M/S Paul Ratnaike Associates for the Petitioner-Respondent.

	Faisz Musthapha, PC with Ms. Faisza Markar, Riad Ameen and Rushitha Rodrigo instructed by Ms. G.S. Thavarasa for the 2nd Respondent- Respondent. Sanjay Rajaratnam, Senior ASG with Zhuri Zain, SSC and Ms.Nayomi Kahawita, SC for the 3rd to 6th Respondents-Respondents. Gamini Marapana,PC with Navin Marapana and Tersha Abeyratne for the Intervenient Petitioner-Respondent
ARGUED ON:	29th January 2018, 01st February 2018, 02nd April 2018, 17th May 2018, 23rd May 2018 and 30th May 2018.
WRITTEN SUBMISSIONS FILED:	By the 1st Respondent- Petitioner/Appellant on 02nd November 2017 and 06th June 2018. By the Petitioner-Respondent on 02nd November 2017 and 06th June 2018. By the 2nd Respondent-Respondent on 06th November 2017 and 08th June 2018. By the 3rd to 6th Respondents-Respondents on 19th October 2017 and 05th June 2018. By the Intervenient Petitioner-Added Respondents on 06th November 2017 and 07th June 2018.
DECIDED ON:	21st September 2018.

Prasanna Jayawardena, PC, J.

On 30th May 2016, the Petitioner-Respondent ["petitioner"] in this appeal - Ms. Dhilmi Kasunda Malshani Suriyarachchi - obtained a MBBS degree awarded by the institution named the "South Asian Institute of Technology and Management Limited" ["SAITM"], which is the 2nd Respondent-Respondent to this appeal.

The petitioner believed that SAITM had been recognised to be a *"Degree Awarding Institute"* under the provisions of the Universities Act No. 16 of 1978, as amended.

As explained later on in this judgment, the provisions of the Medical Ordinance No. 10 of 1949, as amended, vest in the Sri Lanka Medical Council [SLMC], the duty and power of first provisionally registering and, thereafter, 'finally' registering *"medical practitioners"* in accordance with the provisions of that enactment.

The petitioner also believed that she was entitled to be *"provisionally registered"* as a *"medical practitioner"* by the Sri Lanka Medical Council [SLMC] under and in terms of section 29 (2) of the Medical Ordinance No. 10 of 1949, as amended, because she held

the required qualifications - namely, being of good character and holding a MBBS degree awarded by a *"Degree Awarding Institute"* recognised under the provisions of the Universities Act. In this regard, section 29 (2) of the Medical Ordinance states, *inter alia*, that *"….. a person shall, upon application made in that behalf to the Medical Council* [*ie:* the SLMC], *be registered provisionally as a medical practitioner - (a) if he is of good character; and (b) if he - (i) holds a degree of Bachelor of Medicine of the University of Ceylon or a corresponding university or a Degree Awarding Institute or the General Sir John Kotelawela Defence University; or ….."*.

On 06th June 2016, the petitioner submitted her application to the SLMC applying for provisional registration. However, SLMC refused to entertain the petitioner's application for provisional registration. SLMC took up the position that a person holding a MBBS degree awarded by SAITM was not eligible for provisional registration.

On 14th June 2016, the petitioner made an application to the Court of Appeal praying for, *inter alia*, a writ of *certiorari* quashing the decision of the SLMC to refuse to provisionally register the petitioner as a medical practitioner, a writ of *mandamus* compelling the SLMC to provisionally register the petitioner as a medical practitioner under and in terms of section 29 (2) of the Medical Ordinance and a writ of *prohibition* preventing the SLMC from refusing to provisionally register the petitioner as a medical practitioner. These writs were prayed for in prayers (e), (f) and (g) to the petitioner's petition in the Court of Appeal.

The petitioner named as the 1st to 6th Respondents to this application, the SLMC, SAITM, the Minister of Higher Education and Highways, the Secretary to the Ministry of Higher Education and Highways, the University Grants Commission and the Minister of Health, Nutrition and Indigenous Medicine.

Having heard learned President's Counsel in support of the petitioner's application, the Court of Appeal issued notice on the 1st to 6th respondents.

The SLMC filed its statement of objection. The Minister of Higher Education and Highways, the Secretary to the Ministry of Higher Education and Highways, the University Grants Commission and the Minister of Health, Nutrition and Indigenous Medicine filed a joint Statement of Objection. It appears that, SAITM did not file a Statement of Objections.

The petitioner and all the respondents were represented by learned President's Counsel when this application was taken up for argument before the Court of Appeal. Thereafter, by its Order dated 31st January 2017, the Court of Appeal issued a writ of *certiorari* quashing the decision of the SLMC refusing to provisionally register the petitioner as a medical practitioner, a writ of *mandamus* compelling the SLMC to provisionally register the petitioner as a medical practitioner and a writ of *prohibition* preventing the SLMC from refusing to provisionally register the petitioner as a medical practitioner, as prayed for in prayers (e), (f) and (g) to the petitioner's petition in the Court of Appeal.

On 13th March 2017, the SLMC filed an application in this Court seeking special leave to appeal from the Order of the Court of Appeal. The petitioner was named as the Petitioner-Respondent to this application. SAITM was named as the 2nd Respondent-Respondent. The Minister of Higher Education and Highways, the Secretary to the Ministry of Higher Education and Highways, the University Grants Commission and the Minister of Health, Nutrition and Indigenous Medicine were named as the 3rd to 6th Respondents-Respondents.

On 04th May 2017, four students at the Faculties of Medicine of State Universities made an application to intervene in the proceedings before this Court. On 25th May 2017, the Government Medical Officers' Association ["GMOA"] also made an application to intervene in the proceedings before this Court. On 06th July 2017, the medical students' application for intervention was refused and the GMOA's application for intervention was allowed.

Thereafter, the SLMC's application for special leave to appeal from the Order of the Court of Appeal was heard, over several days, by another bench of this Court. On 29th September 2017, the SLMC was granted special leave to appeal by a majority decision of that bench. Special leave to appeal was granted on sixteen questions of law. These questions of law will be listed later on in this judgment.

Subsequently, this appeal was argued before us on several days commencing on 29th January 2018 and ending on 30th May 2018. Thereafter, the parties have also tendered their written submissions.

While this appeal was pending, the Government has taken several steps with regard to SAITM and the students of SAITM. Eventually, on 28th June 2018, Parliament enacted the General Sir John Kotelawala Defence University (Special Provisions) Act No. 17 of 2018 which, *inter alia*, provided for the General Sir John Kotelawala Defence University to award, on such terms as may be determined by its Board of Management, a MBBS degree of that university to students who have completed the study programme leading to the award of a MBBS degree at SAITM. However, these steps were taken by the Government and the enactment of the aforesaid statute all occurred, long after the petitioner filed her application in the Court of Appeal and also long after the SLMC filed an application in this Court seeking this special leave to appeal from the Order of the Court of Appeal. It has been clearly stated on behalf of the petitioner that the petitioner is seeking a determination from this Court upon the appeal filed by the SLMC from the aforesaid Order of the Court of Appeal. In these circumstances, this Court is obliged to determine the SLMC's appeal based on the facts and circumstances which prevailed at the time the Court of Appeal made its Order and when the SLMC filed its application in this Court seeking special leave to appeal. Quite obviously, while the Order made by this Court will bind the parties with regard to the subject matter of this appeal, our Order will not affect the rights of the parties to this appeal to take such lawful steps as they may be entitled to under the provisions of the aforesaid Act No. 17 of 2018.

Before turning to the questions of law which are before us, it is necessary to consider: (i) the scheme of the Universities Act with regard to the recognition of institutions as *"Degree Awarding Institutes"* for the purpose of developing higher education through courses of study in various branches of learning; (ii) the scheme of the Medical Ordinance with regard to the provisional registration and 'final' registration of medical practitioners by the SLMC and also with regard to the SLMC's powers to examine and investigate recognised universities and institutions which provide courses of study leading to the grant of a medical qualification; (iii) the establishment of SAITM and the facts and circumstances which led to the petitioner's application to the Court of Appeal; (iv) the petitioner's grievance; (iv) the cases of the parties in the Court of Appeal and the Order of the Court of Appeal; and (vi) the SLMC's application seeking special leave to appeal from this Court.

The scheme of the Universities Act

In this regard, Section 25A of the Universities Act empowers the Minister of Higher Education, to make, subject to the provisions of section 70C, an Order recognising any institution as a *"Degree Awarding Institute"* for the purpose of *"developing Higher Education in such courses of study in such branches of learning, as are specified in such Order and subject to such conditions as may be specified"* in that Order. Section 147 of the Act states that the term *"Degree Awarding Institute"* means any institution recognised under the provisions of the aforesaid section 25A of the Universities Act.

Thereafter, Section 27 (1) (*b*) authorises the Minister of Higher Education to amend, vary or revoke an Order made under section 25A which recognises an institution as a *"Degree Awarding Institute"*.

Section 26 and section 27 (2) require that all Orders made under section 25A or section 27 (1) (*b*) must be published in the Gazette and tabled in Parliament.

Thereafter, Part IXA of the Universities Act, which contains sections 70A to 70P, deals with the *"POWERS OF DEGREE AWARDING INSTITUTES"* and also spells out the procedure to be followed before the Minister of Higher Education makes an Order under section 25A recognising an institution as a *"Degree Awarding Institute"*.

In this regard, section 70B (1) provides that the Minister of Higher Education may, by an Order published in the Gazette, appoint any person, by name or office, to be a "Specified Authority" for the purposes of Part IXA of the Act. Thereafter, section 70B (2) provides that the "Specified Authority" may, with the approval of the Minister, delegate any of his powers to such Standing Committees or *ad hoc* committees or officers, as may be determined by the "Specified Authority".

Next, section 70C (1) requires that, before the Minister of Higher Education makes an Order under section 25A recognising an institution as a *"Degree Awarding Institute"*, the

Minister shall obtain a report from the "Specified Authority" in relation to that institution, including the educational facilities provided therein.

With regard to the powers of a *"Degree Awarding Institute"* recognised by an Order made under section 25A, Section 70A specifies that, a *"Degree Awarding Institute"* recognised by an Order made under section 25A shall, with the concurrence of the "Specified Authority", have the power to: (i) admit students and provide instruction in the branches of learning specified in the Order; (ii) hold examinations to ascertain the students who have gained proficiency in the courses of study in such branches of learning; (iii) grant and confer degrees, diplomas, certificates and other academic distinctions on persons who have followed instruction in the courses of study in such branches of learning and passed such examinations; and (iv) grant and confer degrees on persons who have conducted research under its supervision.

Section 70C (2) states that, the Minister may, in consultation with the "Specified Authority", issue general or special directions to a *"Degree Awarding Institute"* recognised by an Order made under section 25A with regard to the manner in which that *"Degree Awarding Institute"* is to exercise its aforesaid powers.

Thereafter, section 70D provides that the "Specified Authority", subject to the direction and control of the Minister, is empowered to make determinations with regard to the requirements for admission of students to a *"Degree Awarding Institute"*, the courses of study to be provided by a *"Degree Awarding Institute"* and the examinations to be held by a *"Degree Awarding Institute"* and the degrees, diplomas and other academic distinctions to be awarded by a *"Degree Awarding Institute"*, the number of students to be admitted annually to a *"Degree Awarding Institute"*, the qualifications of the teaching staff of a *"Degree Awarding Institute"*, the facilities to be provided and academic standards to be maintained by a *"Degree Awarding Institute"* and some other functions of a *"Degree Awarding Institute".*

Finally, it should be mentioned that, section 137 in Part XIX of the Universities Act provides that the "Specified Authority" is empowered to make Rules to apply to matters falling within the scope of the Act.

The scheme of the Medical Ordinance

In this regard, the SLMC is a body corporate established by the Medical Ordinance.

Section 12 (3) stipulates that the SLMC shall perform the duties imposed on it by the Medical Ordinance and states that the SLMC *"may make representations to the Government on any matter connected with the medical profession in Sri Lanka."*.

Section 12 (1) of the Medical Ordinance specifies that the president of the SLMC and four other members of the SLMC are nominated by the Minister in charge of the subject matter of Health. Section 19D provides that the Minister may, on a complaint received

by him, direct any person to inquire into the affairs of the SLMC and the performance by the SLMC, of its duties under the Medical Ordinance.

With regard to the **role SLMC performs in the registration of medical practitioners**, Part IV of the Medical Ordinance deals with the Registers to be kept by the SLMC. Section 20 (1) stipulates that the Registrar of the SLMC shall keep a register of medical practitioners qualified to practice medicine and surgery in Sri Lanka.

Thereafter, Part V of the Medical Ordinance, which contains sections 29 to 42, deals, *inter alia*, with the procedure for the registration of medical practitioners and the effect of registration as a medical practitioner.

A perusal of the relevant provisions of Part V shows that the scheme of the Medical Ordinance is that a person who holds a MBBS degree or equivalent qualification and who wishes to practice medicine or surgery in Sri Lanka, must *first* obtain provisional registration as a medical practitioner from the SLMC under and in terms of section 29 (2) of the Medical Ordinance.

As mentioned earlier, section 29 (2) specifies, *inter* alia, that the Medical Council *"shall"* provisionally register as a medical practitioner a person if he is of good character and if he holds a degree of Bachelor of Medicine of a *"Degree Awarding Institute"*. Section 74 of the Medical Ordinance makes it clear that the term *"Degree Awarding Institute"* used in section 29 (2) has the same meaning as in the Universities Act - *ie:* an institution recognised as a *"Degree Awarding Institute"* by an Order made under section 25A of the Universities Act.

Next, persons who have been provisionally registered as a medical practitioner by the SLMC under section 29 (2) are entitled to obtain a certificate of experience from the SLMC immediately upon meeting the criteria specified in section 32 of the Medical Ordinance with regard to experience. Thereafter, persons who have been provisionally registered under section 29 (2) and who hold the aforesaid certificate of experience under section 32 are entitled to obtain, from the SLMC, `final' registration as medical practitioners under section 29 (1) of the Medical Ordinance.

By operation of sections 34, 38 and 39 of the Medical Ordinance, only persons registered as medical practitioners by the SLMC [*ie:* under section 29 (1) of the Medical Ordinance] may practice medicine or surgery in Sri Lanka.

Thus, obtaining provisional registration as a medical practitioner from the SLMC under section 29 (2) of the Medical Ordinance, is the mandatory first step on the road to practice medicine or surgery after obtaining a MBBS degree in Sri Lanka [other than in the limited circumstances envisaged in section 32 (6) of the Medical Ordinance].

Next, with regard to **the powers of the SLMC**, a perusal of the provisions of the Medical Ordinance shows that *"the powers"* of the SLMC are set out in Part IIIA of the Medical Ordinance which encompasses sections 19A, 19B, 19C, 19D and 19E of that Ordinance.

In this regard, section 19A empowers the SLMC to enter and examine and investigate recognised universities and institutions which provide medical education in order to ascertain whether the course of study provided by such universities and institutions, the degree of proficiency required at examinations held by such universities and institutions and the staff and facilities at such universities and institutions *"conform to the prescribed standards"*. Section 19B empowers the SLMC to require such universities and institutions to furnish information or explanations to the SLMC.

Thereafter, 19C (1) provides that, where the SLMC is satisfied that the *"prescribed standards"* have not been conformed with, SLMC may recommend to the Minister of Health that a qualification granted by such universities and institutions be not recognised for the purposes of registration under the provisions of the Medical Ordinance.

Section 19C (2) provides that, upon receipt of such a recommendation from the SLMC, the Minister is required to send a copy of that recommendation to the university or institution which is the subject of the recommendation and invite it to make its comments.

Finally, section 19C (3) provides that, where the Minister is satisfied, after examining the any comments made by the university or institution and after making such further inquiry as the Minister may consider necessary, that the university or institution *"do not conform to the prescribed standards"*, the Minister shall declare, by regulation, that any provision of the Medical Ordinance which enables the holder of a qualification issued by that university or institution to be registered under the Medical Ordinance, shall cease to have effect in relation to that university or institution - *ie*: that holding a qualification granted by that university or institution shall not entitle the holder of that qualification to obtain registration **under the Medical Ordinance**.

It should be mentioned that, section 19 (*e*) read with section 72 (1) and section 72 (3) of the Medical Ordinance empowers the Minister of Health, after consulting the SLMC, to make Regulations specifying the *"maintenance of minimum standards of medical education including standards relating to course of study, examinations, staff, equipment, accommodation, training and other facilities at the universities and other institutions which grant or confer any qualification which entitles a person to obtain registration under this Ordinance* [*ie:* registration under the Medical Ordinance]. Thereafter, section 72 (4) stipulates that any such Regulations made by the Minister must be gazetted but will not have effect until they are approved by Parliament.

The establishment of SAITM and the facts and circumstances which led to the petitioner's application to the Court of Appeal

The facts and circumstances which led to the petitioner's application to the Court of Appeal are set out below in a chronological sequence. They have been extracted from

the pleadings and annexed documents filed by the parties in the Court of Appeal. I have also taken into account the documents marked "G1", "G2", "4R8", "4R9(a)" and "4R9(b) which were not before the Court of Appeal but which were tendered to this Court by the petitioner and the 3rd to 6th respondents in the course of this appeal. These documents have been considered due to reasons which are set out later on in this judgment.

These facts and circumstances are set out in some detail in an attempt to record and understand the sequence of events and the effect of those facts and circumstances on the subject matter of this appeal. Doing so will assist our effort to correctly determine the sixteen questions of law which are before us.

On 30th June 1999, the **Minister of Higher Education** had, by his Order marked "1R1" with the SLMC's statement of objections in the Court of Appeal, appointed the Chairman of the University Grants Commission to be the "Specified Authority" for the purposes of Part IXA of the Universities Act. This Order was made under and in terms of section 70B (1) of the Universities Act.

SAITM was incorporated on 07th July 2008 with the object of carrying on the business of conducting courses of study in several fields of higher education and to establish affiliations with local and foreign universities. In October 2008, SAITM entered into an agreement with the Board of Investment to set up and carry on business as an institute of higher education. At its inception, SAITM offered courses of study in fields such as Information Technology and Management. SAITM was earlier named the "South Asian Institute of Technology and Medicine (Pvt) Ltd". Subsequently, that name has been changed to the present style of "South Asian Institute of Technology and Medicine Ltd". "South Asian Institute of Technology and Medicine (Pvt) Ltd" and "South Asian Institute of Technology and Medicine Ltd" is one and the same legal person.

In the month of February 2009, the **Minister of Health** had, acting under the provisions of section 19 (*e*) read with section 72 (1) and section 72 (3) of the Medical Ordinance referred to earlier, made the Regulations titled *"Medical Education (Minimum Standards) Regulations No. 01 of 2009"*. These Regulations spelt out the *"minimum standards for the purposes of section 29 of the Medical Ordinance"* which a university, medical school or other institution awarding medical degrees entitling the holder of that medical degree to obtain registration under the Medical Ordinance, must provide to its students through its curriculum. These Regulations were marked "P12(c)" with the petitioner's petition in the Court of Appeal.

However, it is common ground that these Regulations were *not* approved by Parliament at any stage. Therefore, by operation of section 72 (4) of the Medical Ordinance referred to earlier, the Regulations marked "P12(c)" did not come into force and had no effect at any time material this appeal. In any event, by a Notification dated 20th January 2010 published in the Gazette and marked "1R11", the Minister of Health rescinded the *"Medical Education (Minimum Standards) Regulation No., 1 of 2009"* marked "P12(c)".

Thus, at the times material to this application there have been *no* Regulations made by the Minister of Health under and in terms of the provisions of the Medical Ordinance, which specify the *"minimum standards"* that must be met by an university, medical school or other institution awarding medical degrees entitling the holder of that medical degree to obtain registration **under the Medical Ordinance**.

In or about the month of September 2009, SAITM commenced enrolling students for the MD degree programme offered by the Nizhny Novgorod State Medical Academy, which is an old established and well recognised State Medical Academy located in the city of Nizhny Novgorod in the Russian Federation. A medical degree awarded by the Nizhny Novgorod State Medical Academy has been recognised by the SLMC since 1998, as seen from the letters marked "P9" and "P12(a)" filed with the petitioner's petition to the Court of Appeal.

The MD degree programme commenced by SAITM in 2009 was a five year study course leading to a MD degree awarded by the Nizhny Novgorod State Medical Academy. The first four years were to be conducted by SAITM, at its campus in Malabe. The fifth year onwards was to be conducted by the Nizhny Novgorod State Medical Academy, at its campus in Nizhny Novgorod. Since 2009, SAITM enrolled a batch of students each year to follow this MD degree programme. 40 students were enrolled in 2009, 53 students in 2010 and 55 students in 2011. These students expected to obtain MD degree awarded by the Nizhny Novgorod State Medical Academy at the end of their degree programme.

By its letters dated 16th February 2009 and 21st April 2009 marked "P11(a)" and "P11(b)" with the petitioner's petition in the Court of Appeal, SAITM inquired from the SLMC as to what conditions SAITM should meet in setting up the aforesaid medical programme. In response, by its letters dated 28th May 2009 and 29th June 2009 marked "P12(a)" and "P12(b)", the SLMC took up the position that, the aforesaid Regulations marked "P12(c)" had not yet approved by Parliament and that once these Regulations are approved by Parliament, the SLMC would visit SAITM to ascertain whether SAITM meets the standards specified in these Regulations.

However by its subsequent letter dated 09th August 2010 marked "P13", the SLMC stated that, in its view, SAITM cannot exist as an *"off shore"* campus of the Nizhny Novgorod State Medical Academy but that, SAITM *"may however exist as a Degree Awarding Institute referred to in the Universities Act (Section 25 and 70A-70D of Part IXA) and also in the Medical Ordinance (Medical Amendment Act No. 25 of 1988)."*.

In these circumstances, SAITM changed the aforesaid degree programme to one which was to be conducted solely by SAITM and which would lead to a MBBS degree to be offered by SAITM. The Nizhny Novgorod State Medical Academy and the MD degree it was to award, dropped out of the picture. This change took place in the latter half of 2010.

In view of SAITM now conducting the entire degree programme which was intended to lead to a MBBS degree offered by SAITM, the need arose for SAITM to seek recognition as a *Degree Awarding Institute"* under and in terms of the provisions of the Universities Act. Accordingly, by its letter dated 25th January 2011 marked "P14" and documents annexed thereto, SAITM submitted an application to the Chairman of the University Grants Commission for SAITM to be awarded the status of a *"Degree Awarding Institute"*. As mentioned earlier, the Chairman of the University Grants Commission was, at that time, the "Specified Authority" for the purposes of Part IXA of the Universities Act.

Following the appointment of the Chairman of the University Grants Commission as the "Specified Authority" in 1999, the University Grants Commission had published the *"GUIDELINES AND APPLICATION FOR OBTAINING FOR [sic] DEGREE AWARDING STATUS FOR STATE AND NON-STATE HIGHER EDUCATIONAL INSTITUTIONS/INSTITUTES AND FOR THE DEGREES TO BE AWARDED BY INSTITUTIONS/ INSTITUTES GRANTED DEGREE AWARDING STATUS"* set out in document marked "1R2". These Guidelines have been issued on or prior to 13th January 2011, which is the only date mentioned in the document marked "1R2".

The fourth paragraph of these Guidelines marked "1R2" states *"It must be emphasized that the approval by the UGC and the Ministry of Higher Education for the degree awarding status and for professional study programmes does not automatically grant the registration for graduates of such programmes to practice the profession in the country. Therefore, it must be emphasised that the State/Non-State Higher Educational Institutions/Institutes which have been granted degree awarding status which offer professional study programmes leading to degrees such as Medical, Engineering, Architecture and other professional degrees must seek the compliance certification from the respective Specified Professional Bodies. Hence they may be required to submit their study programmes for periodic review by the specified professional bodies who are vested with the powers by Acts of Parliaments [sic] for maintaining standards of the respective professional degree programmes/professions and issue registration to practice."*.

Clause 5 in Part II of "1R2" states *"In the case of professional courses, the institution must have its own training facility/hospital or have access to a suitable teaching facility/hospital, as the case may be. If the training facility/hospital is a government concern, that partnership shall have been formalized through Memorandum of Understanding and operationalized through Agreements. In the case of study programme in medical sciences, the teaching hospital to which the students have access and provided with clinical training must conform into the standards stipulated by the Sri Lanka Medical Council."*.

It appears that these "Guidelines" have not been promulgated in the form of Rules made by the *"Specified Authority"* under section 137 of the Universities Act. The document

marked “1R2” produced by the SLMC is only a printout said to have been downloaded from the University Grants Commission website.

In any event, upon receipt of SAITM’s application marked “P14”, the University Grants Commission appointed two panels of its Quality Assurance and Accreditation Council Division to examine SAITM’s application and report to the University Grants Commission. One panel was to carry out an `Institutional Review’ of SAITM and the other panel was to carry out a `Programme Review’ of SAITM. In doing so, the University Grants Commission was acting in terms of the scheme set out in the “Guidelines” marked “1R2” which*, inter alia*, envisaged that, when an institution makes an application to be recognised as a *“Degree Awarding Institute”*, the University Grants Commission will arrange for that institution to be subjected to an “Institutional Review” and a “Subject Review” [or “Programme Review”]. In a broad sense, the “Institutional Review” was expected to focus on the governance, management, financial viability, facilities and academic planning of the institution and also the academic and research competencies of the staff of the institution. Also in a broad sense, the “Subject Review” [or “Programme Review”] was expected to focus on the admission criteria, academic programme and standards and quality assurance programs and student support/ welfare programs of the institution and also the teaching/training facilities provided to students of the institution.

The Quality Assurance and Accreditation Council Division‘s panel which carried out the `Institutional Review” issued its first report dated 22nd and 23rd February 2011 marked “P15(a)” and its final report dated 20th April 2011 marked “P15(b)”. A representative of the SLMC - Dr. Nonis - was a member of this panel.

The panel’s first report marked “P15(a)”, *inter alia*, identifies SAITM’s aforesaid application marked “P14” as being a *“Self Evaluation Report”* submitted by SAITM in terms of the scheme set out the “Guidelines” marked “1R2”. “P15(a)” goes on to state that, in the course of its “Institutional Review”, the panel has reviewed the following areas of SAITM’s structure as required by the scheme set out in “1R2”: (i) governance; (ii) management; (iii) financial viability; (iv) physical resources; (v) academic planning and development process and quality assurance procedures; and (vi) academic and research competencies of staff. Having conducted its review and reported its findings, the panel has stated that SAITM should be considered for provisional registration provided thirteen recommendations made in the report [relating the aforesaid areas] were satisfied.

Thereafter, the panel’s Final Report submitted three months later concludes that SAITM had satisfied twelve out of the thirteen recommendations made in the first Report. The only recommendation that remained unachieved was one relating to the formulation of proper schemes of recruitment for staff and an increase in the length of the probationary period of newly recruited staff. The panel went on to recommend, as its *“Final Decision”* that *“The Team having had several deliberations on its own and with the SAITM staff arrived at the following observations to* ***consider the SAITM for Provisional***

Recognition as a degree awarding Institute, as the institute demonstrated its commitment and capacity to uphold and sustain the values in higher education and achieve the goals and objectives as specified in the institute corporate plan. However, the panel recommended that a process review to be held after one (01) year to observe the progress and adherence to the suggestions/ recommendations made by the panel.".

The Quality Assurance and Accreditation Council Division's panel which carried out the "Programme Review" ["Subject Review"] issued its first Report dated 24 and 25th February 2011 marked "4R1" with the 3rd to 6th respondent's statement of objections in the Court of Appeal and its Final Report dated 01st July 2011 marked "P15(c)"/ "4R2". Two representatives of the SLMC - Dr. Ranasinghe and Dr. S.G. de Silva were members of this panel.

The panel's first report marked "4R1" also identifies SAITM's application marked "P14" as being a *"Self Evaluation Report"* submitted by SAITM in terms of the scheme set out the "Guidelines" marked "1R2". The report marked "4R1" goes on to state that, in the course of its "Program Review", the panel reviewed the following areas of SAITM's structure as required by the scheme set out in "1R2": (i) admission criteria and procedure; (ii) academic program; (iii) standards and quality assurance; (iv) academic and research competencies of staff (specific to the study program and discipline); (v) teaching/ training/hospital facilities specific to the study program; (vi) student support services and welfare. Having conducted this review and reported its findings, the panel has recommended that SAITM be reviewed again *"with a view to provisional recognition".*

The panel's Final Report marked "P15(c)"/"4R2", in its *"Conclusions"*, recommends that *"SAITM may be granted recognition by the UGC, subject to implementation of the following recommendations within a time period of six months and submission of comprehensive documentation as evidence of their implementation. Also a monitoring and Evaluation process will be conducted annually by the QAA Council of the UGC on implementation of recommendations stipulated by the Review Panel"*. Thereafter, the Final Report marked "P15(c)" lists eight recommendations which SAITM should be required to implement.

Thereafter, by his letter dated 11th July 2011 marked "4R8", the Chairman of the University Grants Commission [who was the "Specified Authority" at the time] recommended to the then Minister of Higher Education that SAITM should be granted *"Degree Awarding Status"* subject to SAITM fulfilling several specified conditions. The "Specified Authority"' added *"The effective date of the Order can be the date on which the Minister signs the Order."*.

Thereupon, the then Minister of Higher Education issued an Order under and in terms of section 25A of the Universities Act, signed by the Minister on 29th August 2011 and published in Gazette No. 1721/19 dated 30th August 2011 and marked "P4". By "P4",

the Minister stated that *"By virtue of the powers vested in me by section 25A of the Universities Act, No. 16 of 1978, I, Dissanayake Mudiyanselage Sumanaweera Banda Dissanayake, Minister of Higher Education, having obtained a report under section 70C of the aforesaid act in respect of the South Asian Institute of Technology and Medicine (Pvt) Ltd [SAITM] a company incorporated in Sri Lanka under the Companies Act No. 7 of 2007, do by this Order and subject to the conditions specified in the Schedule hereto, recognize the South Asian Institute of Technology and Medicine (Pvt) Ltd [SAITM] as a Degree Awarding Institute for the purpose of developing higher education therein, leading to the award of the Degree of Bachelor of Medicine and Bachelor of Surgery (MBBS)."*. The Order listed the *"APPLICABLE CONDITIONS"* referred to by the Minister. The Order went on to specify that, *"This Order shall apply to students seeking admission to the South Asian Institute of Technology and Medicine (Pvt) Ltd (SAITM) on or after the date of the coming into force of this Order."*.

The *"APPLICABLE CONDITIONS"* listed in the Order marked "P4" included: (a) maintaining an appropriate student/staff ratio; (b) making a commitment to provide, on a continued and uninterrupted basis, a teaching and academic programme leading to the award of a MBBS degree; (c) making a commitment to provide, on a continued and uninterrupted basis, facilities to conduct clinical training either at SAITM's own Teaching Hospital or by agreement with other Teaching Hospitals; (d) making a commitment to establish and provide, on a continued and uninterrupted basis, the required professorial units; (e) recruit adequate administrative staff, submit schemes of recruitment for academic and administrative staff, submit a corporate plan for five years, execute a Deed of Trust relating to the establishment of SAITM, submit a letter of offer issued by Bank of Ceylon to grant a construction loan of Rs.600 million to construct professorial units and to submit proof of adequate financial resources and a Financial Plan; (f) establish and provide lecture theatres, auditoriums and examination halls, tutorial rooms, laboratories, museums, facilities for sports and recreation, libraries, information technology facilities, research facilities, units for medical education and other related facilities which the Universities Grants Commission may require. The conditions specified in the Order marked "P4" broadly reflect the recommendations made in the aforesaid reports and the conditions referred to in the letter marked "4R8".

Sometime in 2011, the SLMC has formulated its *"GUIDELINES AND SPECIFICATION ON STANDARDS FOR ACCREDITATION OF MEDICAL SCHOOLS IN SRI LANKA AND COURSES OF STUDY PROVIDED BY THEM"* which are marked "P21"/"1R12".

However, these Guidelines marked "P21"/"1R12" have *not* been embodied in the form of Regulations made by the Minister of Health under and in terms of the Medical Ordinance. Further, the powers conferred on the SLMC by the provisions of Part IIIA of the Medical Ordinance do *not* include the power or authority to make any form of rules or guidelines which have lawful force or effect. Instead, section 19 read with section 72 of the Medical Ordinance make it clear that only the Minister of Health has the power to make Regulations under the Medical Ordinance.

By his Order dated 21st February 2012 marked "1R3", the then Minister of Higher Education, acting under section 70B (1) of the Universities Act, appointed the Secretary, Ministry of Higher Education to be the "Specified Authority" for the purposes of Part IXA of the Universities Act. Thus, from 21st February 2012 onwards, the "Specified Authority" for the purposes of Part IXA of the Universities Act has been the Secretary, Ministry of Higher Education.

As mentioned earlier, the Order marked "P4" stating that SAITM is recognised as a *"Degree Awarding Institute"*, specified that the said Order applies to students admitted to SAITM on or after the date the Order comes into force. As also mentioned earlier, SAITM had, in 2009, commenced admitting students to follow a five year study course leading to a MD degree awarded by the Nizhny Novgorod State Medical Academy and SAITM had, in about the latter half of 2010, changed that MD degree programme to one which would lead to a MBBS degree to be offered by SAITM. Thus, the Order dated 29th August 2011 marked "P4" was not applicable to students who had been admitted to SAITM from 2009 onwards and up to the date the said Order marked "P4" came into force.

In these circumstances, SAITM requested that, the Order marked "P4" be amended to apply also to students who had registered during the period from 15th September 2009 to 29th August 2011.

Following this request, the Secretary to the Ministry of Higher Education, who was the "Specified Authority", appointed an "Institutional Review Committee" to conduct an "Institutional Review" of SAITM *"focusing on the period up to 29.08.2011."*.

That committee submitted a report dated 23rd January 2013 marked "4R6". The committee, *inter alia*, stated that the 1002 bed Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital had commenced limited operations by then and was expected to be fully operational by March 2013. It was also observed that *"Clinical training has commenced with virtual patients. Hospital training was due to commence in early March 2013 with the admission of patients following the inauguration of the hospital."*.

The committee concluded that *"The batches of students admitted to the MBBS degree programme in 2009 and 2010 have missed certain clinical training for want of requisite facilities and staff at the time. In order to make up for such deficiencies, the degree programme of those students is to be extended by about six months without charging extra fees. Therefore upon completion of the MBBS degree programme following the extended period, the MBBS degree of those enrolled in 2009 and 2010 can be considered on par with that of those enrolled after 2011., Therefore, we recommend that conditional recognition be granted to the MBBS degree from the year of its commencement, i.e., from 2009 provided the students enrolled in 2009 and 2010 are given additional training and exposure to make up for deficiencies in the academic and training programmes for want of requisite facilities and staff."*. The committee also made

seven recommendations relating to measures to be taken with regard to improving library facilities, financial requirements and management structures and admission criteria for students.

In addition to the aforesaid "Institutional Review", the Secretary to the Ministry of Higher Education, who was the "Specified Authority", also appointed an "Accreditation and Quality Assurance Review Committee" to carry out a "Programme Review" to examine and report on *"Quality Assurance to ascertain the suitability of backdating the recognition of the Degree Awarding Status to the South Asian Institute of Technology and Medicine and the award of the Degree of Bachelor of Medicine and Bachelor of Surgery (MBBS) from 15th Sep 2009 to 29th August 2011. (Date of inception to the date of Degree Awarding Status)."*.

That committee issued the report dated 26th February 2013 marked "P16"/"4R7". The report, *inter* alia, states with regard to the *"Academic Programme"* of SAITM, *"The curriculum, syllabus and details of teaching learning activities were carefully scrutinized. The committee is of the view that the standards of the academic programme from the inception up to the date of the degree awarding status is comparable to the said standards of the academic programme since the date of degree awarding status and are of comparable quality to the state universities."*. With regard to *"Standards and Quality Assurance (Mechanism and Procedures)"*, the report states *"Academic planning as per the stipulations of the Quality Assurance and Accreditation Council* [*ie:* of the University Grants Commission] *appears to satisfy their authorities and requirements together with the requirements of the international standards."*.

The report of the committee concludes stating, *"Based on the criteria used by the Standing Committee on Accreditation and Quality Assurance for established state universities, committee is of the view that required quality had been maintained as regards to the academic programme from the date of inception (15th Sep 2009) to the date of award of the degree awarding status (29th August 2011). Considering the academic programme, the committee recommends backdating of the degree awarding status to the date of inception."*.

It is said that, till 2013, SAITM had been providing its students with para-clinical and clinical training by arranging for the students to access patients at some private hospitals. The report marked "P16"/"4R7" states that the committee *"was satisfied with the quality of such facilities."*.

By early 2013, the Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital had been established by the Chairman of SAITM and is affiliated to SAITM. That hospital was opened by the then Prime Minister. As set out in the brochure marked "C9" with the petitioner's counter affidavit in the Court of Appeal, it is said to be staffed by qualified and reputed medical personnel. It is said to have 1002 beds and five Professorial Units - namely, Medical, Obstetrics and Gynaecology, Surgical, Paediatric and Psychiatric. It is said to have four main Operating Theatres, an Emergency Treatment Unit, Medical and

Surgical Wards, Paediatric Wards, a Maternity and Gynaecology Ward, a Labour Room, a Neonatal Intensive Care Unit, Medical and Surgical Intensive Care Units, a Cardiology Unit, an Eye Unit, an ENT Unit, a Psychiatric Unit, a Dental Unit, a Physiotherapy Unit, a Radiology Department, a Microbiology Laboratory, a Biochemistry Laboratory, a Haematology Laboratory, other Laboratories, a CT Scanner and other advanced equipment. It must be said here that, although the Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital is said to be well equipped and have the services of qualified and reputed medical doctors, it has been dogged by relatively low patient numbers.

The hospital was about to commence its operations at the time the aforesaid "Accreditation and Quality Assurance Review Committee" committee prepared its report. In those circumstances and as evident from the report marked "P16"/"4R7", the committee did not conduct a review of the clinical training programme conducted at the hospital and stated that *"Committee considered that the hospital inspection was a courtesy visit as it is within the mandate of this committee."*. It is relevant to note here that, the clinical training programme provided by SAITM to the petitioner [who had commenced her MBBS degree programme in end 2009] would, in the normal course of events, be expected to have commenced in end 2011 or in 2012. Thereafter, clinical training would be expected to have continued till end 2015 or later - *ie:* over a further three years or more after the submission of the report marked "P16"/"4R7".

Thereafter, by his letter dated 06th August 2014 marked "4R9(a)", the Secretary to the Ministry of Higher Education [who was the *"Specified Authority"* at the time] inquired from the Chairman of the University Grants Commission [who had been the *"Specified Authority"* at the time the Order marked "P4" was made] whether SAITM had fulfilled the conditions specified in the Order marked "P4". By his letter dated 19th August 2014 marked "4R9(b)", the Chairman of the University Grants Commission advised the Secretary to the Ministry of Higher Education that SAITM had fulfilled all these conditions within the specified time.

Thereupon, the then Minister of Higher Education issued a further Order under and in terms of section 25A read with section 27 (1) (*b*) of the Universities Act, signed by the Minister on 26th September 2013 and published in Gazette No. 1829/36 dated 26th September 2013 and marked "P5". By this Order marked "P5", the Minister referred to his previous Order marked "P4" and amended it, as follows: *"1. With regard only to those students who are registered to read for MD degree of Nizhny Novgorod State Medical Academy through SAITM during the period from 15th September 2009 to 29th August 2011 and who had fulfilled the qualifications specified by the University Grants Commission for selection of students to Universities coming under the purview of the Universities Act, No. 16 of 1978, and who are agreeable to change their course of study to a course of study leading to the MBBS degree awarded by SAITM, the aforesaid Order shall for all purposes in respect only of such students, be deemed to have come into effect on the 15th day of September 2009, subject to such conditions as specified in*

the Schedule hereto.". The Schedule to the Order marked "P5" also specified that SAITM shall *"extend the period of study"* in respect of the students who had registered during the period from 15th September 2009 to 29th August 2011, by a further year from 26th September 2013 *"to enable such students to fulfill the requirements to be eligible for the MBBS Degree awarded by SAITM, without any additional charge of course fee from those students."* .

In the meantime, the Secretary, Ministry of Higher Education, in his capacity as the "Specified Authority" and acting under section 137 read with section 70C and section 70D of the Universities Act made the Rules titled *"Specified Authority (Powers relating to Recognition of Institutes as Degree Awarding Institutes) Rules No.1 of 2013"*.These Rules were published in the Gazette dated 22nd August 2013 and are marked "1R4a"/ "4R3".

Rule 31 of the Rules marked "1R4a"/"4R3" stated that *"All Non-State Institutes which have been recognised as Degree Awarding Institutes in pursuance to the Report made to the Minister by the Specified Authority under Section 70C of the Act and which offer study programmes leading to Degree in Medicine, Engineering, Architecture and other similar professional Degrees shall obtain compliance certification from the relevant Specified Professional Body and shall submit such certification to the Specified Authority."*. However, the Rules marked "1R4a"/"4R3" do not identify or list the "Specified Professional Bodies" which are referred to in Rule 31.

Thereafter, Rule 32 goes on to state that *"Subject to the direction and control of the Minister, the Specified Authority shall, from time to time, examine the performance of any such Degree Awarding Institute through a Quality Assurance Monitoring System established for the purpose, to ensure that the standards set out in these rules are maintained."*. Rule 33 stipulates that *"It shall be the duty of the Degree Awarding Institute to allow the Specified Authority or his authorised representative to visit the Institute during the working hours of any week day and to furnish when requested all necessary information, documents and other evidence necessary for quality assurance monitoring purposes."*. Thereafter, Rule 34 provides that *"The Specified Authority shall, subject to the direction and control of the Minister, inform any Degree Awarding Institute based on such quality assurance monitoring report, of the steps to be taken to maintain in proper standards of Degree Awarding status."*.

It should also be mentioned that Item 5 of Schedule II to "1R4a" "/"4R3" states *"In the case of study programme in medical sciences, the teaching hospital to which the students have access and provided with clinical training must conform into the standards stipulated by the Sri Lanka Medical Council."*.

Subsequently, the Secretary, Ministry of Higher Education, in his capacity as the "Specified Authority" published a notice in the Gazette dated 31st January 2014 marked "1R4b"/4R4" amending Rule 31 of the Rules marked "1R4a" "/"4R3" to read *"All Non State Institutes recognised as Degree Awarding Institutes in pursuance to the reports*

made to the Minister by the Specified Authority under Section 70C of the Act and which offer study programmes leading to Degrees in Medicine, Engineering, Architecture and other similar professional Degrees also may seek compliance certificates from respective professional bodies.".

It is seen from "1R4b"/"4R4" that the aforesaid amendment made on 31st January 2014 *removed* the requirement earlier specified in Rule 31 that a *"Degree Awarding Institute"* is required to obtain compliance certification from the relevant "Specified Professional Body" and submit such compliance certification to the "Specified Authority".

Instead, from 31st January 2014 onwards, Rule 31 made by the "Specified Authority" only stated that *"Degree Awarding Institutes"* have the option of choosing to seek [*"also may seek"*] compliance certification from *"respective professional bodies."* Further, from 31st January 2014 onwards, Rule 31 did not require *"Degree Awarding Institutes"* which did chose to seek compliance certification from *"respective professional bodies"*, to submit such compliance certification to the "Specified Authority".

By a letter dated 12th May 2014 marked "1R6", SAITM invited the SLMC to visit SAITM and the Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital. By "1R6", SAITM also advised the SLMC that *"SAITM is now a Degree Awarding Institute"* by operation of the Order marked "P4" and "P5" and that *"The Hospital is now in full operation. We have fulfilled all the conditions stipulated in the gazette notifications and informed the Secretary, Ministry of Higher Education (Specified Authority)."*. This letter was copied to the Minister of Higher Education and to the "Specified Authority".

In response to SAITM's letter marked "1R6", the SLMC forwarded a set of forms for SAITM to complete and submit to the SLMC.

SAITM then completed those forms and submitted them to the SLMC together with further data and information as set out in SAITM's letter dated 17th August 2014 marked "1R7b". By this letter, SAITM again advised the SLMC that "SAITM was a *"Degree Awarding Institute"* and stated that all the conditions specified in the Orders marked "P4" and "P5" had been fulfilled.

Thereafter, on 27th August 2014, the Secretary to the Ministry of Higher Education, who was the "Specified Authority", wrote two letters to SAITM stating that, SAITM has fulfilled all the conditions stipulated in the first Order marked "P4" and the second Order marked "P5". These two letters are marked "P6(a)" and "P6(b)". Copies of these two letters were sent to the University Grants Commission and to the SLMC.

Thereupon, by its letter dated 24th September 2014 marked "1R5", the SLMC wrote to the Secretary to the Ministry of Higher Education specifically referring to the two letters marked "P6(a)" and "P6(b)" and the Orders marked "P4" and "P5" and stating *"The Council has requested me to inquire from you the basis on which you certified that SAITM has fulfilled the requirements stated in the said gazette notifications."*. There is no evidence to suggest that, after writing this letter marked "1R5", the SLMC took any

further steps with regard to the confirmation issued by the "Specified Authority" [*ie:* his letters marked "P6(a)" and "P6(b)"] that SAITM has fulfilled all the conditions stipulated in the Orders marked "P4" and" P5".

Several months later, the Secretary, Ministry of Higher Education, in his capacity as the "Specified Authority", published another notice in the Gazette dated 02nd December 2014 marked "1R4c"/4R5" again amending Rule 31 of the Rules marked "1R4a"/"4R3" to read *"All Non-State institutes recognised as Degree Awarding Institutes which offer study programmes leading to Degrees in Medicine, Engineering, Architecture and other similar professional Degrees shall obtain a compliance certification from the specified professional body and submit such certification to the Specified Authority."*.

It is seen from "1R4c"/"4R5" that the second amendment made on 02nd December 2014 to Rule 31 *reinstated* the requirement that had been earlier specified in Rule 31 that a *"Degree Awarding Institute"* is required to obtain compliance certification from the relevant "Specified Professional Body" and submit such compliance certification to the "Specified Authority".

By its letters dated 11th June 2015 and 29th June 2015 marked "P17" and "P18", the SLMC informed SAITM that, the SLMC intended to visit SAITM *"in terms of section 19A of the Medical Ordinance"* to carry out a *"three-day inspection"* from 13th to 15th July 2015.

In pursuance of this intimation, a ten member team appointed by the SLMC visited SAITM and carried out an inspection.

Thereafter, the SLMC has submitted to the Minister of Health, a letter dated 04th September 2015 and marked "P19(b)" signed by Dr. S.T.G.R. de Silva who was the Registrar of SLMC at the time, and, a brief report dated 04th September 2015 signed by the President of the SLMC and marked "P19(c)" and a more detailed report marked "P19(d)" which has been signed by the ten members of the team sent by the SLMC and which bears the handwritten date of 04th September 2015.

By these documents, the SLMC has, acting in terms of section 19C (1) of the Medical Ordinance, recommended to the Minister of Health that medical degrees awarded by SAITM should not be recognized for the purpose of registration under the Medical Ordinance.

Thus, by the brief report marked "P19(c)" signed by the President of the SLMC, the SLMC has stated to the Minister of Health that the SLMC has *"decided to recommend to the Minister of Health that* ***THE DEGREE AWARDED BY SAITM SHOULD NOT BE RECOGNIZED FOR THE PURPOSE OF REGISTRATION UNDER THE MEDICAL ORDINANCE."***. The report marked "P19(d) submitted by the inspection team recommends *"…. Given the above deficiencies, the Inspection Team recommends that the SLMC does not recognise graduates who have completed the study programme*

currently provided by the Faculty of Medicine SAITM, as suitable for provisional registration.".

By his letter dated 25th September 2015 marked "P19(a)", the Minister of Health acted under section 19C (2) of the Medical Ordinance and invited SAITM to comment on the reports and recommendation submitted to him by the SLMC.

SAITM responded by its letter dated 20th October 2015 with several annexed documents, which were compendiously marked as "P20". In the letter marked "P20", SAITM has, *inter alia*, challenged the recommendation made by the SLMC and has also stated that the Inspection Team Report's conclusion *"runs contrary to the tenor of the report. The conclusion is also contrary to what was indicated to us by members of the committee at the "wrap up" meeting held at SAITM on 15.7.2015. We have with us a copy of the identical report with a different conclusion [which is unsigned]. That conclusion dovetails with the rest of the report. The conclusion is set out in the schedule 1; the pith and the substance of which is that the SLMC recognizes graduates of the faculty of medicine SAITM as suitable for provisional registration subject to certain conditions. You will observe that the conclusions of the two reports are contrary to one another and cannot be reconciled."*. In this connection, SAITM has annexed, as part of the documents annexed to "P20", an unsigned report said to have been prepared by the ten member team appointed by the SLMC. The body of this unsigned report is on similar lines to the detailed report "P19(d)". However, the conclusion is a recommendation by the team that the SLMC *"recognizes graduates of the Faculty of Medicine SAITM as suitable for provisional registration, subject to following conditions:"*. These conditions include the provision of access to a *"busy state hospital, so that students can be given intensive clinical exposure of one month each in Medicine, Surgery, Paediatrics and Obstetrics and Gynaecology….."*, requiring graduates of SAITM to pass a special licensing clinical examination administered by the SLMC, providing graduates of SAITM with access to a Judicial Medical Officer for a two week attachment and also access to the Medical Officer of Health of the area and, finally, scheduling an inspection of SAITM by the SLMC after five years, to assess the clinical training available at the Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital and to assess whether the arrangements for access to the Judicial Medical Officer and Medical Office of Health are in place.

SAITM has also pointed out that, although both SLMC's letter marked "P19(b)" and brief report marked "P19(c)" expressly state that the detailed report marked "P19(d)" was placed before the SLMC at its 556th meeting held on 28th August 2015, the detailed report marked "P19(d)" is dated 04th September 2015.

Thereafter, the Minister has *not* taken any action under section 19C (3) of the Medical Ordinance to declare, by regulation, that a holder of a MBBS degree granted by SAITM is not entitled to be registered **under the Medical Ordinance**.

The petitioner's grievance

The petitioner had enrolled as a student of SAITM in September 2009. She initially followed the MD degree programme which was expected to lead to a MD degree awarded by the Nizhny Novgorod State Medical Academy. Consequent to SAITM changing that course of study to a MBBS programme conducted solely by SAITM and leading to a MBBS degree to be awarded by SAITM, the petitioner followed the amended degree programme and expected to obtain a MBBS degree awarded by SAITM. Following the stipulation made in the second Order marked "P5" that students who had registered during the period from 15th September 2009 to 29th August 2011 should follow a further year of the course of study, the petitioner completed a further year of study. Thus, the petitioner sat for the MBBS final examination only in May 2016. She passed that examination very creditably, obtaining a Second Class Upper Division. On 30th May 2016, the Senate of SAITM awarded the petitioner a MBBS degree. A letter issued by SAITM certifying that the petitioner was awarded a MBBS degree and obtained a Second Class Upper Division, is marked "P3".

After obtaining her MBBS degree from SAITM, the petitioner sought to submit her application dated 06th June 2016 marked "P7" to the SLMC applying for provisional registration as a medical practitioner under and in terms of section 29 (2) of the Medical Ordinance.

The petitioner has, in her affidavit, affirmed to the fact that the SLMC refused to accept her application. That fact is corroborated by an affidavit affirmed by a Senior Lecturer at the SAITM who accompanied the petitioner when she went to hand her application to the SLMC. That affidavit is marked "P8".

The SLMC's refusal to accept the petitioner's application for provisional registration gave rise to the petitioner's application to the Court of Appeal seeking the writs of *certiorari*, *mandamus* and *prohibition* referred to earlier.

The petitioner's case in the Court of Appeal

The gravamen of the petitioner's case in the Court of Appeal was pleaded in paragraphs [3] to [16] of the petition, as follows: (i) since 2009, the petitioner has followed a course of study at SAITM, initially leading to a MD degree and later leading to a MBBS degree; (ii) in 2016, the petitioner was awarded a MBBS degree with a Second Class Upper Division from SAITM; (iii) by the Order dated 29th August 2011 marked "P4", the then Minister of Higher Education had recognised SAITM as a *"Degree Awarding Institute"* for the purpose of awarding a MBBS degree subject to several conditions specified in the said Order; (iv) the Order marked "P4" applied only to students admitted to SAITM after 30th August 2011; (v) by the later Order dated 26th September 2013 marked "P5", the then Minister of Higher Education amended his previous Order marked "P4" and made it applicable to students registered with SAITM during the period from 15th

September 2009 to 29th August 2011; (vi) by the letters dated 27th August 2014 marked "P6(a)" and "P6(b)", the Secretary to the Ministry of Higher Education confirmed that the conditions specified in the Orders marked "P4" and "P5" had been fulfilled by SAITM; (vii) on 06th June 2016, the petitioner applied to the SLMC for provisional registration as a medical practitioner under and in terms of section 29 (2) of the Medical Ordinance; (viii) the Registrar of SAITM informed the petitioner that the SLMC was unable to accept her application because students from SAITM were not *"registrable"*; (ix) the petitioner is entitled to be provisionally registered as a medical practitioner under and in terms of section 29 (2) of the Medical Ordinance because SAITM is a *"Degree Awarding Institute"* as referred to in section 29 (2) of the Medical Ordinance and the petitioner holds a MBBS degree awarded by a *"Degree Awarding Institute"* and the petitioner is of good character; (x) since the petitioner possesses the aforesaid qualifications, the SLMC is required by law to provisionally register the petitioner under section 29 (2) of the Medical Ordinance and an imperative requirement is placed on the SLMC to do so with the SLMC having no discretion in this regard; (xi) the SLMC has acted wrongfully and/or unlawfully and/or *mala fide* and/or unreasonably and/or capriciously and/or *ultra* vires its own powers and/or in excess of jurisdiction by refusing to provisionally register the petitioner as a medical practitioner under and in terms of section 29 (2) of the Medical Ordinance; and (xii) in these circumstances, the petitioner is entitled to writs of *certiorari*, *mandamus* and *prohibition* and interim orders, as described earlier in this judgment.

The petitioner pleaded that, although the aforesaid report marked "P19(d)" submitted by the team from the SLMC which inspected SAITM, explicitly treated the Guidelines published by the SLMC in 2011 and marked "P21"/"R12" as *"prescribed standards"* in terms of sections 19A and 19C of the Medical Ordinance, these Guidelines have no force or effect in law. The petitioner pleaded that, therefore, the SLMC had acted *ultra vires* and in excess of jurisdiction in purporting to inspect and examine SAITM and make a recommendation in terms of sections 19A and 19C of the Medical Ordinance.

The petitioner also pleaded that SLMC has exhibited a manifest bias against SAITM. In this connection, the petitioner averred that, the Registrar of the SLMC [Dr. S.T.G.R.de Silva] who held office at the time the SLMC conducted its aforesaid inspection and made its aforesaid recommendation to the Minister of Health in 2015, had a daughter who had earlier pursued a medical degree at SAITM but had been *"de-registered on account of non-payment of fees"* and on disciplinary grounds. The petitioner stated that, there was pending litigation between the Registrar's daughter and SAITM. In this regard, the petitioner filed marked as "P22(a) to "P22(d)", the affidavit dated 12th December 2011 submitted to the SLMC by the said Registrar of the SLMC in which he made a complaint against SAITM and also the Chairman of SAITM, the letter dated 30th December 2011 by which the SLMC called for an explanation from the Chairman of SAITM, the reply dated 13th February 2012 sent by the Chairman of SAITM and the plaint dated 17th February 2012 in an action filed in the District Court of Kaduwela by the daughter of the said Registrar of the SLMC against SAITM.

The petitioner went on to plead that, *"….. the instruction and training received by the Petitioner, as well as the clinical experience she was exposed to while a medical student at SAITM is on par and compares favourably with the training, education and experience received by students in other universities throughout the country. In particular, the quality of lecturers at SAITM and the fact that SAITM now has access to an affiliated private hospital are illustrative of the above. The Petitioner has the benefit of classes with comparatively fewer students ensuring greater individual attention from a highly qualified faculty; clinical exposure at other faculties; and ample clinical exposure to out-patient environment - in which, given the evolving nature of medical practice, many complex operations and procedures are conducted."*. In this connection, a detailed description by the petitioner of her clinical training and practical experience, was marked "P23". This document sets out what appears to be a detailed record of a considerable number of clinical rotations and appointments including professorial appointments in a number of fields of medicine and surgery. The names of the specialists who supervised the petitioner are stated together with a detailed description of the training and experience received by the petitioner.

The petitioner also referred to Fundamental Rights Application No. SC FR 532/2012 and CA Writ Application No.s W 25/2014 and W 457/2013 which had been filed seeking to impugn the Order marked "P4". The petitioner said that these applications had been dismissed or withdrawn. The related petitions and orders were marked "P28(a)", "P28(b)" and "P29(a)" to "P29(d)". Further, the petitioner referred to Fundamental Rights Application No. SC FR 208/2014 filed by a few students of SAITM seeking the provision of clinical training at State hospitals and stated that the Minister of Health had, *inter alia*, undertaken to provide that clinical training but had not complied with that undertaking, resulting in the institution of proceedings for Contempt of Court. The related petitions, orders and other documents were marked "P30(a)" to "P30(g)".

The petitioner pleaded that, *"SLMC's decision not to register her in terms of the Medical Ordinance as amended is ultra vires the authority of SLMC; motivated by manifest bias and made mala fides; is unreasonable, unlawful, in excess of jurisdiction and contrary to unequivocal statutory duty cast on it in terms of section 29 of the Medical Ordinance."*.

The SLMC's case in the Court of Appeal

In its Statement of Objections in the Court of Appeal, the SLMC averred that it *"….. is the only and apex professional body that inter-alia regulates the registration of graduates to be enrolled as medical practitioners …. with the sole objective and aim of maintaining adequate standards in the medical profession which ensures the safety and quality of healthcare afforded to patients in Sri Lanka."*. The SLMC went on to claim that, in terms of the Medical Ordinance, it was *"….. the sole authority to regulate and maintain minimum standards of medical education ….. at universities and other institutions which grant or confer a medical degree."*.

The SLMC took up the position that, the Guidelines marked "1R2" issued by the University Grants Commission were in force when the petitioner enrolled in SAITM and when the Order marked "P4" was issued by the Minister of Higher Education.

The SLMC then referred to the Rules marked "1R4a"/"4R3" published in the Gazette on 22nd August 2013 and pleaded that, by operation of Rule 31 of these Rules, SAITM was mandatorily required to obtain compliance certification from the SLMC. In this connection, the SLMC stated that, insofar as SAITM is concerned, the *"relevant Specified Professional Body"* referred to in Rule 31 of "1R4a"/"4R3" is the SLMC. In support of this contention, the SLMC also referred to Item 5 of Schedule II to "1R4a" which, as mentioned earlier, states *"In the case of study programme in medical sciences, the teaching hospital to which the students have access and provided with clinical training must conform into the standards stipulated by the Sri Lanka Medical Council."*.

The SLMC then stated that, the Order marked "P4" recognizing SAITM as a *"Degree Awarding Institute"* was subject to the conditions specified therein and pleaded that SAITM had not complied with one or more of the several conditions specified in the said Order. In this regard, the SLMC stated that, in particular, SAITM has *"failed to put in place facilities relating to the conduct of clinical training by the faculty, either at its own teaching hospital or in agreement with any other teaching hospital, as referred to in the applicable conditions in the said schedule"* of the Order marked "P4". The SLMC also stated that, the petitions filed in S.C. F.R. Application No. 208/2014 marked "P30(a)" and S.C. Contempt Application No. 3/2015 marked "P30(e)" established that, clinical training in the fields of *"Access to Rehabilitation Unit of National Institute of Mental Health"*, *"National Campaign/Vector Control Programme"*, *"Community Medicine"* and *"Medical Jurisprudence/Medico Legal"* were not available at the Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital. The SLMC further stated that, the Proceedings in S.C. Contempt Application No. 3/2015 marked "P30(f)" and "P30(g)" established that SAITM had not provided its students with clinical training in the fields of *"Forensic Training"*, *"Public Health Training"*, *"Psychiatric Training"* and *"Vector Control"*.

Thereafter, the SLMC averred that the statements made by the Secretary to the Ministry of Higher Education [*ie:* the "Specified Authority"] in the letters marked "P6 (a)" and "P6(b)" confirming that the conditions specified in the Order marked "P4" had been fulfilled, *"appears to be false"*. The SLMC also pleaded that the letters marked "P6(a)" and "P6(b)" *"certainly cannot have reference to conditions which apply continuously."*.

The SLMC went on to aver that, the medical degree awarded by SAITM *"is subject to a Compliance Certificate"* being issued by the SLMC in favour of SAITM and that, *"unless and until a Compliance Certificate is issued"* by the SLMC *"as required by the aforesaid UGC Guidelines and Rules published in the said Gazette"* the medical degree awarded by SAITM *"cannot and should not be regarded in law, to be a MBBS Degree within the meaning of Section 29(2) of the Medical Ordinance for the purpose of granting Provisional Registration."*. Thereafter, the SLMC stated that, SAITM *"has admittedly*

failed to secure a Compliance Certificate in terms of the aforesaid Guidelines/Rules.". [The *"Guidelines/ Rules"* referred to by the SLMC have to be the Guidelines set out in "1R2" and the Rules set out in "1R4a"/"4R3"].

Thereafter, SLMC pleaded that, the provisions in Part IIIA of the Medical Ordinance authorize the SLMC to enter and examine and investigate a university or other institution that provides medical education to ascertain whether the course of study provides the degree of proficiency required to confer a medical degree and whether the staff, equipment and other facilities *"conform to prescribed standards"*. SLMC stated that, where it is found by the SLMC that a university or other institution do not conform the prescribed standards, the SLMC *"is entitled to recommend to the Minister that such qualification should not be recognized for purposes of registration."*.

The SLMC states that the report marked "P19(d)" submitted by the ten person team sent by the SLMC to inspect SAITM was tabled before the SLMC on 28th August 2015. The SLMC says that, seven members of the ten person team had signed this Report by 28th August 2015 and that the other three members of the team signed the Report on 04th September 2015 and the latter date was written on the Report. In this connection, two affidavits by signatories to "P19(d)" were marked "1R9" and "1R10".

The SLMC then avers that, at its 556th meeting held on 28th August 2015, the SLMC evaluated the findings and observations contained in the report marked "P19(d)" in the light of the SLMC's "Guidelines" marked ""P21"/"1R12" and that the SLMC *"decided to recommend to the Hon. Minister of Health that the DEGREE AWARDED BY SAITM SHOULD NOT BE RECOGNIZED FOR THE PURPOSE OF REGISTRATION UNDER THE MEDICAL ORDINANCE."*.

With regard to the findings of the ten person team which are set out in the report marked "P19(d)", the SLMC pleaded that, the *"main deficiencies identified by the Inspection Team"* are: (i) *"**General Inadequacy of clinical exposure in all areas** in terms of numbers and case mix is of grave concern. In particular, exposure to trauma in Surgery, common surgical emergencies and obstetrics and gynaecology, as well as exposure to emergencies in adult medicine and paediatric care is lacking. The Faculty is making an attempt to overcome these deficiencies, but it is still insufficient at present."*; (ii) *"Lack of facilities for training in practical clinical **Forensic Medicine** e.g. to examine and carry out medico-legal post-mortem examinations."*; and (iii) Deficiency in exposure to **preventive care services in the state sector** i.e. the MOH Office activities and field services.

The SLMC went on to state that, *"the clinical training which is received by students of the 2nd Respondent [ie:* SAITM] *is far from satisfactory in terms of case numbers and the desired mix of patients as opposed to the clinical training received in the State Medical Faculties, where there is a large number and a variety of patients for students to learn the techniques of medical diagnosis and treatment."*. In this regard, the SLMC alleged that, on the face of the document marked "P23", the clinical training received by

the petitioner *"….. is far from adequate."* The SLMC also alleged that, the clinical exposure recorded in "P23" refers *"to numerous ad hoc informal arrangements with individual consultants working in private sector hospitals."*. The SLMC alleged that *"the clinical training at SAITM depends heavily on the use of models, mannequins and healthy people pretending to be ill (play-acting) as opposed to real patients and real human organs of the body, which deprives those students of real life situations and experiences and feelings of empathy."* . The SLMC also alleged that, the medical examinations conducted by SAITM *"are not supervised by any authority nor is it supervised by the 1st Respondent* [*ie:* the SLMC] …."*.*

In summary, the SLMC pleaded that, the clinical training provided at the Neville Fernando Sri Lanka-Russia Friendship Teaching Hospital *"does not conform to the standards stipulated by the Sri Lanka Medical Council"* as required by the Guidelines marked "1R2" issued by the University Grants Commission and the Rules marked "1R4a"/"4R3" issued by the Secretary to the Ministry of Higher Education. The SLMC also pleaded that, the Guidelines marked "1R2", the Rules marked ""1R4a"/"4R3" and the Guidelines marked "1R12"/"P21" published by the SLMC should necessarily be considered when interpreting the provisions of section 29 (2) of the Medical Ordinance with regard to the requirements for the provisional registration as a medical practitioner.

The SLMC pleaded that, in the circumstances set out above, the petitioner's application should be dismissed.

It should be mentioned that, the SLMC also raised several preliminary objections in its Statement of Objections. By its Order dated 31st January 2017, which is being challenged before us, the Court of Appeal rejected all those preliminary objections. This Court has not given special leave to appeal with regard to the decision of the Court of Appeal in respect of any of these preliminary objections. Therefore, it is unnecessary for me to make any further reference to the preliminary objections taken by the SLMC in the Court of Appeal.

The 3rd to 6th respondents' position in the Court of Appeal

The 3rd to 6th respondents - namely, the Minister of Higher Education and Highways, the Secretary to the Ministry of Higher Education and Highways, the University Grants Commission and the Minister of Health, Nutrition and Indigenous Medicine - filed a joint Statement of Objections.

The 3rd to 6th respondents stated that *"SAITM has requested the degree awarding status to award degrees on Medicine from the UGC by their letter dated 25th January 2011* [*ie:* "P14"]*. Accordingly, UGC as the then Specified Authority conducted a subject review and an institutional review of the SAITM thoroughly. Finally, degree awarding status was granted by the Ministry of Higher Education in terms of section 25A of the Universities Act by issuance of an Extraordinary Gazette Notification No. 1721/19 dated*

*30/08/2011 subject to eight (08) conditions mentioned therein (Vide-P4).".*On the same lines, the 3rd to 6th respondents also averred *"….. the University Grants Commission (UGC) at its 829th meeting held on 07th July 2011 recommended that SAITM should be allowed to award the MBBS degree while allowing SAITM to fulfil shortcomings within the given time period as stipulated in the recommendations. The Hon. Minister of the Ministry of Higher Education by Extraordinary Gazette Notification No. 1721/19 dated 30th August, 2011* [*ie:* "P4"] *granted permission to the SAITM to award the MBBS degree with effect from 30th August 2011."*.

Next, the 3rd to 6th respondents referred to the reports marked "4R6" and "P16"/"4R7" and averred that *"According to the above two reports Extraordinary Gazette No. 1721/19 dated 30.08.2011* [*ie:* "P4"] *was amended by Extraordinary Gazette No. 1829/36 dated 26.09.2013* [*ie:* "P5"] *giving provision to students who have been registered to read for MD degree at NNSMA during the period from 15.09.2009 to 29.08.2011 and who have fulfilled the qualifications specified by UGC to enrol with the MBBS programme."*.

The 3rd to 6th respondents stated that SAITM *"*is a *"Degree Awarding Institute"* in terms of the Medical Ordinance.

The petitioner's counter affidavit

The petitioner filed a Counter Affidavit to which were annexed the documents marked "C1" to "C10(d)".

The document marked "C2" is the SLMC's Annual Report for the Year 2009. The petitioner highlighted the fact that, the SLMC has stated in "C2" that the Faculty of Medicine of the Rajarata University of Sri Lanka lacks the resources required for training undergraduate medical students. The document marked "C4" is a report of a preliminary inspection of the Faculty of Medicine of the Kotelawala Defence University, which was conducted on 13th March 2015 by a team representing the SLMC. The petitioner highlighted that, despite the fact that the Faculty of Medicine of the Kotelawala Defence University did not then have an affiliated teaching hospital and clinical training was done *"at 12 centres"*, the team sent by the SLMC had concluded that, *"the facilities provided for training were found to be of a very high standard and the team felt that once the hospital was completed in 2015, the entire training of military medical graduates could be undertaken in these facilities."*. The petitioner pleaded that, despite the aforesaid deficiencies in the Medical Faculty of the Rajarata University of Sri Lanka and the Faculty of Medicine of the Kotelawala Defence University, the SLMC registered graduates of those institutions and *"maliciously imposes a different standard for medical graduates of the 2nd Respondent - SAITM which do not have the foregoing deficiencies of KDU and Rajarata University."*.

The petitioner also pleaded that, *"at the request of UGC/His Excellency the President, the 2nd Respondent* [*ie:* SAITM] *has granted scholarships to 07 students who secured excellent results at the Advanced Level which is also a further manifestation of the legitimate expectation that at all times the Government itself held out that holders of MBBS degree of the 2nd Respondent-SAITM will be admissible for registration with the 1st Respondent* [*ie:* the SLMC] *and pursuant thereto these students have also devoted their valuable time to following this course; …."*. In this connection, the petitioner produced marked "C10(a)" a letter dated 12th March 2013 sent to SAITM by the University Grants Commission and marked "C10(b)" photographs of His Excellency, the then President presenting these scholarships to four of these students on 28th March 2013.

The Order of the Court of Appeal

The relevant sections of this Order will be referred to when dealing with the questions of law which have to be decided by this Court.

The Court of Appeal also considered whether the SLMC had acted *mala fide* with regard to the petitioner's application for provisional registration and with regard to SLMC's dealings with SAITM. In this regard, the Court of Appeal observed that: SLMC has admitted that, the report marked "P19(d)" had been presented to the SLMC at its 556th meeting held on 28th August 2015 even prior to three members of the team which had investigated SAITM placing their signatures on the report. The Court of Appeal also analysed the report marked "P19(d)" and observed that *"When considering the observations made by the investigators as referred to above it is clear that the above observations does not match with the final recommendation made by them."*. The Court of Appeal considered the report marked "C4" submitted to the SLMC by the team which examined the Faculty of Medicine of the Kotelawala Defence University and compared that report marked "C4" with the report marked "19(d)" on SAITM. Having done so, the Court of Appeal commented *"When considering the two reports referred to above, it appears that one report has been made after inspecting SAITM and the other after inspecting FOM-KDU but two different standards have been used, when preparing those reports."*. Thereafter, the Court of Appeal held that *"When considering the conduct of the 1st Respondent* [*ie:* the SLMC] *referred to above, it is clear that the said Respondent had acted outside its power and acted ultra vires the provisions of the Medical Ordinance (as amended) but, the material before this court was not sufficient to conclude that the said conduct of the 1st Respondent was with an ulterior motive. In the said circumstances I am reluctant to conclude that the above conduct of the 1st Respondent* [*ie:* the SLMC] *amounts to an act committed mala-fide but conclude that the steps taken by the 1st Respondent* [*ie:* the SLMC] *after submitting its recommendation under section 19C (1) of the Medical Ordinance (as amended) was made ultra-vires without having any power to do so."*.

The SLMC's application to this Court for special leave to appeal

As mentioned earlier, the SLMC made an application to this Court seeking special leave to appeal from the aforesaid Order of the Court of Appeal. As also mentioned earlier, the GMOA made an application to intervene in these proceedings and that application for intervention was allowed by this Court.

In their application for intervention, the GMOA echoed the contentions advanced by the SLMC that SAITM was mandatorily required to obtain compliance certification from the SLMC but has failed to do so, that the Order marked "P4" is a conditional order and one or more of the conditions specified in "P4" have not been fulfilled by SAITM and that the letters marked "P6(a)" and "P6(b)" are *"false"* and *"have no validity in law in the absence of a formal and permanent order being Gazetted by the Minister replacing the said conditional recognition."*.

The questions of law to be decided

As mentioned earlier, this Court has, by a majority decision, granted the SLMC special leave to appeal on sixteen questions of law. These questions of law are reproduced *verbatim*:

1] the said order is contrary to law and against the weight of evidence,

2] the Court of Appeal erred in holding that the 2nd Respondent-Respondent SAITM had been declared as a Degree Awarding Institution and continued to be a Degree Awarding Institution empowered to grant and confer the MBBS Degree on the Petitioner-Respondent, when P4 is only a conditional order issued under Section 25A of the Universities Act and the rules and guidelines framed under Section 70D of the Universities Act, which require the Degree Awarding Institution to obtain a Compliance Certificate, complying inter alia with the said conditions. Therefore P4 being only a conditional order and in the absence of a compliance certificate as required by the Rules and Guidelines framed under the Universities Act, the 2nd Respondent cannot be treated in law as a recognised Degree Awarding Institute.

3] Further the Court of Appeal failed to consider that the Minister had not made any order varying or setting aside the conditional order made under Section 25(a) in terms of Section 27 of the Universities Act.

4] The Court of Appeal further failed to consider and/or appreciate that the letters P6a and P6b issued by the 4th Respondent-Respondent cannot be considered as sufficient proof of the conditions set out in the said Conditional Order being fulfilled, inasmuch as, the Rules and/or Guidelines require the 2nd Respondent-

Respondent to obtain a compliance certificate issued by the SLMC as morefully set out in this Petition.

5] In the absence of a specific operative date given in the order made under Section 25A, the Court of Appeal erred in holding that the said order was in force and operative. The Court of Appeal failed to appreciate that Section 26 of the Universities Act was mandatory and non-compliance with the same was fatal. The Court of Appeal erred in holding that the operative date of the order was 29/08/2011 when the order itself does not specify an operative date. The Court of Appeal erred in accepting the date given by the 2nd Respondent-Respondent in the absence of an operative date in the order.

6] The Court of Appeal erred in accepting P5 as a valid order made, which is retrospective in effect and therefore the Court of Appeal further erred in holding that the Petitioner's application for provisional registration should be allowed, notwithstanding the fact that the recognition was made retrospectively which has no force or effect in law, and the Court of Appeal misdirected itself in holding that a retrospective Order made by P5 is valid in law.

7] The Court of Appeal erred and misdirected itself by holding that the 1st Respondent-Petitioner is compelled to grant provisional registration as a Medical Practitioner to the Petitioner-Respondent as per Sections 29(2) and 32 of the Medical Ordinance, notwithstanding the 2nd Respondent-Respondent's failure to obtain a compliance certificate as required by the Rules/Guidelines framed under the Universities Act.

8] The Court of Appeal misdirected itself in interpreting and applying Rule/Regulation 31 and 32 framed under the Universities Act and making its findings on the basis that the absence of a compliance certificate issued by SLMC did not affect the recognition of the 2nd Respondent as a degree awarding institute.

9] The Court of Appeal erred by failing to hold that in the absence of a Compliance Certificate required in terms of Regulation No. 31 above, the 2nd Respondent-Respondent could not have been duly recognised as a Degree Awarding Institute.

10] The Court of Appeal failed to consider and/or appreciate that the purported Order made under Section 25A of the Universities Act (vide P4), which purportedly recognised the 2nd Respondent as a Degree Awarding Institute is a conditional order requiring the fulfilment of several conditions set out in the schedule therein, some of which have not been fulfilled even to-date, as evinced by the Report of the Inspection Team comprising of 10 individuals appointed by the SLMC and the consequent decision of the SLMC made in terms of Section 19C of the Medical Ordinance [vide P17 to P19(d)].

11] The Court of Appeal erred and misdirected itself by directing the 1st Respondent-Petitioner to grant provisional registration as a Medical Practitioner to the Petitioner-Respondent as per Sections 29(2) and 32 of the Medical Ordinance.

12] The Court of Appeal erred in holding that the 1st Respondent had differently treated the 1st Respondent Petitioner institute vis-à-vis Kothalawela Defense University. In any event, the Court of Appeal failed to appreciate that the said university is a state institute which has access to state resources, i.e. hospitals and other facilities which is not the case with regard to the 2nd Respondent-Respondent University.

13] The Court of Appeal also failed to consider Section 39 of the Medical Ordinance which empowers a provisionally registered person from practicing medicine, surgery, and midwifery, and it was the prime duty of the Petitioner, being the sole regulatory body, to satisfy itself with regard to the standards maintained by the 2nd Respondent-Respondent.

14] The Court of Appeal erred in holding that "in the absence of any finding by the Minister under Section 19C(3) of the Medical Ordinance there is no obstacle with the SLMC to act under Section 29(2) of the Medical Ordinance and provisionally register the Petitioner" when the 1st Respondent Petitioner is the sole regulatory authority with regard to the Medical profession.

15] The Court of Appeal erred in holding that the Petitioner Respondent has a "legal right to provisionally register under section 29(2) of the Medical Ordinance (as amended) since she has fulfilled the necessary requirements under the Ordinance.".

16] The Court has erred in deciding to grant the relief as prayed by the Petitioner in paragraph (e), (f) and (g) to the Petition.

Before considering these sixteen questions of law, it is necessary to refer to two preliminary objections raised by the petitioner in the written submissions dated 02nd November 2017, which were filed before this appeal was taken up for argument. Firstly, the petitioner contends that this appeal should be dismissed because the SLMC has failed to annex to its petition to this Court seeking special leave to appeal, the written submissions filed by the parties in the Court of Appeal and the applications for intervention filed in the Court of Appeal by the GMOA, the Registrar of the SLMC and other persons. The petitioner submits that, the failure to annex these documents constitutes a breach of the requirements specified in Rule 2 read with Rule 6 of the Supreme Court Rules 1990. Secondly, the petitioner contends that, the SLMC has failed to come to this Court with clean hands. In this regard, the petitioner submits that the SLMC has suppressed the aforesaid documents from this Court and also submits that the SLMC has sought to mislead the Court of Appeal and this Court with regard to content and effect of SLMC's reports marked "P19(c)" and "P19(d)".

However, Mr. Romesh de Silva, PC appearing for the petitioner did not advance either preliminary objection at the time the arguments were heard by us. In any event, with regard to the first preliminary objection, the written submissions filed by the parties in the Court of Appeal have been subsequently tendered by the SLMC without any objection made by the petitioner. Thus, these written submissions are now before us. The applications for intervention were rejected by the Court of Appeal and are not relevant to this appeal in the absence of the petitioner having drawn our attention to any material in those applications which cut across the SLMC's case before us. With regard to the second preliminary objection, the documents marked "P19(c)" and "P19(d)" were before the Court of Appeal and are before us. Learned President's Counsel who appeared for the SLMC in the Court of Appeal and learned President's Counsel who appeared for the SLMC in this Court have made their submissions based on the contents of these documents. I see no basis to form a view that an attempt was made to mislead either Court. For these reasons, the two preliminary objections are overruled.

This appeal will be decided on its merits.

Question of law no. [1] is whether the Order of the Court of Appeal is contrary to the law and against the weight of the evidence. That question can only be considered after the other questions of law are decided.

The first part of question of law no. [2] and question of law no.s [3] and [10] raise the issue of whether the Court of Appeal erred by failing to realise that the Order marked "P4" is *"only a conditional order"* which remains inoperative in the absence of a further Order made by the Minister stating that SAITM is unconditionally recognised as a *"Degree Awarding Institute"* because the conditions specified in "P4" have been fulfilled. Question of law no. [10] also raises the related issue of whether the SLMC's reports marked "P19(c)" and "P19(d)" establish that these conditions have not been fulfilled. Therefore, these three questions of law can be considered together.

When considering these two issues, it has to be kept in mind that, as mentioned earlier, the recognition of an institution as a *"Degree Awarding Institute"* under and in terms of section 25A of the Universities Act is done solely under the provisions of the Universities Act and Rules made thereunder. No other enactment including the Medical Ordinance has any bearing on the recognition of an institution as a *"Degree Awarding Institute"* under and in terms of section 25A of the Universities Act. Further, as observed earlier, under and in terms of the scheme of the Universities Act, the sole authorities who exercise power or authority over an institution which seeks or which has been recognised as a *"Degree Awarding Institute"* are the Minister of Higher Education and the "Specified Authority".

With regard to the aforesaid first issue of whether the Court of Appeal erred by failing to realise that the Order marked "P4" is *"only a conditional order"* which remains inoperative until a further Order is made by the Minister, it is clear that both Orders marked "P4" and "P5" have specified conditions subject to which the Orders were made.

Next, section 25A of the Universities Act expressly provides for the Minister of Higher Education to recognise a *"Degree Awarding Institute"* subject to conditions which are to be specified in the Order made by him - *ie:* section 25A states that the Minister may make an Order under that section recognising an institution as a *"Degree Awarding Institute"* for the purpose of developing Higher Education in such courses of study in such branches of learning, as are specified in that Order *"….. and subject to such conditions as may be specified* [*ie:* in that Order]*…... "*.

It seems to me that, practical considerations require that the recognition of a *"Degree Awarding Institute"* would, usually, have to be subject to conditions which are to be met - these conditions could be one-off conditions which are to be satisfied in respect of management structure, staff strength, financial stability, premises and other facilities which are tangible or objective criteria and also continuing conditions with regard to quality, skills and other subjective criteria. It has to be realised that the establishment of an institution of higher education is, invariably, a lengthy and expensive process and that it would, in most cases, be impractical [if not impossible] to satisfy all these criteria *before* that institution seeks the status of a *"Degree Awarding Institute"*. At the same time, it has to be also acknowledged that unless the institution obtains the status of a *"Degree Awarding Institute"*, it will be unable to continue to function and attract and enrol students and, thereby, become unable to satisfy the specified conditions. It seems to me that section 25A of the Universities Act seeks to prevent such a `Catch 22' situation from arising by specifically providing that the recognition of a *"Degree Awarding Institute"* can be subject to conditions - both one-off and continuing - which are to be met.

Thereafter, section 27 (1) (*b*) specifically empowers the Minister of Higher Education to amend, vary or revoke an Order made under section 25A granting recognition of a *"Degree Awarding Institute"*. Thus, a *"Degree Awarding Institute"* which fails to satisfy the conditions specified in the Order made under section 25A granting it that status, will become liable to suffer the revocation of its status as a *"Degree Awarding Institute"*. The revocation of that status could be done at any time after recognition as a *"Degree Awarding Institute"* by an Order made under section 25A. Thereby, the Minister is empowered to maintain continuous supervisory jurisdiction over the operations of a *"Degree Awarding Institute"* so as to ensure that it fulfils the conditions under which it was granted that status and to ensure that it continues to satisfy those conditions throughout its period of operation.

Thus, there is nothing unusual about the fact that, the Orders marked "P4" and "P5" stipulate that the recognition of SAITM as a *"Degree Awarding Institute"* is subject to the conditions which are to be fulfilled.

It is also clear that, where the Minister of Higher Education has made an Order under section 25A recognising an institution as a *"Degree Awarding Institute"* subject to specified conditions, the provisions of the Universities Act do not contemplate the Minister having to make a further Order confirming that these specified conditions have

been met. Instead, as mentioned earlier, provision is made in section 27 (1) (*b*) for the Minister to amend, vary or revoke an Order made under section 25A granting recognition of a *"Degree Awarding Institute"* if that institution fails to satisfy the conditions specified in the Order made under section 25A.

Therefore, there was no requirement for a further Order to be made by the Minister of Higher Education stating that the conditions specified in "P4" and "P5" have been fulfilled and that SAITM is unconditionally granted the status of a *"Degree Awarding Institute"*. On the contrary, the absence of an Order made by the Minister under section 27 (1) (*b*) amending, varying or revoking the recognition of SAITM as a *"Degree Awarding Institute"* is testament to the fact that SAITM continues to have the status of a *"Degree Awarding Institute"*.

Thus, the learned President of the Court of Appeal has observed the fact that *"Under the schedule to the said order* [*ie:"*P4"] *the applicable conditions have been specifically stated…."* and, after examining the facts placed before him, the learned President correctly held *"As far as the case in hand is concerned, this court is therefore satisfied that SAITM has been declared as a Degree Awarding Institution and continues to be a Degree Awarding Institution at all times relevant to the present application under the provisions of the Universities Act No. 16 of 1978 (as amended)"* and *"In the absence of any order made under section 27 (1) (b) revoking the order made by the Minister of Charge of Higher Education, it is clear that, SAITM is empowered to grant and confer the MBBS Degree on the Petitioner as per the provisions of the Universities Act (as amended) and there is no other impediment under the Universities Act for SAITM to grant and confer the said Degree to the Petitioner."*.

In this connection, it is also relevant to mention that, as observed earlier, the "Institutional Review Report" marked "P15(a)" recommended that SAITM be recognised provided thirteen recommendations listed in "P15(a)" were satisfied and, thereafter, the "Institutional Review Final Report" marked "P15(b)" has expressly stated that, twelve of the thirteen recommendations made in the previous report marked "P15(b)" have been satisfactorily met by SAITM. The only recommendation which had not been satisfactory complied with at the time "P15(b)" was issued on 20th April 2011 was the relatively incidental recommendation made in "P15(a)" with regard to properly documenting schemes of recruitment and producing evidence of the availability of staff. Next, as mentioned earlier, the "Programme Review Report" marked "4R1" has recommended that SAITM be recognised provided seven requirements listed in "4R1" were satisfied. Thereafter, the "Programme Review Report" marked "P15(c)"/"4R2" has also recommended that SAITM be granted provisional recognition subject to implementation of the eight recommendations specified in "P15(c)"/"4R2" and a monitoring and evaluation process to be conducted annually by the University Grants Commission. Thereafter, the "Institutional Review Committee" has submitted its report dated 23rd January 2013 marked "4R6". In addition to the aforesaid "Institutional Review", the "Accreditation and Quality Assurance Review Committee" appointed by the "Specified

Authority" carried out a "Programme Review" and issued the report dated 26th February 2013 marked "P16"/"4R7". This committee was chaired by the Dean and Professor of Surgery of the Faculty of Medical Sciences of the University of Sri Jayawardenapura and consisted of another Professor of the Faculty of Medical Sciences of the University of Sri Jayawardenapura, two Professors of the Faculty of Medical Sciences of the University of Ruhuna, the Acting Director of the Quality Assurance and Accreditation Council of the University Grants Commission and the Deputy Director General of Health Sciences of the Ministry of Health. As mentioned earlier, this committee has concluded that SAITM has maintained the required quality as regards SAITM's academic programmes and has recommended that the *"Degree Awarding Status"* granted to SAITM be made effective from 15th September 2009 onwards.

The aforesaid reports indicate that the conditions specified in the Orders marked "P4" and "P5" had been fulfilled by SAITM.

Mr. Manohara de Silva, PC appearing for the SLMC and Mr. Marapana, PC, appearing for the GMOA have submitted that the reports marked "P15(a)", "P15(b)", "4R1" and "P15(c)"/"4R2" cannot be considered because they do not bear the signatures of the members of the panels of the Quality Assurance and Accreditation Council of the University Grants Commission who prepared the reports made a similar submission.

However, the 3rd to 6th respondents - namely, the Minister of Higher Education and Highways, the Secretary to the Ministry of Higher Education and Highways, the University Grants Commission and the Minister of Health, Nutrition and Indigenous Medicine - have not disputed these reports. Further, they have produced "4R1" and have also produced marked "4R2" the report marked as "P15(c)" by the petitioner. In these circumstances, I see no reason to doubt the genuineness of the reports marked "P15(a)", "P15(b)", "4R1" and "P15(c)"/"4R2".

In its written submissions filed on 02nd November 2017, the SLMC has also sought to cast doubt on the reports marked "4R1" and "P15(a)" by pointing out that the report marked "4R1" by the 3rd to 6th respondents and the report marked "P15(a)" by the petitioner have different dates and different contents. However, it is a matter for concern that the SLMC has omitted to mention that the report marked "4R1" and the report marked "P15(a)" are two entirely different reports on two different areas of review - *ie:* as mentioned earlier, "4R1" is a "Programme Review Report" and "P15(a)" is an "Institutional Review Report". In this regard, as observed earlier, the "Guidelines" marked "1R2" envisaged that, both an "Institutional Review" and a "Subject Review" [or "Programme Review"] will be carried out by the Quality Assurance and Accreditation Council Division of the University Grants Commission when examining an application made by an institute to obtain *"Degree Awarding Status"*. Thus, not only is the SLMC's contention baseless, it also betrays a fundamental lack of understanding of the nature of the reports and process which the SLMC now purports to challenge. This, in turn, raises a question on the merits and motivation of SLMC's attack on the procedures followed when SAITM was recognised as a *"Degree Awarding Institute"* by "P4" and "P5".

Further, it is seen that the SLMC took no action to dispute the validity of the recognition granted to SAITM as a *"Degree Awarding Institute"* when "P4" and "P5" were issued in 2011 and 2013 respectively. The SLMC has claimed that it is the sole regulatory authority with regard to the medical profession and has professed that it is deeply concerned with the standards of medical education. If that were the case and if the SLMC was *bona fide* of the view that SAITM was not entitled to be recognised as a *"Degree Awarding Institute"*, the SLMC would have, undoubtedly, sought to challenge the validity of "P4" and "P5" when they were issued in 2011 and 2013. However, the SLMC did not make any application to a Court disputing the validity of "P4" and "P5".

In these circumstances, it can be reasonably concluded that the SLMC saw no reason to doubt the validity of the Orders marked "P4" and "P5" at the time they were issued in 2011 and 2013 respectively.

Mr. Manohara de Silva, PC and Mr. Marapana, PC have also submitted that, the requirement specified in section 70C of the Universities Act that the Minister shall obtain a report from the "Specified Authority" before making an Order under section 25A recognising a *"Degree Awarding Institute"* is a `condition precedent' which must be fulfilled before the Minister can make a valid Order under section 25A recognising a *"Degree Awarding Institute"*. Learned President's Counsel went on to submit that the aforesaid reports marked "P15(a)", "P15(b)", "4R1" and "P15(c)"/"4R2" submitted in 2011 and the aforesaid reports marked "4R6" and "P16"/"4R7" submitted in 2013 cannot be regarded as reports made by the "Specified Authority" in terms of section 70C of the Universities Act.

With regard to the Order marked "P4", it is seen that the reports marked "P15(a)", "P15(b)", "4R1" and "P15(c)"/"4R2" were submitted by panels of the Quality Assurance and Accreditation Council of the University Grants Commission several months prior to "P4". At that time, the "Specified Authority" was none other than the Chairman of the University Grants Commission and Section 70B (2) of the Universities Act enabled him to delegate his powers *"….. to such Standing Committees or ad hoc committees consisting of such number of members as may be determined by the Specified Authority or to any officer or servant appointed by such Authority."*. There is no doubt that the aforesaid reports were in the possession of the "Specified Authority" [*ie:* the Chairman of the University Grants Commission] well prior to the making of the Order marked "P4". It is reasonable to assume that the "Specified Authority" would have proceeded, in the normal course of official business, to advise the Minister of the contents of the aforesaid reports and the recommendations made therein to recognise SAITM as a *"Degree Awarding Institute"*. It is also reasonable to assume the "Specified Authority" made his own recommendation and report to the Minister.

Similarly, with regard to the Order marked "P5", as also mentioned earlier, the "Institutional Review Committee" which submitted the report marked "4R6" and the "Accreditation and Quality Assurance Review Committee" which submitted the report marked "P16"/"4R7" were both appointed by the Secretary to the Ministry of Higher

Education who was the "Specified Authority" at the time and who, in terms of Section 70B (2), was entitled to delegate his powers to a Standing Committee or to an *ad hoc* committee. There is no doubt that these two reports were in the possession of the "Specified Authority" [*ie:* the Secretary to the Ministry of Higher Education] well prior to the making of the Order marked "P5". Here too, it is reasonable to assume that the "Specified Authority" would have proceeded, in the normal course of official business, to advise the Minister of the contents of the aforesaid reports and the recommendations made therein to amend the reach of the earlier Order marked "P5". It is also reasonable to assume the "Specified Authority" made his own recommendation and report to the Minister.

It is relevant to mention here that section 70C (1) of the Universities Act only requires that the Minister of Higher Education must obtain a *"report"* from the "Specified Authority". There is no requirement that a written report must be obtained. Therefore, it would appear that a verbal report made by the "Specified Authority" to the Minister could satisfy the requirements of section 70C (1) in appropriate circumstances.

Next, it is seen from the Orders marked "P4" and "P5" that, the then Minister of Higher Education has specifically stated that he has obtained reports under section 70C of the Universities Act before making those Orders.

In view of these unambiguous statements made by the then Minister of Higher Education, it is reasonable to assume that: (i) before making the Order marked "P4", the Minister had considered a report from the "Specified Authority" [who, at the time, was the Chairman of the University Grants Commission] based on the aforesaid reports marked "P15(a)", "P15(b)", "4R1" and "P15(c)"/"4R2" which recommended SAITM be recognised as a *"Degree Awarding Institute"* subject to conditions; and (ii) before making the second Order marked "P5", the Minister had considered a report from the "Specified Authority" [who, at the time, was Secretary of the Ministry of Higher Education] based on the aforesaid reports marked "4R6" and "P16"/"4R7" which recommended that the reach of the Order marked "P5" be amended.

In these circumstances, I am of the view that, even in the absence of the production of reports in the form of documents submitted by the relevant "Specified Authority" himself to the Minister of Higher Education, there has been substantial compliance with the requirements of section 70C of the Universities Act prior to the making of the Orders marked "P4" and "P5".

In any event, the aforesaid submission made by Mr. Manohara de Silva, PC and Mr. Marapana, PC that the aforesaid reports do not constitute reports from the "Specified Authority" obtained by the Minister in terms of section 70C of the Universities Act and that, therefore, there had been non-compliance with a 'condition precedent' prior to the Minister making his Orders marked "P4" and "P5", was first advanced in this Court.

In view of this submission, the 3rd to 6th respondents have, as entitled to, tendered: the letter dated 11th July 2011 marked "4R8" sent by the Chairman of the University Grants Commission to the then Minister of Higher Education; the letter dated 06th August 2014 marked "4R9(a)" sent by the Secretary to the Ministry of Higher Education to the Chairman of the University Grants Commission; and the letter dated 19th August 2014 marked "4R9(b)" sent by the Chairman of the University Grants Commission to the Secretary to the Ministry of Higher Education.

As mentioned earlier, the letter marked "4R8" is a recommendation made to the then Minister of Higher Education by the Chairman of the University Grants Commission [who was the "Specified Authority" at the time] that SAITM be granted *"Degree Awarding Status"*. The letter marked "4R8" is, undoubtedly, a `report' made by the "Specified Authority" to the Minister as contemplated by section 70C. The Order dated 29th August 2011 marked "P4" was made by the then Minister after he obtained the aforesaid letter marked "4R8". Thus, it is manifestly clear that there has been full compliance with requirements of section 70C of the Universities Act before the Order marked "P4" was made by the Minister under section 25A of the same Act.

Next, by his letter marked "4R9(a)", the Secretary to the Ministry of Higher Education has inquired from the Chairman of the University Grants Commission whether SAITM had fulfilled the conditions specified in the Order marked "P4" and by his letter marked "4R9(b)", the Chairman of the University Grants Commission has advised the Secretary to the Ministry of Higher Education that SAITM had fulfilled all these conditions within the specified time. It is reasonable to assume that the Secretary to the Ministry of Higher Education [who was the "Specified Authority" at the time] has, in the ordinary course of official business, reported this fact to the then Minister of Higher Education and made his recommendations. As mentioned earlier, the Minister has stated in "P5" that he received a report from the "Specified Authority". In these circumstances, I have no doubt that there has been full compliance with requirements of section 70C of the Universities Act before the Order marked "P5" was made by the Minister under section 25A of the same Act and that the `condition precedent' which Mr. Manohara de Silva, PC and Mr. Marapana, PC referred to, was satisfied at the time the Orders marked "P4" and "P5" were made.

Next, the Secretary to the Ministry of Higher Education - who was the "Specified Authority" in terms of section 70B of the Universities Act at the time - has issued the letters marked "P6(a") and "P6(b)" addressed to SAITM confirming that SAITM has *"fulfilled all the conditions stipulated therein within the specified time period."*. These letters have been copied to the University Grants Commission and to the SLMC.

In the Court of Appeal and in this Court, the SLMC has claimed that these letters are *"false"*. However, upon receiving the copies of "P6(a") and "P6(b)", the SLMC did not dispute the confirmation issued by the Secretary to the Ministry of Higher Education [*ie:* the "Specified Authority"] that SAITM had fulfilled all the conditions specified in the Order marked "P4" and "P5". Instead, the SLMC has only written the letter dated 24th

September 2014 marked “1R5” inquiring about the basis on which the letters marked “P6(a”) and “P6(b)” were issued. The SLMC has certainly not disputed the fact that SAITM has fulfilled all the conditions specified in the Orders marked “P4” and “P5”.

Here too, in the light of the SLMC’s claim that it is the sole regulatory authority with regard to the medical profession and its claim that it is deeply concerned with the standards of medical education, I would think that, if the SLMC was *bona fide* of the view that the confirmations issued by the “Specified Authority” in his letters marked “P6(a”) and “P6(b)” were *“false”*, the SLMC would have, undoubtedly, sought to challenge the validity of “P6(a”) and “P6(b)” at the time they were issued by the “Specified Authority” in 2014. However, the SLMC did not make any application to a Court disputing the validity of “P6(a”) and “P6(b)”.

Further, even upon receipt of SAITM’s letters dated 12th May 2014 and 24th September 2014 which unequivocally stated that SAITM has fulfilled all the conditions specified in the Orders marked “P4” and “P5”, the SLMC has not disputed this position.

In these circumstances, the claim now made by the SLMC in the Court of Appeal and in this Court that these letters marked “P6(a”) and “P6(b)” are *“false”*, is very belated and is without any merit.

With regard to the issue of whether the SLMC’s reports marked “P19(c)” and “P19(d)” establish that the conditions specified in “P4” and “P5” have not been fulfilled, it is seen that the report marked “P19(d)” by the ten member team sent by the SLMC to inspect SAITM has dwelt primarily on alleged deficiencies in the clinical training programme of SAITM and has not considered whether SAITM has fulfilled the other conditions specified in the Order marked “P4” and “P5”. In this regard, Mr. Faisz Mustapha, PC appearing for SAITM has correctly submitted, *“….. SLMC Report in P19(d) does not say that the conditions in P4 and P5 have not been fulfilled by SAITM and speaks only of clinical training.”*.

In any event, it is necessary to examine whether the SLMC’s reports marked “P19(c)” and “P19(d)”, even if they are to be accepted at face value, can have any effect on SAITM’s status as a *“Degree Awarding Institute”* **under and in terms of the Universities Act**.

When doing so, it has to be kept in mind that the SLMC is a creature of the Medical Ordinance and its powers and role are prescribed in the Medical Ordinance. The relevant Minister for the purposes of the Medical Ordinance and the SLMC is the Minister of Health.

Further, as stated earlier, the SLMC issued the reports marked “P19(c)” and “P19(d)” consequent to an examination and investigation of SAITM conducted by the SLMC claiming to act under the provisions of Part IIIA of the Medical Ordinance. Therefore, as observed earlier, the Reports marked “P19(c)” and “P19(d)” could, at the most, set in motion a process under the provisions of section 19C of the Medical Ordinance which

leads to the Minister of Health declaring that the holder of a MBBS degree awarded by SAITM is not entitled to be registered **under the provisions of the Medical Ordinance**.

However, even in the event of the Minister of Health making such a declaration under the provisions of section 19C (3) of the Medical Ordinance, SAITM's recognition as a *"Degree Awarding Institute"* **under and in terms of the Universities Act** will remain unaffected unless and until the Minister of Higher Education makes an Order under section 27 (1) (*b*) of the Universities Act amending, varying or revoking SAITM's recognition as a *"Degree Awarding Institute"*. As stated earlier, the granting of the status of a *"Degree Awarding Institute"* to an institution and the revocation of that status is done solely by the Minister of Higher Education and the supervision and control of a *"Degree Awarding Institute"* is solely in the hands of the Minister of Higher Education and the "Specified Authority", **under the provisions of the Universities Act**.

The two statutes - *ie:* the Medical Ordinance and the Universities Act - do not contain provisions which enable their areas of operation to intersect. As Mr. Rajaratnam, PC, Senior Assistant Solicitor General put it, *"there are two legal regimes"*. It is clear that the schemes set out in the two enactments exist separate and independent of each other.

Thus, the contents of the Reports marked "P19(c)" and "P19(d)" prepared by the SLMC claiming to act under and in terms of the provisions of Part IIIA of the Medical Ordinance can have no bearing or impact on SAITM's recognition as a *"Degree Awarding Institute"* **under the provisions of the Universities Act**. As Mr. Romesh de Silva, PC has tellingly submitted, *"The Medical Ordinance has no place in the recognition of the Degree Awarding Institute"* and *"The Medical Ordinance cannot either register or de-register a Degree Awarding Institute given recognition under the Universities Act."*.

As mentioned earlier, the reports marked "P19(c)" and "P19(d)" have to be regarded solely within the context of the process described in the provisions of Part IIIA of the Medical Ordinance which empowered the SLMC to examine and investigate SAITM and make its recommendation to the Minister of Health. These two reports cannot be equated to or be regarded as being in the nature of "certificates of compliance" referred to in the Rules marked "1R4A"/"4R3" made under and in terms of the provisions of the Universities Act.

For the aforesaid reasons, the first part of question of law no. [2] and questions of law no.s [3] and [10] are answered in the negative.

Next, the second part of question of law no. [2] and questions of law no.s [4], [8] are [9] all raise the issue of whether the provisions of the Universities Act, the Guidelines marked "1R2" and the subsequent Rules marked "1R4a"/"4R3", mandatorily required SAITM to obtain a "compliance certificate" from the SLMC and whether, therefore, SAITM cannot be regarded as a recognised *"Degree Awarding Institute"* since SAITM has, admittedly, not obtained a "compliance certificate" from the SLMC.

It is seen that the provisions of the Universities Act do not contain any stipulation to the effect that an institution which has been recognised under section 25A as a *"Degree Awarding Institute"* must obtain a "compliance certificate" from any person. Instead, as mentioned earlier, the scheme of the Universities Act is that *"Degree Awarding Institutes"* recognised under section 25A of the Act are subject to the supervision and control of the Minister who is authorised to make Orders under section 27 (1) (*b*) amending, varying or revoking that status. Further, in terms of the provisions of Part IXA of the Universities Act, the "Specified Authority" exercises several powers over a recognised *"Degree Awarding Institute"*. It is also common ground that neither the Minister nor the "Specified Authority" has made any Order or direction adversely affecting the recognition of SAITM's status as a *"Degree Awarding Institute"*.

Therefore, SLMC's aforesaid contention that the provisions of the Universities Act and the Guidelines marked "1R2" and the subsequent Rules marked "1R4a"/"4R3" mandatorily required SAITM to obtain a "Compliance Certificate" from the SLMC can *only* be based upon the Guidelines marked "1R2" or the subsequent Rules marked "1R4a" /"4R3".

In this regard, the Guidelines marked "1R2" were issued prior to 2011 or in 2011 by the University Grants Commission - which was the "Specified Authority" at the time. These Guidelines had been published at the time the Order marked "P4" was issued under section 25A of the Universities Act recognising SAITM as a *"Degree Awarding Institute"*.

However, there is no suggestion that these Guidelines have been promulgated in the form of Rules made under section 137 of the Universities Act. Therefore, these Guidelines had no binding effect and SAITM was not mandatorily required to comply with these Guidelines. In any event, the fourth paragraph of these Guidelines states that an institution which has been recognised as a *"Degree Awarding Institute"* must *"seek"* compliance certification from the relevant "Specified Professional Body" *after* that institution is awarded such recognition. However, the *obtaining* of compliance certification is not made mandatory by these Guidelines.

Thus, it is clear that the Guidelines marked "1R2" have no effect on the validity of the Order marked "P4" or the continuance of the recognition granted to SAITM as a *"Degree Awarding Institute"*.

With regard to subsequent Rules marked "1R4a"/"4R3" made by the Secretary to the Ministry of Higher Education on 22nd August 2013, Rule 31 of these Rules specified that after a Non-State Institute has been recognised as *"Degree Awarding Institute"* that Non-State Institute *"shall obtain*" compliance certification from the relevant *"Specified Professional Body"* and then submit the compliance certification to the *"Specified Authority" - ie:* to the Secretary to the Ministry of Higher Education.

However, as Mr. Faisz Mustapha, PC appearing for SAITM highlights, the Rules marked "1R4a"/"4R3" do not stipulate who the relevant *"Specified Professional Body"* is in the case of *"Degree Awarding Institutes"* such as SAITM and, further, the Rules marked

"1R4a"/"4R3" do not stipulate the nature and scope of a "compliance certificate" or the standards against which compliance is to be certified. Thus, there is weight in Mr. Mustapha's contention that Rule 31 of "1R4a"/"4R3" *"is vague, uncertain and therefore ultra vires"* and learned President's Counsel's consequent submission, citing Sharvananda J, as he then was, in ATTORNEY GENERAL vs. FERNANDO [79 (1) NLR 39 at p.42-43] that, Rule 31 of "1R4a"/"4R3" is invalid since as it is *ultra vires* the powers conferred on the Secretary to the Ministry of Higher Education [the "Specified Authority"] by the provisions of the Universities Act.

In any event, the Rules marked "1R4a" /"4R3" do not state the consequences of a failure by a *"Degree Awarding Institute"* to obtain compliance certification from the relevant "Specified Professional Body". Therefore, the failure to obtain compliance certification from the relevant "Specified Professional Body" will not `automatically' adversely affect the recognition of an institution as a *"Degree Awarding Institute"*. As learned Senior Assistant Solicitor General submitted *"there are no dire consequences"* stipulated in the Rules marked "1R4a"/"4R3" for a failure on the part of SAITM to obtain compliance certification from the relevant "Specified Professional Body".

Instead, as mentioned earlier, Rule 32 states that, the "Specified Authority" shall, subject to the direction and control of the Minister, examine the performance of the *"Degree Awarding Institute"* to ensure that the standards set out in the Rules marked "1R4a"/"4R3" are maintained. Rule 33 requires the *"Degree Awarding Institute"* to cooperate with the "Specified Authority" for quality monitoring purposes. Rule 34 requires the "Specified Authority" to inform the *"Degree Awarding Institute"* of the steps to be taken to maintain proper standards of *"Degree Awarding Status"*.

Thus, it is evident that, the Rules marked "1R4a"/"4R3" firmly place the responsibility of ensuring that a *"Degree Awarding Institute"* maintains the required standards upon the "Specified Authority" - *ie:* upon the Secretary to the Ministry of Higher Education - subject to the direction and control of the Minister.

Therefore, even if one is to assume that, insofar as SAITM is concerned, the SLMC is to be regarded as the "Specified Professional Body" referred to in the Rules marked "1R4a"/"4R3", the SLMC has no status or role to play other than to respond to a request made by SAITM and either issue or refuse to issue compliance certification to SAITM.

Thus, under and in terms of the Rules marked "1R4a" /"4R3", the fact that SAITM has not obtained compliance certification from the SLMC has no prejudicial consequences unless and until the "Specified Authority" - *ie:* the Secretary to the Ministry of Higher Education - issues a direction to SAITM requiring that it obtains a compliance certificate from the "Specified Professional Body" or the Minister of Higher Education acts under section 27 (1) (*b*) of the Universities Act and amends, varies or revokes the *"Degree Awarding Status"* granted to SAITM due to a failure to obtain a compliance certificate from the "Specified Professional Body". As Mr. Romesh De Silva, PC has correctly submitted *"Thus if the Secretary, Ministry of Higher Education does not want or need a*

compliance certificate nothing further follows.".It is common ground that neither the "Specified Authority" nor the Minister of Higher Education have issued such a direction or taken any such action against SAITM.

Further, a perusal of the chronological sequence of events shows that, Rule 31 of the Rules marked "1R4" which specified that Non-State Institutes which have been recognised as a *"Degree Awarding Institute"* under and in terms of the provisions of the Universities Act *"shall obtain"* compliance certification from the relevant "Specified Professional Body" was amended by the gazette notification dated 31st January 2014 marked "1R4b". Subsequent to that amendment, Rule 31 stated only that after recognition as a *"Degree Awarding Institute"*, a Non-State Institute *"also may seek"* compliance certification from *"respective professional bodies.".*

Therefore, from 31 January 2014 onwards, the Rules marked "1R4a"/"R43" did not oblige SAITM to seek or obtain compliance certification from the relevant "Professional Body". It is also seen that, the "Specified Authority" has issued the confirmations dated 27th August 2014 marked "P6(a)" and "P6(b)" during this period when SAITM was not obliged, by the Rules marked "1R4a"/"R43", to obtain compliance certification from the relevant "Specified Professional Body".

As a result of this sequence of events, even if one is to assume that, insofar as SAITM is concerned, the SLMC is to be regarded as the "Specified Professional Body" referred to in the Rules marked "1R4a"/"R43", SAITM was not obliged to seek or obtain compliance certification from the SLMC at the time the "Specified Authority" issued his letters dated 27th August 2014 marked "P6(a)" and "P6(b)" confirming that SAITM has fulfilled all the conditions specified in the Orders marked "P4" and "P5".

Next, it is seen that, Rule 31 of the Rules marked "1R4a"/"R43" was again amended by the gazette notification dated 02nd December 2014 marked "1R4c". Subsequent to that amendment, Rule 31 again stipulated that, after obtaining recognition as a *"Degree Awarding Institute"* a Non-State Institute *"shall obtain"* compliance certification from the "Specified Professional Body".

Mr. Manohara de Silva, PC appearing for the SLMC contended that the amendments to Rule 31 made by the gazette notification dated 31st January 2014 marked "1R4c" and the gazette notification dated 02nd December 2014 marked "1R4c" were done for the ulterior and improper purpose of accommodating the continuance of the recognition of SAITM as a *"Degree Awarding Institute"* by the issue of the letters dated 27th August 2014 marked "P6(a)" and "P6(b)" confirming that SAITM has fulfilled all the conditions specified in the Orders marked "P4" and "P5".

The `switching to and fro' manifested by these two gazette notifications during the course of the year 2014 does raise a question as to why Rule 31 was amended by first making the obtaining of a compliance certificate optional and later re-imposing the original requirement that obtaining a compliance certificate was obligatory. However, it is also possible that these amendments to Rule 31 were occasioned by *bona fide* policy

considerations. In the absence of material which cogently indicates a lack of *bona fide*s on the part of the then Minister of Higher Education or the then *"Specified Authority"*, we are not entitled to draw an adverse inference from the mere fact of these two amendments. This is especially so in the light of the fact that, despite the SLMC professing to be the sole regulatory authority of the medical profession with a deep concern regarding the standards of medical education, the SLMC raised *no* objection whatsoever at the time these two amendments were made in the year 2014.

In the light of the aforesaid facts and circumstances, I am of the view that the absence of a compliance certificate obtained by SAITM under and in terms of Rule 31 of the Rules marked "1R4a" does not adversely affect the recognition of SAITM as a *"Degree Awarding Institute"* under the provisions of the Universities Act.

Accordingly, the second part of question of law no. [2] and questions of law no.s [4], [8] are [9] are answered in the negative.

Question of law no. [5] raises the issues of whether the Court of Appeal erred in failing to hold that "P4" was of no force or avail in law because there was no specific operative date stated in that Order and whether the Court of Appeal erred when it held that the operative date of the Order marked "P4" was 29th August 2011. Question of law no. [5] also raises the issue of whether compliance with section 26 of the Universities Act was mandatory and non-compliance was fatal to the validity of the Order marked "P4".

With regard to the first issue of whether the operative date of the Order marked "P4" was 29th August 2011, the learned President of the Court of Appeal has held *"When considering the legal regime under the Universities Act No. 16 of 1978 (as amended) it is clear that there are two Degree Awarding Institute Orders issued under section 25A of the Act by the Minister in Charge of Higher Education after complying with section 70C of the said Act with regard to SAITM. Out of the said two orders, the 1st order* [ie: "P4"] *has come into operation since 29th August 2011 and the second order* [ie: "P5"] *backdates the date of operation to 15th September 2009 to cover the students who had undertaken to follow the MD Degree programme with NNSMA including the Petitioner to the present application."*.

In the opening paragraph of the Order marked "P4" the then Minister of Higher Education has stated that *"I …. do by this order and subject to the conditions specified in the Schedule hereto*, *recognize the South Asian Institute of Technology and Medicine (Pvt) Ltd (SAITM) as a Degree Awarding Institute ….."..* Thereafter, Clause 8 of the Order marked "P4" states *"This order shall apply to students seeking admission to the South Asian Institute of Technology and Medicine (Pvt) Ltd (SAITM) on or after the date of coming into force of this order."*. Finally, the Order states the date of 29th August 2011.

Section 26 of the Universities Act stipulates that every Order made under section 25 *"shall come into force on the date specified therein ….."*.

In my view, the effect of section 26 of the Universities Act and the aforesaid contents of the Order marked “P4” establish that the said order came into force on 29th August 2011 - *ie:* the date stated on the Order. The fact that the Order marked “P4” came into force on 29th August 2011 is also manifested by the later Order marked “P5” which expands the recognition of SAITM to the period from 15th September 2009 to 29th August 2011 and, thereby, proceeds on the basis that the earlier Order marked “P4” came into force on 29th August 2011.

Thus, the learned President of the Court of Appeal has correctly held that the Order marked “P4” came into operation on 29th August 2011.

With regard to the second issue of whether compliance with section 26 of the Universities Act was mandatory and non-compliance was fatal to the validity of the Order marked “P4”, section 26 of the Universities Act requires that every Order made under section 25 *“shall come into force on the date specified therein and shall, as soon as possible thereafter, be tabled in Parliament.”*.

A perusal of the Statement of Objections filed by the SLMC in the Court of Appeal and the Order of the Court of Appeal indicates that the SLMC did not suggest, in the Court of Appeal, that there had been a failure to place the Orders marked “P4” and “P5” before Parliament. In any event, in view of this issue being raised in question of law no. [5] framed in this Court, the petitioner has, as entitled to, tendered copies of the Hansard publications which establish that the Orders marked “P4” and “P5” were tabled in Parliament. These documents are marked “G1” and “G2”. In the light of these documents, Mr. Manohara de Silva, PC appearing for the SLMC before us, did not, very correctly, pursue a contention that there had been a failure to table the Orders marked “P4” and “P5” in Parliament.

Accordingly, question of law no. [5] is answered in the negative.

Question of law no. [6] raises the issue of whether the Order marked “P5” is invalid because it is *“retrospective in effect”*.

A perusal of the Statement of Objections filed by the SLMC in the Court of Appeal and the Order of the Court of Appeal indicates that the SLMC did not advance such a contention in the Court of Appeal.

In any event, it is plain to see from the Order marked “P5” that it has only amended the reach of the previous Order marked “P4” recognising SAITM as a *“Degree Awarding Institute”* to apply to students who registered with SAITM during the period 15th September 2009 to 29th August 2011 when the Order marked “P4” came into force. As submitted by Mr. Faisz Mustapha, PC, the Order marked “P5” only identifies a further category of students of SAITM who are to come within the scope of the Order marked “P4”.

Section 27 (1) (*b*) of the Universities Act confers upon the Minister of Higher Education wide powers to amend, vary or revoke the previous Order marked “P4” and,

accordingly, the then Minister has exercised that power and made the Order marked "P5" which expressly states that the then Minister is acting *"By virtue of the powers vested in me by section 25A read with section 27 (i) (b) of the Universities Act …."*. It is clear that the then Minister of Higher Education was acting within the scope of the powers conferred on him by Section 27 (1) (*b*) of the Universities Act when he made the Order marked "P5" amending the reach of the previous Order marked "P4".

In these circumstances, I see no reason why the Order marked "P5" should be regarded as being invalid and answer question of law no. [6] in the negative.

Question of law no. [7] asks whether the Court of Appeal erred when it held that the SLMC is compelled to grant the petitioner provisional registration as a medical practitioner under section 29 (2) and section 32 of the Medical Ordinance notwithstanding the fact that SAITM has not obtained a compliance certificate as contemplated in the Guidelines marked "1R2" and the Rules marked "1R4a"/"4R3".

Firstly, it has to be realised that section 32 relates to the criteria required to obtain a certificate of experience after obtaining provisional registration and, is therefore, not relevant here.

With regard to whether the SLMC is compelled to grant the petitioner provisional registration as a medical practitioner under section 29 (2) of the Medical Ordinance notwithstanding the fact that SAITM has not obtained a compliance certificate as contemplated in the Rules marked "1R4a"/"4R3", I have previously held that, the mere fact that SAITM has not obtained a compliance certificate as contemplated in Rule 31 of the Rules marked "1R4a"/"4R3" does not adversely affect SAITM's status as a *"Degree Awarding Institute"* **under and in terms of the Universities Act**.

Next, as stated earlier, section 29 (2) of the Medical Ordinance stipulates that the SLMC *"shall"* grant provisional registration under section 29 (2) if an applicant for provisional registration is of good character and holds a MBBS degree granted by a *"Degree Awarding Institute"*.

There is no dispute that the petitioner is of good character. Further, as determined earlier in this judgment, at the time the petitioner made her application to the SLMC for provisional registration under section 29 (2) of the Medical Ordinance, SAITM continued to hold the status of a recognised *"Degree Awarding Institute"* under and in terms of the Universities Act and, therefore, the MBBS degree granted to the petitioner by SAITM was a MBBS degree granted by a *"Degree Awarding Institute"*.

Thus, it is seen that, on the face of section 29 (2) of the Medical Ordinance, there was an imperative duty cast on the SLMC to provisionally register the petitioner because she is of good character and she holds a MBBS degree granted to her by a *"Degree Awarding Institute"*. Therefore, on the face of section 29 (2), the petitioner was entitled to obtain provisional registration under section 29 (2) of the Medical Ordinance and the SLMC was obliged to grant such provisional registration to the petitioner.

However, when considering question of law no. [7], it also relevant to examine whether, notwithstanding SAITM having the status of a recognised *"Degree Awarding Institute"* **under and in terms of the Universities Act,** the reports marked "P19(c)" and "P19(d)" issued by the SLMC will preclude the petitioner from obtaining provisional registration as a medical practitioner **under the provisions of the Medical Ordinance**.

In this regard, the learned President of the Court of Appeal held that, *"When going through the said provisions of the Medical Ordinance (as amended) it is clear that under section 19A the SLMC is empowered to appoint a committee as revealed in the case at hand and on its recommendation the SLMC `may' submit its recommendations to the Minister. However, as observed by this court, the role played by the SLMC ends at that point and any steps with regard to the said recommendations of the SLMC will have to be taken by the Minister under the provisions of section 19C (2) and (3) of the said Ordinance."*. The learned President went on to comment *"As further observed by this court the Minister is bound to furnish a copy of such recommendation to the institution for its comments and also empowered making further inquiry as he considered necessary and thereafter take his decision with regard to the recommendation submitted to him by the SLMC. If the Minister's decision is that, the institution concerned do not conform to the prescribed standard, in such a situation he shall declare it by regulation but, the Minister is not required to publish his decision if he is not going to act under the report or he is satisfied with the explanation forwarded by the Institution."*. He later stated *"As observed above in this order, if the Minister is not going to act on the report of SLMC or satisfied with the explanation by the institute, he is not required to publish his decision and in the said context, the only inference this court can reach is that the Minister who acted under section 19C(2) of the Medical Ordinance (as amended) after going through the response of the Institute has decided not to act under section 19C(3) of the Medical Ordinance (as amended)."*. Summing up, the learned President of the Court of Appeal concluded that, *"In these circumstances it is very much clear that the report prepared and submitted to the Minister* [*ie:* "P19(c)"] *under section 19A, 19B and 19C(1) of the Medical Ordinance was acted upon by the Minister under section 19C(2) but not taken any steps under section 19C(3) of the same Ordinance and therefore the recommendations of the 1st Respondent SLMC made under section 19C(1) was not implemented by the Minister (Minister in Charge of Health) under the provisions of the Medical Ordinance. In the said circumstances, there is no obstacle for the SLMC to provisionally register the Petitioner who has obtain a MBBS Degree from SAITM acting under section 29(2) of the Medical Ordinance (as amended)."*.

It has to firstly be recognised that, the SLMC expressly claims that it was acting under and in terms of section 19A in Part IIIA of the Medical Ordinance when it carried out the inspection of SAITM by the ten member team representing SAITM and prepared the reports marked "P19(c)" and "P19(d)". Accordingly, it has to be observed here that the SLMC's explicit claim that it acted under and in terms of section 19A of the Medical Ordinance carries with it an inherent recognition by the SLMC that SAITM was a recognised *"Degree Awarding Institute"* under and in terms of the Universities Act. That

is because section 19A empowers SAITM to enter and investigate only recognised universities and institutions which are recognised *"Degree Awarding Institutes"*.

Next, it has to be noted that, by the report marked "P19(c)" signed by the President of the SLMC, the SLMC has stated to the Minister of Health that the SLMC has *"decided to recommend to the Minister of Health that* ***THE DEGREE AWARDED BY SAITM SHOULD NOT BE RECOGNIZED FOR THE PURPOSE OF REGISTRATION UNDER THE MEDICAL ORDINANCE."***. Thus, it is clear that the reports marked "P19(c)" and "P19(d)" issued by the SLMC were recommendations made by the SLMC to the Minister of Health under and in terms of section 19C (1) of the Medical Ordinance.

Upon receipt of the aforesaid recommendations of the SLMC set out in its reports marked "P19(c)" and "P19(d)", the Minister of Health was required by section 19C (2), to invite SAITM to submit to him its response to the recommendations made by the SLMC. The Minister has done so by his letter marked "P19(a)" and SAITM has submitted its response marked "P20".

Thereafter, section 19C (3) entitled the Minister to make such further inquiry as he considers necessary and satisfy himself whether that SAITM did not *"conform to the prescribed standards"*. Section 19C (3) goes on to provide that, if the Minister is satisfied that SAITM did not *"conform to the prescribed standards"*, he is entitled to declare, by Regulation, that the holder of a MBBS degree granted by SAITM is not entitled to provisional registration as a medical practitioner **under the provisions of the Medical Ordinance**. Further, section 72 read with section 19 (*e*) of the Medical Ordinance vests in the Minister, the power to make such Regulations.

However, it is plain to see that, after receiving the recommendations of the SLMC set out in its reports marked "P19(c)" and "P19(d)" and the response marked "P20" submitted by SAITM, the Minister of Health has *not* decided to take any action under and in terms of section 19C (3) of the Medical Ordinance. The Minster has *not* issued a Regulation under section 19C (3) declaring that the holder of a MBBS degree granted by SAITM is not entitled to provisional registration as a medical practitioner **under the provisions of the Medical Ordinance**.

In the absence of the Minister issuing such a declaration, the reports marked "P19(c)" and "P19(d)" and the recommendations made therein by the SLMC are of no force or effect under and in terms of the provisions of the Medical Ordinance.

It should also be mentioned here that, section 19A (1) of the Medical Ordinance stipulates that any investigation by the SLMC of a recognised university or a recognised *"Degree Awarding Institute"* has to be to ascertain whether that university or *"Degree Awarding Institute" …..* "*conform to the prescribed standards."*.

Further, as mentioned earlier, section 19 (*e*) read with section 72 (1) and section 72 (3) of the Medical Ordinance empowers the Minister of Health, after consulting the SLMC, to make Regulations specifying the minimum standards of medical education.

Thereafter, section 72 (4) stipulates that no such Regulation made by the Minister will have effect until it is approved by Parliament.

However, it is undisputed that there were no Regulations made by the Minister of Health specifying the minimum standards of medical education, which were in force at the times material to this appeal. It is also undisputed that the "Guidelines" marked "1R12"/ "P21" published by the SLMC in 2011 have not been embodied in the form of a Regulation declared by the Minister under the provisions of the Medical Ordinance and approved by Parliament.

It is also patently clear that the SLMC has no power to make Regulations under and in terms of the Medical Ordinance. In fact, in the SLMC's letter marked "P12a", the President of the SLMC has acknowledged that *"I must state the obvious viz the SLMC has no power to place these regulations before Parliament."*.

Thus, the document marked "1R12"/"P21" published by the SLMC cannot be treated as setting out the *"prescribed standards"* referred to in section 19A (1) of the Medical Ordinance.

It follows that, there were no valid *"prescribed standards"* in force at the time the SLMC carried out its investigation which ended with the reports marked "P19(c)" and "P19(d)". In this regard, the learned President of the Court of Appeal has correctly held "1R12"/ "P21" *"….. does not carry any binding effect or legal basis to act upon."*.

Consequently, in the absence of *"prescribed standards"* which are in force, the SLMC had no valid basis on which it could carry out a valid or effective examination and investigation of SAITM under and in terms of the provisions of section 19A of the Medical Ordinance. In fact, this position is reflected in the SLMC's aforesaid letter marked "P12a" in which the President of the SLMC had earlier stated in 2009 that the SLMC would examine and investigate SAITM only *after* the relevant Regulations are approved by Parliament [as required by section 72 (4) of the Medical Ordinance].

In the light of the aforesaid facts and circumstances, question of law no. [7] is answered in the negative.

Questions of law no.s [11], [14] and [15] all ask whether the Court of Appeal erred when it held that the petitioner was entitled to be granted provisional registration under section 29 (2) of the Medical Ordinance and directed the SLMC to grant provisional registration to the petitioner.

In the light of the aforesaid facts and circumstances and the determinations of the questions of law considered above, there is no doubt that the petitioner was and is entitled to obtain provisional registration as a medical practitioner under section 29 (2) of the Medical Ordinance and that the SLMC has an imperative duty to provisionally register the petitioner under section 29 (2). I am in entire agreement with the submission made by Mr. Romesh de Silva, PC that *"In the circumstances, the 1st Respondent* [the

SLMC] *has a statutory duty to provisionally register the Petitioner under and in terms of Section 29 (2)."*

It follows that questions of law no.s [11], [14] and [15] must also be answered in the negative.

Question of law no. 12 raises the issue of whether the SLMC has *"differently treated"* the Faculty of Medicine of the Kotelawala Defence University.

A perusal of the report marked "C4" of the preliminary inspection of the Faculty of Medicine of the Kotelawala Defence University, which was conducted on 13th March 2015 by a team representing the SLMC, shows that this team has found the facilities provided for training at that institution "*to be of a very high standard"* despite that institution not having an affiliated teaching hospital at that time. This attitude manifested by the report marked "C4" reveals a very different standard to the attitude manifested by SLMC's report marked "P19(c)" and in the conclusion of the report marked "P19(d)" which were prepared a few months later. In this connection, the learned President of the Court of Appeal held *"When considering the two reports referred to above, it appears that one report has been made after inspecting SAITM and the other after inspecting FOM-KDU but two different standards have been used when preparing those reports."*.

In addition, as established by the SLMC's Annual Report marked "C2", the SLMC has been aware that the Faculty of Medicine of the Rajarata University of Sri Lanka lacked the resources required for training of undergraduate medical students.

It is plain to see that, despite the lack of a teaching hospital affiliated to the Faculty of Medicine of the Kotelawala Defence University at the time of the report marked "C4" and despite the Faculty of Medicine of the Rajarata University of Sri Lanka lacking the resources required for training of undergraduate medical students, the SLMC has decided that no action need be taken against the recognition of medical degree awarded by those two institutions. That is a patently different standard to the one the SLMC adopted in respect of SAITM.

In these circumstances, question of law no. [12] is answered in the negative.

Question of law no. [13] asks whether the Court of Appeal erred in failing to consider that section 39 of the Medical Ordinance entitles a person who has been provisionally registered as a medical practitioner under section 29 (2) to practice medicine, surgery and midwifery and in failing to consider whether it was the *"prime duty"* of the SLMC *"being the sole regulatory body, to satisfy itself with regard to the standards maintained by the 2nd Respondent-Respondent* [*ie:* SAITM]*".*

It hardly needs to be said that these claims made by the SLMC with regard to its role and responsibility, do not exempt the SLMC from obeying the statutory provisions of the Medical Ordinance and the Universities Act. The SLMC is a creation of the Medical Ordinance and must confine itself to the powers vested in it by the Medical Ordinance. It

has no powers outside those expressly conferred on it by the provisions of the Medical Ordinance.

As held earlier, under and in terms of and by operation of the provisions of the Medical Ordinance and the Universities Act, the petitioner is entitled to provisional registration as a medical practitioner under section 29 (2) of the Medical Ordinance and the SLMC is required, by the law, to forthwith grant that provisional registration to the petitioner. It follows that, thereafter, the SLMC is obliged to accord to the petitioner, without restriction or delay, all the rights which ordinarily flow from provisional registration as a medical practitioner under section 29 (2) of the Medical Ordinance.

Accordingly, question of law no. [13] is answered in the negative.

In the light of the answers to the aforesaid questions of law, the remaining questions of law no.s [1] and [16] which ask whether the Order of the Court of Appeal is contrary to the law and against the weight of the evidence and whether the Court of Appeal erred when it decided to grant relief to the petitioner by issuing the aforesaid writs of *certiorari*, *mandamus* and prohibition, are also answered in the negative.

Consequent to the questions of law before us being answered in the negative, this appeal is dismissed and the Order dated 31st January 2017 of the Court of Appeal is affirmed.

By pursuing this litigation, the SLMC has unnecessarily delayed the petitioner obtaining provisional registration as a medical practitioner and would have, thereby, caused her to bear considerable expenses in addition to causing grave prejudice to the petitioner. In these circumstances, the 1st Respondent-Petitioner [the SLMC] shall pay the Petitioner-Respondent a sum of Rs.100,000/- by way of costs.

Judge of the Supreme Court

S.Eva Wanasundera PC
I agree.

Judge of the Supreme Court

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 Appeal

Punchiralage Keerala
Pandikaramaduwa, Parinigama
Plaintiff

SC Appeal 188/2011
SC/HCCA/LA287/2010
NCP/HCCA/ARP/299/07
DC Anuradhapura Case No.16676/L

Keeralage Parakrama
Pandikaramaduwa, Parinigama
Substituted Plaintiff

Vs

1. W. M. Dingiribanda
   No. 39, Nuwaraeli Koliniya,
   Pandikaramaduwa, Parinigama

2. K.A. Chandralatha
   No.39, Nuwaraeli Koliniya
   Pandikaramaduwa, Parinigama

Defendants

AND

Keeralage Parakrama
Pandikaramaduwa, Parinigama
Substituted Plaintiff-Appellant

Vs

1. W. M. Dingiribanda

No. 39, Nuwaraeli Koliniya,
Pandikaramaduwa, Parinigama

2. K.A. Chandralatha
No.39, Nuwaraeli Koliniya
Pandikaramaduwa, Parinigama

Defendant-Respondents

AND NOW BEWEEN

K.A. Chandralatha
No.39, Nuwaraeli Koliniya
Pandikaramaduwa, Parinigama

2nd Defendant-Respondent-Petitioner-Appellant &
Substituted 1st Defendant-Respondent-Petitioner-Appellant

Vs

Keeralage Parakrama
Pandikaramaduwa, Parinigama

Substituted Plaintiff-Appellant-
Respondent-Respondent

Before : Sisira J de Abrew J
Priyantha Jayawardena PC J
Murdu Fernando PC J

Counsel : Shamith Fernando for the 2nd Defendant-Respondent-Petitioner-Appellant.
Rohan Sahabandu President's Counsel for the Substituted Plaintiff-Appellant- Respondent-Respondent

Argued on : 1.6.2018
Written Submission
Tendered on : 8.6.2018 by the 2nd Defendant-Respondent-Petitioner-Appellant
6.6.2018 by the Substituted Plaintiff-Appellant-
Respondent-Respondent

Decided on : 18.7.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court dated 22.7.2010 wherein the learned Judges of the Civil Appellate High Court set aside the judgment of the learned District Judge and gave judgment in favour of the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent). Being aggrieved by the said judgment the 2nd Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) has appealed to this court. This court by its order dated 28.11.2011 granted leave to appeal on questions of law set out in paragraphs 12(b),(d),(g),(i),(j),(k) and (m) of the Amended Petition of Appeal dated 14.9.2011which are set out below.

1. The learned Judges have erred in law by not considering the fact that the Respondent has failed to identify the corpus.

2. The learned Judges have failed in law in applying Section 103 0f the Evidence Ordinance to this case.

3. The learned Judges have erred in law by granting damages whereas no evidence had led in this case with regard to damages.

4. The learned Judges have erred in law by not giving any reason in their judgment for dismissing the Petitioner's counter claim.

5. The said judgment is against the weight of the evidence placed before the court.

6. The judgment is contrary to legal precedents created by superior courts in similar circumstances.

7. The said judgment is inconsistent with the evidence transpired during the trial and thus bad in law.

The Plaintiff-Respondent filed this case against the Defendant-Appellant seeking a declaration that he is the lawful permit holder of the lands described in the 1st and the 2nd schedules of the plaint. He also sought an order to eject the Defendant-Appellant from the land described in the 2nd schedule of the plaint and compensation amounting to Rs.20,000/- per month from the year 1992. The land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The land described in the 1st schedule of the plaint has been given to the Plaintiff-Respondent by a permit (P1) given by the State in terms of Section 19(2) of the Land Development Ordinance on 2.12.1991. This fact has been proved by the Plaintiff-Respondent. The learned District Judge by his judgment dated 1.6.2005 dismissed the case of the Plaintiff-Respondent on the basis that the corpus had not been identified. Is the judgment of the learned District Judge correct? I now advert to this question. The land for which the Plaintiff-Respondent seeks a declaration of title has been described in the plaint by reference to physical metes and bounds. According to Section 41 of the Civil Procedure Code the land must be described in the plaint so far as possible by reference to physical metes and bounds **or** by reference to a sufficient sketch, map or plan. The word '**or**' is important. Section 41 of the Civil Procedure Code expects the plaintiff to describe in the plaint the land by reference to physical

metes and bounds **or** by reference to a sufficient sketch, map or plan. In the present case the land has been described in the plaint by reference to physical metes and bounds. The son of the Plaintiff-Respondent gave evidence and also produced the permit marked P1which describes the land by reference to physical metes and bounds. His evidence was not challenged by the Defendant-Appellant. The son of the Plaintiff-Respondent was not cross-examined by the Defendant-Appellant. This shows that the Defendant-Appellant has admitted the boundaries of the land of the Plaintiff-Respondent. When I consider all the above matters, I hold that the Plaintiff-Respondent has complied with Section 41 of the Civil Procedure Code with regard to the land for which he sought a declaration of title and has proved the identification of corpus. The learned District Judge has concluded that the land for which the declaration of title is sought has not been identified. I must mention here that there was not even an issue on the question whether corpus has not been identified. When I consider all the above matters, I hold that the conclusion reached by the learned District Judge is wrong.

The Plaintiff-Respondent's son, in his evidence, stated that the Defendant-Appellant encroached on to his land described in the 1st schedule of the plaint; that the encroached area of the land is described in the 2nd schedule of the plaint; and that the land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The Defendant-Appellant did not cross-examine the above witness. This shows that the Defendant-Appellant has not challenged the evidence of the Plaintiff-Respondent. Therefore it appears that the Plaintiff-Respondent has proved that the Defendant-Appellant has encroached to his land and that the encroached area has been described in the 2nd schedule of the plaint. Further the Plaintiff-Respondent has proved that the land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the

plaint. The Defendant-Appellant did not give evidence. The learned District Judge decided that the Permit of the Plaintiff-Respondent (P1) has been proved by him. When I consider the evidence led at the trial, I am of the opinion that the Plaintiff-Respondent has proved that he is the lawful permit holder of the land described in the plaint. If the Plaintiff-Respondent is the permit holder of the land described in the plaint, he can maintain a rei-vindicatio action. In Palisena Vs Perera 56 NLR 407 it was held that a permit holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain vindicatory action against a trespasser. In Bandarnayke Vs Karunawathi [2003] 3SLR 295 it was held that a permit holder under the LDO enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser. In Dharnadasa Vs Jayasena [1997] 3SLR 327 GPS de Silva CJ held that in a rei vindicatio action, the burden is on the plaintiff to establish the title pleaded and relied on by him. In the present case the learned District Judge also decided that the permit of the Plaintiff-Respondent had been proved by him. Considering all the above matters, I hold that the Plaintiff-Respondent has established his title to the land to maintain a vindicatory action.

The Defendant-Appellant has however raised an issue on prescription in respect of his land. According to the conclusion of the learned District Judge, this issue has not been proved. What is the intention of an encroacher to a land? His intention is to secretly possess and acquire lands for which he has no title and to expand the area of encroachment day by day. His intention is secret and dishonest. A person who possesses a land with a secret intention cannot claim prescription in terms of Section 3 of the Prescription Ordinance because his possession cannot be considered as an adverse possession. Even a co-owner who possesses a co-owned land cannot claim prescription in terms of Section 3 of the Prescription Ordinance. This view is supported by the judgment delivered by the Privy Council in Corea Vs

Appuhamy 15 NLR 65 and the judgment of Basnayake CJ in the case of Gunawardene Vs Samarakoon 60 NLR 481.

> *In Corea vs Appuhamy (supra) Their Lordships held as follows. '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 that result'.*
>
> *In Gunawardene Vs Samarakoon (supra) Basnayake CJ held that possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.*

An Encroacher starts encroaching upon lands for which he has no title and continues to possess the encroached portion of the land with a secret and dishonest intention. Therefore his possession in the encroached portion of the land cannot be considered as an adverse possession. Such a person cannot claim prescriptive title to the encroached area of the land under Section 3 of the Prescription Ordinance because his possession is not an adverse possession. Section 3 of the Prescription Ordinance reads as follows.

> *Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of*

service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

To claim prescriptive title in terms of Section 3 of the Prescription Ordinance, the claimant's possession to the land should be an adverse possession. This is one of the conditions that should be proved by the claimant. This view is supported by the judgment of Weerasuriya J in the case of Seeman Vs David [2000] 3 SLR 23 wherein His Lordship held as follows. "The proof of adverse possession is a condition precedent to claim prescriptive rights". Considering all the above matters, I hold that an encroacher to a land is not entitled to claim prescriptive title

in terms of Section 3 of the Prescription Ordinance to the encroached area of the land or to the entire land. In fact when a person encroaches upon lands for which he has no title, he acquires status of a trespasser in respect of the encroached area of the land. Trespasser starts possessing lands for which he has no title and continues to possess the land secretly. As I pointed out earlier, to claim prescriptive title in terms of Section 3 of the Prescription Ordinance claimant's possession should be an adverse possession. A person who possesses a land with secret intention cannot claim that his possession is an adverse possession. Possession of a land by a person with secret intention cannot be considered as an adverse possession in terms of Section 3 of the Prescription Ordinance. Thus a trespasser who violates the law of the land and possesses the land cannot claim benefit of the law of the land. Thus a trespasser cannot acquire prescriptive title in terms of Section 3 of the Prescription Ordinance. Same principle applies to an encroacher. Considering all the aforementioned matters, I hold that an encroacher cannot claim prescriptive title in terms of Section 3 of the Prescription Ordinance.

In a rei vindicatio action, once the court decides that the plaintiff is the owner of the land and that the defendant has encroached on to the land of the plaintiff, the court must declare that the plaintiff is the owner of the land and also make an order for the ejectment of the encroacher (the defendant) since possession of the encroacher becomes an unlawful possession. This view is supported by the judicial decision in Pathirana Vs Jayasundera 58 NLR 169 wherein Gratiaen J at page 172, held that 'in rei vindicatio action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.' In the same way, in a case where the plaintiff seeks a declaration that he is the lawful permit holder of the land given to him in terms of Section 19(2) of the Land

Development Ordinance, once the court decides that the plaintiff is the lawful permit holder of the land and that the defendant has encroached on to the land of the plaintiff, the court must make an order declaring that the plaintiff is the lawful permit holder of the land and also must make an order to eject the encroacher (the defendant). In the present case the Plaintiff-Respondent has established that he is the lawful permit holder of the land described in the 1st schedule of the plaint and the Defendant-Appellant has encroached upon the said land. Therefore it becomes the duty of the court to make an order ejecting the Defendant-Appellant.

Learned counsel for the Defendant-Appellant contended that the area alleged to have been encroached by the Defendant-Appellant has not been identified by the Plaintiff-Respondent by way of a plan and that therefore the case of the Plaintiff-Respondent should fail.

In Gunasekara Vs Punchimenika [2002]2 SLR 43 the Court of Appeal observed the following facts.

> *"The plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion- the encroached portion was not described with reference to physical metes and bounds or by reference to any map or sketch. The matter was fixed for ex-parte trial; after ex-parte trial an application was made to issue a commission to survey the land and identify the same. The ex-parte trial did not end up in a judgment. After the return of the commission, the plaint was amended, a fresh ex-parte trial was thereafter held. After the decree was served, the defendant-appellant sought to purge default, which was refused."*

Court of Appeal held as follows.

> *"The Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon – section 46(2)(a) read together with section 41 of CPC."*

What happens when a plaint is rejected on the basis that the encroached area has not been described by way of a plan or a sketch in a case where a plaintiff seeks a declaration of title to his land (main land) described in his plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan? Then the encroacher would be placed at an advantageous position and would continue to possess the land without any legal right. Further encroacher may later make a claim for prescriptive title to the encroached area on the ground that his right to possess the land has been recognized by court since the plaintiff's case had earlier been rejected. However it is a question whether the encroacher in such a case would be successful in his claim. Thus, when the plaint is rejected in a case of this nature on the aforementioned ground the encroacher who violates the others' legal rights would be placed at an advantageous position and the owner of the land would be placed at a disadvantageous position. Thus if orders of this nature are permitted to stand, an encroacher who does not respect the law of the land and violates the others' rights would be protected by orders of court and the rights of lawful owners of properties would not be protected by courts. At this juncture it is pertinent to consider observation made by Sansoni J in the case of M. Kanapathipillai Vs M. Meerasaibo 58 NLR41 at page 43 wherein His Lordship observed as follows: "There is a well-established rule that the law will presume in favour of honesty and against fraud." The learned District Judge, before making the impugned order in this case, should have been mindful of the above

observation made by His Lordship Sansoni J in M. Kanapathipillai's case (supra). I do not doubt that Gunasekara's case (supra) would have been differently decided if the above material and legal principle enunciated by Sansoni J were considered. Thus if courts make orders of this nature (rejecting plaint on the basis that the encroached area has not been described by way of a plan or a sketch), the courts would be encouraging violators of law. Therefore, in my view when an owner of a land files a plaint seeking a declaration of title to his land and to eject an encroacher or encroachers from his land, he should describe his main land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan. In this regard one should not forget the fact that the plaintiff is seeking a declaration of title to his main land which has been described in the above manner which is in conformity with Section 41 of the Civil Procedure Code. The situation would have been different if an encroacher to a land seeks a declaration on prescription to the encroached area. Then such a portion of land should be described by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan in the plaint. Section 41 of the Civil Procedure Code reads as follows.

> *"When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only."*

What is the specific portion of land discussed in Section 41 of the Civil Procedure Code? It has to be noted here that in an action for declaration of title, the claim is

made for the main land. Therefore in an action for a declaration of title, 'the specific portion of land' discussed in Section 41 of the Civil Procedure Code is the land for which the plaintiff seeks a declaration of title. Therefore in an action for a declaration of title and ejectment of encroacher from the land, when the **land is described** in the plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan, it is wrong for court to reject the plaint on the basis that the **encroached area has not been described in the plaint** by reference to a sufficient sketch, map or plan.

As I pointed out earlier, the intention of an encroacher is to expand his area of encroachment day by day. If the encroached area is described by way of a plan or sketch at the time of filing the case, it may not be the same encroached area at the time of conclusion of the case. Thus at the time of filing action for a declaration of title if a plan is annexed to the plaint describing the encroached area and the court makes an order ejecting the encroacher as per the plan, the encroacher would still be holding on to another portion of the land even after the order of ejectment is implemented because his area of encroachment at the time of ejectment may be larger than what was shown in the plan. In such an event the Plaintiff may have to file another case to eject the encroacher from the other portion of the land. Thus there would not be an end to litigation and this type of procedure would support the allegation of laws delays. Therefore it appears that the unwritten principle in law enunciated by Sansoni CJ in the case of H.A.M Cassim Vs Government Agent Batticaloa 69 NLR 403 that ***'there must be finality in litigation'*** would be violated if the courts of this country start rejecting plaints as discussed above. When I consider all the above matters, I feel that producing a plan describing the area of encroachment cannot be expected when the owner of a land files action seeking a declaration of title to his main land and for ejectment of encroacher. In an action

for a declaration of title, if the plaintiff establishes his case and the court gives judgment in favour of the plaintiff, and in the plaint an order for ejectment of encroacher or encroachers is also sought, it becomes the duty of court to make an order to eject the encroacher from the main land irrespective of the fact that the encroached area is described by way of metes and bounds or a plan or a sketch. Considering all the aforementioned matters, I hold the view that when the plaintiff who claims to be the owner of a land files a case seeking a declaration of title to his land and also an order to eject an encroacher or encroachers from his main land, what is expected by Section 41 of the Civil Procedure Code is to describe his main land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan but the said section does not expect to describe the encroached area in the plaint by reference to physical metes and bounds **or** by reference to a sufficient sketch, map or plan.

But in the present case although learned counsel for the Defendant-Appellant contended that the encroached area has not been described by way of a plan, the encroached area has been identified by way of boundaries. In this connection Section 41 of the Civil Procedure Code is important.

In the present case, the encroached area by the Defendant-Appellant has been described in the 2nd schedule of the plaint by way of boundaries. Thus the encroached area has been described in the plaint by reference to physical metes and bounds. I therefore hold that the Plaintiff-Respondent has complied with Section 41of the Civil Procedure Code even with regard to the encroached area which is not necessary. When I consider all the aforementioned matters, I reject the contention of learned counsel for the Defendant-Appellant. When I consider all the above matters, I hold that the learned Judges of the Civil Appellate High Court

have come to the correct conclusion and the learned District Judge was wrong when he dismissed the Plaintiff's case. In view of the conclusion reached above, I answer the above questions of law No.1,3,4,5,6,7 in the negative. The question of law No.2 does not arise for consideration. For all the above reasons, I affirm the judgment of the Civil Appellate High Court and dismiss this appeal with costs. The Plaintiff-Respondent is entitled to the costs in all three courts.

Appeal dismissed.

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court

Murdu Fernando 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

SC. Appeal No. 194/2012

SC. HC. CA. LA. No. 535/2011

Appeal No.
WP/HCCA/GPH/102/01 (F)

DC. Negombo Case
No. 3329/L

(deceased) 1. Paththinikuttige Anthony Nonis
No. 162, Seththappaduwa,
Pamunugama.

1a. Paththinikuttige Mary Bernadette Fernando

1b. Baddeliyanage Don Ruphus

Both of No. 149, Seththappaduwa,
Pamunugama.

(deceased) 2. Paththinikuttige Bridget Nonis
No. 162, Seththappaduwa,
Pamunugama.

Plaintiffs

Vs.

1. Ranaweera Arachchige Dona Rita Resiya

2. Hettiarachchige Don Ignatius Glennie

3. Hettiarachchige Godfrey

4. Hettiarachchige Ranjith

All of No. 196, Rajawatte,

Pamunugama.

Defendants

AND

1a. Paththinikuttige Mary Bernadette Fernando

1b. Baddeliyanage Don Ruphus
Both of No. 149, Seththappaduewa,
Pamunugama.

Plaintiff-Appellants

Vs.

(deceased) 1. Ranaweera Arachchige Dona Rita Resiya

1a. Philip Neri Hettiarachchi
No. 196, Rajawatta,
Seththappaduwa,
Pamunugama.

2. Hettiarachchige Don Ignatius Glennie

3. Hettiarachchige Godfrey

(deceased) 4.Hettiarachchige Ranjith

All of No. 196, Rajawatte,
Pamunugama.

4a. Arachchige Rose Mary Nirmala
No.301A, Bollathe, Ganemulla.
Defendant-Respondents

AND NOW BETWEEN

1a. Philip Neri Hettiarachchi
No. 196, Rajawatta,
Seththappaduwa,
Pamun
2. HettiarachchigeDonIgnatius Glennie

3. Hettiarachchige Godfrey
Both of No. 196, Rajawatte,
Pamunugama.

Defendant-Respondent-Petitioners

Vs.

1a. Paththinikuttige Mary Bernadette
Fernando

1b.Baddeliyanage Don Ruphus
Both of No. 149, Seththappaduwa,
Pamunugama.

Plaintiff-Appellant-Respondents

4a. Arachchige Rose Mary Nirmala
No. 301A, Bollathe,
Ganemulla.

Defendant-Respondent-Respondent

Before : Sisira J. de Abrew, J.
Prasanna Jayawardena, PC, J. &
L. T. B. Dehideniya, J.

Counsel : H. Withanachchi with Anuradha Weerakkody for the

Defendant-Respondent-Appellants.

S. A. D. S. Suraweera for the Substituted Plaintiff-Appellant-Respondents.

Argued on : 02.10.2018

Decided on : 03.12.2018

Sisira J. de Abrew, J.

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action bearing No.3329/L in the District Court of Negombo against the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) for a declaration of title to the land described in the plaint (Dhangahawathukabella). The learned District Judge after trial by his judgment dated 2.4.2001 dismissed the case of the Plaintiff. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 19.8.2011 set aside the judgment of the learned District Judge and entered judgment in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment the Defendant-Appellant has appealed to this court and this court by its order dated 5.11.2012 granted leave to appeal on questions of law stated in paragraphs 25(i),(ii),(iii),(v),(vi) and (vii) of the Petition of Appeal dated 16.12.2011 which are set out below.

1. Did the High Court err in law by misconstruing the principles laid down in Sirajudeen Vs. Abbas in determining the acquisition of prescriptive rights claimed by the Plaintiffs?

2. Were the learned Judges of the High Court in error by the application of the starting point of the acquisition of prescriptive rights in favour of the Plaintiffs?

3. Has the High Court misdirected itself by holding that the 1st Plaintiff commenced his possession of the land in suit from the day the same was mistakenly transferred to the Defendants?

4. 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 prescription?

5. Has the High Court erred in law by holding that the Plaintiffs had established adverse possession against the Defendants so as to acquire the corpus by way of prescription?

6. Did the learned High Court Judges err with regard to the burden of proof by casting the burden on the Defendants to establish their prescriptive claim?

Facts of this case may be briefly summarized as follows.

It is undisputed that nine lands including a land called Dhangahawathukabella which is the subject matter of this case and a land called Kadolgahawatta had been transferred to Plaintiff Anthony Nonis (now deceased) by deed No 815(P1) dated 12.2.1960 by RA Danial Fernando, HD Philip Neri, and Justin Hamy. Plaintiff-Respondent claimed that Anthony Nonis by deed No 818 (V1) dated 1.3.1960 transferred seven (7) lands out of nine lands referred to in deed No.815 to Rita Resiya (the 1st defendant) , the wife of Philip Neri keeping the land called Dhangahawathukabella and the land called Kadolgahawatta with Anthony Nonis. Thus Plaintiff-Respondent and his heirs were under honest belief that they were

the owners of the said two lands. Although the Plaintiff-Respondent and his heirs thought that lands called Dhangahawathukabella and the land called Kadolgahawatta had not been transferred to the 1st defendant, the deed No 818 (V1) dated 1.3.1960 reveals that the said two lands had been transferred to the 1st defendant. But the Plaintiff-Respondent claimed that Anthony Nonis and his heirs (the wife and children) possessed these two lands from March 1960 onwards on the basis that they were the owners of the two lands. Most important question that must be decided in this case is whether Plaintiff-Respondent and his heirs have acquired prescriptive title to these two lands in terms of Section 3 of the Prescription Ordinance. Section 3 of the Prescription Ordinance reads as follows.

> *Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as*

herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

In terms of Section 3 of the Prescription Ordinance, a person who claims prescription should prove the following ingredients.

1. Uninterrupted possession of the property.
2. Undisturbed possession of the property.
3. Adverse possession or independent possession of the property.

for a period of ten years.

A claimant who claims prescriptive title will be successful only if he proves the above ingredients.

1st and 2nd Ingredients are supported by the judicial decision in the case of Fernnado Vs Wijesooriya 48 NLR 320 at pages 325 and 326 wherein Canekeratne J observed thus:

> "Another essential requisite to constitute such an adverse possession as will be of efficacy under the statute is continuity; and whether a possession is " undisturbed and uninterrupted " depends much upon the circumstances. If the continuity of possession is broken before the expiration of the period of time limited by the statute, the possession of the true owner is restored; in such a case to gain a title under the statute a new adverse possession for the time limited must be had."

In the present case, has the Plaintiff-Respondent enjoyed uninterrupted and undisturbed possession of the property in dispute (land called Dhangahawathukabella) for a period of ten years. Lucia Fernando who is the wife of Plaintiff Anthony Nonis in her evidence at pages 163 and 164 states that her husband executed deed No 818(V1) dated 1.3.1960 and from 1.3.1960 she and her husband were possessing the lands called Dhangahawathukabella and Kadolgahawatta till 25.3.1983 without any dispute. The sons of the 1st defendant on 25.3.1983 came and disturbed their possession to the lands. The case was filed in August 1984. The 1st defendant in her evidence at page 323 states that she even does not know the names of the said two lands. The above evidence clearly demonstrates that Plaintiff Anthony Nonis and his wife have had uninterrupted and undisturbed possession of the property in dispute for a period of 23 years.

The next question that must be considered is whether possession of the property in dispute by Plaintiff Anthony Nonis and his wife was an adverse possession. I now advert to this question. To claim prescriptive title under Section 3 of the Prescription Ordinance, the claimant's possession to the property should be an adverse possession or independent possession. This is one of the conditions that should be proved by the claimant. In this connection, I would like to consider certain judicial decision. In Fernnado Vs Wijesooriya 48 NLR 320 at pages 325 Canekeratne J observed thus:

> There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the holder of the land adverse ; if it be clear that there is no such intention there can be no pretence of an

> adverse possession. It is necessary to inquire in what manner the person who had been in possession during the time held it, if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse.

In De Silva Vs Commissioner General of Inland Revenue, 80 NLR 292 it was held as follows:

"Where property belonging to the mother is held by the son the presumption will be that it is permissive possession which is not in denial of the title of the mother and is consequently not adverse to her."

In the case of Seeman Vs David [2000] 3 SLR 23 wherein His Lordship Justice Weerasuriya held as follows. "The proof of adverse possession is a condition precedent to claim prescriptive rights".

Considering the above legal literature I hold that in order to prove adverse possession the claimant must prove that he possessed the property adverse to the original owner

Therefore it is seen that if a person, who claims prescription in terms of Section 3 of the Prescription Ordinance, possesses the property with a secret intention his possession cannot be considered as an adverse possession and as such he is not entitled to succeed in a claim of prescription. Further I hold that if a person who knows that he is not the owner of a property starts possessing the property with a secret intention that he would be able to claim prescription at the end of ten years, such a person is **not** entitled to claim prescription under Section 3 of the Prescription Ordinance. This view is supported by the following judicial decisions. In Madunawala Vs Ekneligoda 3 NLR 213 wherein Bonser CJ held as follows:

> "A person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation."

BONSER, C.J. further observed thus:

> "Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as owner."

In Corea Vs Appuhamy 15 NLR 65 Privy Council held:

> 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 some thing equivalent to ouster could bring about that result.

I further hold that if a person possesses a land with leave and licence of the owner, such a possession is not adverse possession. This view is supported by judicial decisions in De soysa vs Fonseka 58 NLR 501 and Siyaneris Vs Jayasinghe Udenis de Silva 52 NLR 289

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 the case of Navaratne Vs Jayatunga 44 NLR 517 Howard CJ held thus:

> "Where a person enters into occupation of property belonging to another with the latter's permission he cannot acquire title to such property by prescription unless he gets rid of his character of licensee by doing some overt act showing an intention to possess adversely.

As I pointed out earlier Anthony Nonis's wife Lucia Fernando in her evidence stated that they possessed the land in dispute for a period of 23 years without any dispute from 1.3.1960. She at page 202 states that she planted 40 coconut plants in this land. As I pointed out earlier, the 1st defendant in her evidence states that she even does not know the name of the lands. The above evidence clearly establishes that the Plaintiff-Respondent has possessed the land in dispute on the honest belief that he is the owner of the land and that possession by the Plaintiff-Respondent was an adverse possession.

For the above reasons, I hold that the Plaintiff-Respondent has proved undisturbed, uninterrupted and adverse possession for a period of 23 years; that he has proved the necessary ingredients set out in Section 3 of the Prescription Ordinance and that the Plaintiff-Respondent is entitled to succeed in this case. For the aforementioned reasons, I answer the above questions of law in the negative. For the above reasons, I affirm the judgment of the learned Judges of the Civil Appellate High Court dated 8.11.2011 and dismiss this appeal with costs. The Judges of the Civil Appellate High Court were correct when they entered judgment in favour of the Plaintiff-Respondent. The Plaintiff-Respondent

is entitled to judgment in this case. The learned District Judge is directed to enter judgment accordingly.

The Plaintiff-Respondent is entitled to costs in all three courts.

Appeal dismissed.

Judge of the Supreme Court.

Prasanna Jaywardena PC J

I agree.

Judge of the Supreme Court.

L.T.B. Dehideniya J

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

Samarasinghe Dassanayakege Babun Nona alias
Dassanayakege Babun Nona Samarasinghe
No.509/6, Namal Mawatha,
Habarakada, Homagama.

Plaintiff

SC Appeal 197/2012
SC/(HC)CALA/81/2012
WP/HCCA/AV/1058/2008(F)
DC Homagama Case No.2042/L

Vs

1. Kalyanawathi Wickramasinghe
2. Kanduboda Arachchige Rajeewa Kumara Perera
   No.269/3, Habarakada, Homagama.

Defendants

AND BETWEEN

1. Kalyanawathi Wickramasinghe
2. Kanduboda Arachchige Rajeewa Kumara Perera
   No.269/3, Habarakada, Homagama.

Defendant-Appellants

Samarasinghe Dassanayakege Babun Nona alias
Dassanayakege Babun Nona Samarasinghe
No.509/6, Namal Mawatha,
Habarakada, Homagama.

Vs

Plaintiff-Respondent

AND NOW BEWEEN

Samarasinghe Dassanayakege Babun Nona alias
Dassanayakege Babun Nona Samarasinghe
No.509/6, Namal Mawatha,
Habarakada, Homagama.
(The Plaintiff died before the Judgment delivered in the District Court and now her son was substituted in her place)

Deceased Plaintiff

Upali Dayaratne Perera
No.269/2, Habarakada, Homagama.

Substituted Plaintiff-Respondent-Petitioner-Appellant

Vs

1. Kalyanawathi Wickramasinghe
2. Kanduboda Arachchige Rajeewa Kumara Perera
   No.269/3, Habarakada, Homagama.

Defendant-Appellant-Respondent-Respondents

Before : Eva Wanasundera PC J
Sisira J de Abrew J
Nalin Perera J

Counsel : Ranjan Suwadaratne PC with Sunari Thennakoon for the Substituted Plaintiff-Respondent-Petitioner-Appellant
Kamal Dissanayake with Sureni Amarathunga for the Defendant-Appellant-Respondent-Respondents

Argued on : 19.1.2018

Written Submission
Tendered on : 7.5.2013 by the

Substituted Plaintiff-Respondent-Petitioner-Appellant
1.2.2013 by the Defendant-Appellant-Respondent-Respondents

Decided on : 21.6.2018

Sisira J de Abrew J

The Plaintiff-Respondent-Petitioner-Appellant hereinafter referred to as the Plaintiff-Appellant) filed this case against the Defendant-Appellant-Respondent-Respondents (hereinafter referred to as the Defendant-Respondents) for a declaration of title. The learned District Judge after trial decided the case in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Respondents appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 23.1.2012 set aside the judgment of the learned District Judge and held in favour of the Defendant-Respondents. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 9.11.2012, granted leave to appeal on questions of law set out in paragraphs 32 (c) and 32 (d) of the Petition of Appeal dated 5.3.2012 which are set out below.

1. Have the Judges of the Civil Appellate High Court misdirected themselves by failing to consider the fact that the learned Trial Judge before whom the factual evidence was led has duly evaluated the evidence and arrived at her judgment dated 23.1.2012?
2. Have the Judges of the Civil Appellate High Court misdirected themselves by arriving at the finding that the deceased Plaintiff has never disputed her deserted husband's ownership despite of the strong and cogent evidence to the effect that the deceased Plaintiff's husband has completely deserted the

deceased Plaintiff and the child and was living with another woman in Thanamalwila area in arriving at their final decision?

The Defendant-Respondents have taken up the position that David Perera who is the husband of the Plaintiff-Appellant by deed No 961 dated 12.10.1991 marked V1 transferred the property in question to Jamis Siriwardena; that Jamis Siriwardena by deed No.1024 dated 8.2.1993 marked V3 transferred the property to the 1st Defendant-Respondent; and that the 1st Defendant-Respondent is the owner of the property. The Defendant-Respondents sought a declaration that the 1st Defendant-Respondent is the owner of the property.

The Plaintiff-Appellant claims title to the property by prescription. Has she obtained the prescriptive title to the property in question? If this question is answered in the negative her case should fail. I now advert to this question. The plaintiff is the wife of David Perera. Their marriage has not been dissolved. The following evidence given by the Plaintiff-Appellant is important to decide the above question.

Q. Your husband gave the land and the house for you to maintain yourself.

A. Yes.

Q. You possess the property on the title of your husband.

A. I possess the property.

The above evidence demonstrates that her possession is not an adverse possession. Under Section 3 of the Prescription Ordinance for a person to claim prescriptive title his or her possession should be an adverse possession. Since the possession of the Plaintiff-Appellant is not adverse possession she is not entitled to

claim prescriptive title to the property. Further when wife possesses a property of her husband she cannot claim prescriptive title under Section 3 of the Prescription Ordinance against her husband because such a possession cannot be considered to be an adverse possession against her husband. In the present case, the Plaintiff-Appellant is the wife of David Perera who is the owner of the property. David Perera transferred the property to Siriwardena on 12.10.1991. Thus the declaration of title Deed No. 333 dated 1.2.1993 written by Plaintiff-Appellant has been written without her acquiring the prescriptive title. The case was filed in the District Court on 25.2.1993. When I consider all the above matters, I hold that the Plaintiff-Appellant has not acquired the prescriptive title to the property and that Plaintiff-Appellant has not proved that he is the owner of the property. This is a rei vindicatio action. In an action for rei-vindicatio the plaintiff must prove that he is the owner of the property. This view is supported by the following judicial decisions.

In De Silva Vs Gunatilake 32 NLR 217 at 219 Macdonell CJ held thus: "There is abundant authority that, a party claiming a declaration of title must have title himself. … The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."

In Peiris Vs Savunahamy 54 NLR 207 Dias SPJ (with whom Justice Gratiaen agreed) held thus:

"Where in an action for declaration of title to land, the Defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium."

In Abeykoon Hamine Vs Appuhamy 52 NLR 49 Dias SPJ (with whom Jayatilake CJ agreed) observed thus:

"This being action for rei vindicatio, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute."

In Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 Supreme Court held thus: "In an action rei vindicatio the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established."

Since the Plaintiff-Appellant has not proved that she is the owner of the property, she is not entitled to succeed in her action filed against the Defendant-Respondents. The Defendant-Respondents have proved his title. Considering all the above matters, I answer the above questions of law in the negative. For the above reasons, I refuse to interfere with the judgment of the Civil Appellate High Court, affirm the judgment of the Civil Appellate High Court and dismiss this appeal. Considering the facts 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.

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 against the Judgment of High Court of Wayamba Province Holden in terms of section 9 of High Court (SPL) Provisions Act No. 19 of 1990 (as amended)

Wickrama Arachchi Kolambage Sanjeewa Kumara
C/O D.M. Herath Banda,
Thenthankuriyawa,
Anamaduwa.

Applicant

SC Appeal 202/2015

SC (SPL) LA 115/15
Provincial High Court
No. HCALT 1/15
LT 28/1784/11

Vs,

K.A. Nandana Kuruppu,
Nandana Brothers,
No. 124/15, I.D.H. Mawatha,
Puttalam.

Respondent

And

K.A. Nandana Kuruppu,
Nandana Brothers,
No. 124/15, I.D.H. Mawatha,
Puttalam.

Respondent -Appellant

Vs,

Wickrama Arachchi Kolambage Sanjeewa Kumara
C/O D.M. Herath Banda,
Thenthankuriyawa,
Anamaduwa.

Applicant-Respondent

And now between

Wickrama Arachchi Kolambage Sanjeewa Kumara
C/O D.M. Herath Banda,
Thenthankuriyawa,
Anamaduwa.

Applicant-Respondent-Appellant

Vs,

K.A. Nandana Kuruppu,
Nandana Brothers,
No. 124/15, I.D.H. Mawatha,
Puttalam.

Respondent-Appellant- Respondent

Before: **S.E. Wanasundera PC J**

Vijith K. Malalgoda PC J

Murdu N. B. Fernando PC J

Counsel: G.R.D. Obeysekara with Unica Fonseka for the Applicant-Respondent-Appellant

Chandana Wijesooriya for the Respondent-Appellant-Respondent

Argued on: 02.07.2018

Decided on: 10.10.2018

Vijith K. Malalgoda PC J

The Applicant-Respondent-Appellant (hereinafter referred to as the Applicant) who was employed by the Respondent-Appellant-Respondent (hereinafter referred to as the Respondent) in August 2006 as electricity supplier and a foreman, had worked under the Respondent until his services were terminated by the Respondent on 1st March 2011.

As against the said decision of the Respondent to terminate his service, the Applicant had gone before the Labour Tribunal of Chilaw and filed an application dated 1st June 2011.

At the conclusion of the Inquiry, by order dated 17th December 2014 the Labour Tribunal had declared that the termination of the Applicant's services is unlawful and a sum of Rupees 337,500/- was ordered as compensation to be paid to the Applicant.

The said order of the Labour Tribunal was challenged by the Respondent before the Provincial High Court holden in Chilaw and by order dated 25th May 2015, the High Court had allowed the said appeal and set aside the order of the Labour Tribunal dated 17th December 2014.

Being dissatisfied with the above order, the Applicant had filed a special leave to appeal application before the Supreme court, and the Supreme Court after considering the said application had granted leave on the following question of Law,

> "Did the High Court in the proper evaluation of the evidence err that the Applicant was not an employee of the Respondent?"

As revealed before us, when the Applicant complained to the Labour Tribunal that the Respondent unlawfully terminated his service, the Respondent responding to the said application had taken up the position that the Applicant was not a 'workman' employed by him but was an 'independent contractor' and that the Tribunal could not entertain the application.

In the said circumstances, the question that the Tribunal had to decide was whether the Applicant was an employee of the Respondent or an independent contractor or in other words the relationship between the Applicant and the Respondent was for a "contract of service" or "contract for service"

Both, the Applicant and the Respondent have admitted that there was no written contract between them and in the said circumstances, the Respondent took up the position that, the Respondent worked as a contractor to the Ceylon Electricity Board, and after obtaining such contracts, he sub-contracted the work to 3rd parties and shared the profit. In the said circumstances he took up the position that the Applicant too was an independent contractor of the Respondent who under took sub-contracts from the Respondent.

However, as against the said position taken up by the Respondent, the Applicant had taken up the position before the Labour Tribunal, that the Applicant and the other workmen who worked for the Respondent, had gathered at the house of the Respondent every morning to obtain instructions, from him with regard to their daily work and similarly reported back to the Respondent around 5.30 p.m. During their work, either when they engaged in clearing the main lines or giving house connections, they used the equipment provided by the Respondent. In the said circumstances the case of the Applicant before the Labour Tribunal was that he was subject to the directions and control of the Respondent during the period in question.

The Applicant in his evidence marked a document admitted to be in the hand writing of the Respondent where at the top of the page Applicant's name appears as "Sanjeewa". The said document refers to payments made to the Applicant for clearing electrical lines and supplying Electricity for the period 2006-2007. In reference to A-1 the Respondent took up the position that the said document has no connection to the Applicant but it refers to monies reserved for the vehicles.

The learned President of the Labour Tribunal had considered the positions taken up by both parties with regard to A-1 and rejected the position taken up by the Respondent. Whilst referring to the evidence of the Respondent it was further observed by the President of the Labour Tribunal that,

the Respondent had not maintained a proper record of the payments made to his employees until July 2011, a date subsequent to the termination of the Applicant.

As observed by this court, our courts have followed several tests to identify the relationship between the two parties and control test is one such test accepted by our courts.

The said test was discussed by *Sharvananda (J)* (as he was then) in the case of ***M.D. Jamis Appuhamy vs. T.P. Shanmugam, (1978) 80 NLR 298*** at *299-300* as follows;

> "The question of the applicant's status, on the facts stated above, thus comes up for decision. Was the applicant an employee under a contract of service or an independent contractor on a contract for service? A contract of service is simply another name for a contract of employment under which the parties are master and servant in the strict sense. A contract for services, on the other hand, is a contract under which an independent contractor agrees to render services to another in circumstances in which the relationship of master and servant is not created. A servant is one who is bound to obey any lawful orders given by the master as to the manner in which his work shall be done. The master retains the power of controlling him in his work and may direct not only what he shall do but how he shall do it. An independent contractor, as opposed to a servant, is one who carries on an independent employment in the course of which he contracts to do certain work. He may, by the terms of his contract, be subject to the directions of his employer. But, apart from the contract, he is his own master as to the manner and time in which the work shall be done.

In *Collins vs. County Council,* Hilbery, J. summarized the distinction in this way:-

> "In one case the master can order or require what is to be done; while in the other case he can, not only order or require what is to be done, but how it shall be done."

In the case of ***The Times of Ceylon Ltd Vs. The Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya 63 New Law Reports 126*** **at 132,** *T.S.Fernando (J)* had observed;

> "Being in mind that ultimate test to be applied is whether the hirer had authority to control the manner and execution of the act in question or, to put in the words to be found in the judgment of the Supreme Court of India, whether there exists in the master a right to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work,…."

In the case of ***Sri Lanka Insurance Corporation Ltd Vs. A.C.R. Wijesundera SC Appeal 99/2010*** SC minute dated 28.06.2017 Supreme Court observed that;

> "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 hires 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."

As observed by me, the learned President of the Labour Tribunal was mindful of the said test when concluding that there exists a master servant relationship between the Applicant and the Respondent. (Pages 6-8 of the order)

The Appellate courts are reluctant to interfere with the findings of the Trial Courts including the Labour Tribunal unless a serious miscarriage of justice has taken place when the Tribunal was analyzing the evidence and the law relating to its findings.

In the case of ***Jayasuriya Vs. Sri Lanka State Plantation Corporation 1995 2 Sri LR 379 at 391,*** Amarasinghe J had observed the above as follows;

> "The industrial Disputes Act No 43 of 1950 states in section 31 D that the order of a Labour Tribunal shall and shall not be called in question any court except on a question of Law. While Appellate Courts will not intervene with pure finding of fact, yet if it appears that,

The tribunal has made a finding wholly unsupported by the evidence or

Which is inconsistent with the evidence and contradictory of or

Where the tribunal has failed to consider material and relevant evidence or

Where it has failed to decide a material question or

Misconstrued the question and has directed its attention to the wrong matters or

Where there was an erroneous misconception amounting to a misdirection or

Where it failed to consider material documents or misconstrued them or

Where the tribunal has failed to consider the version of one party or his evidence or erroneously supposed there was no evidence, the finding of the tribunal is subject to review by the Court of Appeal."

As observed above in this judgment, the learned President of the Labour Tribunal has correctly analyzed the evidence placed before the Labour Tribunal and had applied the test relating to identification of the relationship between the Applicant and the Respondent.

However when considering the judgment of the High Court of Provinces, I observe that the learned High Court Judge had failed to appreciate the role of the High Court in an appeal process and has merely given his interpretation to the evidence led before the trial court i.e. the Labour Tribunal and interfered, with the finding on mere questions of fact.

The above position is in violation of section 31 D of the Industrial Disputes Act and contrary to the decision in ***Jayasuriya V. Sri Lanka State Plantation Corporation (supra)*** decided by the Supreme Court.

In the case of ***Ceylon Cinema and Film Studio Employees Union V. Liberty Cinema Ltd [1994] 3 Sri LR 121*** the Court of Appeal too, had held that,

> "The question of assessment of the evidence is within the province of the Labour Tribunal and if there is evidence on record to support its findings the Appellate Court cannot review those findings even though on its own perception to the evidence it may be inclined to come to a different conclusion."

For the reasons setout above I hold that the Learned High Court Judge has erred in law when he interfered with the findings of the Labour Tribunal on a pure question of fact by giving his own interpretation to the evidence and the documents led before the Labour Tribunal. I therefore answer the question of law enumerated above by this court, in favour of the Applicant-Respondent-Appellant and against the Respondent-Appellant-Respondent.

I further make order setting aside the judgment dated 27.05.2015 of the Provincial High Court holden in Chilaw and affirm the order of the Labour Tribunal of Chilaw dated 17.12.2014.

Appeal allowed. However, I order no costs.

Judge of the Supreme Court

S.E. Wanasundera PC J

I agree,

Judge of the Supreme Court

Murdu N. B. Fernando 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

Hasini Dilshani Wijesinghe
Jayawardane
No.465/50, Nelum Place,
Jalthor, Ranala.

Minor appearing by her Next Friend

Amitha Damayanthi Konggahage
Jayawardane
No.465/50, Nelum Place,
Jalthor, Ranala.

Plaintiff

SC Appeal 207/2016
SC(HC)CALA185/16
WP/HCCA/COL/60/2010/F(A)
DCColombo 57651/MR

Vs

Pitakanda Wahumpurage Rohana
Sumith Ananda.
No.402, Himbutana Road,
Mulleriyawa, New Town.

KMD Samantha
No.467/8, Rajasinghe Mawatha,
Udumulla,
Mulleriyawa, New Town.

Wajira Sumith Udunuwara
No.406, Udumulla

Mulleriyawa, New Town

Defendants

AND

Wajira Sumith Udunuwara
No.406, Udumulla
Mulleriyawa, New Town
3rd Defendant-Petitioner-Appellant

Vs

1. Amitha Damayanthi Konggahage
   Jayawardane
   No.465/50, Nelum Place,
   Jalthor, Ranala.

Plaintiff-Respondent

2. Pitakanda Wahumpurage Rohana
   Sumith Ananda.
   No.402, Himbutana Road,
   Mulleriyawa, New Town.

3. KMD Samantha
   No.467/8, Rajasinghe Mawatha,
   Udumulla,
   Mulleriyawa, New Town.

Defendant-Respondents

AND NOW

Wajira Sumith Udunuwara
No.406, Udumulla
Mulleriyawa, New Town
3rd Defendant-Petitioner-Appellant-

Petitioner-Appellant

Vs

1. Amitha Damayanthi Konggahage
   Jayawardane
   No.465/50, Nelum Place,
   Jalthor, Ranala.

Plaintiff-Respondent-
Respondent-Respondent

2. Pitakanda Wahumpurage Rohana
   Sumith Ananda.
   No.402, Himbutana Road,
   Mulleriyawa, New Town.

3. KMD Samantha
   No.467/8, Rajasinghe Mawatha,
   Udumulla,
   Mulleriyawa, New Town.

Defendant-Respondents-
Respondent-Respondents

Before : Sisira J de Abrew J
LTB Dehideniya J
Murdu Fernando PC J

Counsel : S Kumaralingam for 3rd Defendant-Petitioner-Appellant-Petitioner-Appellant
MDJ Bandara for the Plaintiff-Respondent- Respondent-Respondent

Argued on : 21.6.2018

Written Submission
Tendered on : 29.6.2018 by the 3rd Defendant-Petitioner-Appellant-Petitioner-Appellant
19.1.2018 by the Plaintiff-Respondent-Respondent-Respondent

Decided on : 03.12.2018

Sisira J de Abrew J

In this case the Plaintiff states that 1st to 3rd defendants did not answer the summons of the learned District judge. The learned District judge fixed the case for ex-parte trial. After serving the decree on the 2nd and 3rd Defendants, the 3rd Defendant made an application under Section 86(2) of the Civil Procedure Code to purge the default. The learned District Judge by his order dated 23.3.2010 dismissed the application to purge the default. Being aggrieved by the said order of the learned District Judge, the 3rd Defendant appealed to the Civil Appellate High Court. The Civil Appellate High Court, by its judgment dated 11.3.2016 dismissed the appeal and affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 3rd Defendant has appealed to this court. This court, by its order dated 1.11.2016, granted leave to appeal on questions of law stated in paragraphs 11(b) and 11(d) of the petition of appeal dated 20.4.2016 which are set out below.

1. Have the Honourable Judges of the Civil Appellate High Court erred by failing to consider that since statutory provisions apply to service of summons and unless the summons are duly served the other statutory consequences for non-appearance on serving summons would not apply on the Defendant.
2. Have the Honourable Judges of the Civil Appellate High Court erred by failing to consider the provisions of Section 62 of the Civil Procedure Code which categorically deals with substituted service and provides that service (of summons) has to be on an order of the court.

The 2nd and 3rd Defendant-Appellants both gave evidence at the inquiry. They both said that they did not receive summons in this case. The 2nd Defendant in his

evidence stated that no summons had been pasted on his door. The 3rd Defendant-Appellant in his evidence stated that no summons had been pasted on his gate. S.L Dougles Priyantha, the Process Server in his evidence stated that he pasted summons on the door of the 2nd Defendant-Appellant. He also, in his evidence, stated that he pasted summons on the gate of the 3rd Defendant-Appellant. Both Defendant-Appellants in their evidence denied this position. Section 60 of the Civil Procedure Code reads as follows.

> (1) The court shall, where it is reported that summons could not be effected by registered post or where the summons having been served and the defendant fails to appear, direct that such summons be served personally on the defendant by delivering or tendering to him the said summons through the Fiscal or the Grama Niladhari within whose division the defendant resides or in any case where the plaintiff is a lending institution within the meaning of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, through the Fiscal or other officer authorized by court, accompanied by a precept in form No. 17 of the First Schedule. In the case of a corporation summons may be served personally by delivering or tendering it to the secretary or like officer or a director or the person in charge of the principal place of business of such corporation.
>
> (2) If the service referred to in the preceding provisions of this section cannot by the exercise of due diligence be effected, the Fiscal or Grama Niladhari shall affix the summons to some conspicuous part of the house in which the defendant ordinarily resides or in the case of a corporation or unincorporated body, to the usual place of business or office of such corporation or such body and in every such case the summon shall be deemed to have been duly served on the defendant.

In terms of Section 60(2) of the Civil Procedure Code, the Fiscal has the right to affix the summons on a conspicuous part of the house. There is no dispute on this point. In an inquiry to purge the default it is the burden of the defendant to establish that summons had not been served on him. In Windawath Vs thopman

[1998] 3 SLR 1 Court of Appeal held thus "The defendants have to begin leading evidence and once the defendant's lead evidence to prove that summons had not been served on them and establish that fact, burden shifts back onto the plaintiffs to rebut the evidence."

The 2nd and 3rd Defendant-Appellants have stated in their evidence that they did not receive summons. Dougles Priyantha, the Process Server in his evidence stated that when he went to the 2nd Defendant's house, the wife of the 2nd Defendant was sweeping the house and he affixed the summons on the door. If this evidence is true it is very strange as to why the 2nd Defendant did not appear in court. In these circumstances the question that arises is whether the Process Server's evidence could be accepted as true evidence. Dougles Priyantha, the Process Server in his evidence stated that when he went to the 3rd Defendant's house, his house was closed; that he made inquiries from the person who is living in front of the 3rd Defendant's house; and that he learnt that the 3rd Defendant would return in a short while. If that is so, question that arises is as to why he did not wait to meet the 3rd Defendant. Thus the question arises whether his evidence satisfies the test of probability. Dougles Priyantha, the Process Server in his evidence states that he normally takes down notes with regard to the details of the people from he makes inquiries when he goes to serve summons. But in the present case he had not done so. According to Dougles Priyantha, the Process Server, summons was pasted on the gate of the 3rd Defendant on 17.4.2018 and he knocked on the gate. The 3rd Defendant categorically states in his evidence that he was present at home on 17.4.2018. When I consider the evidence of Dougles Priyantha, the Process Server, I feel that I am unable to accept his evidence as true evidence. When I consider the evidence led at the trial and the judgment of the learned District Judge, I feel that the learned District Judge has not analyzed the evidence properly. If he had properly analyzed the evidence of the Process Server, he would have realized the

improbability of the situation narrated by the Process Server. In the case of De Silva and others Vs Seneviratne and others [1981] 2 SLR 7 Ranasinghe J at page 16 made the following observation.

"H.N.G. Fernando, J. (as His Lordship the Chief Justice then was) in the case of Mahawithana vs. Commissioner of Inland Revenue 64 NLR 217 where in dealing with the question as to when an appellate Court would interfere with the findings of a tribunal on the primary questions of fact, at page 223, it was stated that it was open to an appellate Court to reconsider such findings of fact only:

(a) If that inference has been drawn on a consideration of inadmissible evidence or after excluding admissible and relevant evidence,

(b) If the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence, or

(c) If the conclusion drawn from relevant facts is not rationally possible, and is perverse and should therefore be set aside."

In the present case also the stand taken up by the Process Server is impossible and therefore I hold that the order of the learned District Judge is perverse

For the above reasons, I cannot permit to stand the order of the learned District Judge dated 23.3.2010. The Civil Appellate High Court affirmed the said order of the learned District Judge. For the above reasons, I set aside the order of the learned District Judge dated 23.3.2010 and the judgment of the Civil Appellate High Court dated 11.3.2016. In view of the conclusion reached above, the 1st question of law is answered as follows:

The learned Judges of the Civil Appellate High Court have failed to evaluate the evidence led at the trial. The 2nd question of law does not arise for consideration.

When the order of the learned District Judge dated 23.3.2010 is set aside, the 2nd Defendant too becomes entitled to file his answer. I direct the learned District

Judge to give an opportunity to the 2nd and 3rd Defendant-Appellants to file their answer. The learned District Judge is directed to conclude this case without any delay.

Judge of the Supreme Court.

L.T.B. Dehideniya

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

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

In the matter of an Appeal from a Judgment of the Civil Appellate High Court.

Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama

Plaintiff

Vs

SC APPEAL 213/2012
SC/ HCCA/ LA/ 329/2011
SC / HCCA / Ma / 2008 (F)
DC / Hambantota / 224 / 96 / L

Jayasooriya Arachchi Patabendige Wijeratne
No. 203, Tangalle Road, Hungama.

Defendant

AND THEN BETWEEN

Jayasooriya Arachchi Patabendige Wijeratne
No. 203, Tangalle Road, Hungama.

Defendant Appellant

Vs

Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama

Plaintiff Respondent

AND NOW BETWEEN

Jayasooriya Arachchi Patabendige Wijeratne
No. 203, Tangalle Road, Hungama.

Defendant Appellant Appellant

Vs

Abeydeera Jayasooriya Seena Patabendige
Kusumawathie of " Sena Welandasala",
Hungama.

Plaintiff Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ,**
H. N. J. PERERA J. &
MURDU FERNANDO PCJ.

COUNSEL : Rohan Sahabandu PC with Ms. Hasitha Amarasinghe for the Defendant Appellant Appellant.
J.C.Boange with Dilshan Boange for the Plaintiff Respondent Respondent.

WRITTEN SUBMISSIONS
FILED ON : 24.07.2018.
ARGUED ON : 05.07.2018.
DECIDED ON : 05.10.2018.

S. EVA WANASUNDERA PCJ.

The Plaintiff, Kusumawathie instituted action in the District Court of Hambantota to obtain a declaration of title to the lands in the 1st and 2nd Schedules to the Plaint

and to eject the Defendant Wijeratne from the land in the 2nd Schedule and obtain possession of the same. At the end of the trial the learned District Judge entered judgment in favour of the Plaintiff and granted relief as prayed for in the Plaint. Being aggrieved by the said judgment, the Defendant appealed to the Civil Appellate High Court. The High Court affirmed the judgment of the District Court. Thereafter the Defendant in the District Court case appealed once again to the Supreme Court against the judgment of the Civil Appellate High Court.

The Defendant Appellant Appellant (hereinafter referred to as the Defendant) was granted leave to appeal by this Court on the following questions of law:-

1. In the circumstances pleaded, could the learned District Judge as well as the High Court reject the claim of the Defendant on prescription, stating that the Defendant had not established the starting point of his adverse possession?
2. Has the Defendant established his prescriptive rights over the land in dispute?
3. In the circumstances pleaded, have the learned District Judge as well as the High Court misinterpreted the principles governing prescription?

Kusumawathie , the Plaintiff and Wijerathna, the Defendant were in adjoining lands. Kusumawathie had a boutique named " Sena Welandasela" on the land which is in the 1st Schedule to the Plaint. To the east of that land on which the boutique was situated, was another building with a boutique run by Wijerathna. The Plaintiff alleged in the Plaint that Wijerathna had entered into her land behind her boutique and had started using the said land which belonged to the Plaintiff. There had been a quarrel on the issue of Wijerathna trying to build a fence encroaching on the land belonging to Kusumawathie. As a result of a complaint filed by Kusumawathie against wrong actions of Wijerathna on 08.01.1996 at the Hungama Police, the police had filed an action in the Primary Court to keep peace between the parties, under Section 66 of the Primary Courts Act.

After an inquiry, the Primary Court Judge had granted possession of 'the rest of the land excluding only the boutique "Sena Welandasela" of Kusumawathie', to Wijerathna on **11.09.1996**. **Thereafte**r Wijerathna had commenced work on the said land and tried to build a fence and other buildings on the land. That is the reason and basis of the Plaintiff as indicated in the Plaint, to have filed within less than three months from the order of the Primary Court Judge, a re-vindicatio

action against Wijerathna on **28.11.1996**. Wijerathna filed answer of one page on 03.02.1997 denying all the averments of the Plaint and stating that he had been possessing the land with adverse possession for over 10 years and claiming that he has title on prescription. Later on, after 5 years and 7 months, the Plaint was amended on 09.09.2002 and amended Answer was filed about 7 months thereafter, on 09.07.2003. A commission was issued to survey the land by Court and it was returned with a Report. The Plaintiff and the Defendant had given evidence. Other persons also had given evidence. Documents P1 to P7 were marked on behalf of the Plaintiff and documents V1 to V14 were marked on behalf of the Defendant. The case had proceeded for about 11 years and at the end of the trial, **the District Judge delivered Judgment on 05.02.2008 granting the reliefs as prayed for by the Plaintiff in his judgment of 23 pages of A4 size in Sinhala**.

Being aggrieved by the said Judgment, the Defendant appealed to the Civil Appellate High Court and the Judges of the **High Court affirmed** the judgment of the District Court. Now this case is before this Court and leave has been granted on the questions of law as aforementioned.

The Plaintiff Respondent Respondent (hereinafter referred to as the Plaintiff) sought a declaration that she is the owner of the lands in the 1st and 2nd Schedules in the Plaint. She had bought the lands originally coming from Asena Marikkar Naina Mohamed Hajjiar and claimed title on the chain of deeds as well as prescriptive title. The Defendant took up the position that he had prescribed to the property and moved for dismissal of the action.

The District Judge had concluded that the **Plaintiff had proved title** to the property and that the **Defendant had failed to discharge the burden of proving prescriptive title.** The question in hand is whether prescription over 10 years was proved by the Defendant. It is trite law in our country that prescriptive possession by any Defendant has to be adverse to the Plaintiff and uninterrupted by the Plaintiff.

Section 3 of the Prescription Ordinance reads as follows:-

“Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or

performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of land or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs."

The Defendant never challenged the title of the Plaintiff to the particular property. The person named Asena Marikkar Naina Mohamed Hajjiar had transferred the property to Abdul Rahuman Ayesha Umma by Deed 3794 dated 02.01.1970. The said Ayesha Umma had got the Plan number 3103 dated 03.03.1971 done by Licensed Surveyor John de Silva and got Lot D marked therein. The said Lot D was purchased by the Plaintiff from the said Ayesha Umma by Deed **No. 269** dated **30.11.1984** and attested by Thaha Mohamed Farook Notary Public.

In January, 1996, the Defendant had quarrelled with the Plaintiff when she was walking on the land in question according to the complaint made by the Plaintiff to the Police. As she had complained to the Police and when the Police filed action before the Primary Court under Sec.66 of the Primary Courts Act, the Court had granted possession to the Defendant. It is only after the Primary Court granted him possession that the **Defendant had fenced the land against the wishes of the Plaintiff and had started to build on the land.**

The Plaintiff had complained to the Police at first when the Defendant had tried to build on the land. After the Primary Court decision to hand over the land to be possessed by the Defendant, the Plaintiff had soon thereafter filed the re vindicatio action and also obtained **an injunction against the Defendant staying the process of building** and fencing etc.

The Plaint contained two Schedules. The prayer was to declare that the land described in the Second Schedule is part and parcel of the land described in the First Schedule. The First Schedule is the land to which the Plaintiff had obtained

legal title, by way of properly executed title deeds. Her boutique was built on a small area of the said land. The land covered by the Second Schedule was possessed by the Defendant. When the District Judge issued a Commission to a Surveyor to survey the land, the Surveyor H.P.P.Jayawardena made the Plan No. 2664 dated 21.11.1998 showing the allotment of land marked as D2 depicted in Plan No. 3103 dated 03.03.1971. He showed two allotments of land marked Lot A and Lot B. Lot A was the area the Plaintiff had built the boutique on, containing in extent 01.54 Perches. Lot B was the area containing in extent 15.56 Perches, which was part of Lot D2 in Plan No. 3103 as aforesaid. This is the area of land the Defendant was in possession.

The Plaintiff filed amended Plaint dated 09.09.2002 and the Defendant's counsel, Faizal Rasheen had mentioned in open court that he has no objections to the amended Plaint on 21.01.2003, according to the journal entry number 42 of the District Court brief which is before this Court. The case had got fixed for trial and trial had commenced on 08.09.2003. Trial ended and written submissions and documents had been filed by both parties. Judgment was delivered on 05.02.2008. The District Judge's judgment was quite long and he had analysed the evidence given by each and every witness. It is contained in 24 type written A4 size pages.

The District Judge **had issued a commission** on the Surveyor and Plan No. 2664 dated 21.11.1998 was made by Licensed Surveyor H.P.P. Jayawardena and Lot B in the said Plan indicated the area which was possessed by the Defendant. The extent of the Lot B was indicated as 15.56 Perches. Lot A on which the Plaintiff's boutique was situated was shown to be of an extent of 1.54 Perches. The report of the surveyor at page 306 of the brief submits that the water tank and the roofless toilet and a small boutique on the Lot B had been built by the Defendant **by force against the objections of the Plaintiff** and an old toilet which was falling apart was claimed to have been built by the Plaintiff but the Defendant also had claimed to have built that as well.

The Defendant had marked a Deed in his evidence as V 12 and he had bought the land of an extent of 02.75 Perches on which he also has set up a boutique. The Defendant claims title to this small block of land which is covered by his boutique. **Anyway that portion of land does not belong to the corpus in question**. He claims that he had been in possession of this Lot B in Plan 2664 for a length of time. He himself stated that he had been occupying the land in question knowing that it

belonged to others. He has in his evidence said that he **' just commenced possessing the land'.** One of his witnesses, a Grama Niladari said that he was on the land from 1986 to 1993, which I observe as possession for only seven years. The Defendant's position is that he had been in possession for a long time. **He did not give a specific year or date or against whom he was possessing the property.**

The Plaintiff's position was that the Defendant started quarrelling in 1996 **and until then the Plaintiff was in possession.** However the evidence before the District Court had not shown any overt act done by the Defendant at any particular time or month or year against the owner's rights. The Defendant had been unable **to set up a date of commencement of uninterrupted and undisturbed possession** with any person's evidence or any documents.

The Plaintiff had proved her title by way of deeds. The Defendant had failed to prove uninterrupted and undisturbed possession over 10 years against the Plaintiff. The facts were analyzed by the District Judge quite well and the learned High Court Judges did not interfere with the findings of fact by the District Judge.

The Defendant's Counsel , in his submissions has cited ***Theivanapillai Vs Arumugam 15 NLR 358, Cadija Umma Vs Don Manis Appu 40 NLR 392, Tillekaratne Vs Bastian 21 NLR 392*** and argued that the parenthesis clause in Section 3 of the Prescription Ordinance has a clear bearing on the meaning of the words "adverse possession" and the Defendant in the case in hand " had not performed any act as an acknowledgement of a right existing in another person **within the period of his possession**". In his further written submissions filed after the oral submissions made in Court by the Defendant's counsel, it was heavily argued that the possession of the Defendant should be calculated with the possession by his predecessors like his father and his grandfather and that the Defendant had been on the land for a very long time but there was no evidence to the particular portion of the land having been possessed by the predecessors of the Defendant, either.

The argument of the Counsel for the Defendant was that the whole law regarding prescriptive title is contained in Section 3 of the Prescription Ordinance. Accordingly, the Defendant had been in undisturbed and uninterrupted possession for a long time. The Counsel had quoted a number of authorities in that regard. When he made submissions on " title adverse to or independent of that of the

Plaintiff", the counsel had quoted only one authority, namely, ***Fernando Vs Wijesooriya 48 NLR 320.*** The said Counsel had quoted Canekeratne J. thus:
" there must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent specifically is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the holder of the land adverse – if it be clear that there is no such intention, there can be no pretence of adverse possession." The Counsel argued that the Defendant's possession fits into this statement of Canekeratne J.

Taking that argument, for the moment, as correct, one can ask the question if the owner of a land goes abroad or goes to a far away area to live, leaving the land, then, person B who starts possessing the said land , knowing that it belongs to A, just goes into occupation thereof and stays there for a length of time, and without the knowledge of the owner, can person B state that he gets prescriptive title just by only continuing to be on the land with just an intention to possess it as his own and claim prescriptive title against the true legal owner, person A ? Does Section 3 of the Prescription Ordinance recognize that possession as "adverse possession".

It is to be noted that in the case in hand, the Plaintiff is running a boutique on part of the land she is praying for a declaration of title and in the adjoining land which is only 2.75 Perches and legally owned by the Defendant, the Defendant is running another boutique. The part of the land in question, according to the way it is situated, is placed, right behind the Defendant's boutique. The situation can be well seen according to the survey done by the court commissioner. The Defendant *only states* that he has been in possession for *a long time*. The time is not specified.

However, I fail to see what the "period of possession" that the Defendant is pointing at.

I am of the opinion that, in any action where the Defendant makes an attempt to prove "uninterrupted and undisturbed adverse possession", **firstly**, the Defendant should identify the person/owner against whom he claims adverse possession. The Defendant cannot take a stand to say "well, I have been in possession against the rights of all the owners who could have held ownership from the time I entered the land and held it as the possessor". It should be **specifically adverse possession against the owner who also has to be specified**. **Secondly**, the Defendant should

demonstrate that he had never been interrupted by the owner who has title to the land or that he had **never been disturbed by the owner**. The burden of proof is on the Defendant to prove these ingredients if he claims prescription for over ten years against the owner.

The Counsel for the Defendant has quoted from the judgment of the District Judge who had in his judgment referred to ***Sirajudeen Vs Abbas 1994, 2 SLR 365*** in which the then Chief Justice G.P.S. de Silva had stated at page 370 to read " 1st Defendant has failed to establish a starting point for his acquisition of prescriptive title." The President's Counsel for the Defendant argues that the Chief Justice is wrong in having stated so in the said case. He argues that Sec. 3 of the Prescription Ordinance does not specify the time in that manner and further submits that the mere fact of having been in possession for a long time is enough to get prescriptive title.

I find that the Counsel challenging Chief Justice G.P.S.de Silva's views in the said judgment , does not stand to reason because for 'any person on earth to be held to have possessed any land without any disturbance or interruption' does not come under "adverse possession" as in Sec. 3 of the Prescription Ordinance. The meaning of 'adverse' is equal to 'opposed to'. 'Opposed to whom', has the Defendant been possessing the land to which he claims to have prescribed to. It has to be understood as 'not opposed to the whole world' but 'opposed to the legal owner.'

The President's Counsel has argued on behalf of the Defendant regarding the parenthesis clause in Sec. 3. It is the clause within Sec. 3 which reads as " that is to say a possessor unaccompanied by payment of rent or produce or performance…… from which an acknowledgment of a right existing in other person would fairly and naturally be informed." He submitted that the Defendant in the case in hand can claim refuge under the parenthesis clause as there was no evidence forth coming to prove any of the acts/services/statements – in the parenthesis clause. He submitted that the words in this clause is not placed therein by the legislator to mean "as for example" but as a "definition" of the phrase 'adverse possession'.

To my mind, the words in the parenthesis clause is quite clearly showing an example. How can it be interpreted to be a definition simply because, it describes

a situation where the Defendant was earlier paying rent or produce or performance by way of action such as that, to be in possession of the land under the ownership of the legal owner and then there would have arisen a particular point of time when the Defendant stops/refuses/does not comply with any action of accepting or recognizing the ownership of the Plaintiff. That is the time and point at which the adverse possession commences. It is an example. It is not a definition. In the case in hand the Defendant had never been paying rent or produce or performance to the owner. How can such a person claim refuge on the parenthesis clause. I fail to understand that argument as a valid argument at all. I hold that the parenthesis clause explains how the number of years of adverse possession should be calculated.

Further more I have given consideration to all the cases enumerated below given in support of the Defendant's case as claimed by the Counsel :-

1. Fernando Vs. Wijesooriya 48 NLR 320.
2. Terunnanse Vs Manike 1 NLR 200.
3. Perera Vs Ranatunga 66NLR 137.
4. Cadija Umma,et al Vs Don Manis Appu 40 NLR 392(PC)
5. Perera Vs Premawathie 74 NLR 302.
6. Simon Appu Vs Christian Appu 1 NLR 288.
7. Jane Nona Vs Gunawardane 49 NLR 422.
8. Lucia Perera Vs Martin Perera 53 NLR 347
9. Appuhamy Vs Goonatilake 18 NLR 469.
10. Charles Vs Ramaiya 2 NLR 235.
11. Emonis Vs Sadappu 2 NLR 261.
12. Fernando Vs Wijesooriya 48NLR 320.
13. Nonis Vs Petha 73 NLR 1.
14. Raki Vs Lebe 16 NLR 138.

I hold that in the case in hand, the Defendant has failed to prove prescriptive possession as included and provided for, in Sec. 3 of the Prescription Ordinance, according to the evidence led at the trial before the District Court. He is not entitled to get prescriptive title under Section 3 of the Prescription Ordinance.

I answer the questions of law as aforementioned in favour of the Plaintiff Respondent Respondent and against the Defendant Appellant Appellant. I affirm

the judgment of the Civil Appellate High Court dated 21.07.2011 and the Judgment of the District Court dated 05.02.2008.

The Plaintiff is entitled to the reliefs prayed for in the Plaint and to take out writ to eject the Defendant from the land.

The Appeal is dismissed with costs of suit in all courts.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 to the Supreme Court in terms of section 9 (a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

Office-in-Charge,
Police station,
Buttala.

Complainant

SC Appeal 220/2014

H.C. Monaragala/ Case No.52/2012
M.C Wellawaya Case No. 56461

Vs,

Kotuwila Kankanamalage Premalal Leonard Perera,
No. 02, Kuda Gammanaya,
Pelwatta Sugar Company,
Buttala.

Accused

And between

Kotuwila Kankanamalage Premalal Leonard Perera,
No. 02, Kuda Gammanaya,
Pelwatta Sugar Company,
Buttala.

Accused- Appellant

Vs,

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

2. Office-in-Charge,
   Police station,
   Buttala.

Defendant-Respondents

And now between

Kotuwila Kankanamalage Premalal Leonard Perera,
No. 02, Kuda Gammanaya,
Pelwatta Sugar Company,
Buttala.

Accused- Appellant-Petitioner-Appellant

Vs,

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

2. Office-in-Charge,
   Police station,
   Buttala.

Complainant-Respondents-Respondents-Respondents

Before: **Nalin Perera CJ**

S.E. Wanasundera PC J

Vijith K. Malalgoda PC J

Counsel: Kumar Arulanandan PC, with Ms. Devika Panagoda and N. Wijerathne

for the Accused-Appellant-Petitioner-Appellant

Malik Azeez SC, for the Complainant-Respondent-Respondent-Respondents

Argued on: **29.08.2018**
Decided on: **09.11.2018**

Vijith K. Malalgoda PC J

The Accused-Appellant-Petitioner-Appellant Kotuwila Kanakanamage Premalal Leonard Perera had preferred the present appeal against the Judgment of the learned Provincial High Court Judge of Monaragala dated 04.09.2014 with leave obtained from the Provincial High Court of Monaragala under *section 9 (a)* of the High Court of Provinces (Special Provisions) Act No 19 of 1990 (as amended) read with *Article 154 (P) (3b)* of the Constitution, on the following questions of law;

a) Is the decision taken by the Provincial High Court Judge, that the learned Magistrate is correct in acting on the evidence of the complainant as true and correct is legal?

b) Is the decision taken by the Provincial High Court Judge that the amount of compensation ordered by the learned Magistrate is insufficient and the decision to enhance the amount of compensation to Rs. 80,000/- a defective and a wrong order?

When this matter was taken up for argument before this court, the learned State Counsel who appeared for the 1st and the 2nd Respondents-Respondents-Respondents (hereinafter referred to as the 1st and the 2nd Respondents) had raised a preliminary objection for the maintainability of the 1st question of Law referred to above.

However the learned President's Counsel who represented the Accused-Appellant-Petitioner-Appellant (hereinafter referred to as Accused-Appellant) refrained from responding to the above preliminary objection, and rested his case on the question whether the Accused-Appellant was denied of a fair trial by the learned Trial Judge.

At the outset, it must be noted that, this was not a ground of appeal on which leave was granted by the leaned High Court Judge. There is no proof before this court of at least raising this ground as a ground of appeal before the High Court or the counsel who represented the Accused-Appellant in the High Court of Provinces inviting the court to consider granting leave on this issue, if it was the position of the Accused-Appellant that, he was denied of a fair trial by the learned Trial Judge.

This court needs to take cognizance of the fact that the Respondents are required to meet the questions raised at the time the leave was granted and not the questions of Law that are totally alien to the questions of Law on which the leave was granted.

The Accused-Appellant was charged before the Magistrate's Court of Wellawaya on two counts for the commission of offences of causing mischief and criminal intimidation, offences punishable under sections 418 and 486 of the Penal Code.

As revealed before us, the prosecution had relied on the evidence of the Virtual Complainant, A.K. Dayapala and two Police Officers who assisted the investigation at the trial before the Magistrate's Court. At the conclusion of both the prosecution and the defence cases, the learned Magistrate delivered the judgment convicting the Accused-Appellant of the first count whilst acquitting him of the 2nd count.

When convicting the Accused-Appellant on count one, the learned Magistrate had acted upon the evidence of the single lay witness, A.K. Dayapala, whilst concluding him as a credible witness. When affirming the above conviction the learned High Court Judge too had concluded that the above decision of the learned Trial Judge, that witness Dayapala is a credible witness is correct.

The 1st question of Law on which the leave was granted, referred to the credibility of the above witness. The learned State Counsel whilst challenging the maintainability of the said question of Law had submitted that the credibility of a lay witness does not amount to a question of law but amounts to a question of fact.

Granting of leave by the High Court of Provinces is referred to in *section 9 (a)* of the High Court of Provinces (Special Provisions) Act No 19 of 1990 (as amended) as follows;

"Section 9;

(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;" (emphasis added)

As referred to in *Section 9 (a)* of the High Court of Provinces (Special Provisions) Act No 19 of 1990, it is the duty of the learned High Court Judge to satisfy that, there is a "substantial question of Law" to be considered by the Supreme Court, when granting leave to appeal on an appeal argued before him.

As observed by this court, out of the two questions of law, the leave was granted, the 1st question refers to "acting on the evidence of the complainant by the learned Magistrate" and it is evident that a Magistrate will only act on the evidence of a witness, if the witness is a credible witness and the credibility is tested mainly on the demeanour or deportment of a witness after applying several tests such as, probability/ improbability , spontaneity, belatedness, consistency/ inconsistency, and/or interestedness/ dis interestedness.

The 1st question of law further refers to the decision reached by the learned High Court Judge with regard to the said acceptance of the evidence by the Magistrate, and the Appellate Courts have repeatedly held that the Appellate Courts will not disturb the finding of a trial court on its finding of the credibility of a witness.

I would like to refer to some of the decisions both by the Supreme Court as well as by the Court of Appeal, on these issues, relied in favour of the said objection.

The Privy Council in the case of ***Fradd V. Brown and Company Ltd 1919 (20) NLR 282*** held;

> "Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witness, but also to the course of the trial, and the general impression left on the mind of the Judge of the first instance, who saw and noted everything

> that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact purely is over-ruled by a Court of Appeal."

In the case of ***the Attorney General V. Sandanam Pitchi Mary Theresa [2011] 2 Sri LR 292*** Supreme Court held;

> "Credibility is a question of fact and not law. Appellate Judges have repeatedly stressed the importance of Trial Judges' observation of the demeanour of witnesses in deciding questions of fact. Demeanour represents the Trial Judges' opportunity to observe the witness and his deportment."

In ***Ariyadasa V. Attorney General [2012] 1 Sri LR 84*** the Court of Appeal held that;

> "Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the Trial Judge has taken such a decision after observing the demeanour and deportment of a witness……."

G.P.S. de. Silva (CJ) in the case of ***Alwis V. Piyasena Fernando [1993] 1 Sri LR 119*** held that;

> "The Court of Appeal should not have disturbed the findings of primary facts made by the District Judge based on credibility of witness."

In the Court of Appeal decision of ***Kumar de. Silva and 2 others V. Attorney General [2010] 2 Sri LR 169***, *Sarath de. Abrew J* had held that;

> "Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the Trial Judge"

When considering the above decisions and the submissions placed before us, it appears that the learned High Court Judge is correct in holding that the learned Magistrate is correct in acting on the evidence of the complaint, but the learned High Court should not have considered the said decision of the High Court as a question of law when granting leave under section 9 (a) of the High Court of Provinces (Special Provisions) Act.

The learned President's Counsel who represented the accused-appellant before us, neither opposed the said preliminary objection nor made any submissions in support of any of the issues on which leave was granted by the High Court including the 2nd ground of appeal.

Whilst relying on the decision by the Supreme Court in ***Mallawarachchige Kanishka Gunawardena V. H.K. Sumanasena SC Appeal 201/2014*** SC minute dated 15.03.2018 the learned president's Counsel submitted that his client the accused-appellant was not awarded a fair trial by the learned Magistrate.

In support of the above contention, the learned President's Counsel relied on two main issues. He firstly submitted that there is no record of reading charges to the Accused-Appellant before the Magistrate's Court. Secondly he took up the position that there is no record of prosecution closing its case and the accused being explained his rights by the learned Magistrate.

In this regard this court is mindful of the provisions contained in *section 182 (1), (2) 183 (2) (a) (b) and 184* of the Code of Criminal Procedure Act No 15 of 1979 which reads as follows;

182 **(1)** Where the accused is brought or appears before the court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted

183 **(2)** if the accused does not make a statement or makes a statement which does not amount to an unqualified admission of guilt the Magistrate shall ask him if he is ready for trial and,

(**a**) If the accused replies that he is ready for trial shall proceed to try the case in manner hereinafter provided, but

(**b**) If the accused replies that he is not ready for trial by reason of the absence of witnesses or otherwise the Magistrate shall, subject to the provisions of subsection (3) of section 263, either postpone the trial to a day to be then fixed or proceed forthwith to try the case in manner hereinafter provided.

But anything herein contained shall not prevent the Magistrate from taking in manner hereinafter provided the evidence of the prosecution and of such of the witnesses for the defence as

may be present, and then, subject to the provisions of subsection (3) of section 263 for reasons to be recorded by him in writing adjourning the trial for a day to be fixed by him.

184 **(1)** When the Magistrate proceeds to try the accused he shall take all such evidence as may be produced for the prosecution or defence respectively

(2) The accused shall be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate.

(3) The complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused.

Even though the learned President's Counsel had taken up as his first issue, the failure by the trial judge to read out the charges to the accused, our attention was drawn by the learned State Counsel to the journal entry dated 29.09.2010 where the learned Magistrate had endosed as follows;

29.09.2010

a) Plaint had been filed

b) Charges explained

c) Pleaded not guilty

d) Issue summonds on P/W1

e) Fix for trial on 25.05.2011

The above journal entry which was properly signed by the leaned Magistrate is a clear indication of the learned Magistrate complying with *Section 182* of the Code of Criminal Procedure Act No 15 of 1979 referred to above.

The second issue the learned President's Counsel had raised refers to the provisions in *Section 184 (2) and (3)* of the Code of Criminal Procedure Act No 15 of 1979 but as observed by me, provisions

of the above subsections does not provide a specific procedure when the learned Magistrate had decided to call for the defence from an accused person.

In the Supreme Court decision in Mallawarachchige Kanishka Gunawardena Vs. H.K. Sumanasena referred to above, this court had considered the provisions in *Section 4 (2)* of the International Covenant on Civil and Political Rights (ICCPR) Act No 56 of 2007 in the absence of a right to appeal under the provisions of the Sir Lanka Bureau of Foreign Employment Act No 21 of 1985.

Even though the said decision by the Supreme Court had only referred to the provisions of section 4(2) of the said Act, their Lordships of the Supreme Court had observed the importance of the provisions of the International Covenant on Civil and Political Rights (ICCPR) Act as follows;

> "Sri Lanka is a state party to the International Covenant on Civil and Political Rights (ICCPR) where an inherent right of appeal is recognized against any conviction. The Covenant, which was adopted by the General Assembly of the United Nations on 16th of December, 1966, entered into force on 23rd March, 1976 Sri Lanka acceded to the aforesaid covenant in the year 1980.
>
> Sri Lanka being a dualist state, implementation of the ICCPR requires that it be incorporated into domestic law which was accomplished in 2007 with the passage of ICCPR Act. The goal of the covenant is to define international human rights standards and to require signatory states to adopt measures to enforce those rights. The rights provided by the ICCPR are regarded as the basic human rights that should be viewed as restrictions (against derogation) on the government of signatory states. The ICCPR is valid for its signatory states and every signatory government is obligated to observe its provisions."

Section 4 (1) of the ICCPR Act No 56 of 2007 referred to the entitlement of an alleged offender as follows:

> **Section 4 (1)** A person charged of a criminal offence under any written Law, shall be entitled-
>
> **a)** To be afforded an opportunity if being tried in his presence;

b) To defend himself in person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;

c) To have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance;

d) To examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;

e) To have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted; and

f) Not to be compelled to testify against himself or to confess guilty

None of the provisions in the ICCPR Act or the Code of Criminal Procedure Act No. 15 of 1979 referred to above, speaks of a right of an accused person to be informed of his rights as raised by the learned President's Counsel, but however I observe that, what is required by Law is to afford a fair opportunity for an accused person to submit his defence during a criminal trial before a Court of Law.

When going through the proceeding of the Magistrate's Court, I observe that the case for the prosecution was concluded on 16.05.2012 and the learned Magistrate had fixed the defence case for 20.06.2012 and permitted the accused who was represented by an Attorney-at-Law to obtain copies of the proceeding for him to get ready with his case.

During the defence case the accused had given evidence and summoned three witnesses to give evidence on his behalf.

The above procedure adopted before the Magistrate's Court clearly indicates that the accused was afforded a fair trial during the trial before the learned Magistrate.

In the said circumstances, I see no merit in the argument placed before us by the learned President's Counsel who represented the Accused-Appellant.

For the reasons given in the judgment I allow the preliminary objection raised on behalf of the 1st and the 2nd Respondents on the 1st question of law and dismiss this appeal with cost. Answering the 2nd question on which the leave was granted does not arises for the reasons adduced in the Judgment.

There is reference to another appeal lodged by the Accused-Appellant bearing No. 195/2014 and at the commencement of the proceedings in the present appeal, the learned President's Counsel who appeared in the both cases had agreed to abide by the decision in the present case.

However when going through the docket of the present case I observe that the case referred to as SC Appeal 195/2014 is a matter which was not supported for leave before this court but was originally assigned the number as SC /SPL /LA 195/2014. Since there was a direct appeal from the High Court with leave obtained from the High Court, this matter was not supported for leave before this court. However at a later stage, the original number SC /SPL /LA 195/2014 had been recorded as SC Appeal 195/2014 erroneously.

In the said circumstances, I see no reason to refer to the said appeal in this Judgment.

I affirm the decision of the learned High Court Judge of Monaragala dated 4th September 2014.

Appeal dismissed with costs.

Judge of the Supreme Court

Nalin Perera
I agree,

Chief Justice

S.E. Wanasundera, PC
I agree,

Judge of the Supreme Court

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

In the matter of an Appeal

SC.Appeal No. 252/2014
SC.HC.CALA.No. 213/2014
HCCA (Avissawella)
WP/HCCA/AV/722/2008(F)
DC.Pugoda Case No. 469/L

Oliver Ranjith Samaranayake,
929/6, Kotte Road,
Etul Kotte,
Kotte.

Plaintiff

-Vs-

1. Rajapakse Mohottige David,
2. Rajapakse Mohottige Dona Nilanthi,

Both of

Dodangahawatte, Samanabedda,
Tittapattera.
Defendants

3. Don Nimal Karunaratne
Samanabedda, Tittapattara.
Added 3rd Defendant

AND BETWEEN

Oliver Ranjith Samaranayake,
929/6, Kotte Road,
Etul Kotte,
Kotte.
Plaintiff-Appellant

-Vs-

1. Rajapakse Mohottige David,(Deceased)
1A and 2. Rajapakse Mohottige Dona Nilanthi,

Both of

Dodangahawatte, Samanabedda,
Tittapattera.
Defendants-Respondents

AND NOW BETWEEN

Oliver Ranjith Samaranayake,
929/6, Kotte Road,
Etul Kotte,
Kotte.
Plaintiff-Appellant-Petitioner-Appellant

-Vs-

1. Rajapakse Mohottige David,(Deceased)
1A and 2. Rajapakse Mohottige Dona Nilanthi,

Both of

Dodangahawatte, Samanabedda,
Tittapattera.
Defendant-Respondent-
Respondent-Respondents

3. Don Nimal Karunaratne
Samanabedda, Tittapattara.

Added 3rd Defendant-Respondent-Respondent

Before : Sisira J de Abrew J
LTB Dehideniya J
Murdu Fernando PC J

Counsel : Thushani Mendis for Plaintiff-Appellant-Petitioner-Appellant
Kamal Suneth Perera for the
1A and 2nd Defendant-Respondent-Respondent-Respondents

Argued on : 27.3.2018
Written Submission
Tendered on : 2.4.2018 by Plaintiff-Appellant-Petitioner-Appellant
10.3.2015 by the 1A and 2A Defendant-Respondent-Respondent-Respondents
2.4.2018 by the Added 3rd Defendant-Respondent-Respondent

Decided on : 6.9.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court dated 25.3.2014 wherein the learned Judges of the Civil Appellate High Court dismissed the appeal on the ground that 3rd Defendant-Respondent-Respondent who is a necessary party had not been brought before court by the Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) when he filed the appeal in the Civil Appellate High Court.

The Plaintiff-Appellant filed action against the 1st and the 2nd Defendant-Respondent-Respondents (hereinafter referred to as the 1st and the 2nd Defendant-Respondents) seeking a declaration of title to the land described in the schedule to

the amended plaint. Later on an application made by the 2nd Defendant-Respondent, the 3rd Defendant-Respondent was added as a party (the 3rd Defendant). The learned District Judge by his judgment dated 24.11.2004 decided that the 3rd Defendant-Respondent is entitled to Lot No.1 of Plan No.2964/w dated 14.5.2001 of DB Wijesinghe Licensed Surveyor. The learned District Judge also granted the relief claimed in paragraphs (a),(b) and (c) of the prayer to the answer of the 1st and 2nd Defendants. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court but failed to name the 3rd Defendant as a party in the Petition of Appeal filed in the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court dismissed the appeal on the ground that the 3rd Defendant-Respondent who is a necessary party had not been named as a party in the Petition of Appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 17.12.2014, granted leave to appeal on questions of law set out in paragraphs 25(a),(b),(c),(d) and (e) of the Petition of Appeal dated 3.5.2014 which are set out below.

a. Did the Provincial High Court of Civil Appeal err in holding that if the Petitioner's action is dismissed it would prejudicially affect the rights of the 3rd Defendant-Respondent?
b. Did the learned Provincial High Court of Civil Appeal fail to take cognizance of the case of Ibrahim Vs Beebee (19 NLR 289) ?
c. Did the Provincial High Court of Civil Appeal err in holding that the 3rd added Defendant was a necessary party to the adjudication of the Appeal ?
d. Did the learned Provincial High Court of Civil Appeal fail to take cognizance of Sections 759(2) and 770 of the Civil Procedure Code

and thereby failed to add the 3rd Defendant-Respondent as a party to the Appeal ?

e. Did the learned Provincial High Court of Civil Appeal fail to take cognizance of and follow the judicial precedent of Your Lordships' Curt in Ediriweera Jayasekara V Willorage Rasika Lakmini (2010 (1) SLR 41?

Learned counsel for Plaintiff-Appellant contended that it was not necessary to name the 3rd Defendant-Respondent in the plaint as no relief claimed against him. She therefore contended that the 3rd Defendant-Respondent is not a necessary party to the appeal. I now advert to this contention. Although learned counsel for the Plaintiff-Appellant contended so, the Plaintiff-Appellant in his Petition of Appeal filed in the Civil Appellate High Court has sought to set aside the judgment of the learned District Judge dated 24.11.2004 and to grant relief as prayed for in the amended plaint. She contended that no relief was sought against the 3rd Defendant in the amended plaint. It has to be noted here that the learned District Judge by his judgment dated 24.11.2004, has granted relief to the 3rd Defendant-Respondent. If the Civil Appellate High Court decided to set aside the judgment of the learned District Judge, then the decision of the Civil Appellate High Court would have set aside the relief granted to the 3rd Defendant-Respondent by the learned District Judge. Therefore if the 3rd Defendant-Respondent was made a party to the appeal filed in the Civil Appellate High Court, he would have defended the judgment of the learned District Judge and would have resisted the relief claimed in the Petition of Appeal. Therefore it appears that the aforementioned failure was a deliberate act by the Plaintiff-Appellant. The conduct of the Plaintiff-Appellant must also be considered. He is a person who did not name the 3rd Defendant in the plaint. I have

earlier observed that the failure of the Plaintiff-Appellant to name the 3rd Defendant in the plaint was a deliberate act on the part of the Plaintiff-Appellant. This is further established by his conduct. When I consider all the above matters, I hold the view that the 3rd Defendant-Respondent is a necessary party to the appeal filed in the Civil Appellate High Court.

When the aforementioned failure on the part of the Plaintiff-Appellant was brought to the notice of court, the Plaintiff-Appellant took up the position that if the Civil Appellate High Court decides that the 3rd Defendant-Respondent is a necessary party, the court has the power to notice the 3rd Defendant-Respondent. The Plaintiff-Appellant however did not make an application to court to add the 3rd Defendant-Respondent as a party. For the above reasons, I am unable to conclude that the failure on the Plaintiff-Appellant to name the 3rd Defendant-Respondent as a party to the appeal filed in the Civil Appellate High Court was a mistake or an omission. If it is a mistake or an omission, the Plaintiff-Appellant should have made an application to the Civil Appellate High Court to add the 3rd Defendant-Respondent as a party to the appeal. For the above reasons, I hold that aforementioned failure was a deliberate act by the Plaintiff-Appellant.

Section 759(2) of the Civil Procedure Code reads as follows.

> *"In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just."*

I have earlier concluded that failure on the part of the Plaintiff-Appellant to name the 3rd Defendant-Respondent as a party to the appeal filed in the Civil Appellate

High Court was deliberate act. Therefore the said failure cannot be considered as a mistake or an omission or a defect. Thus Section 759(2) of the Civil Procedure Code has no application to the facts of this case.

In Jayasekara Vs Lakmini and Others [2010] 1SLR 41, this court observed the following facts.

> *"The 4th defendant-appellant failed to name the 1st and 2nd defendants in the District Court in the partition action as the respondents in the appeal - only the plaintiff was made a party. On the objection raised by the plaintiff-appellant that the appeal is not property constituted the High Court overruled the objection stating that, all necessary parties had been noticed by the 4thdefendant-appellant in compliance with Section 755 and fixed the case for argument."*

This court held as follows.

> *"The issue at hand falls within the purview of a mistake, omission or defect on the part of the appellant in complying with the provisions of Section 755. In such a situation if the Court of Appeal was of the opinion that the respondent has not been materially prejudiced, it was empowered to grant relief to the appellant on such terms as it deemed just."*

In the present case, I have held that the aforementioned failure was not a mistake or an omission or a defect. Therefore the decision in Jayasekara Vs Lakmini and Others (supra) has no application to the facts of this case.

In considering the appeal of the Plaintiff-Appellant it is important to consider Section 770 of the Civil Procedure Code which reads as follows.

> *"If, at the hearing of the appeal, the respondent is not present and the court is not satisfied upon the material in the record or upon other evidence that the notice of appeal was duly served upon him or his registered attorney as hereinbefore provided, or if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may issue the requisite notice of appeal for service."*

In terms of the above section the Court of Appeal has the discretion to use the power granted by the said section. When the failure on the part of the Plaintiff-Appellant is a deliberate act, the court has the power to refuse to take steps in terms of Section 770 of the Civil Procedure Code. This view is supported by the observation made by Ennis J in Ibrahim Vs Beebee 19 NLR 289. Ennis J discussing the provisions of Section 770 of the Civil Procedure Code made the following observation.

> *"In my opinion three courses are open to the Court. It may (1) proceed to hear the appeal as it stands, or (2) add, and give notice to, parties under the provisions of section 770 of the Civil Procedure Code, or (3) dismiss the appeal for defect of parties."*

For the aforementioned reasons, I reject the contention of learned counsel for the Plaintiff-Appellant. In view of the conclusion reached above, I answer the 1st question of law as follows.

"If the Civil Appellate High Court allowed the appeal of the Plaintiff-Appellant, it would have affected the rights of the 3rd Defendant-Respondent.''

I answer the 2nd to 5th questions of law in the negative. When I consider the judgment of the Civil Appellate High Court, I feel that there are no reasons to interfere with the said judgment. For the above reasons, I affirm the judgment of Civil Appellate High Court and dismiss the appeal of the Plaintiff-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

LTB Dehideniya J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

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

SC Appeal 101/2014
SC Appeal 100/2014

In the matter of an application for Leave to Appeal under section 31DD of the Industrial Disputes Act, as amended by Act No 11 of 2003

D.M.B. Warnakulasooriya,
No.113, Maligakanda Road,
Colombo 10.

Applicant

Vs,

Hotel Developers (Lanka) Ltd.
Hilton Colombo,
No.02, Chittampalam A. Gardiner Mw,
P.O Box. 1000,
Colombo.

Respondent

And between

D.M.B. Warnakulasooriya,
No.113, Maligakanda Road,
Colombo 10.

Applicant-Appellant

Vs,

Hotel Developers (Lanka) Ltd.
Hilton Colombo,
No.02, Chittampalam A. Gardiner Mw,
P.O Box. 1000,
Colombo.

Respondent- Respondent

And Now between

D.M.B. Warnakulasooriya,
No.113, Maligakanda Road,
Colombo 10.

Applicant-Appellant-Appellant

Vs,

Hotel Developers (Lanka) Ltd.
Hilton Colombo,
No.02, Chittampalam A. Gardiner Mw,
P.O Box. 1000,
Colombo.

Respondent-Respondent-Respondent

Before: **S.Eva Wanasundera PC J**
Priyantha Jayawardena PC J
Vijith K. Malalgoda PC J

Counsel: Chula Bandara with Gayathri Kodagoda for the **Applicant-Appellant-Appellant in the SC Appeal No. 101/14** and **Applicant-Appellant- Respondent in SC Appeal No. 100/14**

Raneesha de. Alwis for the **Respondent-Respondent-Respondent in the SC Appeal No. 101/14** and **Respondent-Respondent-Appellant in SC Appeal No. 100/14**

Argued on: 17.11.2017

Judgment on: 26.07.2018

Vijith K. Malalgoda PC J

Appellants in the appeals i.e. SC Appeal 100/2014 and SC Appeal 101/2014 agreed to take up both appeals together and to abide by one judgment of this court. In the said circumstances this judgment deals with both appeals preferred by the Applicant-Appellant-Appellant and the Respondent-Respondent-Appellant against the Judgment of the High Court of Western Province holden in Colombo dated 09.01.2014.

The Applicant-Appellant-Appellant in SC Appeal 101/2014 (hereinafter referred to as the Applicant) had filed an application dated 18.11.2009 in the Labour Tribunal Colombo under section 31B of the Industrial Disputes Act against the Respondent-Respondent-Respondent in SC Appeal 101/2014 (herein after referred to as the Respondent) for unlawful termination of her services as a secretary.

As revealed before us the Applicant was initially employed as a Secretary on probation by the Respondent on 3rd May 1994 and on 28th November her appointment was confirmed with effect from 3rd November 1994. Her services were terminated by her employer with effect from 28.10.2009, and by application dated 18th November 2009 she went before the Labour Tribunal, Colombo against the said termination.

At the conclusion of the inquiry before the Labour Tribunal, by order dated 17th August 2011, the Labour Tribunal had accepted the position taken up by the Respondent, that the Respondent had not terminated the employment of the Applicant but the Applicant had vacated her post and dismissed the application of the Applicant subject to any statutory entitlements due to the Applicant.

Being aggrieved by the said decision of the Labour Tribunal, the Applicant preferred an appeal to the High Court of Western Province holden in Colombo. By Judgment dated 9th January 2013, the High Court of the Western Province had dismissed the said appeal subject to the payment of compensation to the Applicant computed on the last drawn basic salary, for 15 years of service based on 3 months per year.

Both, the Applicant and the Respondent who were aggrieved by the said decision of the High Court of Western Province had preferred the present applications seeking special leave from the Supreme Court. When the said Applications were supported before this court for special leave, this court granted special leave in both cases on the following questions of law as raised by the Applicant-Appellant-Appellant and Respondent-Respondent-Appellant in their respective applications filed before this court.

In SC Appeal 101/2014

a) Are the determinations of the Labour Tribunal dated 17.08.2011 and the High Court dated 09.01.2014 supported by the evidence led in that case including documentary evidence?

b) Did the Labour Tribunal and High Court err in Law by coming to the conclusion that the misconduct committed by the Petitioner was sufficiently serious to justify termination of service?

In SC appeal 100/2014

c) Did the learned High Court Judge err in awarding compensation to the Respondent despite finding that determination of the order of Labour Tribunal is equitable and there is no reason to interfere with the said order?
d) Did the learned High Court Judge err in awarding compensation to the Respondent despite holding that the Respondent had acted with intent to vacate employment?

The Applicant who was confirmed in her capacity as Secretary was functioning as the Secretary to the Executive Chef at the Respondent Hotel.

As submitted by the Applicant she had been a dedicated employee and was never accused of any misconduct during her service. However as revealed before us the Applicant had developed an abdominal pain from time to time and as a result she underwent a surgery on 22.08.2009 at the National Hospital Colombo. After the said surgery she was advised to be on medical leave for 28 days by the doctor who performed the surgery and accordingly she was placed on medical leave for the period 20.08.2009 to 17.09.2009.

As submitted by the Applicant, she reported back to work after the medical leave on 21.09.2009 and continued to work for nearly one week but due to complications, she was compelled to take bed rest as it was difficult to attend to work. On 28th September 2009 she informed her Head of the Department that she was unable to attend to work. But as revealed from the evidence placed before the tribunal, she kept away from work until she received a telegram on 9th October 2009 asking her to report to work immediately.

Even though she was asked to report for work immediately by the said telegram, since 10th and 11th October 2009 being a weekend and her off days she reported to Human Resources Manager on 12th October.

However as submitted by the Respondent, even on the 12th the Petitioner had come to the office of the Human Resources Manager around 5.00 p.m. When she met the Human Resources

Manager, she was served with the vacation of post notice, which was challenged by the Applicant before the Labour Tribunal.

In the light of the above evidence placed before the Labour Tribunal, the main question to be resolved before this court as raised in the Appeal 101/2014 is, whether it is just and equitable for the Labour Tribunal President, and the learned High Court Judge to hold that the Applicant had vacated her post with effect from 28.10.2009.

As already discussed in this judgment, the Applicant had kept away from work since 28.09.2009 after sending a SMS (short message service) to her immediate supervisor to the effect that she is unable to come to work, until she received a telegram from her employer on 08.10.2009 requesting her to report to work "as soon as possible" (A-1). With regard to the receipt of A-1, the Applicant takes up the position that she received the same on 09.10 which is a Friday and she reported for work on the following Monday, the first working day after the receipt of A-1.

When going through A-1 it appears that, no final date had been given by A-1 to report for work but it's a request to report for work as soon as possible.

As admitted by both parties before this court, when the Applicant met the Human Resources Manager around 5.00 pm, the Applicant was served with the vacation of post notice. At the time the said vacation of post notice was served, the Applicant was in possession with a medical certificate issued by her family doctor which was approved by the hotel doctor as well.

The concept of vacation of post was discussed by *F.N.D. Jayasuriya (J)* in the Court of Appeal decision in ***Nelson de. Silva Vs. Sri Lanka State Engineering Corporation (1996) 2 Sri LR 342 at 343*** as follows;

> "The concept of vacation of post involves two aspects; one is the mental element, that is intention to desert and abandon the employment and the more familiar element of the concept of vacation of post, which is the failure to report at the work place of the employee. To constitute the first element, it must be established that the Applicant is not reporting at the work place, was actuated by an intention to voluntarily vacate his employment."

When discussing the above, *Jayasuriya (J)* was guided by the decision of the Supreme Court in ***The Superintendent of Hewagama Estate Vs. Lanka Eksath Workers Union SC 7-9/69 Supreme Court minutes 02.02.1970*** and referred to the said decision in his Judgment at page 343 as follows;

> "The learned President of the Labour Tribunal hold on the facts that there was no abandonment of employment by the workman as the workman in question had no intention of abandoning his employment.
>
> The learned President correctly applying the legal principles observed that the physical absence and the mental element should co- exist for there to be a vacation of post in law. Besides, he held on this issue the Tribunal ought to be guided by the common law of the land which is the Roman Dutch Law and consequently the English doctrine of frustration, relied upon by the learned Counsel, has no application whatsoever to the situation under consideration. An appeal preferred by the employer against this order of the learned President of the Labour Tribunal was considered by the Supreme Court in *The Superintendent* of *Hewagama Estate Vs. Lanka Estate Workers Union* and the order of the learned President was affirmed in Appeal."

As already discussed in this judgment, A-1 only requested the Applicant to Report to work as soon as possible. No final date had been given in A-1 for the employer to consider whether the Applicant had vacated the post. The applicant had reported to work the earliest possible day; i.e. the following Monday since she received the telegram on Friday. The Applicant in explaining the delay in reporting on Monday, had stated that she had to wait for the Company Doctor to get her medical approval until 3.30 pm.

The Applicant had been previously (between 2007 to 2009) warned on several occasions for getting absent without previous approval and, on the present occasion, obtained leave for a single day by sending a short massage (SMS) to her immediate supervisor. However she had kept away from work for nearly 15 days until the 12th. The learned President of the Labour Tribunal after considering the above material had come to the conclusion that the applicant had no intention of reporting to work and therefore the mantel element required to establish the concept of vacation of post is fulfilled in this occasion. However he has failed to consider the subsequent conduct of the Applicant when she received A-1. The Applicant had reported to work

"as soon as possible" on the earliest possible day with a medical certificate approved by the company doctor. Whether the medical certificate is dated and the illness referred to in the medical certificate is immaterial to the Human Resources division or to the learned President of the Labour Tribunal, since it refers to the period leave required and had been approved by the company doctor.

If the Applicant's intention is not to report to work, she wouldn't have reported to work on the earliest possible day with a medical certificate. In the said circumstances I cannot agree with the finding of the learned President of the Labour Tribunal when he concluded that the Applicant had vacated her job since her conduct had fulfilled mental as well as physical elements required by Law.

In the case of ***Ceylon Cinema and Film Studio Employees Union Vs. Liberty Cinema (1996) 3 Sri LR 121*** the limitations of the Appellate jurisdiction when considering the decision of the Labour Tribunal was considered and it was decided that,

> "The question of assessment of evidence is within the province of the Labour Tribunal and if there is evidence on record to support its finding the Appellate Court cannot review those finding, even though on its own perception to the evidence it may be inclined to come to a different conclusion."

I am further mindful of the decision in ***The Colombo Apothecaries Co. Ltd Vs. Ceylon Press Workers Union 75 NLR 182*** where *Justice Weeramanthri* observed that,

> "The principle that, although there is no right of appeal on questions of fact, the Supreme Court will interfere where the Labour Tribunal has misconstrued the questions at issue and directed its attention to the wrong matters or has arrived at findings which bear no relation to the evidence led before it."

When considering the material already discussed it appear that the finding of the learned President of the Labour Tribunal with regard to the legal requirement to establish the concept of vacation of post does not support the material placed before the Labour Tribunal.

In the said circumstances I answer question of law (a) in SC Appeal 101/2014 in favour of the Applicant and conclude that both the Labour Tribunal and the High Court had erred when it was

concluded both by the Labour Tribunal and High Court that the Applicant had vacated her post from 28.09.2009.

During the trial before the Labour Tribunal, four documents were produced on behalf of the employer marked R1 to R 4. The said documents are warning letters issued by the employer when the Applicant got absent without informing the employer. In addition to the said warning letters, certain E-mails were also produced in evidence to establish that the conduct of the applicant had created lot of hardships to her immediate supervisor, the Executive Chef of the Employer Hotel.

When going through the contents of the four warning letters issued to the Applicant, it appears that the Applicant was severely warned for her conduct of frequently absenting without informing at least her immediate supervisor for several dates. As observed by me, all these instances, the applicant got herself absent for several days sometime nearly two weeks. The above conduct of the Applicant had created lot of hardships to the employer and as revealed, it had effected the smooth functioning of the kitchen Department of the Employer Hotel.

The Applicant being the secretary to the Executive Chef to the Employer Hotel had played a key role in the functions of the Kitchen Department. As observed in document produced marked A-23 an E-mail sent to the Human Resource Department, in December 2008 the Executive Chef had referred to the regular absenteeism of the Applicant in the following terms;

> "After advising Mano about her regular absenteeism and punctuality to work last week thru Human Resource Office, again she did not report to work since 3rd December 2008 saying she has a stomach problem. If you check her roster, you will find the pattern of keeping off from work and this has caused severe draw back in the operation of work at the chef's office.
>
> This is the busiest period of the year and her absence from work has effected a downward trend to maintain the required quality."

In the case of ***Brook Band (Ceylon) Ltd V. Tea Rubber Coconut and General Produce workers' Union 77 NLR 6*** a five judges Bench comprising of *Fernando J, Sirimanne J, Samarawickrama J, Siva Supramaniam J,* and *Tennakoon J,* whilst discussing the question of reinstatement had concluded that;

> "On the question of reinstatement of a workman, the past record of service of the workman is of the greatest importance and relevancy."

In the case of ***Sri Lanka State Plantation Corporation V. Lanka Podu Seva Sangamaya (1990) 1 Sri LR 84*** the Supreme Court concluded that;

> "Where the termination is found to be unjustified, the workman is, as a rule, entitled to reinstatement. An order for payment of compensation is competent in situations referred to in sections (33) (3) (workman in personal service) and (33) (5) (workman requesting compensation instead of reinstatement) or where such order would be otherwise just and equitable in the circumstances as contemplated by section 33 (6) of the Act.

When considering the matters already discussed by me in this judgment, I observe that this is not a fit case to make order to reinstate the Applicant- Appellant-Appellant is SC Appeal 101/2014 but considering the past record and the position held by her in the capacity of a Personal Secretary to the Executive Chef, to order compensation in lieu of reinstatement.

When considering the amount of compensation that should be awarded to the Applicant I am further mindful of the decisions in the ***Associated News Papers of Ceylon Ltd V. Jayasinghe (1982) Sri LR 595*** where a bench comprising of *Samarakoon CJ, Wanasundera J,* and *Saza J,* held that;

> "When a tribunal is called upon to determine compensation, it should take into account back wages lost but it is not entitled to make a separate award of back pay in addition to compensation."

and the decision in ***Associated Cables Ltd V. Kalutarage (1999) 2 Sri LR 314*** where a bench comprising of *Amerasinghe J, Gunasekara J,* and *Weerasekara J* held that;

> "The award of compensation to the workman in a sum of Rs. 150,000 was bad for the want of an adequate basis for computing that amount. Instead, the payment of 3 years' salary would be a just and equitable award of compensation."

In the said circumstances I observe that, the amount of compensations which has already been ordered by the learned High Court Judge is just and equitable.

In the said circumstance I answer the question of law raised in both appeals as follows;

SC Appeal 101/2014

a) No

b) Not arise

SC Appeal 100/2014

c) Not arise

d) Not arise

Whilst considering the questions of law raised in the two appeals as referred to above, I declare that both the President of the Labour Tribunal and the learned High Court Judge had erred when they concluded that the Applicant had vacated her post with effect from 28.09.2009. I further make order for the Respondent to pay as compensation a sum of money computed on the last drawn basic salary for 15 years based on 3 months per year as ordered by the High Court.

SC Appeal 101/2014 is allowed and SC Appeal 100/2014 is dismissed.

However I order no costs.

The Applicant-Appellant-Appellant is entitled further for statutory entitlements as well.

Judge of the Supreme Court

S. Eva Wanasundera PC J

I agree,

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree,

Judge of the Supreme Court

SC/ CHC/04/06

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

In the matter of Appeal under the Provisions of Section 753 of the Civil Procedure Code

Murughasan Chandrika

No.13, Perumal Kovil Street,

Nagapattinam, 611001 Tamilnadu, India

Carrying on a business as proprietorship Under the name style and firm

Rajithi Agencies No.139, Linghi Chetty Street, Gulam Arcade, Chennai 600 001 India.

PLAINTIFF

Case No:-SC/CHC/Appeal 04/2006

Case No:-H.C.Civil 235/2011(1)

Nature:-Money

Procedure:-Regular

V.

1.Romav Limited

Bucklersbury House,

3, Queen Victoria Street,

London EC4N 8EL

2.Unicorns Clearing And Forwarding

(private) Limited

2nd Floor, Greenlanka Tower,

No.46/46, Navam Mawatha,

Colombo 2.

DEFENDANTS

Unicorns Clearing And Forwarding

(private) Limited

2nd Floor,Greenlanka Towers,

No.46/46, Navam Mawatha,

Colombo 2.

2nd DEFENDANT-APPELLANT

V.

1.Murughasan Chandrika

No.13,Perumal Kovil Street,

Nagapattinam, 611001 Tamilnadu.

India.

Carrying on a business as
Proprietorship under the name
style and firm-
Rajithi Agencies,
No.139, Linghi Chetty Street,
Gulam Arcade, Chennai 600 001
India.

PLAINTIFF-RESPONDENT

2.Romav Limited
Bucklersbury House,
3, Queen Victoria Street,
London EC4N 8EL

1st DEFENDANT-RESPONDENT

BEFORE:-PRIYASATH DEP, PC CJ.

SISIRA J. DE ABREW, J.

H.N.J.PERERA, J.

COUNSEL:-Sujeewa Srinath Tissera for the 2nd Defendant-Appellant

Plaintiff-Respondent absent and unrepresented.

ARGUED ON:-30.11.2017

DECIDED ON:-03.04.2018

H.N.J.PERERA, J.

The Plaintiff-Respondent instituted action against the 1st & 2nd Defendants claiming damages under three causes of action as prayed for in the prayer 1, 2 & 3 of the plaint.

The Plaintiff's position was that she contracted with the 1st Defendant whose agent in Sri Lanka was the 2nd Defendant for the carriage of goods more fully referred to in the Bills of Lading marked P2, P4 and P6 at the trial. The 1st Defendant contracted with the Plaintiff inter alia that the cargo shall be carried to the Port of Colombo for delivery to the consignees as stated in the Bills of Lading aforesaid whilst the goods shall be released from the custody of the 1st Defendant only on presentment of the original Bills of Lading.

On the material dates when the cargo had been carried to the Port of Colombo, the 2nd defendant acting on its own behalf and for on behalf of the 1st Defendant breached the conditions of the said Bills of Lading and wrongfully and unlawfully released or authorized the release of the said cargo without the original Bills of Lading having been duly presented.

It was further alleged that the Plaintiff was entitled to receive the consideration for the cargo before its release from the vessel and /or the custody of the Sri Lanka Ports Authority and the requirement that the original Bills of Lading should be obtained from the negotiating Bank and presented to the carrier or its agent in order to ensure that the shipper received the money. In consequence of the release of the cargo by the 1st & 2nd Defendants contrary to the terms of the Bills of Lading and the law the Plaintiff suffered loss and damages in the sums referred to in the plaint.

Since the 1st Defendant was absent and not represented an ex-parte trial was held against the 1st Defendant.

The 2nd Defendant filed answer and took up the position that there was no legal nexus for the Plaintiff to sue the 2nd Defendant, that no cause of action accrued to the Plaintiff to sue the 2nd Defendant and that the 1st Defendant accepted the Plaintiff's consignment for transport subject to

(a) English law shall be the jurisdiction

(b) that the dispute shall be resolved by Arbitration according to FALCA(fast and low cost Arbitration Terms)

At the commencement of the trial the following matters were admitted.

1. Paragraphs 2(a), 2(b)m 4,12 and 20 of the plaint.

2. That the 2nd Defendant Company is resident within the local limits of the jurisdiction of the High Court of Western Province-Colombo.

3.That the 2nd Defendant as agent of the 1st Defendant delivered the consignments set out in the Bills of Lading marked X2, X3 and X4 annexed to the plaint to Nasik Foods of 218-220. 5th Cross Street, Colombo 11 the consignee named therein.

4. Receipt of the document marked X5 annexed to the plaint.

The Plaintiff's case, essentially is that the plaintiff was entitled to receive the consideration for the cargo carried by the 1st Defendant to the port of Colombo, before it is released from the vessel and/or custody of the Sri Lankan Port Authority.

It is the Plaintiff's position that the Plaintiff made arrangements to ensure payment for the cargo by laying down the condition that it must be released to the Consignee on the presentment of the Bills of Lading that should be collected from the negotiating Bank and presented to the carrier or its agent. Admittedly the cargo in question has been released

to the Consignee by the 2nd Defendant, who acted as the agent of the 1st Defendant during the relevant time without the presentment of the original Bills of Lading. Admittedly, what has been presented at the time of clearance of the cargo were Bank guarantees which the Plaintiff alleges as having been forged. The main complaint of the Plaintiff is that the 2nd Defendant has delivered the goods on forged Bank guarantee, and therefore the Plaintiff was deprived of the consideration it would have otherwise received, if the cargo was allowed to be cleared upon the presentment of the original Bills of Lading.

The learned trial Judge, after trial held with the plaintiff and entered judgment in favour of the Plaintiff as prayed for in paragraphs (a), (b) (c) and (d) of the prayer to the plaint. Aggrieved by the said judgment of the learned trial Judge the 2nd Defendant-Appellant has preferred this appeal to this Court.

When this matter was taken up for argument before this Court the main argument of the learned Counsel for the 2nd Defendant-Appellant was that the Learned High Court Judge erred in law in holding that the Commercial High Court has the jurisdiction to hear the case and the Arbitration clause in the Bill of Lading has not ousted the jurisdiction of the Court to try the case without reference to arbitration.

The 2nd Defendant-Appellant has raised an issue with regard to want of jurisdiction by reason of the Jurisdiction and Law clause in the Bill of Lading. Jurisdiction and the law clause states “English Law and Jurisdiction London Arbitration FALCA (fast and low cost Arbitration) Terms.”

The Learned trial Judge in his judgment has held that the dispute is more closely connected with Colombo than England. He has emphasized the fact that judgment has already been entered against the 1st Defendant ex-parte. The 2nd defendant’s principal place of business is situated

within the jurisdiction of High Court Colombo. Admittedly the cargo in question has been discharged at the Port of Colombo which too is situated within the jurisdiction. The Bank to which the original documents relating to the cargo have been addressed, and also carries on its business of banking in Colombo within the territorial jurisdiction of the said Court. The Consignee's principal place of business also is situated in Colombo. It is also to be noted that the 2nd defendant has admitted paragraph 2 (b) of the plaint. This admission is to the effect that the 2nd Defendant is a body corporate which can sue and be sued in its corporate name. The 2nd Defendant's registered office and/or principal place of business is admitted to lie within the local limits of the jurisdiction of the High Court of Colombo. As submitted by the Learned President's Counsel for the plaintiff the wrongs for the redress of which the instant action was brought against the Defendants , being the delivery of the cargo wrongfully and unlawfully at Colombo, is sufficient for the Court to be clothed with jurisdiction. I am too of the opinion that the dispute is more closely connected with Colombo, Sri Lanka than England and I agree with the trial Judge that sufficient reason has been shown that that Colombo High Court is clothed with jurisdiction to hear and determine this action.

In Perera V. Commissioner of National Housing, (1974) 77 N.L.R.361 Tennekoon C.J observed:-

"A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a *defectus jurisdictionis* and the second a 'latent' or 'contingent' want of jurisdiction or a *defectus triationis*. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference

must also be noted. In that class of case where the want of jurisdiction is patent, no waver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are *non coram judice* and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction."

In the instant case it cannot be said that the Court lacked patent jurisdiction to hear and determine the plaintiff's action.

Section 5 of the Arbitration Act No 11 of 1995 states:-

"Where a party to an arbitration agreement institutes legal proceedings in a Court another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the Court exercising jurisdiction in respect of such matter."

It is a pre-condition that the defendant should have objected to the exercise of jurisdiction by court in respect of the matter which the parties have agreed to resolve by arbitration. The defendant has in its answer objected to the exercise of jurisdiction by Court. Therefore it is very material to consider whether the said clause in the Bill of Lading amounted to a valid agreement to arbitrate. The formal requirements of an arbitration agreement are set out in Section 3 of the Arbitration Act

of 1995, which provides that such an agreement should take the form of an arbitration clause in a contract or should consist of a separate agreement. The main question to be considered in this appeal is whether the said clause in the Bill of Lading amounted to an agreement by the parties to submit to arbitration any dispute that may arise from the said agreement. There can be no agreement to arbitrate without a manifestation of consent of parties to submit to arbitration any dispute that may arise from a contract entered into by them. Can it be said that the said clause in the Bill of Lading to the effect that "JURISDICTION AND LAW CLAUSE-English Law and jurisdiction, London Arbitration, FALCA (Fast and low cost arbitration) Terms" clearly manifests the consent of parties to refer the dispute for arbitration? Or that it is a clear and unambiguous manifestation of consent of the parties to resort to arbitration?

Usually stay of local proceedings is sought in favour of a foreign jurisdiction where the dispute arises out of a contract which contains an exclusive jurisdiction clause and Courts generally uphold such clause on the basis that such clauses represent the agreement of the parties. However this may not be true with regard to the exclusive jurisdiction clause found in bills of lading, such as in this case, where one can hardly say that such clauses were negotiated and contractual obligations undertaken between parties of equal bargaining power.

Further it is very pertinent to note that the 2nd Defendant has not raised any objection to the continuance of this action. The 2nd Defendant could have moved Court to have issue No 18 tried as a preliminary issue. But instead the 2nd Defendant has submitted to the jurisdiction of the Court and continued to participate at the trial and proceeded to get a judgment on its merits. Even though an issue has been raised based on the question relating to jurisdiction, the 2nd defendant has not objected to the trial being proceeded with. If on the other hand the 2nd Defendant

was seriously contesting the jurisdiction of the Court based upon section 5 of the Arbitration Act, No 11 of 1995, he could have taken up the matter as a preliminary objection in terms of section 147 of the Civil Procedure Code at the very commencement of the trial. No such objection had been taken by the defendant at the commencement of the trial.

Section 39 of the Judicature Act No 2 of 1978b states:-

“Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.

In Pathmawathie V. Jayasekera (1997) (1) S.L.R. 248 it was held that:-

“It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties”.

Section 147 of the Civil Procedure Code states:-

When issues both of law and fact arise in the same action, and the Court is of the opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fir, postpone the settlement of the issues of fact until after the issues of law have been determined.

The Court has the power to dismiss an action on an issue of law without any evidence or admission being recorded.(Cathiravelu V. Dadabhoy 15 N.L.R 389.)

The defendant has failed to move Court to try the said issue as a preliminary issue. The defendant has failed to formulate a preliminary issue relating to the jurisdiction of the Court at the commencement of the trial. His failure to move Court to try the said issue as a preliminary issue on such a vital matter will amount to a waiver of objections in regard to lack of jurisdiction of Court to hear and determine the defendant's action. The defendant is deemed to have consented and submitted to the jurisdiction of the Court and he cannot be permitted to challenge the jurisdiction. (Rodrigo V. Raymond (2002) (2) S.L.R.78.)

In Elgitread Lanka (Private) Limited V.Bino Tyres (Private) Limited Saleem Marsoof ,J held that the Commercial High Court had the power to dismiss the action or stay proceedings , for the purpose of giving effect to Section 5 of the Arbitration Act. It was also observed in the said case that the discretion to decide whether to dismiss an action or stay proceedings has to be exercised after carefully considering the facts and circumstances of each case. Had the defendant exercised his right to object to the jurisdiction of the Court under Section 5 of the Arbitration Act that would have enabled the Court to consider whether to dismiss the plaintiff's case or to refer the parties to arbitration as agreed upon.

Having regard in particular to the prejudice caused to the plaintiff I am of the opinion that the 2nd Defendant was precluded by delay and acquiescence from raising the said objection to jurisdiction and that he had in fact waived it.

English law governs the law of Sri Lanka in diverse areas such as commercial law, banking and international trade law. The British enacted the Civil Law Ordinance in 1852 introducing English law in commercial disputes. English commercial law principles were introduced by Section 3 of the Ordinance "with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land

(maritime matters) life and fire insurance " in the absence of specific statutory enactments.

Therefore no prejudice is caused to the defendant by the High Court of Colombo exercising jurisdiction in this matter as the governing law applicable in Sri Lanka to the present action is English law.

The 2nd defendant has also taken up the position that the plaintiff's action is prescribed. The defendant is seeking to rely on 4(G) of the terms and conditions of the Bill of lading marked P2a, P4a and P6a.

4(G) reads as follows:-

"The carrier shall be discharged of all liability unless suit is brought in the proper forum and written notice thereof received by the carrier within nine months after delivery of the goods or the date when the goods should have been delivered. In the event that such time period shall be found contrary to any conventions or law compulsorily applicable, the period prescribed by such convention or law shall then apply but in that circumstance only."

Upon a plain reading of this provision it is very clear that the time bar imposed therein is meant to apply only in circumstances where no other convention or law is applicable. The plaintiff's action has been filed in Sri Lanka where the provisions of the Prescription Ordinance are compulsorily applicable. The Plaintiff's causes of actions are based on wrongful delivery of the Plaintiff's cargo by the defendants in breach of the conditions contained in the Bills of lading marked P2a.P4a, P6a. Therefore under Section 6 of the Prescription Ordinance the period of prescription which is applicable under these circumstances is six years from the date of such breach.

Section 6 of the Prescription Ordinance states:-

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 falling within the description of instruments 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, 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.

The plaintiff has filed this action in the year 2001. It is to be noted that the action has been instituted within six years from the date of the breach that being on or about the 21st of June 1999 for two cargos and on or about 5th of July 1999 for the third cargo. Therefore I see no merit in the said argument of the learned Counsel for the defendant.

For the above reasons I see no reason to disturb the judgment of the learned High Court Judge. Accordingly the appeal of the 2nd Defendant-Appellant is dismissed with costs.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PC, CJ.

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

Southland Apparels (Pvt.) Ltd.,
No. 80, Hulftsdorp Street,
Colombo 12.

Plaintiff

Vs

Hatton National Bank Plc.,
HNB Tower, Darley Road,
Colombo 10.

Defendant

SC CHC APPEAL 33/07
CHC 329/2003 – 1

AND NOW BETWEEN

Hatton National Bank Plc.,
HNB Tower, Darley Road,
Colombo 10.

Defendant Appellant

Vs

Southland Apparels (Pvt.) Ltd.,
80, Hulftsdorp Street,
Colombo 12.

Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.,**
PRIYANTHA JAYAWARDENA PCJ., &
L. T. B. DEHIDENIYA J.

COUNSEL : Shamil Perera PC with Primal Ratwatte, Duthika Perera, Ms. L. Jayasinghe and Ms. K.Gunasinghe for the Defendant Appellant
Basheer Ahamed with Laxman Jayekumar and S. Ahamed for the Plaintiff Respondent.

ARGUED ON : 19.02.2018.

DECIDED ON : 21.03.2018.

S. EVA WANASUNDERA PCJ.

The Plaintiff Respondent Company (hereinafter referred to as the Plaintiff) had sued the Defendant Bank in the Commercial High Court of Colombo claiming damages in a sum of Rs. 5,197,581.56 for the losses incurred by the company on the basis of five alternative causes of action contained in the Plaint dated 23.12.2003. The Defendant Bank filed answer dated 19.05.2004 praying for a dismissal of the Plaint and prayed for judgment against the Plaintiff on the claim in reconvention of 50 million rupees. Thereafter the replication of the Plaintiff was filed on 07.07.2004.

The Plaintiff is a private company which carries on business of exporting garments. It had maintained a foreign currency banking unit account at the Defendant Bank for the purpose of carrying on transactions with its foreign buyers of the garments made in this country by the Plaintiff company through the said account with the Banker. In 1999 December, the Plaintiff had entered into a contract with Prestige Apparel Manufacturing Incorporation of Laredo, Texas, U.S.A. to supply jackets, pants, vests, coveralls and other like items. Then the buyer, Prestige Apparel Manufacturing Inc. opened two irrevocable letters of credit through its banker, International Bank of Commerce, Laredo, Texas naming the Plaintiff as beneficiary. The letters of credit were subject to Uniform Code of

Practice 500. The buyer's banker was International Bank of Commerce, Laredo, Texas, U.S.A.

By letters of credit bearing Nos. CM 100086 dated 03.12.1999 and CM 100195 dated 28.04.2000 issued by the buyer's banker, International Bank of Commerce, Laredo, Texas the Plaintiff was named as beneficiary for US Dollars 110,656.50 and US Dollars 44239.80. The monies on the letters of credit were available with the Defendant Bank in Sri Lanka by draft drawn on the International Bank of Commerce, 30 days after acceptance. The documents required under the said letters of credit included a full set of clean on board ocean/marine Bills of Lading marked freight collect consigned to the Order of the International Bank of Commerce.

By Letters of Credit Nos. CM 100086 dated 03.12.1999 as amended and CM 100195 dated 28.04. 2000 as amended , the Plaintiff was named as the beneficiary for US Dollars 110656.50 and 44329.80 respectively. They were marked as P1 and P2 respectively with the Plaint. When shipments were to be done, partial shipments by Air or Sea were allowed. Even transshipments were allowed. The Plaintiff shipped the goods to the buyer and **obtained from Transcargo Pvt. Ltd. of Colombo the agent of the carrier,** the Bills of Lading and Airway Bills made to the Order of the International Bank of Commerce, USA. The particulars of goods shipped to the buyer under the Letters of Credit are set out in the Bills of Lading and Airway Bills referred to in paragraphs 7, 8 and 9 of the Plaint dated 23.12.2003. The Defendant Bank had accepted the original documents by memos issued by the Bank to the Plaintiff. The said documents were against both the Letters of Credit issued by the International Bank of Commerce, USA, under No. CM 100195 and No. CM 100086.

By the Bill of Lading bearing No. TC/WICE/NORA/00104 dated 30.08.2000, the said carrier's agent, **Transcargo Pvt. Ltd**. , received from the Plaintiff at the Port of Colombo, 80 cartons containing 960 pieces of Explorer Jackets, 17 cartons containing 398 pieces of Brown Duck Brush Pants and 65 cartons containing 1560 pieces of Jungle Pants, on board the vessel "Oriental Bay V35 – 76" for discharge at Singapore and delivery at Los Angeles to the Order of the International Bank of Commerce in USA. The said Bill of Lading was in respect of Letter of Credit No. CM 100086 dated 03.12.1999. A true non negotiable copy of the said Bill of Lading was marked as P3 and pleaded as part and parcel of the Plaint and marked in

evidence also as **P3 subject to proof**. In the same way by some other Bills of Lading bearing different numbers and different dates , which were marked as P4, P5, P6, and P7 the carrier's agent, **Transcargo Pvt. Ltd.** received the goods from the Plaintiff at the Port of Colombo and at the Katunayake Air Port. True non negotiable copies of the said Bills of Lading **P4, P5, P6 and P7** were produced in evidence and marked **subject to proof.**

The Defendant Bank by Memos dated 17.10.2000 and 14.09.2000 acknowledged receipt of the original documents including the Bills of Exchange (drafts), Bills of Lading and Invoices for negotiation against the Letters of Credit Nos. CM 100086 and CM 100195 issued by the International Bank of Commerce, USA. They were marked as **P14 and P15** in evidence **subject to proof**.

The complaint and grievance of the Plaintiff is that the **Defendant Bank** by having **accepted** the said **original documents** as mentioned in the memos issued by the Defendant Bank to the Plaintiff, **was obliged to negotiate** the said documents against the said Letters of Credit issued by the said International Bank of Commerce, USA and **failing negotiation** or acceptance of the Bills of Exchange (drafts) and documents, the **Defendant Bank was obliged to return the original documents to the Plaintiff.**

The Plaintiff had found out that **the carrier had delivered the consignments without** obtaining the **original Bills of Lading and/or Airway Bills** which were made to the order of the International Bank of Commerce, USA ; the exported goods by the Plaintiff to the buyer in USA namely Prestige Apparels Manufacturing Incorporation of Laredo, Texas had taken charge of the consignments of apparels made for them by the Plaintiff; but no money was forthcoming in that regard to the seller, the Plaintiff. Yet, it had been informed to the Plaintiff that the original Bills of Lading and the Airway Bills had been sent back to the issuing Bank, the Defendant.

Then, the Plaintiff had made a complaint **against the carrier's agent in Colombo, Transcargo Pvt. Ltd. to the Criminal Investigations Department.** The CID requested the Plaintiff to submit **the originals of the Bills of Lading** and Airway Bills as well as the connected shipping documents. The Plaintiff had directed the CID to get them from the Defendant Bank. The Bank had not been able to give any such documents to the CID or the Plaintiff. The Plaintiff alleges that the said

documents had been lost/misplaced by the Defendant Bank due to the fault of the Defendant Bank which had wrongfully got the **services of Deutsche Bank** AG, Colombo, to send and receive parcels of the Defendant Bank through 'DHL'. It is so alleged, because the International Bank of Commerce, Texas, U.S.A. had informed the Plaintiff that the original documents had been **returned to the Deutsche Bank** office in Colombo. It was allegedly later found out that they have got misplaced/lost at the office of the Deutsche Bank in Colombo without the same having reached the Defendant Bank. The **CID h**ad later on informed the Plaintiff that they **cannot look into** the **complaint made by the Plaintiff against Transcargo Pvt. Ltd.,** the agent of the carrier **without the original documents**. It is only **thereafter** that the Plaintiff had commenced legal action in the case in hand against the Defendant Bank.

According to the Plaintiff, since the buyer in U.S.A. had collected the goods to wit. garments from the carrier, without accepting, paying and collecting the original shipping documents from the International Bank of Commerce, USA, the said International Bank of Commerce had returned the documents to Sri Lanka, to the Deutsche Bank, Colombo. It is obvious that it is the buyer in USA who had done the wrongful act of collecting the garments from the carrier, " without accepting, paying and collecting the original documents" from the Bank of the buyer, the International Bank of Commerce, USA. It is only then, that the buyer's Bank , the **International Bank of Commerce, USA** had decided to send back the documents to the seller's Bank, i.e. the **Hatton National Bank, Colombo**, which is the Defendant Bank in this case. Did the buyer's Bank do it correctly is a question.

The buyer's Bank, International Bank of Commerce should have in fact returned the original documents to the Hatton National Bank. But instead the parcel of documents had been sent to the Deutsche Bank, which got the documents from the courier DHL on a public holiday, on 28th December, 2000. The buyer's Bank, IBC / USA had not taken good care to send it to the seller's Bank, HNB/ Colombo. Deutsche Bank did the service to HNB by having arranged the Courier Service DHL to take the original documents at the very beginning of the business relating to the buyer and seller. DHL carried the documents as courier service to IBC/USA . The Deutsche Bank was the usual arranger of DHL to send the documents. That Bank had nothing to do with the business of the buyer and the seller. It was only a convener of a service to HNB. It is obvious that the buyer's Bank, IBC/USA had

been negligent in **not having identified the proper Bank** to which the originals of documents were to be returned to and acted in a negligent way and had sent the same addressed to the Deutsche Bank which had nothing to do with the business that was going on between the buyer and the seller. Anyway it is a fact that the papers have got lost/misplaced.

The argument of the counsel for the Plaintiff was put down in writing in the written submission in this way. "It is most respectfully and most humbly submitted that if X bank uses or employs Y bank to send valuable original shipping documents to Z bank, surely Z bank will and can return those valuable original shipping documents to X bank, through the Y bank. That is natural and to be expected, that is why the Defendant Bank was silenced by the reply of International Bank of Commerce, USA."

I fail to understand the said argument as a valid argument with regard to the return of the original documents to the Deutsche Bank. The buyer's bank ought to have identified the seller's bank properly as HNB and sent the papers to HNB through courier service very carefully according to the accepted rules of practice in law regarding the Bills of Lading and Letters of Credit in business between customers who place so much of trust in the bankers who deal with the international business totally relying on their banks to do the right thing and taking care to serve their customers without fail. The buyer's bank IBC/USA had come to know that its own cutomer, Prestige Apparel Manufacturing Incorporated in Laredo, Texas, USA had **collected the goods from the carrier without accepting , paying and collecting the original shipping documents from the buyer's bank, quite wrongfully and illegally** and may be acting in collusion with the carrier or its agent in USA **and then in a hurry wanted to send the original documents back to the seller**, so that the seller could take action to sue the buyer and/or the carrier and its agent to recover the monies due to the seller from the buyer. But the papers have got lost/misplaced due to the fact that it was not addressed to HNB quite wrongfully and not sent through courier service to HNB but to the Deutsche Bank. It is negligence on the part of IBC/USA. In fact the Plaintiff has a cause of action to sue the buyer and the buyer's bank as well as the carrier and the agents of the carrier. None of them are parties to the suite in hand. The Plaintiff has failed to bring proper parties before court to recover the loss.

Once again, the counsel for the Plaintiff has submitted in the written submissions filed in this Court that " It is most respectfully and humbly submitted that without the duly endorsed original Bills of Lading or Airway Bills, the carrier had no right or authority to deliver the goods to the importer or 'notify party' or any other person, except IBC / USA or its order named in the Bills of Lading and Airway Bills." I find that the Plaintiff by stating thus accepts the fact that the carrier had done the most wrongful and illegal act by having released the goods to the buyer without the original documents and that the cause of action lies against the carrier.

The only contention of the Plaintiff seems to be that the **Plaintiff is unable to file action against the carrier without the original Bills of Lading and Airway Bills** which are the contract documents between the carrier and the Plaintiff due to the Defendant Bank having got the services of the Deutsche Bank which has lost/misplaced the original documents.

The Plaintiff holds the Defendant Bank HNB responsible for the loss of the original documents which got lost in the hands of the Deutsche Bank when the buyer's bank IBC/USA sent them to the Deutsche Bank. The Plaintiff complains that, the reason for IBC/USA to have returned the documents later to the Deutsche Bank is simply because HNB had , at the very inception of the business which is the subject matter of this case, sent the original documents to IBC/USA through courier service of DHL which was facilitated by the regular services done by the Deutsche Bank to HNB. It is alleged that the HNB had used the Deutsche Bank wrongly by having passed the responsibility of sending the documents through DHL by the said Deutsche Bank and therefore the IBC/USA when it wanted to return the documents later, back to the seller's bank , had correctly sent it to the said Deutsche Bank. The Plaintiff argues that therefore the HNB is responsible for the loss of the original documents. To my mind this argument does not hold water.

Different Banks in the world have their own methods of dealing with what they are bound to do in handling their part of the deal in the business of their customers. The customer who relies on the bank serving him does not have a hold in how the bank runs its business. The bank can get the services of other banks to do many other things other than what a regular bank is known to be doing in the eyes of the normal regular customers. The practices in the business world by and

between banks in the world is a vast subject matter. The customer cannot expect the bank to do business for the customer in an exact particular way. The bank is duty bound to get what is expected to be done by the customer through the bank. In this instance, HNB got just the **services of Deutsche Bank** to dispatch the documents through DHL to IBC/USA. HNB did not pass any of its responsibilities to the Deutsche Bank. Neither did it pass the burden of carrying the documents to USA. HNB got DHL to carry the documents to USA. The services of DHL was channeled through the Deutsche Bank. Then again when IBC/USA wanted to return the documents, IBC/USA need not get the services of DHL or the Deutsche Bank , just because HNB had used DHL or the Deutsche Bank. It is up to the IBC/USA to use the best courier service of its choice to send the documents to HNB. The Plaintiff cannot be heard to say that IBC/USA sent the papers back to Deutsche Bank **because** HNB had used the Deutsche Bank. This argument sounds awkward and does not make any sense. Moreover, this argument cannot push the responsibility of the documents getting lost/misplaced on the HNB at all. If at all the IBC/USA had been negligent in having not identified the seller's bank correctly.

Yet, it is due to this kind of scenario being expected in this world wide business transactions , that the "Uniform Customs and Practice for Documentary Credits" got born on earth under the auspices of the International Chamber of Commerce.

Article 1 of the ICC Uniform Customs and Practice for Documentary Credits in vogue at present reads as follows:-

" The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500, shall apply to all Documentary Credits [including to the extent to which they may be applicable, Standby Letter(s) of Credit] where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit."

It is an accepted fact that the Plaintiff and the Defendant Bank are bound by the rules in UCP 500.

Article 16 of the same reads:-

" Banks assume no liability or responsibility for the consequences arising out of delay and/or **loss in transit of** any message(s) , letter(s) **or document(s)** or for delay……."

What has happened in this instance is that the documents have got lost in transit from the IBC/USA to the Defendant Bank, HNB. Neither the issuing bank nor the recipient bank can be held liable for the said loss of documents.

However, I do not find any evidence before court to the effect that the parcel of documents supposed to have been received by the Deutsche Bank or sent by the IBC/USA except the Swift Message which is supposed to have stated that the parcel contained the originals of the Bills of Lading and Airway Bills, in fact contained the originals of the said documents. On the other hand, just because the originals have got lost, the Plaintiff cannot be heard to say that the Plaintiff is unable to file action to sue the carrier or its agent or the buyer who has failed to pay the seller and get justice from court because in fact the goods had been released by the carrier fraudulently and the buyer has failed to pay the seller. The Defendant Bank cannot be held liable for the wrongful acts of the buyer and the buyer's bank. The accusation brought forward that the Defendant Bank is responsible for the loss of the parcel of whatever documents is frivolous.

The learned trial judge has accepted that the parties are bound by the UCP 500 rules and even arrived at the conclusion that the Defendant Bank does not become responsible according to the said rules on a plain reading of the rules. Yet, the learned trial judge has **concluded wrongly** when he stated thus: **"** However, as I have explained herein before, the Manager Trade Services of the Defendant Bank himself has admitted that those original shipping documents were sent to the Deutsche Bank AG Colombo by the issuing bank in USA. Therefore, the return of documents to the Deutsche Bank in Colombo by the International Bank of Commerce **can safely be accepted even though no proper proof of the documents P14 and P15 has been established."** I find that there is nothing but conjecture in this conclusion by the trial judge.

The learned trial judge finally had concluded, while perceiving that many documents marked subject to proof and not having been proved afterwards but ignoring that fact, that ' **if** the Defendant Bank **did not employ the Deutsche Bank** , the issuing bank **could have sent** the documents direct to the Defendant

Bank and then the documents **would not have got lost**.' It is hypothetical. No person can truly state that if any one sends documents to the Deutsche Bank that the documents would invariably get lost or on the other hand if any one sends documents to the HNB directly that they would definitely not get lost but reach the HNB. I find that the Defendant Bank's action in getting the services of the Deutsche Bank to deliver the originals of documents through the courier DHL at an early stage to the IBC/USA is not a factor to be reckoned by the said Bank , IBC/USA to

return the said documents to the Deutsche Bank. It is the duty of the IBC/USA to return the original documents back to the Defendant Bank through any courier service that IBC/USA thinks fit. The Defendant Bank cannot be held liable for the loss of the originals of any documents. No person was called as a witness from the issuing bank.

I find that the learned High Court Judge had failed to identify the basic difference between a Bank carrying on business of banking and a courier carrying on business of courier services. The Banks employ the couriers and never provide the services of a courier. The Defendant Bank could not have straight away made itself to provide courier services without employing the services of a courier. The learned trial judge had made a wrong finding that it is due to the arbitrary decision of the Defendant Bank to have appointed the Deutsche Bank as the courier, that the loss and damage which was caused to the Plaintiff should be borne by the Defendant Bank. It is in fact DHL who was the courier and DHL was only paid by the Deutsche Bank because the Defendant Bank had made use of the services offered by the Deutsche Bank to that effect. It is wrong to conclude that Deutsche Bank was the courier without any basis.

I find that the Plaintiff had totally failed to prove that any cause of action had accrued to the Plaintiff to sue and get relief as prayed for against the Defendant Bank. Then, I find that even though the Defendant Bank had made a claim in reconvention against the Plaintiff, there does not seem to be any proper proof of the same.

I find that the learned Commercial High Court judge had gone wrong in concluding that the Defendant Bank is liable to pay the loss incurred by the Plaintiff.

I do hereby set aside the judgment of the Commercial High Court dated 15.06.2007.

The Appeal is allowed. However I order no costs of suite.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J.
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.

Aitken Spence & Company Limited,
No. 305, Vauxhall Street,
Colombo 2.

Petitioner

SC CHC APPEAL 08/2005

Commercial High Court
Case No. 02/2003(2)

Vs

1. The **Garment Services Group Ltd**.,
   Swan House, 52-53 Poland Street,
   London WIV 3DF.
2. **Dennis Day Limited**,
   Swan House, 52-53 Poland Street,
   London WIV 3DF.
3. **Aitken Spence Garments Ltd.,**No.305,VauxhallStreet,Colombo2.
4. J.M.S. Brito, Cinnamon Garden Residencies,No. 67, Ward Place,
   Colombo 07.
5. R.E.V. CasieChetty,No. 50, Rosmead Place, Colombo 7.
6. E.P.A. Cooray, No. 95/15, Kalyani Mawatha, Wattala.
7. K.D.A.Lawrence, No. 41/1, Old Nawala Road, Nawala.
8. D.S.Rose, 4th Floor, Mercantile Investment Building, No. 236, GalleRoad, Colombo 3.

9. M. Rhodes, Swan House, 52-53 Poland Street, London WIV 3DF.
10. Mrs. K.R.M.Weerakoon, No. 589/8, Kandy Road, Ranmutugala, Kandy.
11. M. **Gabay**, No. 7, Sukhastan Gardens, Colombo 7.

Respondents

AND NOW

1. D D Garments Limited (formerly known as '**The Garment Services Group Ltd.**') , Swan House, 52-53 Poland Street, London WIV 3DF.
2. **Dennis Day Limited**, Swan House, 52-53 Poland Street, London WIV 3DF.
3. D.S.Rose, 4th Floor, Mercantile Investment Building, No. 236, Galle Road, Colombo 3.
4. M. Rhodes, Swan House, 52-53 Poland Street, London WIV 3DF.
5. Mrs. K.R.M.Weerakoon, No. 589/8, Kandy Road, Ranmutugala, Kadawatha.

Respondent Appellants

Vs

1. **Aitken Spence & Company Ltd.,** No. 305,Vauxhall Street, Colombo 2.

Petitioner Respondent

2. **Aitken Spence Garments Limited, No. 305, Vauxhall Street, Colombo 2.**
3. J.M.S.Brito, Cinnamon Grand Residencies, No.67, Ward Place, Colombo 7.
4. R.V.E. Casie Chetty, No. 50, Rosmead Place, Colombo 7.
5. E.P.A.Cooray, No. 95/15, Kalyani Mawatha, Wattala.
6. K.D.A. Lawrence, No. 41/1, Old Nawala Road, Nawala.
7. M. **Gabay,** No. 7, Sukhastan Gardens, Colombo 7.

Respondent Respondents

BEFORE : S. EVA WANASUNDERA PCJ,
L. T. B. DEHIDENIYA J. &
MURDU FERNANDO PCJ.

COUNSEL : Aruna de Silva with SakshinHaren for the 1st to 5th Respondent Appellants.
V.K. Choksy with L.D.S.D. Disanayake and S.Gomez for Petitioner Respondent.

ARGUED ON : 18.05.2018.

DECIDED ON : 05.07.2018.

S. EVA WANASUNDERA PCJ.

The Petition of the Respondent Appellants dated 06.04.2005 has placed the following grounds of Appeal when they appealed to this Court from the Order

made by the High Court Judge of the Commercial High Court of Colombo dated 07.02.2005. They read as follows:-

1. The learned High Court Judge has failed to consider the preliminary objections raised in the Statement of Objections of the Respondent Appellants.
2. The said Order is contrary to law and against the material placed before Court.
3. The learned High Court Judge has erred in law in holding that the failure to attend the Board Meetings of the 2nd Respondent Respondent by the nominee Directors of the 1st Respondent Appellant is unjustifiable and unwarranted and amounts to acts of Oppression and Mismanagement within the meaning of Sections 210 and 211 of the Companies Act No. 17 of 1982.
4. The learned High Court Judge has erred in law in holding that the Respondent Appellants should be presumed to have intended the 2nd Respondent Respondent to face all the difficulties/obstacles in the management of the 2nd Respondent Respondent by refusing to attend the Board Meetings of the 2nd Respondent Respondent.
5. The learned High Court Judge has failed to consider the matters set out in the Statement of Objections and the Affidavit tendered on behalf of the Respondent Appellants.
6. The learned High Court Judge has failed to consider that the Petitioner Respondent holds 50% of the shares in the 2nd Respondent Respondent and was at the time of institution of these proceedings and at all times material to this Application and thereafter was in control of the management of the 2nd Respondent Respondent having wrongfully and unlawfully taken over the control of the 2nd Respondent Respondent and therefore not entitled to seek relief under Sections 210 /211 and 213 of the Companies Act.

The facts in summary with regard to the Appeal before this Court is as follows:
The company named Aitken Spence and Company Limited filed an action before the Commercial High Court of Colombo on the 1st of April , 2003 against 11 Respondents, out of which the 1st, 2nd and the 3rd Respondents were companies. The 1st Respondent Company was named as The Garment Services Group Limited (which will be hereinafter referred to as GSGL). The 2nd Respondent company was

named as Denis Day Limited (which well be hereinafter referred to as DDL). Both these companies were incorporated in the United Kingdom and are companies of limited liability. DDL is a wholly owned subsidiary of GSGL. The 3rd Respondent is named as the Aitken Spence (Garments) Limited [which will be hereinafter referred to as **ASGL**] and it is a company of limited liability incorporated in Sri Lanka. It is a wholly owned **subsidiary** of **the Aitken Spence & Company Limited** who was the Petitioner before the Commercial High Court of Colombo.

ASGL forms the subject matter of this Appeal. The issued share capital of this company was 1,997,500 ordinary shares of Rs. 10 each and 3,000,000 preference shares of Rs. 10 each. Pursuant to a **Joint Venture Agreement** (P8) entered into by the Aitken Spence & Company Ltd. with the GSGL, DDL and ASGL, (the 1st, 2nd and 3rd Respondents before the High Court), the**Aitken Spence & Co. Ltd**.,(the Petitioner before the High Court) **sold 50% of these shares of ASGL** and transferred the same to the **GSGL**. The business of ASGL was 'manufacture and export of garments'.

The said Joint Venture Agreement provided that the 3rd Respondent before the High Court, ASGL should have a Board of Directors consisting of 9 Directors. Three are nominated by Aitken Spence & Co. Ltd., the Petitioner in the High Court and three others are nominated by the 1st Respondent, GSGL. The **total of these 6 Directors are named as Voting Directors**. The other 3 Directors are jointly nominated by both the Petitioner and the 1st Respondent and they are designated as **Executive Directors**. The quorum for a meeting of the Board of Directors who shall meet at least once in three months in Sri Lanka should be two Directors nominated by Aitken Spence & Co. Ltd and two Directors nominated by the GSGL. The Board shall appoint one of the Executive Directors as the Chief Executive Officer and he shall be responsible to the Board and the day to day business of ASGL.The 3rd Respondent, shall be managed by the CEO. In the event of any **conflict** between the provisions of the JV Agreement and the Articles of Association of ASGL, the said **ASGL shall amend the Articles** to reflect the terms and conditions of the JV Agreement.

Thus, the 4th and 5th Respondents before the High Court were Voting Directors appointed by the Petitioner, Aitken Spence & Co. Ltd. and the 8th, 9th and 10th Respondents were the Voting Directors appointed by the 1st Respondent, GSGL. On 28.02.2003, the 6th Respondent , Mr. E.P.A. Cooray who was the Chairman of

the Board and a Voting Director nominated by the Petitioner, Aitken Spence& Company Ltd., resigned from the Board. On 26.03.2003, Mr. K.D.A. Lawrence was appointed as the Chairman. He was a Voting Director appointed by the Petitioner.

The 11th Respondent, Mr. Gabay was appointed as the CEO of ASGL and after his appointment, the ASGL made losses continuously and by 31.03.2000 the loss amounted to Rs. 84,810,445/- in the year 2000. An internal audit of the accounts of AGSL revealed that Gabay was functioning in a large scale fraud and financial irregularities which caused massive losses to the AGSL. The Chairman informed the 8th Respondent, D.S.Rose about the situation and suggested that the CEO, Gabay be removed. Rose did not agree. The Chairman of AGSL suspended the services of Gabay as CEO. The Chairman wanted to continue with the employment of 760 employees and to save the business of AGSL and in that interest he complained of the fraud by the CEO to the Criminal Investigations Department and the Police. The**GSGL did not agree with the Chairman of AGSL in these decisions.** However in consultation with the Petitioner Aitken Spence & Company Ltd. , Gabay was given a show cause letter on 20.06.2002 . Charges were sent to him. He did not respond. A domestic inquiry was held. He failed to be present. The inquiry was held ex parte. He was found guilty and his services were terminated. Gabay filed an application for relief before the Labour Tribunal under case number LT 1/ 29 / 2003.

It is from that time onwards that **problems** had started **between** the four companies to the JV Agreement, namely, the Petitioner **Aitken Spence & Co. Ltd., and the 3rd Respondent AGSL** ***on one side*** and the **1st Respondent GSGL and the 2nd Respondent DDL** ***on the other side.***

From 16.05.2002 onwards, the 8th, 9th and 10th Respondents who are the Voting Directors of AGSL nominated by the GSGL consistently failed to attend any meetings of the Board of Directors of AGSL. They refused to sign any Circular Board Resolutions either. The meetings of the Board of Directors of AGSL could not be held for the lack of quorum. Yet, after the removal of the CEO, each month from April, 2002 the AGSL had been recovering from the position of losses in a better way. AGSL has Bank liabilities of an amount of Rs. 215.8 million rupees, Bank interests and charges of an amount of Rs. 1.2 million each month, employment emoluments and overheads etc. to be looked after. Therefore there existed an imperative need for the Board of Directors to meet. The liabilities to

the Bank are secured by guarantees given by the Petitioner Aitken Spence & Co. Ltd. and the 2nd Respondent DDL.

The Petitioner before the High Court , Aitken Spence & Company Ltd. complains about the continuing refusal of the Voting Directors nominated by the 1st Respondent Company, GSGL to attend the meetings of the Board of Directors of the 3rd Respondent AGSL . Furthermore by not signing the Circular Resolutions, the 8th, 9th and 10th Respondents have willfully rendered it impossible for AGSL to function according to procedures to be followed by a company. The AGSL had to fulfill its mandatory statutory obligations under the statutes such as the Companies Act and the Inland Revenue Act. Such mandatory statutory obligations include finalizing, authenticating and tendering to the Registrar of Companies and to the Inland Revenue Department, the Annual Accounts. The Aitken Spence & Company Ltd. alleges that the 8th , 9th and 10th Respondents abetted by the 1st, 2nd and 11th Respondents were endeavouringto bring the affairs of the AGSL, the 3rd Respondent to a halt and to destroy the AGSL to the detriment of the Petitioner, Aitken Spence & Company Ltd. and the 760 employees of AGSL and also alleges that they have been doing so ever since the large scale frauds and irregularities committed by Gabay, the CEO of AGSL came to light.

The Petitioner stated that their conduct were **Oppressive** to the Petitioner and **Prejudicial to the interests** of the 3rd Respondent, **AGSL.**The reliefs sought from the Commercial High Court was made under **Sections 210 and 211 of the Companies Act No. 17 of 1982.**

Sec. 210 reads as follows:-

(1) Any member or members of a company……having complaint that the affairs of a company are being conducted in a manner **oppressive** to any member or members……..may make an application to the District Court of the district in which the registered office of the company is situate for an order under the provisions of this section, where such member or members ……have under the provisions of Sec. 214 a right to make such an application.

(2) Where, on any application made under the provisions of subsection (1) , the court is of opinion that the affairs of a company are being conducted in a manner oppressive to any member…….the **court may, with a view to remedying the matters complained of, make such order as it thinks fit.**

Sec. 211 reads as follows:-

(1) Any member or members of a company having a complaint -

(a) that the affairs of the company are being conducted in a manner **prejudicial to the interests** of the company ; or

(b) that a material…….

May make an application to the District Court of the district in which the registered office of the company is situate for an order under the provisions of this section, where such member has……..under the provisions of Section 214 a right to make such an application.

(2) Where , on any application made under the provisions of subsection (1), the court is of the opinion that the affairs of the company are being conducted as referred to in subsection (1) or that……., **the court may , with a view to remedying or preventing the matters complained of or apprehended, make such order as it thinks fit.**

The prayer to the Petition filed before the Commercial High Court by the Petitioner, Aitken Spence & Company Ltd. dated 01.04.2003 reads as follows:-

" WHEREFORE the Petitioner prays that the Court be pleased to issue **a Decree Nisi**
in the first instance and thereafter **a Decree Absolute** :-

(a) Declaring that the 1st, 2nd, 8th, 9th, 10th, and 11thRespondents have conducted the affairs of the 3rd Respondent in a manner that is:-

(i) **Oppressive** to the Petitioner; and

(ii) **Prejudicial to the interests** of the 3rd Respondent; and,

(b) Directing :-

(i) That the quorum for a meeting of the Board of Directors of the 3rd Respondent shall be any two Voting Directors;

(ii) That Article 93 of the Articles of Association of the 3rd Respondent be amended to read:-

" The quorum for a meeting of the Board of Directors shall be any two Voting Directors of the Company. Where a board meeting cannot be held due to the lack of the requisite quorum, the Chairman of the Meeting or in his absence the Voting Directors present at the Meeting shall re-fix that Meeting to be held fourteen days from the date on which that Meeting could not be held. The quorum

necessary for such re-fixed meeting shall be as above. Due notice shall be given of such re-fixed meeting." ; and,

(iii) That the 8th, 9th, 10th and 11th Respondents be removed from the Board of Directors of the 3rd Respondent; and,

(iv) That the aforesaid Joint Venture Agreement be modified by the deletion therefrom clause 18 thereof.

(c) Award costs; and,

(d) Such other and further relief as to this Court shall seem meet to the Petitioner.

The Petitioner before the Commercial High Court was a shareholder of the 3rd Respondent Company. The Petitioner Company, Aitken Spence & Co. Ltd. made the aforementioned **Application** on the 01.04.2003 under **Sections 210 and 211** and also made another Application on the same day under **Section 213** of the Companies Act No. 17 of 1982.

Section 213 reads as follows:-

(1) **Pending** the making by it of a final order under the provisions of **Section 210 or Section 211**, the Court may, on the application of a party to the proceedings , **make an interim order** including a restraining order which **it thinks fit** for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to **be just and equitable**.

The then Commercial High Court judge had heard the counsel for the Petitioner in support of both the Applications on 04.04.2003 and after giving consideration to the submissions had issued order nisi, in terms of Section 377(a) of the Civil Procedure Code, in respect of prayers (a) and (b) of the Petition seeking relief under Sections 210 and 211 of the Companies Act. However, the interim relief sought by the second Application which was filed was not granted under Sec. 213 and the judge had stated that it would be considered after hearing the Respondents. Later on , the Court had made an interim order that a meeting of the Board of Directors be held before the end of April,2003 with notice to all the directors for the limited purpose of considering the annual audited accounts of the 3rd Respondent AGSL and to carry out its statutory obligations and taking any decision in that regard and the quorum for that meeting of the board of directors of the 3rd Respondent to be any two voting directors.

However, after hearing both parties, the Commercial High Court judge made order on 28.05.2003 , **as prayedfor in paragraph (a)** to the second Application made under **Section 213** dated 01.04.2003 which reads as " to make **an interim order** directing that the quorum for a meeting of the Board of Directors of the 3rd Respondent shall be any two Voting Directors **until the final determination** of the Petitioner's aforesaid application for relief under **Sections 210 and 211** of the Companies Act."

The Judge of the Commercial High Court, at the end of the submissions made by the parties in support of the Application and the objections filed by the parties opposing the Application as well as submissions made with regard to the objections, **made the final order on 7th February, 2005**. The penultimate paragraph of the order reads as follows:-

" For the foregoing reasons, I hold that the decree nisi issued in terms of the prayer **(a) (i) and (ii) should be made absolute**. I further hold that the decree nisi entered in terms of prayer **(b) (i) and (ii) be made absolute**. I also hold that the decree nisi issued in terms of prayer **(b) (iv)** too should be made absolute**."**
Thereafter the Judge made the further order that the decree nisi issued in termsof prayer**(b) (iii) to be dissolved/discharged**. At the end, the Judge also granted the costs of action to the Petitioner from the contesting Respondents.

From the aforementioned Order of the Commercial High Court dated 07.02.2005, the **GSGL, DDL, and the 8th, 9th& 10th Respondents** before the High Court have **appealed** as Appellants, to the Supreme Court, on the grounds set out by me at the very commencement of this Judgment. The Petitioner **Respondent** is the **Aitken Spence & Company Ltd.** and there are **other Respondents including ASGL**and six other persons who are named as Respondent Respondents.

The Appellants pray that the "**Order** making the decree nisi issued in terms of prayers (a) (i), (b)(i), (ii) and (iv) absolute", be **set aside** and/or vacated and to **dismiss the Application** of the Petitioner Respondent made under **Sections 210 and 211 of** the Companies Act No. 17 of 1982.

It should be stressed and understood that the Order made by the Commercial High Court was done **after an analysis of the factual material** before Court. Therefore the said Order is based on the facts before Court. Since the procedure in such applications are by way of summary procedure, the facts are laid down by way of Affidavits placed before court. The Affidavits filed on behalf of the Petitioner Respondent, Aitken Spence & Company Ltd. had submitted that AGSL had ever since it was formed in 1981, made profits every year upto 1995. AGSL had for the first time made losses in 1996 and 1997. After Gabay became the CEO of AGSL the losses had escalated rapidly to Rs. 19,442,073/- in 1998, Rs. 23,422,551/- in 1999, Rs. 84,810,445/- in 2000, Rs. 13,188,152 /- in 2001 and Rs. 21,824,270/- in 2002.

Then, the results of an Internal Audit of AGSL was done by the Internal Auditor and he had reported in reports P23 to P26 that Gabay was guilty of large scale fraud and irregularities which had caused the losses to AGSL. The said documents P23 to P26 were read by me at pages 741 to 753 in Volume II of the Brief before this Court. The contents of the internal audit reports P25 and P26 specifically prove that the CEO had acted in quite a wrongful manner prejudicial to the interest of the ASGL and losses caused to the company are irremediable. The procedures taken in handling the business of ASGL in the manner it was done by the CEO is beyond any reason and quite detrimental to the company. It amounts to fraud against the company, committed by the CEO. The Chairman had informed the Police, the Criminal Investigations Department and the mother company Aitken Spence & Company Ltd. about the state of affairs no sooner than the internal audit reports had reached him. Gabay, the CEO was taken out of his duties and later on his services were terminated.

Gabay went before the Labour Tribunal complaining that his services were terminated by AGSL unreasonably unlawfully and unjustifiably. He prayed for **compensation** but **not reinstatement**. On 25.02.2011 the said Application was dismissed by the Labour Tribunal after a inquiry held inter partes. Gabay appealed from that order to the High Court. The argument/hearing of the said Appeal by the High Court was scheduled for 21.02.2012.

The 1st and 2nd Respondents were the London based companies, GSGL and DDL. After the Joint Venture Agreement was signed by all the four companies, the Articles of Association was amended providing that the quorum for a board

meeting was four Voting Directors of whom two each had been nominated by the GSGL and the Aitken Spence & Company Ltd. After Gabay was suspended none of the Voting Directors of AGSL who had been nominated by GSGL to the Board of Directors of AGSL attended any Board Meeting of AGSL, despite having been informed of the dates for the meetings. They totally refused to sign the Circular Resolutions as well. It was also informed by GSGL in writing that their nominee Directors will not participate in any board meeting by letters addressed to AGSL on 19.06.2002 (P 40) and 17.02.2003 (P52). Due to the said boycott of board meetings and refusal to sign the circular resolutions, the AGSL could not move on in business at all.

The Aitken Spence & Co. Ltd. who owns 50% of the shares of AGSL filed an Application under Sec. 213 of the Companies Act No. 17 of 1982 praying for an interim relief Order directing that the quorum for a meeting of the Board of Directors of AGSL be made **as any two Voting Directors** until the final determination of the Application made under Sec. 210 and 211 of the Act. Court granted the said relief on 28th May, 2003.

'Gabay and the Appellants in this Appeal before the Supreme Court' made an Application to the Supreme Court, for leave to appeal from the Order of the High Court granting the interim relief as aforesaid.**Leave to Appeal was refused** by the Supreme Court and the Application made by the Appellants was **dismissed.**

This Court as at present has to consider the ground on which the Appellants are challenging the impugned Order of the Commercial High Court dated 07.02.2005. The first submission was that the High Court Judge had failed to consider the preliminary objections raised by the Appellants. **The first preliminary objection** was that the High Court had **no jurisdiction** to hear the matter before the High Court because the Petitioner Respondent, Aitken Spence & Co. Ltd. had failed to abide by Clause 19 in the Joint Venture Agreement dated 20.12.1996 marked as P8 and the provisions of Section 5 of the Arbitration Act No. 11 of 1995. The position taken up was that the Petitioner Respondent was bound to refer the matter for arbitration before making an application under Sections 213,210 and 211 of the Companies Act to Court.

The Appellants had taken up that position in the High Court on 05.05.2003 at the time the High Court was considering the Application under Section 213. After

hearing the parties, the then High Court Judge had gone into the matter at length and made a long order of 11 pages quoting judgments from Courts of India and comparing the similar provisions in the Indian Companies Act etc. and had delivered the same in open court on 28.05.2003. The Appellants being aggrieved by the said Order had then appealed to the Supreme Court and as I have mentioned earlier, the Supreme Court had refused leave to appeal and dismissed their Application on 08.07.2003. A certified copy of the Supreme Court order is at page 158 in Volume I of the brief before this Court. Therefore it cannot be stated that the learned Commercial High Court Judge who heard the matter under Sections 210 and 211 have failed to consider the preliminary objection on jurisdiction. The same court cannot and shall not consider the same preliminary objection twice in the very same case. It is totally a wrong submission brought forward by the Appellants before this Court at the hearing of this Appeal.

The **second preliminary objection** was that the Petitioner Respondent , the Aitken Spence & Co. Ltd. cannot have and maintain the Application before the High Court in **as much as it holds 50% of the shares** of the 3rd Respondent, the AGSL and was at the time of the Application as well as at the time of filing the Appeal**, in control of the management of the 3rd Respondent.**The AGSL the 3rd Respondent is a company which exports garments after manufacturing the same in Sri Lanka and has been approved by the BOI in the country. Just because 50% of the shares are owned by the Aitken Spence & Co. Ltd. , that does not mean that the said company is in control. It is Aitken Spence & Co. Ltd. who transferred 50% of the shares owned by the said company to the 1st Appellant before this court, namely GASL and thereafter only the parties entered into the Joint Venture Agreement.

Even though it is alleged by the Appellants, that ,at the time of institution of the proceedings, the Petitioner Respondent **was actually not in control of the AGSL** because the other 50% of the shares were with the 1st Appellant and the Voting Directors nominated by GASL did not either attend the Board Meetings or sign the circular resolutions thus making it impossible for AGSL to function as a manufacturing and exporting garment company. If the Petitioner Respondent was in control there was no reason to enter into litigation against the Appellants. Just because the CEO Gabay was suspended from service by the Petitioner Respondent at a time the 1st Appellant was not in agreement of the same as indicated verbally, it cannot be heard to say that the Petitioner Respondent was

already in control of the AGSL and therefore should not have come before court. That argument does not hold water. The High Court when considering the factual situation has come to the conclusion that the **Petitioner Respondent had the status to come before court due to the current situation which prevailed at that time, in the interests of the AGSL** which had to be saved from falling down in business and also in the interests of the employees of AGSL.

The High Court Judge had identified that it is the termination of the 11th Respondent before the High Court, who was Gabay the CEO was the root of the dispute and had given rise to a conflict of opinion which appeared on the face of it had adversely affected the smooth functioning of the 3rd Respondent company AGSL. The High Court Judge had reasoned out that due to this conflict, the 1st Respondent GASL had made it impossible for the Board of Directors of AGSL to meet and take decisions by making sure that there was no quorum for any meeting acting in a manner oppressive to the interests of the Company with a decision of their nominee Voting Directors not attending the meetings. It is obvious that when there is no quorum, the Board of Directors cannot make the decisions to make the company run forward and then the progress of the company would come to a halt.

The Companies Act had provisions to make applications from court seeking relief in such an instance. According to the pleadings before court, the High Court Judge states that it was quite clear that after the expulsion of the 11th Respondent, the nominee Directors of the 1st Respondent had admittedly refrained from attending any of the board meetings and refused to sign the circular resolutions as well. I find that the learned High Court Judge has analyzed each and every aspect of all matters before making the order.

The Appellants argued that the **CEO is accountable** for the day to day running of the business of the AGSL according to the Joint Venture Agreement and by having removed him, the Petitioner Respondent had taken control of the Company. I am of the opinion that the High Court Judge was correct when he concluded that the Company is run by the Board of Directors and the **CEO is responsible and accountable to the Board of Directors** according to the JVA and the Articles of Association. When it was revealed by the Audit Reports that the CEO was engaged in fraud in running the day to day business of the company , the first thing to be done to save the company was obviously to suspend him which was done even

though it was done without having had a board meeting prior to the same. The evidence before this Court demonstrate that when it was found out that Gabay was involved in fraud meddling with the property of the company such as quotas received by AGSL being sold to other companies etc. which is amply obvious from the Audit Reports P23 to P26, the removal/ suspension of the CEO Gabay had to be done immediately but when the Directors nominated by Aitken Spence & Company orally discussed the matter with the Directors nominated by GSGL and DDL, they had shown their displeasure towards the suggestion of removing Gabay and that is why the Aitken Spence & Company had suspended him since Gabay's actions had been compelling the removal if the company AGSL was to be saved from incurring more and more losses. It looks like what was done had to be done immediately and that is why Gabay was removed from service. Just by doing that the Petitioner did not get the control of the company as argued by the Appellants now.

The action by the Appellants consequently has been analyzed by the High Court Judge quite well in this way at page 15 of his Judgement which is impugned:
" As regards the protest staged by the 1st Respondent and its nominee Directors, it must be observed that as it has been put forward in the forefront of their defence, if the Petitioner was in control of the management of the Company at the time the conflict of opinion arose or the misunderstanding cropped up, **without deciding to keep away from the board meetings, they could have complained against the Petitioner and its nominee Directors to Court** either in the manner Petitioner has invoked the jurisdiction of this Court or in some other way as advised. The fact that the nominee Directors of the 1st Respondent have chosen **not to complain the matter to Court and to sabotage the meetings of the Board of Directors** of the 3rd Respondent, appears to be **too drastic a decision taken against the interests and welfare of the incorporated body, namely the 3rd Respondent Aitken Spence Garments Co. Ltd."**
I totally agree with the analysis of the High Court Judge in that regard. It is due to the actions of sabotage of the meetings and signing the circular resolutions that undoubtedly rendered the management and control of AGSL impracticable and impossible.

The Appellants argued that having invested Rs. 35 million in the AGSL and having entered into the Joint Venture Agreement, it should have been understood by the learned High Court Judge that the Appellants never intended AGSL to face any

difficulties or obstacles and that the presumption drawn by the High Court was wrong. The only way to find the intention is to analyze the facts. I find that the High Court Judge has come to the conclusion that the Appellants intended the down fall of AGSL and to bring the company to a halt by not attending the meetings and refusing to sign the circular resolutions.

Then again the Appellants argued that the learned High Court Judge has conceded and admitted the fact that the reasons why the Appellants refrained from attending the Board Meetings was justifiable quoting from page 10 of the Order thus:

" Be that as it may, admittedly the fact of the matter is that the 11th Respondent has been discontinued from service, as the Executive Director of Aitken Spence Garment Co. Ltd. without any decision being taken by the Board of Directors the Petitioner has not given any plausible explanation as to what prevented it from discussing the conduct of the 11th Defendant at a Board Meeting of the Directors of the Aitken Spence Garment Co. Ltd. prior to any such drastic action being taken against the 11th Respondent which unfortunately has led to an unbendable misunderstanding between both groups of nominee Directors.

In passing it must be mentioned that the situation would have continued to be quite cordial and pleasant between the parties had the Petitioner extended the basic courtesy to discuss the pros and cons of its decision relating to the 11th Respondent's conduct, at a board meeting of Directors of the 3rd Respondent."

I find that by stating as such by the High Court Judge shows that he had looked at all sides of the problem as it then was. Such a statement being included among the other matters which were analyzed from the beginning to the end of the judgment explaining how the Judge saw it, does not necessarily mean that the Judge should have held with the Appellants. That is the very reason that in his Judgment the learned **Judge had not made the decree nisi entered in terms of prayer (b) (iii) absolute but dissolved the same.** Prior to arriving at that part of his decision, the learned Judge has explained thus: " Taking into consideration the fact that the Petitioner has not consulted the Board of Directors, prior to its having taken the decision to expel the 11th Respondent and the protest made by the nominee directors of the 1st Respondent and also being mindful of the commitments of the 1st Respondent towards the Joint Venture Agreement, it is my opinion that the **equitable consideration does not favour** the decree nisi

issued in terms of prayer (b) (iii) being made absolute. Hence the decree nisi issued in terms of prayer (b) (iii) is hereby dissolved / discharged."

I find that the learned High Court Judge has well analyzed the facts and how it affects the 3rd Respondent company AGSL which is the primary duty of the Court when the Petitioner before his Court had invoked Sections 210, 211 and 213 of the Companies Act which was effective at all times pertinent to the problem before the Court. He has looked at the situation from the point of view of the 1st and 2nd Respondents as well as from the point of view of the Petitioner with regard to the AGSL, the company which is the subject matter of the case and arrived at the conclusions on a balance of probabilities with equitable consideration.

Therefore I answer the questions arising out of the grounds of Appeal enumerated at the inception of this judgment in favour of the Respondents and against the Appellants. I dismiss the Appeal and affirm the Judgement of the learned Judge of the Commercial High Court dated 07.02.22005.

Appeal is hereby dismissed. However I make no order regarding costs.

Judge of the Supreme Court

L.T.B. Dehideniya J
I agree.

Judge of the Supreme Court

Murdu Fernando 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.

THE SWADESHI INDUSTRIAL WORKS LIMITED
No.57,Colombo Road,
Kandana.

PLAINTIFF

S.C. C.H.C. Appeal No. 10/2005
C.H.C. Case No. 36/2002/3

VS.

1. DURAI VISVANATHAN RAJPRASAD
C/O M/S Rani Grinding Mills,
No. 219, Main Street,
Matale.

.

2. DIRECTOR OF INTELLECTUAL PROPERTY
National Intellectual Property Office,
3rd Floor, Samagam Medura,
Colombo.

DEFENDANTS

AND

DURAI VISVANATHAN RAJPRASAD
C/O M/S Rani Grinding Mills,
No. 219, Main Street,
Matale.

1ST DEFENDANT- APPELLANT

VS.

THE SWADESHI INDUSTRIAL WORKS LIMITED
No.57, Colombo Road,
Kandana.

PLAINTIFF- RESPONDENT

DIRECTOR OF INTELLECTUAL PROPERTY
National Intellectual Property Office,
3rd Floor, Samagam Medura,
Colombo.

2ND DEFENDANT- RESPONDENT

BEFORE: Priyasath Dep, PC,CJ.
B.P.Aluwihare,PC,J.
Prasanna Jayawardena, PC J.

COUNSEL: M. U. M. Ali Sabry, PC with Ruwantha Cooray and Samhan Munzir for the 1st Defendant - Appellant.
Dr. Harsha Cabral, PC with Buddhika Illangatilleke for the Plaintiff - Respondent.
Rajiv Goonetilleke, SSC for the 2nd Defendant - Respondent.

WRITTTEN SUBMISSIONS FILED: By the 1st Defendant - Appellant on 01st June 2005 and on 06th March 2017.
By the Plaintiff - Respondent on 24th February 2017.

ARGUED ON: 31st January 2017.

DECIDED ON: 18th January 2018.

Prasanna Jayawardena, PC, J.

The plaintiff instituted this action against the 1st defendant in the Commercial High Court, on 09th December 2002, under the provisions of the Code of Intellectual Property Act No.52 of 1979, which was then in force. The Director of Intellectual Property was named as the 2nd defendant in the plaint.

It is not in dispute that, the plaintiff is a leading manufacturer of soaps, talcum powder and other personal care products. The evidence establishes that, in the 1940s, the plaintiff commenced manufacturing a toilet soap named “Rani” Sandalwood Soap. It is also

established that, over the 60 years or more since then, this soap gained much popularity and has become a well-known and widely used product in Sri Lanka. It is clear that, from 1947 onwards, the plaintiff has submitted applications to register several trade marks which are devices containing the word “Rani” or “Rani” Sandalwood Soap”. Gazette notifications with depictions of some of the trade marks which the plaintiff has applied to register, were produced at the trial marked **“P5a”** to **“P5e”**. These documents show that: in 1947, the plaintiff applied to register trade mark no. 10,297 consisting of the words “RANI SANDALWOOD SOAP ” placed within an oval device; in 1962, the plaintiff applied to register trade mark no. 24,199 consisting of the word ‘‘රාණී’’ below a crown; in 1963, the plaintiff applied to register trade mark no. 24,399 consisting of the word ‘‘මහාරාණී’’ below a crown; in 1964, the plaintiff applied to register trade mark no. 25,635 consisting of the word “Rani” in a distinctively stylized and bold font in which the capital letter “R” ends with an elongated flourish, placed within a device of an ornate crest topped by a crown; and, on 30th June 2000, the plaintiff applied to register trade mark no. 98653 which is a device consisting of an ornate crest topped by a crown with a picture of a woman’s face within the crest and the word “Rani” in the same distinctively stylized and bold font in which the capital letter “R” ends with an elongated flourish, appearing below the crest together with some descriptive words. The plaintiff also produced, marked **“P7a”** to **“P7h”**, specimens of soap boxes used by the plaintiff, since the 1940s, to market its “Rani” Sandalwood Soap.

However, it appears that, although the plaintiff has *applied* to register the aforesaid trade marks, the plaintiff does not state that any of these trade marks have, in fact, been subsequently registered.

In any event, these documents produced by the plaintiff establish that, at least from 1964 onwards, the plaintiff has been using trade marks which consist of a device with the word “Rani” in the aforesaid distinctively stylized and bold font in which the capital letter “R” ends with an elongated flourish, together with an ornate crest topped by a crown. There have been some variations to this device from time to time - in particular, the introduction of a picture of a woman’s face - but the continuing and distinct pattern has been the consistent use of the word “Rani” in the aforesaid distinctively stylized and bold font in which the capital letter “R” ends with an elongated flourish, together with the device of an ornate crest topped by a crown. The plaintiff states that it has used this *“Trade Mark `Rani’ ”* for many years and has claimed that consumers identify and associate this trade mark with the plaintiff.

The 1st defendant is the proprietor of a Grinding Mill in Matale. His business was registered in 1980. He makes and markets packets of curry powder and packets of spices. These facts are not in dispute.

The plaintiff says that, in September 2002, the Director of Intellectual Property published a notification marked **“P9”** stating that the 1st defendant had applied for registration of a trade mark no. 98930. The trade mark which the 1st defendant applied to register, is a

device consisting of the word “Rani” within a crest which is topped by a crown and with the words *“Estd 1966”* appearing immediately below the crest. The plaintiff states that this device was *“identical”* to the device used in the plaintiff’s trade marks in respect of “Rani” Sandalwood Soap. The plaintiff states that, therefore, it intends to oppose the registration of trade mark no. 98930. The plaintiff states that, the 1st defendant had made another application no. 93987 to register a similar trade mark and that the plaintiff intends to oppose that registration too.

The plaintiff goes on to say that, its investigations unearthed the further discovery that, the 1st defendant had earlier successfully registered trade mark no. 93988 marked **“P10a”** consisting of a device which has the word “Rani” with the words *“The Flavour of Lanka”*. The plaintiff states that, this device *“visually and phonetically resembles”* the device used in the plaintiff’s aforesaid trade marks. The plaintiff says that it did not oppose the registration of the trade mark no. 93988 because the plaintiff was unaware of the 1st defendant’s application to register that trade mark.

The plaintiff then goes on to state that, the investigations carried out by the plaintiff in 2002, *“revealed”* that, the 1st defendant was marketing various spices and curry powders in packets bearing a device consisting of the word “Rani” within a crest which is topped by a crown. Photographs of these packets of the 1st defendant’s “Chillie Powder” and “Curry Stuff” were produced at the trial marked **“P11a”** and **“P11b”**.

The plaintiff alleges that, there is a visual and phonetic resemblance between the trade marks used by the plaintiff and the devices marked **“P11a”** and **“P11b”** on the 1st defendant’s products and that this resemblance will mislead the public into believing that there is an association between the plaintiff’s products and the 1st defendant’s products, when, in fact, there is no such association.

On this basis, the plaintiff pleaded a First Cause of Action that, the 1st defendant *“is attempting to pass off his products”* as those of the plaintiff and that the 1st defendant is committing *“an act of unfair competition contrary to honest practices in industrial and commercial matters”* and sought the permanent injunction which is prayed for in prayer (c) of the plaint. That is (reproduced *verbatim*): *“A Permanent Injunction restraining the 1st Defendant whether acting by himself and/or through his employees and/or agents and/or otherwise howsoever directly and/or indirectly from manufacturing, marketing and/or selling products under the brand name `Rani’ and/or the Rani logo/device used by the Plaintiff Company.”*. In prayer (c) of the plaint in Sinhala, the plaintiff has used the Sinhala words *“ `රාණි’ යන වර්ග නාමය ”* as having the same meaning as the words *“the brand name `Rani’ ”* used in prayer (c) of the plaint in English. I doubt the words “වර්ග නාමය“ are an appropriate translation for the term and concept of a *“brand name”* [see the Glossary of Technical Terms – Law, published by the Educational Publications Department and also Malalasekera’s English-Sinhala Dictionary]. However, since the plaintiff has used the words “වර්ග නාමය” to mean *“brand name”*, I will use those words when referring to the term *“brand name”*, in this judgment.

Thereafter, the plaintiff pleaded a Second Cause of Action that, the registration of trade mark no. 93988 was a reproduction and an imitation of the plaintiff's trade marks and was likely to mislead the public and, that the use of this trade mark was contrary to the provisions of Chapter XXIX of the Code of Intellectual Property Act No.52 of 1979. On these grounds, the plaintiff prayed for a declaration that, the registration of trade mark no. 93988 in the name of the 1st defendant, was a nullity.

The 1st defendant and 2nd defendant both filed their answers. These answers were filed after the Intellectual Property Act No. 36 of 2003 came into effect and the Code of Intellectual Property Act No.52 of 1979 was repealed. As required by section 208 (4) (*c)* of the Intellectual Property Act No. 36 of 2003, the present case was decided under the provisions of that Act.

In his answer, the 1st defendant has specifically pleaded that, the plaintiff does not have an exclusive right to the use of the name "Rani" and that the 1st defendant too is entitled to use the name "Rani" on his products – ''රාණී යන නාමය භාවිතා කිරීමේ සම්පූර්ණ අයිතිය පැමිණිලිකරුට පමණක් හිමි නොවේ. මෙම විත්තිකරුටද එකී නාමය භාවිතා කිරීමට අයිතිවාසිකමක් ඇති බව ඔහු කියා සිටී*"*. The 1st defendant also averred that, he only manufactures and markets packeted spices and that his business activities are limited to the manufacturing and marketing of spices.

At the trial, the plaintiff raised 25 issues based on the averments in the plaint and the 1st defendant raised 07 issues based on his answer. The 2nd defendant did not raise issues. The plaintiff led the evidence of a Director of the plaintiff company and produced the documents marked **"P1"** to **"P11b"**. The evidence was on the lines of the plaint and set out the plaintiff's case. Learned counsel for the 1st defendant stated that the plaintiff's witness would not be cross examined on behalf of the 1st defendant. The 1st defendant did not lead any evidence or produce any documents. The 2nd defendant did not do so either. Thus, as the learned High Court Judge observed in his judgment, the evidence of the plaintiff's witness *"has not been seriously contested by the 1st Defendant"*.

When one looks at the device used by the plaintiff in its trade marks for several decades and the device used by the 1st defendant on its packets of "Chillie Powder" and "Curry Stuff" marked **"P11a"** and **"P11b"**, it is immediately obvious that, there is a distinct and striking resemblance between the devices used by the 1st defendant on his products and the trade marks used by the plaintiff on its products. In fact, when the learned High Court Judge examined the trade marks used by the plaintiff and the impugned devices used by the 1st defendant, the learned judge observed. in his judgment, that, there was *"a glaring similarity"*.

The learned trial judge was of the view that, this similarity between the trade marks could mislead the public into thinking that the 1st defendant's products are associated with the plaintiff and its products. On that basis, the learned trial judge held, with regard to the plaintiff's First Cause of Action, that the 1st defendant was attempting to pass off his

products as products associated with the plaintiff or as the plaintiff's products and that, thereby, the 1st defendant was committing an act of unfair competition within the meaning of section 160 of the Intellectual Property Act. Therefore, the High Court issued the aforesaid permanent injunction prayed for in prayer (c) of the plaint restraining the 1st defendant from *"manufacturing, marketing and/or selling products under the brand name `Rani' and/or the Rani logo/device used by the Plaintiff Company."*

With regard to the plaintiff's Second Cause of Action seeking a declaration of nullity of the registration of trade mark no. 93988, the learned trial judge held that, there was a similarity between trade mark no. 93988 and the plaintiff's trade marks and that, as a result, the provisions of section 104 (1) (*d*) of the Intellectual Property Act made trade mark no. 93988, inadmissible for registration. On that basis, the learned judge issued the declaration prayed for in the plaint, declaring the registration of trade mark no. 93988, to be a nullity.

The 1st defendant appealed to this Court against the judgment and prayed that the judgment of the High Court be set aside.

At this point, it should be stated that, the aforesaid wording of the permanent injunction prayed for in prayer (c) of the plaint and issued by the High Court, makes it clear that this Order imposes a twofold prohibition on the 1st defendant. These two types of prohibitions are separated by the words *"and/or"* which occur between the words *"under the brand name `Rani'"* and the words "*the Rani logo/device used by the Plaintiff Company."* in the permanent injunction. Thus, the first limb of the permanent injunction restrains the 1st defendant from *"manufacturing, marketing and/or selling products* ***under the brand name `Rani'****…."*. The second limb of the permanent injunction restrains the 1st defendant from *"manufacturing, marketing and/or selling products* ***under ….. the Rani logo/device used by the Plaintiff Company****."* [emphasis added by me].

When the appeal was taken up before us, learned President's Counsel appearing for the 1st defendant stated that: (i) the 1st defendant agrees and undertakes not to use, on its products, the font used by the plaintiff in the word "Rani" contained in the plaintiff's trade marks; and (ii) the 1st defendant agrees and undertakes not to use the device used by the plaintiff - which must include an agreement and undertaking not to use the device of the crest which is topped by a crown, used by the plaintiff, with or without the word "Rani"; and (iii) the 1st defendant will not use the device of a crown. Learned President's Counsel went on to state that, the 1st defendant confines his appeal to the contention that, the plaintiff is not entitled to the exclusive right to use the word "Rani". Consequently, the written submissions filed on behalf of the 1st defendant state (*verbatim*):

> *13. However, at the commencement of the submissions before Your Lordship's Court the counsel for 1st Defendant reduced the scope of the submissions on the basis that,*

a. *the 1st Defendant will forego the use of the use of the font in which the name "Rani" had been presented,*
b. *The 1st Defendant will forego the use of the devise around the same Rani*
c. *The 1st Defendant will forego the use of the crown*
d. *Thus, the 1st Defendant will only confine the case that, the Plaintiff* ***is not entitled to exclusively use the word "Rani"***

14. *Therefore, the 1st Defendant will confine its argument only to whether in the light of the law (which will be dealt with in detail herein below) and in the circumstances of the case presented to Your Lordship's Court as referred to above, the Plaintiff entitled to* ***exclusively use the name `Rani' for its line of products."***.

The words used in the second limb of the permanent injunction issued by the High Court, which restrains the 1st defendant and its agents from *"manufacturing, marketing and/or selling products under the ……. Rani logo/device used by the Plaintiff Company."* make it clear that, the restraint is placed on the use of the plaintiff's logos and devices which incorporate the word "Rani" and the device of the crest and the crown. Therefore, the second limb of the permanent injunction will prohibit the 1st defendant from using devices which are the same or similar to the several trade marks of the plaintiff which were produced at the trial, which contain the word "Rani" in the aforesaid distinctively stylized and bold font in which the capital letter "R" ends with an elongated flourish, together with the device of an ornate crest topped by a crown.

It is apparent from the undertaking given by learned President's Counsel appearing for the 1st defendant and his written submissions that, the 1st defendant does not challenge the second limb of the permanent injunction issued by the High Court. As stated earlier, the High Court issued the permanent injunction following the learned judge's determination that, the similarity between the marks used by the 1st defendant and the marks used by the plaintiff, was likely to mislead the public into thinking that the 1st defendant's products are associated with the plaintiff and its products. Since the 1st defendant does not challenge the second limb of the permanent injunction, there is no need for us to examine the learned trial judge's conclusion that, the similarity between the two trade marks used by the plaintiff and the 1st defendant was likely to mislead the public into thinking that the 1st defendant's products are associated with the plaintiff and its products even though the type and nature of the products are very different to each other and, to use the words of Falconer J in LEGO SYSTEM vs. LEGO M. LEMELSTRICH [1983 FSR 155 Ch. D], the *"field of activity"* and the *"field of recognition"* of the plaintiff's products and the 1st defendant's products, appear to be very different to each other.

The aforesaid limits placed by learned President's Counsel on the scope of this appeal, also make it clear that, the 1st defendant does not dispute the validity of High Court's declaration that the registration of trade mark no. 93988 in the name of the 1st defendant, is null and void. Therefore, I will not examine the merits of that determination made by the High Court, although it appears that the plaintiff's goods are not identical or similar to the

1st defendant's goods and the plaintiff does not own a registered trade mark, in terms of section 104 (1) (*d*) of the Intellectual Property Act.

It follows that, *only* the aforesaid first limb of the permanent injunction - restraining the 1st defendant from *"manufacturing, marketing and/or selling products* ***under the brand name `Rani'****…."* [emphasis by me] - remains a bone of contention in this appeal. It is also evident that, the only question which has to be decided by us is whether the permanent injunction restraining the 1st defendant from *"….. manufacturing, marketing and/or selling products under the brand name `Rani' and/or the Rani logo/device used by the Plaintiff Company."*, prohibits the 1st defendant from using the word or name "Rani", in any form or manner, on the 1st defendant's products of whatever type.

In this regard, as stated earlier, learned President's Counsel appearing for the defendant has submitted that, the plaintiff is not entitled to the exclusive right to use word or name "Rani" on its products. In response, during the argument before us, learned President's Counsel appearing for the plaintiff submitted that, the plaintiff is entitled to the exclusive right to use the word or name "Rani".

When this question raised by both learned President's Counsel is considered, it hardly needs to be said that, not only is "Rani" a frequently used first name, it is also a word used in everyday language to refer to a queen. In these circumstances, a question would immediately arise as to whether any person can obtain, a sole and exclusive right to use the word "Rani" *simpliciter – ie:* an exclusive right to use the word "Rani" depicted in any form or manner and `stand-alone' on that person's products.

In this regard, the well-known rule of both the law of trade marks and also the law relating to `passing off' is that, in the absence of special circumstances such as, for example, cases where extensive use and nurture have resulted in widespread acceptance that a particular word is indelibly associated with a particular product or, cases where, as observed by Lord Herschell in REDDAWAY vs. BANHAM [1896 AC 199] a word has acquired a *"secondary meaning"* that it refers to a particular product, no person can acquire a trade mark which confers an exclusive right to use a name or word that is used in ordinary, everyday language and, similarly, no person can, by alleging `passing off', prevent another from using a name or word that is used in ordinary, everyday language. The principle is that, ordinary words should be available for use by everyone and, therefore, no single manufacturer or trader is permitted to monopolize words which occur in everyday language. In the memorable words of Cozens-Hardy MR in "PERFECTION": JOSEPH CROSFIELD & SONS APPLICATION [1909 26 RPC 837 at 854] *"the great common of the English language"* should be kept open to use by all manufacturers and traders. To illustrate this rule, learned President's Counsel appearing for the 1st defendant cited the statement made by the Delhi High Court in RHIZOME DISTILLERIES P. LTD vs. PERNOD RICARD S.A.FRANCE [2009 Indlaw DEL 2900 para 24] that, *"It is our analysis that no exclusive or proprietary rights can be claimed by either of the parties before us in respect of the word IMPERIAL which is not only in common parlance to be*

found in every dictionary, but is also laudatory in nature as it alludes to royalty or grandeur.". In the same case, Vikramajit Sen J [at para 24] expressed the general rule thus: *"The jural message, therefore, is clear and unequivocal. If a party chooses to use a generic, descriptive, laudatory or common word, it must realize that it will not be accorded exclusivity in the use of such words."*.

Thus, it would appear that, in the absence of special circumstances of the nature described earlier, any claim to a right to the exclusive use of the word "Rani" as a trade mark, whether under the law relating to trade marks or the law relating to `passing off', must be limited to a depiction of that word in a manner which is distinctive. It hardly needs to be mentioned here that, the depiction of the word in a distinctive manner may be achieved by the use of a particular font or a particular colour or a particular design or a combination of these elements or, to use the words of Aldous LJ in KONINKLIJKE PHILIPS ELECTRONICS NV vs. REMINGTON CONSUMER PRODUCT [2003 Ch. 159], the use of some *"capricious addition"*. But, in the absence of special circumstances of the nature described earlier, no person can obtain an exclusive right to use the word "Rani" *simpliciter* on his products.

However, we are not required to further examine the aforesaid question raised by both learned President's Counsel, since this appeal can be decided on a preliminary question arising from the plaintiff's pleadings, the issues and the evidence placed before the High Court.

In this connection, it is apparent from the aforesaid submissions made by both learned President's Counsel during the argument before us, that both of them proceed on the basis that, the <u>first</u> limb of the permanent injunction - which restrains the 1st defendant from *"manufacturing, marketing and/or selling products under the brand name `Rani'…."* - has the effect of prohibiting the 1st defendant from using the word or name "Rani" depicted in any form or manner and on any product of whatever type. In other words, that the restraint placed on the 1st defendant using *"the brand name `Rani' "* constitutes an unqualified prohibition on the 1st defendant using the word "Rani" *simpliciter* - *ie:* a bar on the use of the word or name "Rani" depicted in any form or manner and whether the word or name "Rani" is used in combination with a device or get up or `stand-alone'.

However, it must now be examined whether the <u>first</u> limb of the permanent injunction which restrains the 1st defendant from using *"the brand name `Rani'….."* ["`රාණි' යන වර්ග නාමය"] does, in fact, have the *effect* of imposing an unqualified prohibition on the 1st defendant using the word "Rani" *simpliciter*.

In this regard, it is evident from the wording of the <u>first</u> limb of the permanent injunction, that the restraint is placed on the use of *"the brand name `Rani'..."*. Therefore, in order to ascertain the *effect* of the <u>first limb</u> of the permanent injunction, one must examine what is meant by the term *"brand name"*.

In this regard, it seems to me that, in Sri Lanka, the terms *"brand"* and *"brand name"* are used more often in the corporate, marketing and advertising arenas to denote the totality of the identity and image of an enterprise or company and also sometimes to refer to the totality of the identity and image of a particular product. Thus, a *"Brand"* has been described as the *"known identity of a company in terms of what products and services they offer and also the essence of what the company stands for in terms of service and other emotional, non-tangible consumer concerns"* [D. Antonucci 2014]. Perhaps it could be fairly said that, in Sri Lanka, the terms *"brand"* and *"brand name"* are often used, in a general way, to denote the composite whole of the ideas, impressions and beliefs in the minds of the public with regard to an enterprise or company or a particular product and not as terms used to refer to specific Intellectual Property rights which are recognised in our Law and are protected by our Law.

But, at the same time, it has to be recognised that, there are also instances where the terms *"brand"* and *"brand name"* are sometimes used, in everyday language, especially in the field of Marketing, to mean or refer to a trade mark, which, it hardly needs to be said, is a type of Intellectual Property recognised in our law. That is reflected in the definition of the word *"brand"* by the American Marketing Association which states that a *"brand"* is *"A name, term, design, symbol, or any other feature that identifies one seller's good or service as distinct from those of other sellers.* ***The legal term for brand is trademark.****".* [emphasised added by me] On the same lines, Philip Kotler, the acclaimed teacher and writer on Marketing, states in his work titled "Marketing Management", a *"brand"* is a *"name, term, sign, symbol, or design (or a combination of these) intended to identify the goods and services of one seller or group of sellers and to differentiate them from those of the competitor.".* In fact, the Shorter Oxford Dictionary [5th ed.] states the words *"Brand name"* means *"a trade or proprietary name"*. Black's Law Dictionary [6th ed.] defines the word "*Brand"* as meaning *"A word, mark, symbol, design, term or a combination of these, both visual or oral, used for the purpose of identification of some product or service"*. That is on much the same lines in meaning and effect with the definition of a trade mark in section 101 of the Intellectual Property Act which states that a *"`trade mark"* means *"any visible sign serving to distinguish the goods of one enterprise from those of another enterprise"* and also the description in section 102 (3) of the Act which states *"A mark may consist in particular, of arbitrary or fanciful designations, names, pseudonyms, geographical names, slogans, devices, reliefs, letters, numbers, labels, envelopes, emblems, prints, stamps, seals, vignettes, selvedges, borders and edgings, combinations and arrangements of colours and shapes of goods and containers."*.

There could also be instances where the terms *"brand"* and *"brand name"* are used, in everyday language, when the intention is to mean and refer to a "trade name" of an enterprise within the meaning of section 101 of the Act or, even perhaps, in connection with "act of unfair competition" or a "business identifier other than a mark or a trade name" or an element of the "goodwill or reputation" of an enterprise etc, as contemplated in Part VIII of the Act.

Next, it is necessary to look at the Intellectual Property Act No. 36 of 2003 to ascertain whether it refers to the terms *"brand"* and *"brand name"* and whether these terms come within the scope and ambit of the Act. In this regard, the preamble of the Act states that it is an Act which provides for the Law relating to Intellectual Property in Sri Lanka and matters connected therewith or incidental thereto. This Act repealed the Code of Intellectual Property Act No. 52 of 1979 which had repealed the Copyright Ordinance, Designs Ordinance, Patents Ordinance, Trade Marks Ordinance, Merchandise Marks Ordinance and all other enactments which created or recognised or regulated Intellectual Property rights in Sri Lanka. Therefore, there is no other legislation in Sri Lanka which creates, recognises or regulates Intellectual Property rights. Unlike its predecessor - the Code of Intellectual Property Act - the present Act does not expressly state that it is a codifying Act. But, it is clear that, the Intellectual Property Act No. 36 of 2003 compendiously sets out the entirety of the statutory law which now prevails in Sri Lanka with regard to Intellectual Property rights.

It is evident that, the Intellectual Property Act recognises and provides for and protects an array of specific and identified types of Intellectual Property such as Copyright, Industrial Designs, Patents, Trade Marks, Trade Names and Layout Designs of Integrated Circuits and also provides protection against Unfair Competition and misuse of Geographical Indications.

However, the Act does not define or even refer to the term *"brand name"*. In particular, the term or concept of a *"brand name"* does not figure in Part V and VI of the Act which deals with "MARKS AND TRADE NAMES" and "TRADE NAMES" or in Part VIII of the Act which deals with "UNFAIR COMPETITION AND UNDISCLOSED INFORMATION" which are the areas of Intellectual Property Law which may be connected or relevant to the term and concept of a *"brand name"*.

Thus, it is seen that, the term and concept of a *"brand name"* is not recognised by the Intellectual Property Act. Next, as far as I can ascertain, there are no decisions of the Superior Courts in Sri Lanka which have specifically recognised any rights which may arise from a claim to a *"brand name"* independent of rights under a trade mark.

It appears that, a similar position is obtains in England where the Law recognises specific rights accruing from recognised types of Intellectual Property such as trade marks, copyrights, patents, designs and goodwill but does not protect the more abstract and larger concept of *"brands"* and *"brand names"*. Thus, Lewison J in O2 vs. HUTCHISON [2006 ETMR 677 at para 7] observed, *"English Law does not, however, protect brands as such. It will protect goodwill (via the law of passing off); trade marks (via trade mark infringement) the use of particular words, sounds and images (via the law of copyright); and configuration of articles (via the law of unregistered design rights) and so on. But to the extent that a brand is greater than the sum of the parts that English law will protect, it is defenceless against the chill wind of competition."*.

In the light of the aforesaid analysis, the resulting conclusion is that, in our Law, the term *"the brand name `Rani'…."* [*" `රාණි' යන වර්ග නාමය"*] used in the first limb of the permanent injunction, does not have any specific meaning or effect which is *ex facie* recognisable simply by the mere use of the term. Therefore, since there is no specific meaning or effect accorded to the term *"brand name"* by our Law, it cannot be said that, the first limb of the permanent injunction, which restrains the 1st defendant from using *"the brand name `Rani'..."*., *ex facie* prohibits the 1st defendant from using the word or name "Rani" *simpliciter*.

Instead, in order to ascertain the *effect* of the first limb of the permanent injunction, one has to examine what the plaintiff sought to prohibit when it prayed for a permanent injunction restraining the 1st defendant from using *"the brand name `Rani'…."* and what the High Court *intended* when it issued that permanent injunction prohibiting the use of the *"the brand name `Rani'….."*..

To do so, it is necessary to examine the pleadings in the plaint, the issues raised by the parties and what was proved at the trial.

In this regard, an examination of the plaint shows that, in paragraphs [8], [10], [17], [18], [22], [23], [30], [32], [33] of the plaint, the plaintiff has referred to the applications it has made to register the *"`Rani' Trade mark and Logo"*, its prior use of the *"`Rani' Trade mark and the crown logo/device"* and the *"Trade mark `Rani'"* and the *"Trade mark `Rani' & the crown, the logo/device"* and the *"Trade marks and the logo/device used by the Plaintiff Company to market the `Rani' Sandalwood Soap…."*. In paragraphs [22] of the plaint, the plaintiff has referred to the plaintiff's use of the *"….. Trade mark `Rani' and other associated Marks along with the logo/device of the crown without interruption since the early 1940's and that the consumers identify and associate the said `Rani' with the Plaintiff Company and is one of the most recognizable brand names in the country.".* However, the words *"the said `Rani'* in the latter part of paragraph [22] must refer to the *"Trade mark `Rani'* used earlier in that paragraph. Thus, it is seen that, the plaintiff has laid claim, in the plaint, to **trade marks** and has gone on to plead that, consumers identify these **trade marks** with the plaintiff. It is also seen from the documents produced by the plaintiff that, the trade marks claimed by the plaintiff consist of the word "Rani" in a distinctive stylized font in which the capital letter "R" ends with an elongated flourish, together with the device of an ornate crest and a crown. It is very clear that, the word "Rani" is only *one* of the constituent elements of elaborate and distinctive devices which were the plaintiff's trade marks. Perhaps, it could be rightly said that, the word "Rani" is the major element or leading characteristic of the plaintiff's trade marks. But, it still remains an incontrovertible fact that, the word "Rani" is but *one* element of the plaintiff's trade marks.

Accordingly, it is evident that, in the plaint, the plaintiff has only claimed unregistered trade marks ["වෙළඳ ලකුණු"] which contain the word "Rani" *used together with* several other constituent elements.

Thereafter, when the plaintiff framed issues, it placed in issue the plaintiff's rights to the "`*Rani' Trade mark"* and the *"Trade mark `Rani'"*. Thus, issue no. [9] asks *"Has the Plaintiff Company made the applications morefully set out in paragraph 8 of the Plaint for the registration of the `Rani' Trade Mark and Logo …. ?"*; issue no. [11] (c) asks *"Is the said goodwill and/or reputation in the mind of the purchasing public and trade, associated inter alia, with the Rani trade mark and logo device with which the said product is offered to the public ?"*; issue no. [11] (d) asks *"Is the said Rani trade mark and logo device distinctive of Rani Sandalwood soap manufactured and marketed by the Plaintiff Company ?"*; issue no. [11] (e) asks *"Is the said Rani trade mark and logo device recognized by the public and trade as distinctive specifically of the Rani Sandalwood soap manufactured and marketed by the Plaintiff Company ?"*; issue no. [15] asks *"Is the Plaintiff Company the prior user of the Trade Mark `Rani' & the crown, the logo/device ?"*; issue no. [20] (b) asks *"Is the Plaintiff the prior user in respect of the `Rani' Trade Mark and the crown/logo device ?"*; issue no. [20] (c) asks *"Has the Plaintiff filed several valid applications in respect of the `Rani' Trade Mark and the crown/Logo device ?"*; issue no. [21] asks *"Is the `Rani' Sandalwood Soap a well known mark in Sri Lanka, in the circumstances morefully set out in paragraph 33 of the Plaint ?"* and a few more issues on the same lines. Similarly, the 1st defendant raised a specific issue no. [30] which asks *"Can the Plaintiff alone get the exclusive right to use the trade mark "Rani" ?* The learned trial judge has answered all these issues in the affirmative.

Thus, it is evident that, when the parties raised their issues, they placed in issue the plaintiff's claim to **trade marks** which contain the word "Rani" *together with* several other constituent elements.

Next, the affidavit dated 14th July 2004, which contains the evidence of the plaintiff's witness, was also to the effect that, the plaintiff is entitled to **trade marks** which contain the word "Rani" *and* several other constituent elements.

Thus, it is very clear from the pleadings in the plaint, the issues and the evidence that, the plaintiff has only pleaded and claimed that it is entitled to several unregistered trade marks which contains the word "Rani" *used together with* several other constituent elements.

It is equally evident that, the plaintiff has *not* pleaded in the plaint or placed in issue or led evidence to the effect that it has an exclusive right to use the word or name "Rani" *simpliciter - ie:* the plaintiff has *not* claimed an exclusive right to use the word or name "Rani" depicted in any form or manner and `stand-alone' without the devices of the crest and crown used by the plaintiff. Instead, the plaintiff's case was that, it is entitled to trade marks which contain the word "Rani" *together with* several other constituent elements. Therefore, any reference in the plaint or in prayer (c) of the plaint to the *"brand name `Rani' "* must mean a reference to the trade marks containing the word "Rani" *together with* several other constituent such as the ornate crest and the crown.

To sum up, it is very clear from the pleadings, issues and evidence led at the trial which only referred to and dealt with the plaintiff's trade marks, that, the plaintiff was only seeking to restrain the 1st defendant from using the word "Rani" in a manner which will cause confusion with the plaintiff's unregistered trade marks produced at the trial, in terms of the provisions of section 160 of Part VIII of the Intellectual Property Act dealing with Unfair Competition.

It follows that, since the permanent injunction that has been prayed for in the plaint must be construed in the light of the plaintiff's pleadings and issues and what the plaintiff proved at the trial and be confined within those boundaries, the plaintiff could only seek, by means of the first limb of the permanent injunction set out in prayer (c) of the plaint, to restrain the 1st defendant from committing acts which were within the scope of the plaintiff's pleadings and issues and what the plaintiff proved at the trial – *ie:* to restrain the 1st defendant from using the word "Rani" in a manner which was similar to the plaintiff's trade marks.

Further, since the learned High Court Judge was necessarily obliged to act within the four corners of the plaintiff's pleadings, issues, what the plaintiff proved at the trial and the Law, when the learned judge decided to issue the permanent injunction prayed for in prayer (c) of the plaint, the learned judge could have only intended, by the first limb of that permanent injunction, to issue an Order restraining the 1st defendant from using the word "Rani" in a manner which was similar to the plaintiff's trade marks - *ie:* to restrain the use of the word "Rani" in the aforesaid bold and distinctive font including the capital letter "R" ending with an elongated flourish with or without the other constituent elements of those trade marks, such as the crest and the crown. There was no cause or reason for the learned High Court Judge to intend to or, for that matter, to even contemplate issuing an Order which had the effect of restraining the 1st defendant from using the word "Rani" *simpliciter* and stand-alone.

It appears from the written submissions made on behalf of the plaintiff that, learned President's Counsel has acknowledged that, the High Court issued the permanent injunction to restrain the 1st defendant from using any devices which are the same as or resemble the plaintiff's trade marks. Thus, in paragraphs [66] to [74] of his written submissions, learned President's Counsel has formulated the question *"Can the Plaintiff-Respondent Company claim an exclusive right to use the word Rani ?"* and in paragraph [74] has concluded *"….. in the circumstances the Plaintiff-Respondent is entitled to claim exclusive rights in respect of the Rani Trademark and logo/device and to restrain the 1st Defendant from using the said Rani Trademark and logo/device."*. Learned President's Counsel has, correctly, not pressed a claim that the plaintiff has the exclusive right to use the word "Rani" *simpliciter*.

In these circumstances, I am of the view that, the intended *effect* of the first limb of the permanent injunction issued by the High Court, which restrains the 1st defendant from

"manufacturing, marketing and/or selling products under the brand name `Rani'….", was to restrain the 1st defendant from manufacturing, marketing and/or selling products using the word "Rani" in a manner which was similar to the plaintiff's trade marks.

However, since the first limb of the permanent injunction contains the words *"the brand name"* and fails to use the intended and correct term of *"the trade marks"* (which has an immediately obvious meaning and effect in our law), it is necessary to decide the fate of the first limb of the permanent injunction. Either the first limb of the permanent injunction should be deleted as a result of the failure to use the correct term *or*, despite the lack of technical accuracy arising from the failure to use the proper term in the pleadings, the first limb of the permanent injunction should be amended to bring it in line with the relief the plaintiff intended to seek and the restraint the High Court intended to impose on the 1st defendant and to, thereby, make the first limb of the permanent injunction meaningful under the provisions of the Intellectual Property Act.

When deciding this question, one should keep in mind that, as observed earlier, there are instances where the terms *"brand"* and *"brand name"* are used, in everyday language, when the intention is to mean and refer to a "trade mark". It is evident that, this case is one of those instances since, as set out above, it is apparent that, the term *"the brand name"* has been loosely used in prayer (c) of the plaint when the intention was to mean and refer to the plaintiff's trade mark.

Next, one should also look at the circumstances of the case to decide which consequence should follow in the interests of justice and in conformity with the Law.

In this regard, this Court must take into consideration the fact that, the 1st defendant has voluntarily given the aforesaid three undertakings and, therefore, will not suffer any prejudice as a result of a correction of the error in the wording of prayer (c) of the plaint. Further, there is no doubt that, the plaintiff has proved its rights to the trade marks produced at the trial and also that, at the trial, the 1st defendant did not dispute the plaintiff's rights to those trade marks. It is also appears to me that, the use of the words *"the brand name `Rani'…."* in prayer (c) of the plaint after the plaintiff consistently used the term *"trade marks"* in the plaint, issues and also in the evidence of the plaintiff's witness, is likely to have been an inadvertent error. Paragraph [74] of the plaintiff's written submissions, which was referred to earlier, supports this view.

In these circumstances, I do not think it is fitting to simply delete the first limb of the permanent injunction and, thereby, cause significant prejudice to the plaintiff due to what appears to be an inadvertent error in the wording of prayer (c) of the plaint. Instead, I think it fitting to amend the first limb of the permanent injunction to bring it in line with the relief the plaintiff intended to seek and the restraint the High Court intended to impose on the 1st defendant and to, thereby, make the first limb of the permanent injunction meaningful under the provisions of the Intellectual Property Act.

Therefore, I hold that, the scope and effect of the first limb of the permanent injunction issued by the High Court restraining the 1st defendant from *"manufacturing, marketing and/or selling products under the brand name `Rani'…."* only restrains the 1st defendant from using the word "Rani" depicted in a manner which is identical or similar to the plaintiff's trade marks and from using any devices containing the word "Rani" which are identical or similar to the plaintiff's trade marks. Accordingly, the permanent injunction which has issued under prayer (c) of the plaint is amended to read: *"A Permanent Injunction restraining the 1st Defendant whether acting by himself and/or through his employees and/or agents and/or otherwise howsoever directly and/or indirectly from manufacturing, marketing and/or selling products which bear the word "Rani" depicted in a manner which is identical or similar to the plaintiff's trade marks produced at the trial and/or which bear any device containing the word "Rani" which is identical or similar to the plaintiff's trade marks produced at the trial and/or which is identical or similar to the Rani logo/device used by the Plaintiff Company."*.

To clarify further, the permanent injunction does not impose a restraint on the 1st defendant using the word or name "Rani" *simpliciter - ie:* it does not impose an unqualified prohibition on the 1st defendant using the word "Rani" *provided* the 1st defendant does *not* violate the prohibitions placed by the permanent injunction, as amended.

The aforesaid determination of the effect of the first limb of the permanent injunction issued by the High Court together with the three undertakings given by the 1st defendant and the fact that the 1st defendant does not challenge the second limb of the permanent injunction issued by the High Court and the declaration of nullity issued by the High Court, resolve this appeal. This appeal is allowed only to the extent that, the judgment of the High Court is varied by the amendment of the permanent injunction in the manner set out above. All other reliefs granted by the High Court to the plaintiff shall remain in force, without any change. The High Court is directed to amend the decree accordingly.

The 1st defendant shall abide by the undertakings given on his behalf that the 1st defendant will not use on his products: (i) the font used by the plaintiff in the word "Rani" contained in the plaintiff's trade marks; (ii) the device of the crest which is topped by a crown, used by the plaintiff; and (iii) any depiction of a crown.

In the circumstances of this case, parties will bear their own costs.

Judge of the Supreme Court.

Priyasath Dep,PC,CJ.
I agree

Chief Justice

B.P.Aluwihare,PC,J.
I agree

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

1. C. Aloy W. Fernando,
   No. 43/99, Poorwarama Mawatha,
   Colombo 5

Plaintiff

- Vs -

1. Anton Reginald Atapattu,
   Director,
   Department of Fisheries and Aquatic Resources,
   Maligawatta Secretariat,
   Colombo 10.

2. M.T.K. Nagodawithana,
   Acting Director,
   Department of Fisheries and Aquatic Resources,
   Maligawatta Secretariat,
   Colombo 10

3. Hon. Mahinda Rajapakse,
   Minister of Fisheries and Aquatic Resources,
   New Secretariat Building,
   Maligawatta,
   Colombo 10

SC/CHC/Appeal/30/2006

Commercial High Court (Civil) of the Western Province (holden in Colombo) No. HC (Civil) 06/99(3)

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

Defendants

AND NOW

2. M.T.K. Nagodawithana,
Acting Director,
Department of Fisheries and Aquatic Resources,
Maligawatta Secretariat,
Colombo 10

2nd Defendant-Appellant

2A. Mr. S. W. Pathirana,
Director General,
Department of Fisheries and Aquatic Resources,
New Secretariat Building,
Maligawatta, Colombo 10

Substituted 2A Defendant-Appellant

2B. Mr. Nimal Hettiarachchi,
Director General,
Department of Fisheries and Aquatic Resources,
New Secretariat Building,
Maligawatta, Colombo 10

Substituted 2B Defendant-Appellant

2C. Mr. M. Cristy Lal Fernando,
Department of Fisheries & Aquatic Resources,
New Secretariat Building,
Maligawatta, Colombo 10

Substituted 2C Defendant-Appellant

- Vs -

C. Aloy W. Fernando
No. 43/99, Poorwarama Mawatha,
Colombo 05

Plaintiff-Respondent

1. Anton Reginald Atapattu,
Director,
Department of Fisheries and Aquatic Resources,
Maligawatta Secretariat,
Colombo 10.

1st Defendant-Respondent (Deceased)

3. Hon. Mahinda Rajapakse,
Minister of Fisheries & Aquatic Resources,
New Secretariat Building,
Maligawatta,
Colombo 10.

3rd Defendant-Respondent

3A. Felix Perera,
Minister of Fisheries & Aquatic Resources,

New Secretariat Building,
Maligawatta,
Colombo 10.

Substituted 3A Defendant-Respondent

3A. Hon. Mahinda Amaraweera,
Minister of Fisheries & Aquatic Resources,
New Secretariat Building,
Maligawatta,
Colombo 10

Substituted 3B Defendant-Respondent

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

4th Defendant-Respondent

Argued before: Buwaneka Aluwihare, PC, J
Priyantha Jayawardena, PC, J
Nalin Perera, J

Counsel: Sanjeewa Jayawardena, PC with Nilshantha Sirimanne for the Plaintiff-Respondent
Suren Gnanaraj, SC for the 2nd Defendant-Appellant

Argued on: 26th May, 2017
Decided on: 10th September, 2018

Priyantha Jayawardena, PC, J.

This is an appeal from a judgment of the High Court (Civil) holden in Colombo in respect of moral rights decided under the Code of Intellectual Property Act No. 52 of 1979 as amended.

Factual Background

On 17th September 1993, an advertisement was placed by the Department of Fisheries and Aquatic Resources (hereinafter referred to as 'the Department') in the Dinamina newspaper calling for bids for the compilation of a detailed list of craft and gear used in Sri Lanka's fishing industry for a project funded by the United Nations Development Programme (hereinafter referred to as the 'UNDP').

Several persons including Messrs. Neil Fernando and Company submitted bids for the aforementioned tender. In the bid submitted by Messrs. Neil Fernando and Company, C. Aloy W. Fernando (hereinafter referred to as 'the Respondent') and one Shantha Suraweera were named as two key personnel proposed to work on the project.

After discussions between the said Department and Messrs. Neil Fernando and Company, the tender was awarded to Messrs. Neil Fernando and Company by a letter dated 4th November, 1993.

On 19th November 1993, Messrs. Neil Fernando and Company and the Department entered into an agreement to conduct a descriptive all island survey of fishing crafts and gear in use, and prepare an inventory containing a written description supported by sketches, diagrams and photographs for a consideration of Rs. 731,543/- (hereinafter referred to as the 'Agreement'). The consideration under the Agreement was paid by the Department to Messrs. Neil Fernando and Company after the submission of the Final Draft.

The Agreement was negotiated and signed by the Respondent for and on behalf of Messrs. Neil Fernando and Company and A. R. Atapattu, the 1st Defendant, in his capacity as the Director of the Department (hereinafter the '1st Defendant').

Appendix B of the Agreement set out the Respondent as the Team Leader and Shantha Suraweera as the Craft and Gear Specialist.

Further, Clause 5 of the Standard Conditions of Contract in the said Agreement stated as follows:

> *"(b) <u>Proprietary Rights of the Client</u> in Reports and Records*
>
> *The reports and all other relevant data including maps, diagrams, photographs, plans, statistics and supporting records or materials compiled or prepared in the course of the Services <u>shall be the property of the Client</u> and <u>shall not be used by the Contractor for purposes unrelated to this Contract</u> without the prior approval of the Client. The Contractor shall deliver all such materials to the Client upon the completion of the Services."* [Emphasis added]

Thus, by the aforementioned clause, the economic rights of the work were transferred to the said 1st Defendant for the purpose of the matters referred to in the contract in his official capacity as the Director of the Department. This position was conceded by both the Appellant and the Respondent.

Appendix A of the said Agreement set out the Terms of Reference which stipulated the activities that need to be carried out. Specifically, Activity 4 under the Terms of Reference stated that a catalogue-cum-field manual must be prepared.

After signing the said Agreement, the Respondent and Shantha Suraweera commenced work in terms of the Agreement and led teams to carry out field research in the country's coastal districts, excluding the Northern and Eastern Regions which was carried out by representatives on behalf of Shantha Suraweera and the Respondent. Those representatives used formats prepared by the Respondent. The research carried out involved conducting interviews and detailed studies, taking measurements, taking photographs, preparing the text, making sketches to scale, and compiling key materials that were required for the creation of an inventory of the fishing craft and gear used in Sri Lanka.

The staff of the said Department examined the draft using a Critique Sheet prepared by the UNDP. Subsequently the Respondent and Shantha Suraweera participated in a one day workshop to answer queries raised by the staff of the said Department and using the feedback, made minor changes to the draft.

The final version of the draft was delivered to the 1st Defendant in April 1994, titled "Fishing Craft, Gear and Methods in Sri Lanka" (hereinafter referred to as 'the Final Draft'). The cover page of the Final Draft that was handed over to the Department was as follows:

"**DEPARTMENT OF FISHERIES AND AQUATIC RESOURCES OF THE REPUBLIC OF SRI LANKA**

FISHING CRAFT, GEAR AND METHODS IN SRI LANKA

April 1994

by

Aloy W. Fernando

&

Shantha Suraweera

CONSULTANT

NEIL FERNANDO & CO.

No. 10, Frances Road, Colombo 6,

SRI LANKA"

Through Messrs. Neil Fernando and Company, the Respondent requested from the Department a published copy of the "Fishing Craft and Gear of Sri Lanka" (hereinafter referred to as the 'Published Work'). The Respondent submitted that despite these requests, the 1st Defendant did not furnish a copy of the Published Work.

Later the Respondent managed to obtain a copy of the Published Work and found out that the body of the Final Draft had been reproduced with the new cover page which read as follows:

"**FISHING CRAFT AND GEAR OF SRI LANKA**

Department of Fisheries and Aquatic Resources

UNDP/FAO/SRL/91/022

Marine Fisheries Management Project"

Accordingly, the cover page did not indicate the Respondent and Shantha Suraweera as authors. Further, in the preface to the Published Work, the 1st Defendant had adapted the Respondent's preface from the Final Draft and inserted his name in lieu of the Respondent's name. The Respondent stated that he noticed his name and Shantha Suraweera's had been removed only after he obtained a copy of the Published Work.

The Respondent further submitted that he also became aware that the Published Work had been translated into Sinhala and the authors' names were not indicated in connection with the work and the preface was also adapted in the same manner.

The Respondent stated that he had written to the 1st Defendant and requested him to cease publishing further copies of the Published Work which did not indicate the authorship of the Respondent and Shantha Suraweera in connection with the work. Further, letters of demand were also sent by the Respondent through his attorneys-at-law but no response was received to any of those letters.

The Proceedings Before the High Court (Civil)

The Respondent instituted action in the High Court (Civil) (hereinafter referred to as the 'Commercial High Court') against the 1st Defendant, the Acting Director of the said Department as the 2nd Defendant, the Minister of Fisheries and Aquatic Resources as the 3rd Defendant and the Attorney General's Department as the 4th Defendant.

The action was not filed against the 1st, 2nd and 3rd Defendants in their personal capacity but by virtue of the fact that they held the relevant of posts in the said Department and the Ministry, respectively. The 4th Defendant was made a party in terms of the Civil Procedure Code.

The Respondent prayed, *inter alia*, for the Court to make order for the following in his Amended Plaint:

"(i) *Declaring that the Respondent and Mr. Suraweera are the authors of the book titled 'Fishing Craft and Gear of Sri Lanka' published in English, Sinhala and Tamil by the Department of Fisheries and Aquatic Resources and/or that the [Respondent] is the joint author of the same.*

(iv) Granting a Permanent Injunction restraining the Defendants and their servants and agents from distributing, selling or in any other way circulating any copy of the publication titled 'Fishing Craft and Gear of Sri Lanka' and/or its Sinhala/Tamil translation or any similar publication based on the data contained therein without

appropriately acknowledging the joint authorship of the Plaintiff prominently on the cover and/or on each page on which the title of the publication appears and at the end of the preface of the publication.

(vi) Requiring the Defendants to display on the cover and/or on each page on which the title of the publication appears and at the end of the Preface, the name of the Respondent as the joint author of the said work titled, 'Fishing Craft and Gear of Sri Lanka' in every copy of the same published in English, Sinhala, Tamil or any other language.

(viii) For judgment against the Defendants jointly and severally for a sum of Rs. 15 million together with legal interest thereon from the date of filing action, and further legal interest on the aggregate sum from the date of the decree until payment in full."

The Respondent stated that Shantha Suraweera was not made a party to the action as he was unable to ascertain his whereabouts.

The 1st Defendant died during the course of the proceeding, but the proceeding continued as the case had been filed against him in his official capacity and subsequently, the successors of the 2nd Defendant were added as parties. No objections were raised for those substitutions.

The Commercial High Court delivered judgment in favour of the Respondent against the 1st and 2nd Defendants in terms of the said prayer (i), (iv), (vi) and (viii) and awarded a sum of Rs. 1.5 million together with legal interest.

Being aggrieved by the said judgment, the 2nd Defendant appealed to the Supreme Court, *inter alia*, on the following grounds:

(b) The Learned Trial Judge has misdirected himself in holding that the Plaintiff was the sole author of the publication which was only an inventory he had done with the help of others in the field and the Ministry of Fisheries;

(c) The learned Trial Judge had misdirected himself in holding that the obligations of the Defendants in the case were not based the contract; and,

(e) The learned Trial Judge had misdirected himself in holding that the Plaintiff's copyright was infringed.

Submissions by the 2nd Defendant-Appellant

The learned State Counsel for the 2nd Defendant-Appellant (hereinafter 'the Appellant') submitted that the legal rights involved in this appeal arose from the said Agreement entered between Messrs. Neil Fernando and Company and the 1st Defendant on behalf of the Department.

The Final Draft submitted by the Respondent did not attract copyright as it was a detailed list of fishing crafts and gear used in Sri Lanka as stated in the advertisement calling for bids. It was further submitted that according to Black's Law Dictionary (7th Edition, 1999), an inventory was a detailed list of assets and thus, the work should be regarded as simply being an inventory. Thus, the Appellant argued that the Final Draft was not an 'original' work for the purposes of the Code of Intellectual Property Act No. 52 of 1979 as amended (hereinafter 'the 1979 Act').

The learned State Counsel further submitted that, as per the provisions of the Agreement, the Respondent and Shantha Suraweera participated in one day workshops where the Department staff evaluated and criticised the draft. Moreover, the Respondent was given access to facilities and ensured cooperation of the staff members of the Department. Thus, the work was primarily created by the said Department and not by the Respondent and Shantha Suraweera.

It was also submitted that if the Final Draft attracted copyright, all intellectual property rights; namely, the economic rights and moral rights in the Final Draft had been transferred from the Respondent to the Department due to the provisions of the Agreement. Thus, the Respondent no longer owned the moral rights in the Final Draft. Further, if the Respondent had wanted to retain his moral rights, a specific clause should have been included in the Agreement to that effect.

During the course of oral submissions, the learned State Counsel for the Appellant submitted that the Respondent had waived his right to claim moral rights, if any, by acquiescence and he is now estopped from claiming moral rights.

Without prejudice to the other submissions, the learned State Counsel further submitted that the quantum of damages awarded was excessive.

Submissions by the Respondent

In response, the learned President's Counsel for the Respondent submitted that while economic rights in the Final Draft had transferred to the said Department, the Respondent's moral rights were not transferable in terms of section 11 of the 1979 Act. It was also submitted that the Respondent and Shantha Suraweera continued to be co-owners of the moral rights in the Final Draft and are thereby, entitled to have their names indicated as joint authors in connection with the Published Work. Therefore, the failure to indicate that the Respondent's authorship in connection with the Published Work was an infringement of his moral rights.

It was further submitted that the Respondent was entitled in law to ensure that the Final Draft was published in the same manner which was handed over to the Department without any unauthorized, deletions, alterations, changes or editing.

The Respondent further claimed that there were several errors and changes made to the Final Draft upon publication which infringed his moral rights.

Can the Respondent Claim Copyright to the Final Draft?

In order to consider whether the Respondent had copyright to the Final Draft, it is necessary to consider whether the Respondent was an author of the Final Draft in terms of the 1979 Act.

(a) Who are the '*Authors' of the Final Draft*?

Section 17(1) of the 1979 Act defines an author as follows:

> "*The rights protected under this Part shall be owned in the first instance by the author or authors who created the work. The authors of a work of joint authorship shall be the co-owners of the said rights."* [Emphasis added]

Further, section 6 of the 1979 Act defines a 'work of joint authorship' as follows:

> *"… a work created by two or more authors in collaboration, in which the individual contributions are indistinguishable from each other."*

Thus, it is necessary to consider who created the Final Draft.

The Appellant submitted that the Respondent and Shantha Suraweera were given access to facilities and ensured cooperation of the staff members of the Department to prepare the said draft.

While giving evidence, the Respondent described the work carried out to create the Final Draft. He stated that Shantha Suraweera and he prepared the programme and split the country into five zones. As stated above, data in the North and East was gathered by representatives deployed by them while the remaining zones were visited by the Respondent and Shantha Suraweera and their team. The representatives worked on formats provided by the Respondent and Shantha Suraweera.

Further, the research carried out involved conducting interviews and detailed studies, taking measurements and photographs, making sketches to scale and compiling key materials.

In his evidence, the Respondent stated that he and Shantha Suraweera performed the work laid out in the Terms of Reference in Appendix A of the Agreement which includes the preparation of a catalogue-cum-field manual as stipulated in Activity 4 of Appendix A.

The Terms of Reference in Appendix A stipulated the following activities:

> *Activity 1 – Prepare comprehensive lists of types of craft and gear*
> *Activity 2 – Classify craft and gear*
> *Activity 3 – Documentation of craft and gear*
> *Activity 4 – Prepare a catalogue-cum-field manual*
> *Activity 5 – Present and correct draft*

Further, Activity 4 in the aforementioned Appendix A states as follows:

> *"<u>Prepare a catalogue-cum-field manual</u>*
>
> *Using the collected data, prepare a draft catalogue-cum-field manual in English. The manual is to be user friendly, pedagogic and easily read by a non-technical readership while also containing enough basic data on the craft and gear to identify types but not design the craft and gear in question. ……"*

Thus, the Respondent and Shantha Suraweera used information gathered during field research and information collected by other representatives deployed by them, and exercised skill and judgment to prepare a draft catalogue-cum-field manual (i.e. the Final Draft) which could be easily read and understood by a layperson.

The Appellant submitted that the draft document was critiqued at a workshop held at the Department using a Critique Sheet provided by the UNDP and it was produced in court during trial.

In response, the Respondent stated that after the workshop, the only changes made involved minor editing of the draft document and the removal of repetitions and minor alterations.

A careful consideration of the said Critique Sheet shows that it was merely a mode of providing feedback to the Respondent and Shantha Suraweera as to what needed to be corrected, rather than being a means of contributing to the work. Therefore, I am of the view that giving access to the facilities of the Department, ensuring the cooperation of the Department staff and feedback does not amount to a contribution to the preparation of the Final Draft which meets the threshold required for authorship.

Having considered the work prepared under the Terms of Reference in Appendix A in the Agreement, particularly Activity 4 of Appendix A, I am of the opinion that the Respondent and Shantha Suraweera are the authors of the Final Draft.

Although the roles were divided, it was the culmination of both their skill and judgment that resulted in the Final Draft and their contributions are indistinguishable from each other. Therefore, I am further of the opinion that the Final Draft was a work of joint authorship within the meaning of section 17(1) of the 1979 Act.

(b) Is the Final Draft an *'original*' literary work?

In view of the above finding that the Respondent and Shantha Suraweera are the authors of the Final Draft, it is now necessary to consider whether the Final Draft is an original literary work and therefore a protected work in terms of the 1979 Act.

Section 7 of the said Act stipulates a protected works as follows:

> *"(1) Authors of original literary, artistic and scientific works shall be entitled to the protection of their works under this Part.*
>
> *(2) Literary, artistic and scientific works shall include in particular –*
>
> *(a) books, pamphlets and other writings; ……*
>
> *(3) Works shall be protected irrespective of their quality and the purpose for which they were created."* [Emphasis added]

The originality of the Final Draft was contested by the Appellant on the basis that the Final Draft was not created by the Respondent and Shantha Suraweera, but that they only compiled the data which was collected by them and other representatives deployed by them.

In order to consider if the Final Draft satisfies the requirement of originality, it is necessary to consider the work performed by Shantha Suraweera and the Respondent.

Having considered the Final Draft, I am further of the opinion that the preparation of the Final Draft involved skill, choice of language and style, composition and intellectual effort by the Respondent. Therefore, the Final Draft can be considered as 'original' work for the purpose of the said Act as there is originality in the work.

The test for originality of a work was set out in *University of London Press v University Tutorial Press* [1916] 2 Ch 601 wherein it was held at 608:

> "*The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author."* [Emphasis added]

The fact that the Final Draft contained pre-existing information which was partly gathered by the representatives deployed by the Respondent and Shantha Suraweera does not affect originality of the Final Draft. I am of the view that a novel composition of pre-existing information by exercising skill, knowledge and decisions involving choice of language and style satisfies the requirement of originality. In *Football League Ltd v Littlewood Pools Limited* 1959 Ch 637, it was held as follows at 651:

> *"…it is clearly settled law that there can be no copyright in information or in an opinion per se. Copyright can only be claimed in the composition or language which is chosen to express the information or the opinion."* [Emphasis added]

(c) Is the Final Draft a '*literary work*'?

Section 7(2) of the 1979 Act states that literary, artistic and scientific works include "*books, pamphlets and other writings*".

Section 7(3) of the 1979 Act states that a work is protected notwithstanding its quality and the purpose for which it is created.

The minimum standard of a literary work required to attract copyright was set out in *University of London Press Limited v University Tutorial Press Ltd (supra)* at 608 wherein the court had to address whether examination papers were subject to copyright. It was held:

> *"In my view the words "literary work" cover work which is expressed in print or in writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature and refers to written or printed matter."* [Emphasis added]

In order to determine if a work constitutes a literary work under the 1979 Act, it is necessary to consider the work performed, instead of the quality and purpose for which the draft was created. In *Football League Limited v Littlewoods Pools Limited (supra)* at 650, it was held:

> "*Compilations frequently, though not, of course, necessarily, consist of merely quasi-statistical reference matter such as railway time tables, horse breeding material, catalogues, indices, solar and lunar calendar events and reference directories. Such material has no literary merit in the sense of having grammatical composition.… Copyright for such a compilation can be claimed successfully if it be shown that some labour, skill, judgment or ingenuity has been brought to bear upon the compilation. The amount of labour, skill, judgment or ingenuity required to support successfully a claim for copyright is a question of fact and degree in every case."* [Emphasis added]

The Respondent, Shantha Suraweera and the representatives had collected data and decided on the type of data that should be included; which photographs should be taken and used and, finally, compiled and composed the final draft of an inventory containing a written description supported by sketches, diagrams and photographs which was user friendly, pedagogic and easily read by a non-technical readership while containing basic data on craft and gear for identification.

Hence, I am of the opinion that the Final Draft prepared by the Respondent and Shantha Suraweera constitutes a 'literary work' within the meaning of Section 7(1) of the 1979 Act.

(d) **Are the Sketches and Photographs in the Final Draft subject to Copyright?**

As required by the Agreement, the Respondent and Shantha Suraweera took measurements and prepared sketches which were included in the Final Draft. The 1979 Act states that protected works include '*works of drawing*' under section 7(2)(g).

In *Vermaat and Powell v Boncrest Ltd* [2001] FSR 5, the court held that the annotated drawings of bedspreads were protected by copyright though they were not exclusively pictorial. Thus, I am of the opinion that the sketches included in the Final Draft are subject to copyright.

Further, they took photographs of the fishing craft and gear and included them in the Final Draft. Under section 7(2)(h), '*photographic works*' are also protected under the 1979 Act. In *Absolute Lofts South West London Ltd v Artisan Home Improvements Ltd* [2015] EWHC 2608 (IPEC), the court awarded damages for infringement of copyright in photographs of loft conversions.

In *Associated Newspapers of Ceylon v Chandragupta Amerasinghe* [2013] 1 SLR 290, the court held that the use of photographs taken of the 1983 communal riots without the approval of the photographer amounted to an infringement of copyright.

The Final Draft contained photographs that were taken and drawn by the Respondent and Shantha Suraweera using their skill and judgment. Thus, I am of the view that the abovementioned photographs satisfy the criteria set out in section 7(2)(h) of the 1979 Act.

(e) Is the Final Draft a Protected Work?

As stated above, the Final Draft (which included the sketches and photographs) authored by the Respondent and Shantha Suraweera is an original literary work within the meaning of section 7 of the 1979 Act and is therefore copyright protected.

Have the Moral Rights Been Transferred by the Agreement?

Moral rights are personal rights which protect the personal rights of an author in respect of the treatment and control of the author's works.

England's Statute of Anne was enacted in 1710 to introduce substantive rights and definitive procedures relating to copyright and its purpose was described as to encourage learned men to compose and write useful books. Cornish and Llewellyn (5th Edition) stated that the concept of moral rights evolved primarily from Continental Europe in recognition of the need to safeguard the artistic integrity of the author. The concept of moral rights was incorporated into the Berne Convention for the Protection of Artistic and Literary Works at the 1928 Rome Conference. As a signatory to the aforementioned convention, moral rights were incorporated into our law by the Legislature.

Moral rights are enshrined in section 11 of the 1979 Act which states:

> "(1) *The Author of a protected work shall have the right –*
>
> *(a) to claim authorship of his work, in particular that his authorship be indicated in connexion with any of the acts referred to in Section 10, except when the work is included incidentally or accidentally when reporting current events by means of broadcasting or television;*
>
> *(b) to object to, and to seek relief in connexion with, any distortion, mutilation or other modification of, and any other derogatory action in relation to, his work, where such action would be or is prejudicial to his honour or reputation.*
>
> *(2) The rights referred to in subsection (1) shall subsist for the life of the author and fifty years thereafter. After his death, the said rights shall be exercisable by his heirs.*
>
> *(3) The rights referred to in subsection (1) shall be exercisable even where the author or his heirs do not have the rights referred to in Section 10.*
>
> *(4) The rights referred to in subsection (1) are <u>not transferable</u>."* [Emphasis added]

The Appellant's submission that a specific contractual clause was necessary for the Respondent to retain his moral rights is not sustainable in view of the said section 11(4). Nor can it be argued that Clause 5 of the Standard Conditions of Contract annexed to the Agreement which transfers "*all property*" in the work carried out transferred moral rights in view of the specific prohibition stipulated in section 11(4).

Additionally, the nature of the Respondent's employment is irrelevant when it comes to the question of moral rights as moral rights attach to the author of a work and are non-transferable in terms of the law.

Hence, I am of the opinion that the moral rights of the Respondent and Shantha Suraweera relating to the Final Draft cannot be transferred under the said Agreement.

Translations

It is necessary to note that section 10 of the 1979 Act, *inter alia*, states that the author of a protected work has the right to reproduce and translate the whole work or a part thereof. As the Department is the current holder of the economic rights to the Final Draft, it has the right to translate the Final Draft as per section 10 of the 1979 Act.

The rights in translations are set out in section 8 of the 1979 Act which states:

> *"(1) The following shall also be protected as original works –*
>
> *(a) <u>translations</u>, adaptations, arrangements and other transformations of literary, artistic and scientific works…*

> *(2) The protection of any work referred to in subsection (1) shall be without prejudice to any protection of a pre-existing work utilised by the making of such work."* [Emphasis added]

As noted earlier, section 11(4) states that moral rights are not transferable and section 11(3) states that they may be exercised even when the economic rights have been transferred.

At this point, it is also worthy to consider Section 15 of the 1979 Act which states:

> *"Where any work has not been published in Sinhala or Tamil within ten years from its having been published for the first time in its original language, it shall be lawful to translate the said work into Sinhala or Tamil, as the case may be, and to publish such translation, even without the authorisation of, and without any payment to the owner of the copyright of the work, without prejudice to the application of the provisions of section 11."* [Emphasis added]

Thus, I am of the view that the protection afforded to moral rights is of a standard that when an economic right holder lawfully translates a protected work, moral rights can still be asserted by the author who created the original work.

Do the Published Work and the Translation Thereof Infringe the Moral Rights of the Respondent?

(a) **The Right to Have Authorship Indicated**

Upon comparing the Final Draft and the Published Work, it is evident that the same wording and structure have been copied short of some typographical errors and minor changes to formatting.

Further, the first, second, sixth and ninth paragraphs of the preface submitted by the Respondent were copied verbatim and five new paragraphs were added by the 1st Defendant. Most notably, the paragraph by the Respondent thanking Shantha Suraweera for his work on the project was deleted and 1st Defendant's name at the bottom of the preface replaced the Respondent's name.

Therefore, having compared the Final Draft and the Published work, I am of the opinion that the Published Work was merely the Final Draft with an altered cover page and preface.

Thus, the removal of the Respondent and Shantha Suraweera's names from the cover page and preface amount to an infringement of the Respondent's moral right to have his joint authorship with Shantha Suraweera recognised.

(b) The Right to Have Authorship Indicated in a Translation

As opined earlier, an author can exercise his moral rights with regard to translations of a work by having his or her name indicated as the author of the original work which was subject to translation.

While the prayer in the plaint filed in the Commercial High Court refers to translations in Sinhala and Tamil, it must be noted that only the Sinhala translation of the Published Work was produced at the trial.

In the circumstances, the Respondent and Shantha Suraweera were entitled to exercise their moral rights with regard to the translation of the Published Work even though the translation was lawful as the economic rights to the Final Draft are held by the Department.

Therefore, I am of the opinion the Respondent and Shantha Suraweera are entitled to have his work acknowledged when the translations were published.

(c) Did the Department Mutilate or Distort the Final Draft?

With regard to the allegation of mutilation or distortion of the Final Draft, I am of the view that although there are minor errors in the publication, they are insufficient to constitute mutilation or distortion within the meaning of Section 11(1)(b).

Did the Respondent Waive his Right to Claim Moral Rights to his Work?

The Appellant submitted that the Respondent participated in the negotiations and the drafting of the said Agreement. Further, the Respondent signed the Agreement on behalf of Messrs. Neil Fernando and Company. Therefore, the Appellant argued that the Respondent should have secured his moral rights by including a clause in the Agreement to protect such rights. Further, the aforementioned process, he acquiesced by conduct and this amounted to waiver of his moral rights, if any. Hence, he is now estopped from claiming moral rights.

With regard to the concept of waiver, section 87 of the UK's Copyright, Designs and Patents Act of 1988 states:

> *"(1) It is not an infringement of any of the rights conferred by this Chapter to do any act to which the person entitled to the right has consented.*
>
> *(2) Any of those rights may be waived by instrument in writing signed by the person giving up the right.*
>
> *(3) A waiver –*
>
> > *(a) may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works, and*
> >
> > *(b) may be conditional or unconditional and may be expressed to be subject to revocation;*
>
> *and if made in favour of the owner or prospective owner of the copyright in the work or works to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed.*
>
> *(4) Nothing in this Chapter shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to any of the rights mentioned in subsection (1)"*

Waivers of moral rights has now been included under section 10(3) of the Intellectual Property Act No. 36 of 2003 which is set out below:

> *"The author may waive any of the moral rights mentioned in subsection (1), provided that such a waiver is in writing and clearly specifies the right or rights waived and the circumstances to which the waiver applies:*

Provided that, where a waiver of the rights under paragraph (c) of subsection (1) specifies the nature and the extent of the modification of other action in respect of which the right is waived, subsequent to the death of the author or the physical person or legal entity upon whom or which the moral rights have devolved shall have the right to waive the said rights."

Since there is no similar provision regarding waiver and acquiescence in the 1979 Act, I am of the opinion that the Respondent has not waived his moral rights to the work he had created under the Agreement. In fact, waiver was not part of the Sri Lankan law in terms of the 1979 Act and only became part of our law when the Intellectual Property Act No. 36 of 2003 was enacted.

Remedies for the Infringement of Moral Rights

The purpose of indicating authorship is to ensure that authors are given due recognition for their work and thereby protect society as a whole. The need to afford such protection to artists, authors and other creators of works was summarised in *Tolnay v Criterion Film Productions Limited* [1936] 2 AER 1625 at 1626 and 1627:

"*All persons who have to make a living by attracting the public to their works, be they artistes in the sense of painters, or be they literary men who write books or who perform in other branches of the arts, such as pianists or musicians, must live by getting known to the public."*

The remedies for infringement of copyright are set out in section 21 of the 1979 Act which provides:

"*(1) Any person who infringes any of the rights protected under <u>this Part</u> may be prohibited by injunction from continuing such infringement and <u>may also be liable in damages.</u>*

(2) The provisions of Chapter XXXII relating to infringements shall apply, mutatis mutandis, to the rights protected under this Part." [Emphasis Added]

The 'Part' referred to in section 21 includes moral rights under section 11; thus, the remedies for copyright infringement include remedies for the infringement of moral rights. As stated earlier, the moral right infringed by the Department in this case is the moral right to claim authorship to the Published Work and, therefore, the remedies available under section 21 need to be considered.

In relation to the infringement of the right to claim authorship, injunctions may be granted under section 21 to prevent the circulation of works that have not been attributed to the author. Further, damages could be awarded in order to compensate for losses suffered in appropriate cases.

The word "*may*" in section 21 of the 1979 Act makes the award of damages discretionary and I am of the view that due consideration must be given to the circumstances and the facts of each case if damages are to be awarded.

Assessing the Quantum of Damages

The issue with a moral rights infringement is that it often deals with intangible or non-monetary losses. One approach of calculating damages is to compare the position of the affected person before and after the infringement and to raise the affected person to the position they would have been prior to the wrong. The other approach is to consider what the affected person's position would have been if his rights had not been infringed and what benefits could have been gained.

In this instance, it would be more appropriate to apply the latter approach as the Respondent is unable to quantify the damages for not being attributed as a joint author of the Published Work.

The benefit that would have been gained if the right had not been breached is generally considered to be publicity. G. Davies and K. Garnett in Moral Rights (Sweet and Maxwell, 2010) at 10-056 stated:

> "*The measure of damages for infringement of the paternity right will usually be related to the loss of recognition of publicity thereby caused."*

Further, the case cited by the Respondent, *Tolnay and Another v Criterion Film Production (supra)* at 1627, addresses the question of financial loss when the defendants failed to give the plaintiffs screen credit. The court held as follows:

> *"… I doubt not that the loss of publicity is serious to an author. … <u>One way in which they can expect remuneration and expect employment is by getting their name before the public.</u> Therefore, I think that as they have been deprived here of screen credit, <u>it must be that they have suffered damage, and it must mean that they have suffered damages which is not nominal</u>, and I am bound to give them a separate sum for each."* [Emphasis added]

While loss of publicity is one aspect, I am of the opinion that it is necessary to consider other relevant factors when awarding damages for the infringement of the moral right to claim authorship. Such factors include whether it is a flagrant or innocent infringement, lost employment opportunities, the competitive or non-competitive nature of the infringement and profits made from the infringing publication. However, the award of damages should not be a windfall.

Further, in instances where the economic rights have been transferred, the price paid for the economic rights ought to be taken into consideration when awarding damages for the infringement of moral rights. However, if the economic rights have been transferred for purposes such as charity and other considerations, the consideration paid will not be a deterrent to award damages for the breach of moral rights.

Was the Award of Damages Excessive?

The Appellant submitted that in any event, the damages awarded by the trial judge were excessive.

In response, the Respondent contended that the quantum of damages awarded by the trial court was justified on the basis of moral rights infringement when considering the failure to indicate joint authorship, altering the preface, replacing the Respondent's name with the 1st Defendant's

name and the loss of employment opportunities due to the non-recognition as he lost future opportunities to get more work in the relevant field.

It was proved at trial that the names of the Respondent and Shantha Suraweera had been removed from the cover page and only carried the name of the Department. Further, all references to Shantha Suraweera and the Respondent had been removed from the preface. When reading the preface in the Published Work, it is apparent that the Published Work was attributed solely to the said Department and, therefore, a reader of the Published Work would not know the Respondent and Shantha Suraweera are the joint authors of the said work.

The Respondent further stated that he persuaded Messrs. Neil Fernando and Company to undertake the work as the work would give him publicity and as such he worked on a lower hourly rate than usual.

The Respondent submitted that the infringement was flagrant as his name and Shantha Suraweera's name had been removed intentionally. It was further submitted that the failure to indicate his joint authorship deprived him of publicity and career opportunities. Further, when applying for consultancy positions, the number of publications attributed to his name was one of the criterions used to assess his suitability for the position. Thus, the failure to indicate his joint authorship deprived him of more opportunities and higher income consultancy positions which resulted in a financial loss.

Although a specific sum was not proved, I am of the view that the trial court was correct in deciding to award damages to the Respondent. In light of the aforesaid conclusion, it is necessary to consider whether the damages awarded by the trial judge are excessive.

It is appropriate to award a fair and reasonable sum as compensation taking into consideration the facts and circumstances of the infringement referred to above.

The Respondent and Shantha Suraweera were identified as key personnel in the Agreement and later the Department organised the workshop to critique the Final Draft; therefore, the Department knew that the joint authors of the Final Draft were Shantha Suraweera and the Respondent. However, the cover page and the preface had been changed to give the impression that the work was carried out by the said Department.

Moreover, a document was produced during trial titled 'Sri Lanka/FAO National Workshop on Development of Community-Based Fishery Management'. An article within the said document cited the Final Draft under consideration in this appeal and attributed the Respondent and Shantha Suraweera as the joint authors. The citation was marked as 'Xd' at trial. Thus, the Department was aware that the Respondent and Shantha Suraweera were the authors of the Final Draft and acknowledged them as such in the aforementioned document.

It is important to note that in the instant case, the Respondent did not have an opportunity to read the final version of the draft before it was printed and published, and therefore, he did not have an opportunity to stop the publication by way of an injunction.

I am of the view that the Respondent was deprived of publicity and future prospects of seeking similar work when the Appellant failed to indicate the Respondent's joint authorship in connection with the Published Work and the translation of the Published Work.

As stated above, after considering the Department's actions with regard to the Published Work, particularly the removal of the Respondent and Shantha Suraweera's name from the cover page of the Published Work, the alteration of the preface including the removal of the line thanking Shantha Suraweera and publishing the book without the knowledge of the Respondent and

Shantha Suraweera amount to flagrancy. Moreover, the work was published in such a manner that the public would believe that the work was created by the Department.

The Respondent also claimed exemplary damages. Exemplary damages are a highly contentious form of civil remedy due to their punitive element. The House of Lords in *Rookes v Bernard* [1964] AC 1129 laid down the governing principles of awarding exemplary damages. Exemplary damages may be awarded where, *inter alia*, the infringer had made a calculated infringement with the knowledge that his profit would be more than the compensation he would be required to pay. However, in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, it was held that exemplary damages could only be granted in limited circumstances.

Evidence led at trial revealed that the Department was under the misconception that the moral rights were transferred to the Department under the Agreement. Further, there was no mutilation or distortion of the work handed over to the Department. The infringement by the Department was also a non-competing infringement. In these circumstances, I am of the view that though exemplary damages could be awarded in the event of a serious and abusive breach of a moral right, the instant case does not warrant awarding exemplary damages.

Taking into the consideration all the facts and circumstances of this case stated above, particularly with regard to the misconception of ownership of the moral rights by the Department and the non-competing nature of the infringement, I am of the opinion that the sum of Rs. 1.5 million awarded in terms of prayer (i), (iv), (vi) and (viii) of the amended plaint was excessive.

The loss of publicity, future prospects of securing similar work, the flagrancy of the infringement and the fact that the Respondent charged a lesser hourly rate to perform the work under the contract, I am of the opinion that the sum of Rs. 500,000/- with legal interest thereon would meet the ends of justice in this case.

Hence, I modify the award of Rs. 1.5 million with legal interest thereon and award a sum of Rs. 500,000/- as damages with legal interest thereon.

I affirm the judgment of the trial judge subject to the abovementioned modification of the above quantum of damages awarded to the Respondent.

However, The Department is entitled in law to publish and distribute the Published Work and translations thereof subject to the aforementioned intellectual property rights of the Respondent and Shantha Suraweera (i.e. by acknowledging them as joint authors).

I order no costs.

Judge of the Supreme Court

Buwaneka 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

In the matter of an Appeal from the Commercial High Court of Colombo.

People's Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 02.

Plaintiff

SC CHC APPEAL No. 32/09
Commercial High Court
Case No. CHC (Civil) 239/05(1)

Vs

The Partnership business being carried on under the name and style of Zaid Tea.

1.Miran Naushad Jamaldeen,
No. 52, Sea Beach Road,
Colombo 11.
2.Siththi Ayesha Naushad,
No. 52, Sea Beach Road,
Colombo 11.

Defendants

AND NOW

The Partnership business being carried on under the name and style of Zaid Tea.

1.Miran Naushad Jamaldeen,
No. 52, Sea Beach Road,
Colombo 11.

2.Siththi Ayesha Naushad,
No. 52, Sea Beach Road,
Colombo 11.

Defendant Appellants

Vs

People's Bank, No. 75, Sir
Chittampalam A Gardiner
Mawatha, Colombo 02.

Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.,**
SISIRA J DE ABREW J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : M.C.M. Muneer with Chandima Samarasiri for the Defendant Appellants.
Kushan D'Alwis PC with Chamila Wickram-anayake and Ms. A. Tennakoon for the Plaintiff Respondent.

ARGUED ON :10.10.2017.

DECIDED ON : 19.02.2018.

S. EVA WANASUNDERA PCJ.

The Appellants in this case have appealed to this Court from the judgement of the Commercial High Court of Colombo dated 08.07.2009. The said judgment was in favour of the Plaintiff Respondent, the People's Bank (hereinafter referred to as the Plaintiff Bank).

By Plaint dated 28.10.2005, the Plaintiff Bank had filed action against the two partners of the business being carried on under the name and style of Zaid Tea. The said two partners are the 1st and 2nd Defendant Appellants (hereinafter referred to as the Defendant Appellants). The Plaintiff sought a judgment and decree in a sum of Rs. 28,037,446.11 and interest thereon at the rate of 24% per annum on a sum of Rs. 16,914,333.15 from 01.11.2003 until the date of the decree and thereafter legal interest on the aggregate sum until the payment in full. The Defendant Appellants had filed answer denying the averments in the plaint and claiming that they are not liable to pay. The trial proceeded on seven admissions and 64 issues raised by the parties on 13.09.2006.

The subject matter of the case before the trial court was the **purchase of 4 foreign bills by the Plaintiff Bank** on the **application** and at the request **of the Defendant Appellants.** The Plaintiff Bank claimed that the money used to purchase the four Foreign Bills on the application of the Defendant Appellants had to be paid back to the Plaintiff Bank by the Defendant Appellants. However, **the main defense** of the Defendant Appellants was that the Plaintiff Bank should recover the purchase money of the Foreign Bills not from the Defendant Appellants but from SLECIC (Sri Lanka Export Credit Insurance Corporation) from whom the purchase of bills were secured.

The Plaintiff Bank led in evidence documents marked X1 to X18 through the Deputy Manager, Special Assets Unit. The 1st Defendant Appellant had given evidence marking V1 to V10 in evidence.

The partnership of the Defendant Appellants, Zaid Tea had been a customer of the Bank for a length of time and they had enjoyed other facilities granted by the Bank. One such other facility was 'export trust receipt' facility granted to the same Defendants, the partners of Zaid Tea, on the security granted by SLECIC

under “pre shipment credit guarantee of SLECIC”. This facility is a different facility and is not with regard to the Foreign Bills. The Defendant Appellants’ own document marked as **V1 specifically indicates** that there was **no security of SLECIC in respect of the Foreign Bills purchase facility.** Moreover, the Plaintiff Bank’s witness, when giving evidence categorically stated that the pre shipment credit guarantee of SLECIC is **applicable to export trust receipt facility** and not to the Foreign Bills purchase facility which forms the subject matter of the case before the Commercial High Court. Right along, when giving evidence on 27.02.2008, the witness of the Bank had reiterated this position and even in cross examination, he had quite specifically confirmed this position.

The High Court Judge , writing the judgment has explained the reasoning very well as follows:-

එමෙන්ම, පැමිණිල්ලේ සාක්ෂිකරු හරස් ප්‍රශ්ණ වලට පිළිතුරු දෙමින්, දිගින් දිගටම කියා ඇත්තේ, වි.1 ලේඛණය මෙම නඩුවට පාදක ගණුදෙනු වලට අනදාළ බව වේ. එමෙන්ම විත්ති වාවකයන් ලෙස ගෙන ඇති ස්ලෙසික් රක්ෂණ ආවරණය මෙම නඩුවේ ගණුදෙනුවලට අනදාළ බවත්, එය අදාළ වුයේ, අපනයනය භාර කුවිතාන්සි ණය වෙනුවෙන් පමණක් බවත් හරස් ප්‍රශ්ණ වලට පිළිතුරු ලෙස කියා ඇත. වි.1 දෙස බැලිමේදි ද වි.1 අදාළ යැයි තර්කය සඳහා උප කල්පනය කරන විටෙක වුවත්, එහි 4 වන පහසුකම ලෙස දක්වා ඇති විදේශ බිල්පත් මිලදි ගැනිම සුරක්ෂිත කිරිමට‘‘ස්ලෙසික්’’ රක්ෂණය ඉල්ලා නැත. එය අදාළ වී ඇත්තේ, පැමිනිල්ලේ සාක්ෂිකරු කියන ලෙසට ම 3 වන වන පහසුකම් වර්ගය වන අපනයන භාර කුවිතාන්සි මිලට ගැනිමටය. ස්ලෙසික් රක්ෂණය මෙම නඩුවේ ගණුදෙනු වලට අදාළ නොවන බවත්, බැංකුවේ ඉල්ලිම ස්ලෙසික් ආයතනයට ඉදිරිපත් කලේ අපනයන භාර කුවිතාන්සියේ හිග මුදල් අයකර ගැනිමට අදාළව බවත්, පැමිණිල්ලේ සාක්ෂිකරු හරස් ප්‍රශ්ණ වලට පිලිතුරු ලෙස කියාද ඇත.

Even supposing there was a security cover for Foreign Bills purchase, the security cover is taken by the business person from SLECIC and then who can claim the money from SLECIC? It is not the Bank who wanted the security cover but the businessman who obtained such a cover. In the case in hand , if there was such a security cover, it is only the Defendant Appellants who could legally make the claim.

In fact there was no such security cover. The 1st Defendant Appellant in his evidence had rather **admitted** that the pre shipment credit guarantee of SLECIC is **in respect of the “ export trust receipt facility**”. It was not for “foreign bills purchase”. The 1st Defendant Appellant was the person who ran the business and knew the truth even though it was pleaded by the Defendant Appellants in their answer and the submissions made by their Counsel that the **Foreign Bills**

purchase was under security cover of SLECIC. The High Court Judge had correctly analyzed this position in his judgment in this way:

විත්තිය පවසන ලෙස මෙම නඩුවේ ගණුදෙනුවලට අදාළව එවැනි රක්ෂණයක් තිබී,පැමිනිලිකාර බැංකුව ඉල්ලිමක් කර ප්‍රතික්ෂේප වුණි නම්, අදාල රක්ෂණය කල ආයතනය කෑදවා මෙම නඩුවට අදාළ ගණුදෙණු සම්බන්ධව රක්ෂණයක් වී බැංකුවේඉල්ලිම ප්‍රතික්ෂේප කල බව තහවුරු කිරීමට තිබුණි. එසේ කර නැත. එසේ නොකරන්නේ එය පල රහිත නිසා විය යුතුය. අනෙක් අතට, එවැනි රක්ෂණ ආවරණයක් පැවැතියේ යැයි තර්කය සඳහා උප කල්පනය කරන විටෙක වුවත්, විත්තිය ලකුණු කරන වී.3 ලේඛණය "OBJECTIVES OF SLECIC " **අනුව රක්ෂණ ආවරණය නිකුත් කරන්නේ අපනයනයකරුට වන අතර, හිමිකම් පෑම කලයුත්තේද,අපනයනකරු වන විත්තිකරු මිස බැංකුව නොවන බව විත්තියේ සාක්ෂි අනුවම පැහැදිලිය. රක්ෂණය බැංකුවට නියැද කරන** (assign) **තිබුනේ යැයි සැලකුවත් ඉල්ලිම මූලිකව ඉදිරිපත් විය යුත්තේ ඊට හිමිකම ඇති අපනයනකරු වෙතිනි.**

The correspondence between the Plaintiff Bank and the Defendant Appellants which were marked in evidence by the Defendant Appellants themselves, amply show the facts, i.e. that they were defrauded by the buyer and they had not received the proceeds of the sale of bulks of tea which were exported by them to the foreign buyer company. In fact they had filed action to recover the monies from the foreign buyers in the District Court of Colombo. The criteria for repayment the dues to the Bank is not related to whether the Appellants in fact received the sale price or part of it or totally no money at all from the buyers but the fact that such repayment was agreed upon prior to the Bank purchased the Foreign Bills on the application made by the Defendant Appellants on their behalf.

The Defendant Appellants had also submitted that the entirety of the evidence had been led before another judge and the judge who had written the judgment had not seen the demeanor of the witnesses and therefore the analysis of the evidence was incorrectly done by the writer of the judgment. I have gone through the said judgment and I find that the second judge had taken up every argument and analyzed the evidence and the documents quite well after having adopted the proceedings with the consent of both parties prior to writing the judgment which is impugned. There is no reason to merit that argument.

I find that the judgment of the Commercial High Court judge is correct in fact and in law. There is no merit in this Appeal.

I affirm the judgment of the Commercial High Court dated 08.07.2009 and make order dismissing the Appeal. The Appeal is dismissed with costs.

Judge of the Supreme Court

Sisira J De Abrew 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 from the Commercial High Court of Colombo.

Chistobel Matilda Joshua,
No. 35/1, Kawdana Road,
Dehiwala. (deceased)

Plaintiff

SC CHC APPEAL 52/2012
Commercial High Court No.
HC (Civil) 744/2010/MR

John Sylvester Horatio Joshua,
No. 15/1, Beach Road,
Mount Lavinia.
And Presently Of
No. 5, Police Park Avenue,
Colombo 05.

Substituted Plaintiff

Vs

Seylan Bank PLC,
CeylincoSeylan Towers,
No. 90, Galle Road,
Colombo 03.

Defendant

AND NOW BETWEEN

John Sylvester Horatio Joshua,
No. 15/1, Beach Road,
Mount Lavinia.
And Presently Of
No. 5, Police Park Avenue,
Colombo 05.

Substituted Plaintiff Appellant

Vs

Seylan Bank PLC,
CeylincoSeylan Towers,
No. 90, Galle Road,
Colombo 03.

Defendant Respondent

BEFORE : **S. EVA WANASUNDERA PCJ,**
PRASANNA JAYAWARDENA PCJ &
MURDU FERNANDO PCJ.

COUNSEL : P.K.W. Wijeratne with K.K.Farooq for the Substituted Plaintiff Appellant.
Kuvera de Zoysa PC with Seneka de Saram for the Defendant Respondent.

ARGUED ON : 22.03.2018.

DECIDED ON : 12. 06. 2018.

S. EVA WANASUNDERA PCJ.

This is an Appeal from an Order of the Judge of the Commercial High Court of Colombo dated 06.07.2012. By the said **Order**, the High Court Judge had **rejected the Application** of the Substituted Plaintiff Appellant (hereinafter referred to as the Appellant), to **amend the Plaint** as well as **dismissed the Plaintiff's action**, before the Commercial High Court **with costs** awarded to the Defendant Respondent, the Seylan Bank (hereinafter referred to as the Respondent Bank) by the same order.

The original Plaintiff, Christobel Matilda Joshua had instituted action in the District Court of Colombo on 23.06.2009 against the Defendant, Seylan Bank seeking a declaration that the said Bank had breached the contract with the Plaintiff by not having properly maintained the account of the Plaintiff, having issued a debit card to the Plaintiff which failed to perform while the Plaintiff was travelling in Malaysia and thus resulting in damages caused to the goodwill of business interests of the Plaintiff. The Plaintiff further claimed damages in a sum of ten million rupees which was alleged to have caused due to the negligence of the Seylan Bank. The Plaintiff had mentioned the number of the international debit card issued to her by the Seylan Bank as 4143-9501-8200 in the Plaint.

The Seylan Bank, the Defendant in the said action before the District Court had filed answer on 19.03.2010 disputing the jurisdiction of the District Court and had pleaded that since it is a commercial transaction over three million rupees that the case had to be sent to the Commercial High Court. Furthermore the Defendant Seylan Bank had denied having issued an international debit card with the aforementioned number and sought dismissal of the action with costs and damages of twenty five million rupees on the ground that the Plaintiff was maliciously claiming damages from the Defendant.On 30.07.2010, in the **District Court,** the case was called to fix for trial and the **District Judge fixed the case for trial on 14.10.2010**.

Thereafter, on application made by the parties on 10.11.2010, the District Judge made order to transfer the case to the Commercial High Court. When the case was called before the Commercial High Court on 25.04.2011, counsel for the Plaintiff had informed court that the Plaintiff had passed away. The Plaintiff, Christobel Matilda Joshua had died on 03.02.2011. An application was made by

the widower, John Sylvester Horatio Joshua on 24.05.2011 to be substituted in the Plaint in place of the Plaintiff. The Defendant Seylan Bank objected to the same but later on after having considered the objections, the Judge of the **Commercial High Court** made order on 10.10.2011, allowing the application for substitution and he **fixed the case for trial on 21.02.2012.** Accordingly the husband of the deceased was substituted in place of the deceased Plaintiff.

When the case came up for trial before the Commercial High Court**on 21.02.2012**, the counsel for the Substituted Plaintiff, having discovered that the number of the international debit card given in the plaint had only three sets of numbers instead of four sets of numbers**moved court for a date to amend the Plaint**. On 05.03.2012, the Substituted Plaintiff filed a motion with the proposed amended plaint seeking to amend the number of the debit card to read as 4143-9501-4008-8200, in six places in the Plaint.

The Defendant Seylan Bank objected to the application for amendment of the Plaint and filed objections on 21.05.2012 praying for relief as follows:-

(a) Dismiss the purported application of the Substituted Plaintiff dated 05.03.2012 to amend the Plaint and
(b) Dismiss and/or reject the amended Plaint of the Substituted Plaintiff dated 05.03.2012.

The Commercial High Court Judge, having considered the written submissions made by both parties made order on 06.07.2012 **dismissing the action with costs.**

The Substituted Plaintiff has appealed to this Court from the said Order of the Commercial High Court on several grounds as follows:

1. The said Order is contrary to law.
2. It was a misconception by the learned trial judge to consider 14.10.2010 as the first date of trial and conclude that there was a delay of 1 year and 4 months to the date of the application for amendment, whereas the said first date of trialhad been fixed by the said District Courtwhich had no jurisdiction to hear and try the case.

3. It has escaped the attention of the learned trial judge that the amendment sought was in respect of making good the omitted set of 4 numbers to the 3 sets of 4 numbers each , that identified an international Debit Card issued to a customer of the Defendant Seylan Bank, where the fact of the issuing of the debit card could have been easily examined by the Defendant Seylan Bank even without any of the identification numbers printed on the card.
4. On the question of the deceased Plaintiff being guilty of laches the learned Judge failed to consider that any amendment of the plaint could have been sought only on the discovery of the omission of 1 set of 4 numbers out of 4 sets of 4 numbers each.
5. The learned High Court Judge had erred resulting in the miscarriage of justice by dismissing the Plaintiff's action on a mere technicality and solely on the ground of the refusal of an application to amend the Plaint and acting without jurisdiction, in that the Defendant Bank was not seeking such relief by the statement of objections filed by the Bank.
6. The learned High Court Judge had erred in applying the provisions of Section 93 of the Civil Procedure Code especially Section 93(2) and the concept of laches especially where grave prejudice could result to the Appellant and there was no prejudice to the Respondent Bank.

Section 93(2) of the Civil Procedurre Code reads as follows:-

"**On** or after the day **first fixed for the trial** of the action and before final judgment, **no application** for the **amendment** of any pleadings **shall be allowed unless** the Court is satisfied for reasons to be recorded by the Court **that grave and irremediable injustice will be caused if such amendment is not permitted,** and on no other ground, and that the party so applying **has not been guilty of laches**."

The facts before Court regarding the dates has to be analyzed to decide the 'day first fixed for the trial'. When the case was before the District Court, and before the original Plaintiff died, the District Judge had fixed the case for trial on 14.10.2010. By that time, the pleadings before the District Court had indicated that the District Court had no jurisdiction to hear the case because of the **high value of the case**. Yet, by that time, however, the parties had not moved the District Court to transfer the case to the Commercial High Court. So, there lay at rest in the District Court, this case under number 04768/09/DMR , fixed for trial

before the District Court on 14.10.2010 **until** the parties moved the District Court on 10.11.2010 by way of an **oral application** that the case be transferred to the Commercial High Court, on the basis that the **District Court had no jurisdiction** to hear the said case. It is obvious that the date 14.10.2010 was a date fixed for trial before the District Court which had **no jurisdiction** to hear the matter.

When the case was properly transferred to the Commercial High Court , the case was a new case to the High Court and as such was given a **new number as 744/2010/MR** and **called** for the first time on 31.01.2011 according to the journal entry No. 12 and as the Plaintiff was not present on that date, notice was issued on the registered Attorney.Thereafter, according to journal entry No. 13, it was called on 25.04.2011 when the Plaintiff was represented by a counsel and it was informed court that the **Plaintiff had passed away** on **03.02.2010.** Within 3 days of the case having been called in the Commercial High Court, the original Plaintiff had died.

The widower of the deceased Plaintiff made an application to be substituted. Objections were filed. An inquiry was held. Written submissions were filed. The Judge of the Commercial High Court delivered an order allowing substitution on 10.10.2011, i.e. 10 months after the date of the case 744/2010/MR was first called in the Commercial High Court. In the same order, the High Court Judge who had jurisdiction to hear the case, fixed the case for trial on **21.02.2012**. It is on **that very first date of trial** before **the High Court** that the Substituted Plaintiff made an application for amendment of the Plaint.

I am of the opinion that **21.02.2012 should be** taken as **the first date of trial** of the case on which the Plaintiff had come to court. The Plaintiff had filed action against the Defendant Seylan Bank in the wrong court , the District Court, which did not have proper jurisdiction to hear the matter. Therefore the date fixed for trial before the **District Court, i.e. 14.10.2010 cannot** be taken as the **first date of trial**.

The learned High Court judge had erred when he based his order on the wrong view that the application for amendment of the Plaint had been made by the Plaintiff after 1 year and 4 months after the 1st date of trial and that it amounts to gross laches. At page 5 of the impugned order of the High Court Judge dated 06.07.2012, it reads as follows:- **"** I need hardly state that the delay on the part

of the Plaintiff in the instant case in making this application for amendment of the plaint is manifestly unreasonable in that the application is made, as I have already stated, **1 year and 4 months after the 1st date of trial**. Undoubtedly, the Plaintiff is guilty of gross laches, and there is **no acceptable and reasonable explanation for such long delay."**

I hold that the High Court was **quite wrong** when the date of the **first date** of trial before the **District Court** which was **without jurisdiction** to hear the case was **considered wrongly** as the first date of the trial before the High Court which had jurisdiction to hear the case. In any case, it is understood that, an order of a lower court acting without jurisdiction cannot be taken as a proper order to be taken cognizance of , by a higher court acting with proper jurisdiction. The trial judge's finding that the deceased Plaintiff was guilty of gross laches based on delay, which was **counted wrongly** as explained by me earlier, is quite unreasonable and cannot be justified.

I wish to consider whether, if the amendment sought is not permitted, grave and irremediable injustice would be caused to the Plaintiff.

The Plaint narrated the story of how the Plaintiff obtained an international debit card from the Defendant Seylan Bank , Dehiwela Branch, prior to leaving Sri Lanka to go to Malaysia and Singapore with an intention of furthering her business matters. On 05.04.2009, she had left Sri Lanka along with some of her family members to Malaysia. In a hotel in Malaysia, the debit card was produced for payment of a bill and it was rejected as an invalid card. Thereafter she had called the Seylan Bank personnel whose names are given in the Plaint and complained from Malaysia. The Bank officers had again informed her that it was corrected but even thereafter the payments could not be done through the debit card. The Plaintiff had borrowed money from persons who were her acquaintances in Malaysia and paid the bills and thereafter returned to Sri Lanka without going further on the trip as planned in the said tour due to the reason that the debit card was not working and rejected as an invalid card.

It is common knowledge in this era in the world that the debit card number can be found out through the computer system in any Bank by just feeding the identification number of the person to the system. The Debit card has four sets of four numbers in each set. The Plaintiff had mentioned in the Plaint , only three

sets of numbers and had missed out on the third set of four numbers prior to the last and the fourth set. In the answer of the Defendant Seylan Bank, it is stated that a debit card with the specific number mentioned in the Plaint was not issued to the Plaintiff. **That is all that is stated by the Defendant Bank**. The Bank had not denied totally having issued any debit card to the Plaintiff. The Bank knew that one set of numbers was missing and that it is an obvious mistake on the part of the Plaintiff.

The Defendant Bank had the knowledge that a debit card was issued to the Plaintiff and the Defendant Bank was aware of the correct four sets of numbers. Without divulging the truth or without accepting that any debit card was issued by the Defendant Bank to the Plaintiff, the Defendant placed **just a denial of having issued** the debit **card mentioned with a missing set of numbers** in the Plaint. The Bank had not acted sincerely but instead had acted taking advantage of the fact that one set of numbers were missing in the number placed in the plaint as the debit card number.

I am not at this moment stating that the Defendant Bank should have divulged the truth in the Answer. Neither am I stating that the Defendant Bank has filed a legally wrong answer. The Defendant is entitled to file its answer in any way the Defendant wants. **Yet**, if the proper number of the international debit card, with 4 sets of numbers with 4 digits in each set, **is not allowed** to be placed before court, by way of an amendment as requested by the Plaintiff, it would **cause grave and irremediable injustice to the Plaintiff,**because the real situation is that the Plaintiff was issued with a debit card by the Defendant Bank but the number of the same mentioned in six places of the Plaintiff was not 100% correct but 75% correct due to **one missing set of 4 numbers**. It is not a matter of the plaintiff having mentioned a totally wrong number of the international debit card but it is a matter of having failed to mention one set of 4 digits. **It is a technical error**. If that amendment is refused, the Plaintiff would not be able to lead evidence to commence his case against the Defendant Bank. That amounts to grave and irremediable injustice to the Plaintiff/ Substituted Plaintiff.

In the case of ***Vellupillai Vs Chairman Urban District Council 33 NLR 464***, Chief Justice Abrahim , in upholding an amendment stated that the Supreme Court is a court of law which should not be trampled by technical objections and it is not an

academy of law. Allowing the amendments at the trial stage, he stated further thus:

" If we do not allow the amendment in this case, we would be doing a very grave injustice to the plaintiff because of the shortcomings of his legal advisor, peculiarities of law."

I am of the view that , the application to amend the Plaint deserves to be allowed so that the Plaintiff gets the chance of commencing his case against the Defendant Seylan Bank. Otherwise, it would cause grave prejudice to the Plaintiff whereas the Defendant **Bank is not prejudiced** at all because the amendment is only an addition of one set of 4 digits to the 3 sets of 4 digit numbers which is something that the Bank had already been **aware of, at all times**.

I am of the opinion that the application for the proposed amendment of the Plaint should be allowed according to law. The amendment proposed should be allowed since the said amendment fulfills the conditions under Section 93(2) of the Civil Procedure Code.

It is interesting to see the conclusion of the trial judge's order which reads as follows:-

" Hence, I unhesitatingly reject the application of the Plaintiff to amend the plaint at this stage of the case. If the amendment is not allowed, I have no quandary that the Plaintiff cannot maintain this action. Therefore, as a necessary corollary, the Plaintiff's action too shall stand dismissed and the Defendant is entitled to costs of the action."

The Commercial High Court had an application by the Plaintiff to amend the Plaint. The Judge decided to make an order disallowing the amendment. The Defendant did not make any application for a dismissal of the whole action. But the trial judge made order dismissing the Plaintiff's action, **surmising that the whole case would fail when the amendment is not allowed**.

No judge has a right to go beyond any relief that is prayed for in any application, stretching his hand too far and granting relief that is not prayed for at all. Such conjecture is unnecessary and uncalled for. No order should be based on

surmising and guess work. It is unlawful and unreasonable. Not having allowed the amendment, the judge should not have gone any further. By doing so, one could say that he has robbed the rights of the parties even to discuss a settlement. Most of the litigants, go for settlements when they are tired of litigating for long periods. There is room for that only when the case is pending. At the time of making order regarding whether to allow the amendment to the Plaint or not, it is quite wrong to have gone further and to have dismissed the action filed by the Plaintiff.

I hold that the Commercial High Court Judge had erred in his order in many ways as revealed above. I allow the amendment to the Plaint to insert the missing set of four numbers into the number of the impugned international debit card number already mentioned in six places of the Plaint. I direct the Commercial High Court to proceed with the trial and decide on the merits of the case having accepted the amended Plaint according to law. I set aside the order made by the Commercial High Court Judge dated 06.07.2012.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando 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 from the Judgment of the Commercial High Court of the Western province, holden in Colombo, under and in terms of section 5 (1) of the High Court of the Provinces (Special provisions) Act No. 10 of 1996 read with the provisions of Chapter LVIII of the Civil Procedure Code

Suntel Limited,
No. 110, Sri James Peiris Mawatha,
Colombo 2.

S.C. (CHC) Appeal No. 53/2012
CHC No. 282/2001 (1)

Plaintiff

Vs.

Electroteks Network Services (Private) Limited,
No. 429D, Galle Road,
Ratmalana.

Defendant

AND NOW BETWEEN

Dialog Broadband Networks (Private) Limited,
No. 475, Union Place,
Colombo 2.

Plaintiff-Appellant

Vs.

Electroteks Network Services (Private) Limited,
No. 429D, Galle Road,
Ratmalana.

Defendant-Respondent

Before: Buwaneka Aluwihare PC. J
Sisira J. de Abrew J
Nalin Perera J.

Counsel: K. Kang-Isvaran PC with Avindra Rodrigo, Lakshmanan Jeyakumar and Aruna De Silva instructed by M/S F.J & G. de Saram for the Plaintiff- Appellant

Thishya Weragoda with Pulasthi Rupasinghe, Iresha Seneviratne, Chinthaka Sugathapala & Lilanthi de Silva for the Defendant-Respondent

Argued on: 18th and 19th of October 2016

Decided on: 12 December-2018

Aluwihare PC. J,

This is an appeal preferred against a judgment handed-down by the Commercial High Court.

The Plaintiff-Appellant challenges the judgment on the following grounds;

1. That the judgment is not a judgement within section 187 of the Civil Procedure Code;
2. That the Defendant-Respondent's claim for damages for loss of reputation and Goodwill cannot be sustained in law;
3. That the Defendant-Respondent carries out an illegal business and therefore not entitled to damages.

At the outset, I wish to note the disinclination to proceed on the question of illegality. A perusal of the brief demonstrates that the Plaintiff-Appellant had not strenuously pursued this claim in the lower court. I am hesitant to allow the Plaintiff-Appellant to raise this ground for the reason that the trial judge did not have the benefit of hearing it to the full extent.

This being a direct appeal, there are no specific questions of law on which leave has been granted. Therefore, I intend to examine the judgment in its entirety without solely limiting myself to the grounds raised by the Plaintiff-Appellant.

The Plaintiff-Appellant, originally incorporated as Telia Lanka (Private Limited) and thereafter named as Suntel (Private Limited), instituted action in Commercial High Court for the recovery of Rs. 68, 765, 407/91 from the Defendant-Respondent. This sum was due pursuant to a series of agreements entered into between the Plaintiff – Appellant and the Defendant - Respondent for the provision of some Telephone lines.

Pursuant to the framework agreement dated 29th May 1998 the parties agreed to the provision of one "E1 link". This framework Agreement was in two parts signed in the same month and are marked D2(ii)(iii) by the Defendant- Respondent and P4, P5 by the Plaintiff – Appellant. It is common ground between the parties that one E1 link carries 30 simultaneous telephone connections. Although under D2 (ii)(iii)/P4, P5 parties first commissioned only one E1 link, this number was progressively increased to two E1 links in October 1998 (D2(iv)(v)/P6,P7), ten E1 links in January 1999 (D2 (vi)(vii)/P8,P9), twenty E1 links in August 1999 (D2 (viii)(ix)/P10,P11) and twenty-two E1 links in October 1999 (D2 (x)/P12).

The Agreements, the alleged breach of which constitutes the cause of action in this case, are the Agreements entered into by the Parties in August 1999 and October 1999. In terms of the agreement marked D2 (ix)/P11, the Plaintiff-Appellant agreed to;

1. Provide the required number of E1 links to the Defendant-Respondent free of charge;
2. Commission and upkeep the links
3. Provide and install at its cost any special equipment to provide high quality service
4. Maintain the said special equipment
5. Provide uninterrupted telecommunication facilities and guarantee quality to be on par or above the industry standards.

In terms of the same agreement, the Defendant-Respondent agreed to;

1. Connect the new links to their existing system immediately.
2. Provide free of charge the space, electric outlets, power supply and airconditioned room to maintain the equipment.
3. Provide sufficient security for the said Equipment and shall bear any loss for unauthorized tampering with the same.
4. Ensure that Rs. 4,000,000 worth outbound traffic per month (call charges only) from all twenty E1 links combined would be diverted through the Suntel Network, in the first two years of operation.

In October 1999, by the agreement marked D2 (x)/P12, the aforementioned clause 4 of the Defendant-Respondent's obligations was amended as follows;

"*ENSPL shall ensure the sum of Rs. 20,000,000 worth of outbound traffic per month from 22 E1 links combined will be diverted through the Suntel network in first two years of operation.*"

Thereafter, the parties proceeded with the installation and operationalized the system. The Plaintiff-Appellant forwarded monthly invoices and the Defendant-Respondent settled them from time to time.

As this state of affairs continued, on 15th June 2000, the Defendant-Respondent informed the Plaintiff-Appellant through a letter marked "D4" that they have only received fifteen E1 links from the promised total of twenty-two. In view of this, the Defendant-Respondent suggested a modification of the minimum monthly commitment—to pay only 2/3rd of the monthly payment. At the bottom of the letter there was space reserved for the signature of the Plaintiff-Appellant, to sign and return if they agreed to the modification of the contract. However, this letter was never signed by the Plaintiff-Appellant.

On 20th July 2000 the Plaintiff-Appellant sent a telefax "P15", informing the Defendant-Respondent that the Respondent had only activated 14 E1 links and that 08 more links were available for commissioning at the Respondent's end.

It is important to note that the parties continued to charge and pay Rs. 20, 000,000 as agreed amidst the exchange of these letters.

In August 2000, the Plaintiff- Appellant brought to the attention of the Defendant-Respondent that their account balance stood at Rs. 75, 554, 382/99. On 11th September 2000, through the letter marked "P18", the Plaintiff Appellant again informed the Defendant-Respondent to settle in full their outstanding payments before 14th September 2000 to avoid disconnection of service.

The Defendant-Respondent responded to this with a letter dated 13th September 2000 marked "D7." In the said letter they disputed the amount in the invoice and informed the Plaintiff Appellant that there was only one invoice to be settled. Consequently, the Defendant-Respondent made a payment of Rs. 20,000,000 on 25th September 2000. This payment was brought to the attention of the Plaintiff-Appellant via letter dated 25th September 2009 marked D9 (d) and was also duly noted in the Plaintiff-Appellant's accounts as shown in "P19".

However, even upon making this payment, the Defendant-Respondent had an outstanding balance of Rs. 69, 309, 219/95 to be settled as at September 2000. On account of this outstanding amount, the Plaintiff-Appellant terminated the service agreement on 26th September 2000.

When the Plaintiff-Appellant instituted action in the Commercial High Court to recover the said 69, 309, 219/95 rupees, the Defendant-Respondent made a counter-claim on the basis that the Plaintiff Appellant had only provided 415 lines to the Defendant – Respondent (*vide* paragraph 11 (ඵ) of the Answer dated 30th May 2002), and that the Defendant-Respondent was only required to pay 2/3rd of the minimum monthly commitment of 20, 000, 000 rupees. They further claimed in reconvention a sum of Rs. 41, 040, 185/12 rupees which they claimed was an overpayment. In addition, the Defendant-Respondent claimed damages estimated at Rs. 4180 million as the second claim in reconvention.

When the trial was in process, the Plaintiff-Appellant withdrew their claim due to the non-availability of a material witness. Thereafter, the trial proceeded on the Defendant-Respondent's counter claim and on 24.02.2012 the learned High Court Judge delivered the judgment in favour of the Defendant-Respondent.

The key question which needs to be decided in this case is whether the Plaintiff-Appellant provided only 415 lines to the Defendant-Respondent in violation of the Framework Agreement. The learned trial judge decided in favour of the Defendant-Respondent relying primarily on the document marked "D4" which is a letter dated 15th June 2000 sent by the Defendant-Respondent to Plaintiff-Appellant informing, *inter alia*, that they had received only 415 lines as at May 2000.

The learned High Court judge has remarked: "*But it is abundantly clear that the Document marked P4 is indicative of the fact that the supply of the said telecommunication lines were only 415 and not 660. If the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" (*vide* p. 866 of the brief)

This is the only reason given by the learned judge for deciding that the Plaintiff-Appellant breached the contract by providing only 415 lines. There is a striking absence of any evaluation of the competing evidence. In its place, there is a reproduction of witness accounts, and a verbatim reproduction of issues and admissions made by the parties. Since the impugned judgment does not contain any reasons for disregarding other evidence, it is incumbent upon this Court to verify whether the decision is in fact supported by the evidence made available by the parties.

Prior to delving into the issue, I consider it necessary to clarify certain peripheral concerns which although peripheral, hold much significance for the proper evaluation of evidence.

As per the Agreement marked "D2 (ix)/P11 and D2 (x)/P12" the Defendant-Respondent undertook mainly two obligations. To quote the exact words in the Agreement

"Clause 2 (1) ENSPL shall connect the ten new E1 links to the existing system immediately"

"Clause 2 (4) ENPSL shall ensure that a sum of Rs. 4, 000, 000 /= (Rupees Four Million) worth of outbound traffic per month (Call Charges only) from all twenty E1 links combined (The ten new E1 links and the existing ten E1 links) would be diverted through the Suntel Netwrok, in the first two years of operation"

This Clause 2 (4) was amended subsequently to read as follows;

"*ENSPL shall ensure that a sum of Rs. 20, 000, 000/- (Rupees Twenty Million) worth of outbound traffic per month from 22 E1 links combined will be diverted through the Suntel network in first two years of operation*"

The amendment is significant mainly for the reason that it increased the minimum monthly commitment from Four Million to Twenty Million.

Thus, as apparent from the Agreement, the Defendant-Respondent had an obligation to "immediately connect the links to the existing system" and pay a minimum monthly commitment of Rs. 20, 000, 000 as call charges. Furthermore, the Defendant-Respondent also agreed that "*in the event that the actual call charges in respect of the Contract in any particular month is less than the minimum monthly call charge, we hereby agree to pay the minimum monthly call charge in lieu of the actual call charge for the relevant month.*"

In terms of the Agreement the minimum monthly commitment was agreed in respect of "call charges." There is no ambiguity in this regard. There is nothing in the agreement to suggest that the minimum monthly commitment is used interchangeably to refer to the 'rental'.

With that I now turn to consider whether the evidence supports the findings made by the learned High Court judge.

At the trial, Defendant-Respondent sought to establish its case on two grounds; firstly, they contended that the Plaintiff-Appellant provided only 415 telephone lines; Secondly that there were irregularities in the Plaintiff-Appellant's accounts. During the appeal, they raised an additional ground—as an extension of the first ground—that the Plaintiff-Appellant agreed to modify the minimum commitment. To the extent possible, and for the sake of clarity, I will address the questions before us without deviating too much from the aforesaid structure.

The Defendant-Respondent's first argument relied on two factors. Firstly, they drew attention to the letter "D4", sent by them in June 2000, informing the Plaintiff Appellant that they had provided only 415 lines. It was solely based on "D4" that the Learned High Court Judge entered the judgment in favor of the Defendant-Respondent. However, in so doing, the learned High Court judge appeared to have overlooked several material documents filed by the Plaintiff-Appellant. Of particular interest is the failure to consider "P14" which is a telefax sent by the Plaintiff-Appellant to the Defendant-Respondent on 27th October 1999, informing that twenty-two E1 links in total had been activated as at October 1999 and were available for immediate commissioning. Another telefax informing the same, was sent in July 2000. The second telefax is marked "P15".

During cross examination, Mr. Abeywardena—the witness for the Defendant-Respondent—disputed receiving "P15" (*vide* p. 697 of the brief). However, they have at no point disputed "P14" which is the first letter sent by the Plaintiff-Appellant in October 1999 stating that "*only 14EI' s are in operation and 08E1's terminated have not been activated at your end*". This is significant because "P15" makes clear reference to the telefax dated 27th October 1999 ("P14").

Even if one were to disregard "P15", a cursory glance at "P14" unequivocally indicates that the Plaintiff-Appellant has in October 1999 brought to the attention of the Defendant Respondent that 08 E1 links were awaiting commissioning at their end. Nevertheless, no weight has been given to "P14" in the judgment, despite the fact that it stood uncontroverted by the Defendant-Respondent.

During cross examination Mr. Abeywardena also took up the position that the Plaintiff-Appellant did not provide the necessary infrastructure for commissioning the twenty-two E1 links (*vide* pp. 694-696). At this point, he was questioned as to why he waited till June 2000, if it was apparent very early on, that the necessary infrastructure had not been provided. However, over and above the assertion that the Plaintiff-Appellant knew about the lack of infrastructure, Mr. Abeywardena failed to provide a sufficient explanation for this lapse. Neither has he produced any other proof to substantiate the said fact.

Secondly, the counsel for the Defendant-Respondent while Cross examining Mr. Thygaraja Prabhath—sole witness for the Plaintiff-Appellant, sought to reinforce the position with regard to 415 lines by referring to a rental charge of Rs. 91, 300 in August 2000.

> *"Q: Now there, they are charged the monthly rentals, correct?"*
> *A; Correct*
> *Q: And the monthly rentals are for the telephone lines that have been provided by you?*
> *A; Yes*
> *Q: and how many telephone lines now there are look at the monthly rental is 91, 300 correct?*
> *A: Yes*
> *Q: now that is at 220 is how much, how many links, how many lines? Now look at the detailed bill you have charged per line 220 correct?*
> *A: yes*
> *Q: So that is 220/- rupees right?*
> *A: yes*
> *…….*
> *Q: now 91, 300 divided by 220 comes to 415?*
> *A: Correct"*
>
> *(vide pp. 849, 850 of the brief)*

Accordingly, the Defendant-Respondent sought to argue that the reason why the appellant charged 91, 300/- was because they had only provided 415 lines. The simple math they put forward was that 91, 300 divided by 220 is 415. While there is no doubt as to the accuracy of this calculation, what the Counsel for the Defendant-Respondent failed to appreciate was that the said sum of 91, 300/- was the amount charged for the rental in respect of the activated lines.

In fact, Mr. Thyagaraja consistently maintained that the rental is charged only for the number of activated lines.

> *"Q: Therefore, I am suggesting to you that you did not at any stage supply more than 415 telephone lines?*
> *A: 415 that was in service when it is in use only it is charged for the rental […]*
> *….*
> *Q; I am suggesting to you that you rented or you made available to the defendant only 415 telephone lines?*
> *A: Once the telephone lines are made active and provided when it is used in the service […] so only after that the bill will reflect the rental component. What I was referring is that we have installed the infrastructure and extended the E1facilities to the defendant's premises but it was not in service. Only the 14 were in service others were at his door steps but it was not used because of that it was not coming into the picture.*
> *Q: Now witness, when you rent a telephone to a consumer whether he uses or charge, he has to pay yearly rental is that correct?*
> *A: If he is not using, it is not charged.*
> *Q: The consumer has to pay the rental correct?*
> *A: Once we complete our installations when the customer starts using … that is after commissioning and putting in to service, it is not using still it is charged. But before putting it in to service it is not charged" (vide pp. 950,951 of the brief)*

The evidence of Mr. Thyagaraja remains consistent. His credibility has not been doubted by the learned High Court Judge nor is there any observation to the effect that there were

contradictions in his position. Yet this position has been rejected by the learned trial judge without giving any reasons.

In any event, the charge of 91, 300 /- rupees cannot conclusively prove that the Plaintiff-Appellant had failed to provide all twenty-two E1 links. As clearly stated in the Agreement, the onus to connect the lines to the system remained with the Defendant-Respondent. Thus, at the most, activated 415 lines could only mean two things;

> either the Plaintiff-Appellant did not provide the requisite number of links and therefore the Defendant-Respondent could not activate them; or
>
> the Plaintiff-Appellant provided the requisite number of lines but the Defendant-Respondent did not activate them.

It does nothing beyond confirming that 415 lines were in operation. Regrettably, the learned High Court Judge misdirected herself in assuming that 415 activated lines is synonymous with non-provision of twenty-two E1 links. She had no basis when she concluded that "*Further the above witness was also encountered by the Counsel for the Defendant regarding D3 which clearly indicates the fact that the plaintiff had supplied only 415 telephone lines to the defendant*" (*vide* page 14 of the Judgment)

Where this is the case, the only factor which lent credence to the Defendant-Respondent's version then was the letter "D4." It was through "D4" that the Defendant-Respondent first brought to the attention of the Plaintiff-Appellant that they had received only 415 lines. In contradistinction to this, there is "P14" which indicates that in October 1999 the Plaintiff-Appellant had activated twenty-two E1 links and made them available for commissioning. Thus, it was incumbent on the learned High Court Judge to note her reasons for rejecting "P14", if she in fact decided to reject it.

On page 10 of the judgment, the learned High Court Judge has stated: "*The plaintiff by purported Fax dated 20th July 2000 has admitted that till then only 14 E1 links were in operation. The said fax has been marked D5.*"

This document marked "D5" is an identical copy of "P15". The document "D5" / "P15" establishes two factors that are relevant for the case;

Firstly, that the plaintiff-appellant had sent a fax in October 1999 informing that they have activated twenty-two E1 links on their end and that those lines were available for commissioning; (this fax is the document marked "P14")

Secondly, that on 20th July 2000, the plaintiff-appellant informed that only fourteen E1 links were in operation.

If the learned High Court judge relied on "D5" to state that "only 14 EI links were in operation", she could not have overlooked the other portion of the same document which refers to the fax sent in October 1999 (which is marked "P14"). The document marked "D5/ P15" must be accepted as a whole and not in a piecemeal manner. The learned High Court Judge could not reprobate and approbate portions of one single document.

By relying on "D5/P15", she opened herself to three irresistible findings;

Firstly, that both as at October 1999 and July 2000, only fourteen E1 links were in operation,

secondly, that at both points of time, the Plaintiff-Appellant had activated twenty-two E1 links from their end and

thirdly, that at both points of time the Defendant-Respondent has failed to connect the remaining eight E1 links to their system.

On the other hand, even if the learned High Court Judge rejected "P15", it would still leave "P14" as an outstanding uncontroverted document which discloses that the Plaintiff-Appellant has taken steps to activate twenty-two E1 links as early as in October 1999. In my view, these were findings which had a material bearing on the Defendant-Respondent's case. Yet no regard has been had to these positions in the impugned judgment.

I also observe certain contradictions in the Defendant-Respondent's version. At paragraph 11 (ඌ) of the Answer dated 30th May 2002, the Defendant-Respondent had taken the position that the Plaintiff-Appellant had provided as at September 2000 only 415 lines. At the same time, in paragraph 11 (ඊ) they have alleged that the Plaintiff-Respondent had provided fifteen E1 links. The letter marked "D4" also refers to the fact that only fifteen EI links had been received by them. However, when giving evidence, the

witness had taken the position that only fourteen E1 links were provided. (*vide* pp. 691-696).

> Considering the fact that one E1 links carries 30 simultaneous telephone lines – which is a fact admitted by both parties—this contradiction cannot be overlooked. If the Plaintiff- Respondent allegedly provided only fourteen E1links, then, the Defendant-Respondent ought to have been able to use 420 lines. On the other hand, if fifteen E1 links were provided, then the number of activated telephone lines should come up to a total of 450. In fact, based on the evidence made available by both parties, 415 lines could only have arisen from 13.888 E1 links. Whether the Plaintiff-Appellant could provide decimals in a package which guarantees 30 simultaneous links or whether activation of all 30 links happened in one go, is a question which the learned High Court Judge ought to have given her mind to.

Furthermore, there is also the peculiar act of the Defendant-Respondent continuing to pay approximately 20, 000, 000/- in the months of January 2000, June 2000, and in August 2000. This is demonstrated in "D10" which is a document marked by the Defendant-Respondent himself. The Defendant-Respondent's proposal to vary the minimum commitment came in June 2000. If there was in fact a shortcoming in relation to the number of telephone lines, the dispute with regard to the minimum commitment should have arisen earlier. At the very least, the Defendant-Respondent had the opportunity to pay 2/3rd of the payment as suggested by them post June 2000. However, as per their own document "D10", the payments appeared to have been made taking the Rs. 20, 000, 000 as the basis. The learned High Court Judge has also concurred in this view; "*It is categorically stated by the Defendant that it has paid a sum of Rs. 200, 000, 000/- from September 1999 to September 2000 for the telephone services provided by the Plaintiff […]*" (*vide* p. 10 of the Judgment).

Nevertheless, these contradictions have escaped the scrutiny of the learned High Court Judge. It appears that she has only mechanically noted them down without giving her mind to their veracity or consistency. The totality of Defendant-Respondent's evidence does not support the position taken in "D4". In those circumstances, the finding in the judgment that "*if the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" remains unsubstantiated.

As I noted at the very outset, the Defendant-Respondent raised in appeal that the Plaintiff-Appellant agreed to reduce the minimum monthly commitment. They sought to establish this by referring to a credit note passed by the Plaintiff-Appellant in August 2000. As per "P19", there is a credit note worth Rs. 11, 865, 134/95 passed by the Plaintiff-Appellant on 07th August 2000. The credit note is explained as "*credit note passed in our books to reduce the disputed amount of LKR 31, 865, 134/95 to LKR 20, 000, 000 as agreed with you.*"

The Defendant-Respondent took the position that the words "agreed with you" is proof of the fact that the Plaintiff-Appellant agreed to the modified minimum monthly commitment. However, this position has not been accepted by the Plaintiff-Appellant. Furthermore, there is no evidence that the Plaintiff-Appellant signed and accepted the modification proposed via "D4". This fact was also admitted by Mr. Abeywardena (*vide* pp. 701, 702 of the brief). In his evidence he conceded that if the Plaintiff-Appellant had agreed to his terms, a total of Rs. 31, 865, 134/95 should have been reduced from the bill. (*vide* p.702). At the same time, he also stated that the Plaintiff-Appellant had allegedly communicated to reduce a sum of Rupees 10 million in lieu of 31 million through a purported letter marked "D15" (*vide* p. 703 of the brief) Regrettably, this letter does not form a part of the brief. Therefore, I am unable to ascertain the veracity of that claim. In any event, I observe that there is still a discrepancy in that position. The Credit note is ostensibly made corresponding to a sum of Rs. 20, 000, 000 while Mr. Abeywardena alleged that the Plaintiff-Appellant purportedly agreed to a sum of Rs. 10 million.

The second ground which the Defendant-Respondent alleged was that there were irregularities in Plaintiff-Appellant's accounts. Mr. Abeywardena has asserted in his affidavit that the Plaintiff-Appellant company charged them an extra Rs. 27, 061,026/34 in July 2000. However, in cross examination, Mr. Abeywardena admitted that on the face of the August invoice this amount was later credited to their account on 07th August 2000. (*vide* pp. 707-709). Irrespective of this, Mr. Abeywardena had conceded that even if all alleged extra charges were deducted, the Defendant-Respondent would still not have been able to cover the amount they were due to pay.

The final line of argument taken by the Defendant-Respondent is that the termination was unjustified for being premature. They contend that the September bill had the 6th of October 2000 as the final date for payment and that the Plaintiff-Respondent terminated the contract on the 26th of September in violation of the contract. I am unable to agree with this contention.

The agreement was terminated on account of the failure to settle in full the total of Rs. 69, 309, 219/95 which had been long overdue. In terms of clause 11 (a) of the Agreement, the Plaintiff-Appellant had the right to disconnect the services "*when any service dues have not been paid upon it becoming due and payable in terms of Clause 5.2 and clause 6 above in respect of this Service or in respect of any other service given to the subscriber in pursuance of any other agreement.*"

The first notice in this regard came in August 2000 where the Plaintiff-Appellant brought to the attention of the Defendant-Respondent that they have an outstanding balance of some 75 million rupees. The second reminder came on 11th September 2000. This letter also gave an ultimatum to the Defendant-Respondent to 'settle in full' the outstanding amount by 14th September 2000 or to risk discontinuation of service. Nevertheless, by 25th September the Defendant-Respondent only paid some 28 million rupees. The payment had been made after the 14th September which indicates that the Plaintiff-Appellant had granted a further grace period to the Defendant-Respondent to uphold their end of the bargain.

Therefore, when the Defendant-Respondent only paid 28 million which does not come up to even ½ of the due amount, the Plaintiff-Appellant may have apprehended a real likelihood of defaulting. In those circumstances, they resorted to discontinue the services as notified.

In the totality of the aforementioned circumstances, it is my considered view that the learned High Court judge misdirected herself when she decided in favour of the Defendant-Respondent. "D4" alone is insufficient to substantiate that the Plaintiff-Appellant has failed to provide twenty-two E1 links. There are apparent contradictions and infirmities in the Defendant-Respondent's case, which when taken together, have the force of vitiating the position taken in "D4". Confronted with these, it is difficult to

hold that the Defendant-Respondent has proved the case on a balance of probabilities. In the result, no question of damages could arise.

Nevertheless, in the interest of justice, I will proceed to briefly examine the second ground of appeal raised by the Plaintiff-Appellant.

Learned President's Counsel appearing for the Plaintiff-Appellant contended that both the Roman Dutch Law as well as the English Law, clearly lay down the principle that in a claim for damages for breach of contract, no compensation for loss of reputation can be considered.

The Plaintiff-Appellant placed great reliance on the decision ***Seabridge Shipping Ltd. v Ceylon Petroleum Corporation (2002) 1 SLR 126***, to substantiate that the Respondent is not entitled to claim damages for the goodwill and reputation for breach of contract. In the said case, the Court of Appeal followed the following position found in Anson's Law of Contract:

> "*Damages cannot, in principle, be recovered in a contractual action for injury to reputation . . .*
>
> *An exception, however, exists in the case of a banker who refuses to pay a customer's cheque when he has in his hands funds of the customer to meet it. If the customer is a tradesman, he can recover in respect of any loss to his trade reputation by the breach.*"

They further submitted that the Roman Dutch Law position as illustrated in **Justice Weeremantry's The Law of Contracts (Vol. I, page 890)** is identical: "*Loss of reputation would thus not be treated as a natural result of breach of contract, nor would damages be awarded in contract for injury to the plaintiff's feelings.*"

However, it is the contention of the Defendant-Respondent that the position taken in Anson's law of contract as quoted in Seabridge case has changed ever since. He drew our attention to a more recent edition of Anson's Law of Contract where it is stated that;

> "*Although damages cannot be recovered in a contractual action for injury to reputation per se, they may be where the loss of reputation*

caused by the breach of contract causes financial loss" **(Anson's law of contract, 30th Edn pp. 568-569)**

He further cited the case ***Malik v Bank of Credit and Commerce International SA (1997) 3 All E R 1*** where it was held that;

> "*[the] fact that the breach of contract injures the plaintiff's reputation in circumstances where no claim for defamation would lie is it by itself a reason for excluding from the damages recoverable for breach of contract compensation for financial loss which on ordinary principles would be recoverable. An award of damages for breach of contract has a different objective: compensation for financial loss suffered by a breach of contract, not compensation for injury to reputation*".

There was a further contention that pure Roman Dutch Law never existed in Sri Lanka and that to a great extent, its remnants have been modified and influenced by the infiltration of English law principles. I observe that this position is supported by Justice Weeramantry's treatise which notes that;

> "***The superior development of the subject of contractual damages in English Law has hence resulted in the superimposition of English principles on the Roman-Dutch Law.***" (The Law of Contracts (Vol. I, page 888))

Hence there is no necessity for us to embark on a voyage of discovery to determine the applicable law. The question in narrow terms is to see whether 'patrimonial loss' in Roman Dutch Law or 'damages for contractual breach' in English Law allows damages for reputation and loss of Goodwill.

There is no doubt that a cause of action in respect of injury to reputation lies in the law of delict. The law of delict provides for damages, where the necessary ingredients are present, whether or not the said reputational injury has caused a financial loss. There is no requirement to prove actual damage. On the other hand, an award of damages for breach of contract has a different objective. To quote the words in ***Malik v Bank of Credit and Commerce***, this objective is "*compensation for financial loss suffered by a breach of contract.*"

As often seen in matters involving commercial entities, the distinction between damage to reputation and financial loss can become blurred. Damage to the reputation of professional persons, or persons carrying on a business, frequently causes financial loss. There is no question that, a "supplier who delivers contaminated meat to a trader can be sued for loss of commercial reputation involving loss of trade" [*vide* Malik v Bank of Credit and Commerce].

Thus, in so far as a commercial entity is concerned, **financial losses** incurred by loss of reputation caused by a breach of contract is a 'patrimonial loss' and not a compensation for 'pain or suffering'. There is no punitive element involved. This also accords with the principle in Roman Dutch Law as found in Justice Weeramantry's The Law of Contracts (Vol. I, page 889)

> *"[…] the true damnum in contract is compensation for patrimonial loss. Hence an important difference between contractual and tortious damages is that the former are awarded with the object of giving compensation for loss suffered and are not influenced as tortious damages are by the consideration that the wrongdoer should be punished nor do they concern themselves with the mental or bodily suffering of the injured party."*

The question therefore is one of evidence as oppose to principle. The claimant must prove that the breach of contract which caused a reputational loss and damages to Goodwill gave rise to a financial loss. This was also the position taken in ***Hatton National Bank v Tilakaratne (2001) 3 SLR 295***.

Mr. Abeywardena had stated in his affidavit;

> "*[the defendant] had entered into contract with several satellite service providers as such as Lockheed Martin International and other International Telecommunication Service providers;*
>
> *Had entered into contract for leasing optic fiber international links from Germany where the satellite circuits end to London and New York*
>
> *Purchased and installed 03 Nos. international gateway switches in the United Kingdom with the capacity of 160EI links (4800 telephone circuits)*

Purchased and did the setting up of several satellite earth stations to receive satellite signals for international communications with associated transmission and switching equipment

I state that the defendant was compelled to make payments to such Satellite and Telecom providers and maintain such telecommunication system at heavy costs notwithstanding the termination of services by the plaintiff as International agreements with US companies cannot be terminated arbitrary without paying heavy damages.

I state that the defendant was equipped to carry heavy international telecommunication traffic to Sri Lanka through the plaintiff's telecommunication system" (paragraphs 30-33)

The hardships which are alleged by the Defendant-Respondent does not follow that they have suffered any financial losses by the alleged damages to their Goodwill. There is nothing which indicates that other trader/service providers were not inclined to continue their relationships with the Defendant-Respondent. Neither is there any evidence to suggest that the Defendant-Respondent missed out on other contractual opportunities or business prospects because of the alleged breach of contract. In fact, the only basis as alluded by the Defendant-Respondent, for calculating damages for loss of Goodwill is "*whether a third-party purchaser would pay Rs. 2,000,000,000 over the Net Asset Value of the Respondent to purchase the Respondent in open market as a going concern, considering that the Respondent has an earning potential of over Rs. 18, 000,000,000 in 15 years at the lowest estimations*".

This Court is therefore invited to make a highly technical opinion on business valuation, for which we have neither the expertise required nor any evidence towards this end.

In the absence of cogent evidence, other than the Defendant-Respondent's mere say so, a claim of reputational loss and damages to Goodwill causing financial loss arising out of the breach of contract cannot be sustained. In fact, what the Defendant-Respondent attempts to claim under the purported damage to Goodwill is not a financial loss but compensation for purported 'injury or suffering'. As I indicated earlier, claims involving

pure injury and suffering cannot be deemed patrimonial loss. They are in fact damnum injuria for which the legal remedy lies in the law of delict.

In those circumstances, I hold that the learned High Court Judge erred when she allowed the Defendant-Respondent's claim for 2,000,000,000 rupees for damages to Goodwill. I also take it upon on me to observe that there is a glaring failure on the part of the learned High Court Judge to address her mind to the question of damages. There is nothing in the impugned judgment which indicates that the learned High Court judge deliberated, let alone called for evidence, to ascertain the said claim.

This overall paucity of reasons and loose ends apparent on the face of it, renders the the Judgement to be violative of section 187 of the Civil Procedure Code. The said section reads;

"*The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively*"

It has been established in a series of judgements that failure to comply with the mandatory requirements in Section 187 of the CPC vitiates the judgment. (*vide* ***Dona Lucihamy v. Ciciliyanahamy*** 59 NLR 214, ***Warnakula v Ramani Jayawardena*** (1990) 1 SLR 206, ***Sobanhamy v Somadasa*** (2005) 3 SLR, ***Perera v Calderla*** (20070 1 SLR 165)

In ***Warnakula v Ramani Jayawardena*** (1990) 1 SLR 206, a District Court judgment was vitiated by the Court of appeal for failing to consider the evidence.

> "*The learned counsel for the plaintiff-appellant submitted to court that the learned District Judge had failed to consider and analyse the evidence. He further submitted that the learned District Judge had failed to give reasons for the findings and he had totally failed to consider the complaints and the documentary evidence produced in this case.*
>
> *There is force in the submission of counsel. The learned District Judge had failed to evaluate and consider the totality of the evidence. His judgment was not in compliance of section 187 of the Civil Procedure Code. He has given a very short summary of the evidence of the parties and witnesses*

and without giving reasons he had stated that he prefers to accept the evidence of the defendant-respondent as it was satisfactory and thereafter proceeded to answer the issues."

The case before us raises issues similar to the ones in the ***Waranakula*** case. The learned High Court judge has only given bare answers to the issues raised. We may assume that the learned Trial Judge was satisfied that the claim of the Defendant-Respondent deserved to be decreed. But the judgment of the learned Trial Judge was not final: it was subject to appeal and unless there was a reasoned judgment recorded by the Trial Judge, an appeal against the judgment may turn out to be an empty formality.

Appellate Courts generally attach great value to the views formed by the Judge of First Instance who had seen the witnesses and noted their demeanor. How the Judge who tried the suit, reacted to the evidence of a witness may not always be found from the printed record. It is for this reason that a judgment revealing the trial judge's thought process becomes an essential attribute of a trial. A mere order deciding the matter in dispute not only prejudices the rights of the parties but whittles down the importance attached to the judicial process. (*vide*. ***Swaran Lata Ghosh vs H. K. Banerjee And Another 1969 AIR 1167***) It colors the decision as one of whim or fancy instead of judicial approach to the matter in contest.

In the present case, it is apparent that the learned High Court judge has failed to review and examine evidence germane to each issue. There is unequivocal acceptance of the Defendant-Respondent's position, to the complete exclusion of the Plaintiff-Appellant's position, notwithstanding the infirmities I have discussed above. In the absence of cogent reasons which suggested themselves to the trial judge, her conclusion "*If the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" is unacceptable and unconvincing. There is also nothing in the judgment to indicate that the learned judge has given her mind to the question of damages.

For the foregoing reasons, I hold that the judgment by the learned High court judge does not comply with section 187 of the Civil Procedure Code. I also hold that the learned High Court Judge has failed to appreciate the facts and evidence of the case and erred in concluding that the Defendant-Respondent was entitled to reliefs prayed in their

counter-claim. Accordingly, I set aside the judgment given by the learned High Court judge.

Appeal allowed.

Judge of the Supreme Court

Justice Nalin Perera

I agree

Chief Justice

Justice Sisira de Abrew.

I agree

Judge of the Supreme Court

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

In the matter of an appeal from the Judgment of the Commercial High Court of the Western province, holden in Colombo, under and in terms of section 5 (1) of the High Court of the Provinces (Special provisions) Act No. 10 of 1996 read with the provisions of Chapter LVIII of the Civil Procedure Code

Suntel Limited,
No. 110, Sri James Peiris Mawatha,
Colombo 2.

S.C. (CHC) Appeal No. 53/2012
CHC No. 282/2001 (1)

Plaintiff

Vs.

Electroteks Network Services (Private) Limited,
No. 429D, Galle Road,
Ratmalana.

Defendant

AND NOW BETWEEN

Dialog Broadband Networks (Private) Limited,
No. 475, Union Place,
Colombo 2.

Plaintiff-Appellant

Vs.

Electroteks Network Services (Private) Limited,
No. 429D, Galle Road,
Ratmalana.

Defendant-Respondent

Before: Buwaneka Aluwihare PC. J
Sisira J. de Abrew J
Nalin Perera J.

Counsel: K. Kang-Isvaran PC with Avindra Rodrigo, Lakshmanan Jeyakumar and Aruna De Silva instructed by M/S F.J & G. de Saram for the Plaintiff- Appellant

Thishya Weragoda with Pulasthi Rupasinghe, Iresha Seneviratne, Chinthaka Sugathapala & Lilanthi de Silva for the Defendant-Respondent

Argued on: 18th and 19th of October 2016

Decided on: 12 December-2018

Aluwihare PC. J,

This is an appeal preferred against a judgment handed-down by the Commercial High Court.

The Plaintiff-Appellant challenges the judgment on the following grounds;

1. That the judgment is not a judgement within section 187 of the Civil Procedure Code;
2. That the Defendant-Respondent's claim for damages for loss of reputation and Goodwill cannot be sustained in law;
3. That the Defendant-Respondent carries out an illegal business and therefore not entitled to damages.

At the outset, I wish to note the disinclination to proceed on the question of illegality. A perusal of the brief demonstrates that the Plaintiff-Appellant had not strenuously pursued this claim in the lower court. I am hesitant to allow the Plaintiff-Appellant to raise this ground for the reason that the trial judge did not have the benefit of hearing it to the full extent.

This being a direct appeal, there are no specific questions of law on which leave has been granted. Therefore, I intend to examine the judgment in its entirety without solely limiting myself to the grounds raised by the Plaintiff-Appellant.

The Plaintiff-Appellant, originally incorporated as Telia Lanka (Private Limited) and thereafter named as Suntel (Private Limited), instituted action in Commercial High Court for the recovery of Rs. 68, 765, 407/91 from the Defendant-Respondent. This sum was due pursuant to a series of agreements entered into between the Plaintiff – Appellant and the Defendant - Respondent for the provision of some Telephone lines.

Pursuant to the framework agreement dated 29th May 1998 the parties agreed to the provision of one "E1 link". This framework Agreement was in two parts signed in the same month and are marked D2(ii)(iii) by the Defendant- Respondent and P4, P5 by the Plaintiff – Appellant. It is common ground between the parties that one E1 link carries 30 simultaneous telephone connections. Although under D2 (ii)(iii)/P4, P5 parties first commissioned only one E1 link, this number was progressively increased to two E1 links in October 1998 (D2(iv)(v)/P6,P7), ten E1 links in January 1999 (D2 (vi)(vii)/P8,P9), twenty E1 links in August 1999 (D2 (viii)(ix)/P10,P11) and twenty-two E1 links in October 1999 (D2 (x)/P12).

The Agreements, the alleged breach of which constitutes the cause of action in this case, are the Agreements entered into by the Parties in August 1999 and October 1999. In terms of the agreement marked D2 (ix)/P11, the Plaintiff-Appellant agreed to;

1. Provide the required number of E1 links to the Defendant-Respondent free of charge;
2. Commission and upkeep the links
3. Provide and install at its cost any special equipment to provide high quality service
4. Maintain the said special equipment
5. Provide uninterrupted telecommunication facilities and guarantee quality to be on par or above the industry standards.

In terms of the same agreement, the Defendant-Respondent agreed to;

1. Connect the new links to their existing system immediately.
2. Provide free of charge the space, electric outlets, power supply and airconditioned room to maintain the equipment.
3. Provide sufficient security for the said Equipment and shall bear any loss for unauthorized tampering with the same.
4. Ensure that Rs. 4,000,000 worth outbound traffic per month (call charges only) from all twenty E1 links combined would be diverted through the Suntel Network, in the first two years of operation.

In October 1999, by the agreement marked D2 (x)/P12, the aforementioned clause 4 of the Defendant-Respondent's obligations was amended as follows;

"*ENSPL shall ensure the sum of Rs. 20,000,000 worth of outbound traffic per month from 22 E1 links combined will be diverted through the Suntel network in first two years of operation.*"

Thereafter, the parties proceeded with the installation and operationalized the system. The Plaintiff-Appellant forwarded monthly invoices and the Defendant-Respondent settled them from time to time.

As this state of affairs continued, on 15th June 2000, the Defendant-Respondent informed the Plaintiff-Appellant through a letter marked "D4" that they have only received fifteen E1 links from the promised total of twenty-two. In view of this, the Defendant-Respondent suggested a modification of the minimum monthly commitment—to pay only 2/3rd of the monthly payment. At the bottom of the letter there was space reserved for the signature of the Plaintiff-Appellant, to sign and return if they agreed to the modification of the contract. However, this letter was never signed by the Plaintiff-Appellant.

On 20th July 2000 the Plaintiff-Appellant sent a telefax "P15", informing the Defendant-Respondent that the Respondent had only activated 14 E1 links and that 08 more links were available for commissioning at the Respondent's end.

It is important to note that the parties continued to charge and pay Rs. 20, 000,000 as agreed amidst the exchange of these letters.

In August 2000, the Plaintiff- Appellant brought to the attention of the Defendant-Respondent that their account balance stood at Rs. 75, 554, 382/99. On 11th September 2000, through the letter marked "P18", the Plaintiff Appellant again informed the Defendant-Respondent to settle in full their outstanding payments before 14th September 2000 to avoid disconnection of service.

The Defendant-Respondent responded to this with a letter dated 13th September 2000 marked "D7." In the said letter they disputed the amount in the invoice and informed the Plaintiff Appellant that there was only one invoice to be settled. Consequently, the Defendant-Respondent made a payment of Rs. 20,000,000 on 25th September 2000. This payment was brought to the attention of the Plaintiff-Appellant via letter dated 25th September 2009 marked D9 (d) and was also duly noted in the Plaintiff-Appellant's accounts as shown in "P19".

However, even upon making this payment, the Defendant-Respondent had an outstanding balance of Rs. 69, 309, 219/95 to be settled as at September 2000. On account of this outstanding amount, the Plaintiff-Appellant terminated the service agreement on 26th September 2000.

When the Plaintiff-Appellant instituted action in the Commercial High Court to recover the said 69, 309, 219/95 rupees, the Defendant-Respondent made a counter-claim on the basis that the Plaintiff Appellant had only provided 415 lines to the Defendant – Respondent (*vide* paragraph 11 (ඵ) of the Answer dated 30th May 2002), and that the Defendant-Respondent was only required to pay 2/3rd of the minimum monthly commitment of 20, 000, 000 rupees. They further claimed in reconvention a sum of Rs. 41, 040, 185/12 rupees which they claimed was an overpayment. In addition, the Defendant-Respondent claimed damages estimated at Rs. 4180 million as the second claim in reconvention.

When the trial was in process, the Plaintiff-Appellant withdrew their claim due to the non-availability of a material witness. Thereafter, the trial proceeded on the Defendant-Respondent's counter claim and on 24.02.2012 the learned High Court Judge delivered the judgment in favour of the Defendant-Respondent.

The key question which needs to be decided in this case is whether the Plaintiff-Appellant provided only 415 lines to the Defendant-Respondent in violation of the Framework Agreement. The learned trial judge decided in favour of the Defendant-Respondent relying primarily on the document marked "D4" which is a letter dated 15th June 2000 sent by the Defendant-Respondent to Plaintiff-Appellant informing, *inter alia*, that they had received only 415 lines as at May 2000.

The learned High Court judge has remarked: "*But it is abundantly clear that the Document marked P4 is indicative of the fact that the supply of the said telecommunication lines were only 415 and not 660. If the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" (*vide* p. 866 of the brief)

This is the only reason given by the learned judge for deciding that the Plaintiff-Appellant breached the contract by providing only 415 lines. There is a striking absence of any evaluation of the competing evidence. In its place, there is a reproduction of witness accounts, and a verbatim reproduction of issues and admissions made by the parties. Since the impugned judgment does not contain any reasons for disregarding other evidence, it is incumbent upon this Court to verify whether the decision is in fact supported by the evidence made available by the parties.

Prior to delving into the issue, I consider it necessary to clarify certain peripheral concerns which although peripheral, hold much significance for the proper evaluation of evidence.

As per the Agreement marked "D2 (ix)/P11 and D2 (x)/P12" the Defendant-Respondent undertook mainly two obligations. To quote the exact words in the Agreement

"Clause 2 (1) ENSPL shall connect the ten new E1 links to the existing system immediately"

"Clause 2 (4) ENPSL shall ensure that a sum of Rs. 4, 000, 000 /= (Rupees Four Million) worth of outbound traffic per month (Call Charges only) from all twenty E1 links combined (The ten new E1 links and the existing ten E1 links) would be diverted through the Suntel Netwrok, in the first two years of operation"

This Clause 2 (4) was amended subsequently to read as follows;

"*ENSPL shall ensure that a sum of Rs. 20, 000, 000/- (Rupees Twenty Million) worth of outbound traffic per month from 22 E1 links combined will be diverted through the Suntel network in first two years of operation*"

The amendment is significant mainly for the reason that it increased the minimum monthly commitment from Four Million to Twenty Million.

Thus, as apparent from the Agreement, the Defendant-Respondent had an obligation to "immediately connect the links to the existing system" and pay a minimum monthly commitment of Rs. 20, 000, 000 as call charges. Furthermore, the Defendant-Respondent also agreed that "*in the event that the actual call charges in respect of the Contract in any particular month is less than the minimum monthly call charge, we hereby agree to pay the minimum monthly call charge in lieu of the actual call charge for the relevant month.*"

In terms of the Agreement the minimum monthly commitment was agreed in respect of "call charges." There is no ambiguity in this regard. There is nothing in the agreement to suggest that the minimum monthly commitment is used interchangeably to refer to the 'rental'.

With that I now turn to consider whether the evidence supports the findings made by the learned High Court judge.

At the trial, Defendant-Respondent sought to establish its case on two grounds; firstly, they contended that the Plaintiff-Appellant provided only 415 telephone lines; Secondly that there were irregularities in the Plaintiff-Appellant's accounts. During the appeal, they raised an additional ground—as an extension of the first ground—that the Plaintiff-Appellant agreed to modify the minimum commitment. To the extent possible, and for the sake of clarity, I will address the questions before us without deviating too much from the aforesaid structure.

The Defendant-Respondent's first argument relied on two factors. Firstly, they drew attention to the letter "D4", sent by them in June 2000, informing the Plaintiff Appellant that they had provided only 415 lines. It was solely based on "D4" that the Learned High Court Judge entered the judgment in favor of the Defendant-Respondent. However, in so doing, the learned High Court judge appeared to have overlooked several material documents filed by the Plaintiff-Appellant. Of particular interest is the failure to consider "P14" which is a telefax sent by the Plaintiff-Appellant to the Defendant-Respondent on 27th October 1999, informing that twenty-two E1 links in total had been activated as at October 1999 and were available for immediate commissioning. Another telefax informing the same, was sent in July 2000. The second telefax is marked "P15".

During cross examination, Mr. Abeywardena—the witness for the Defendant-Respondent—disputed receiving "P15" (*vide* p. 697 of the brief). However, they have at no point disputed "P14" which is the first letter sent by the Plaintiff-Appellant in October 1999 stating that "*only 14EI' s are in operation and 08E1's terminated have not been activated at your end*". This is significant because "P15" makes clear reference to the telefax dated 27th October 1999 ("P14").

Even if one were to disregard "P15", a cursory glance at "P14" unequivocally indicates that the Plaintiff-Appellant has in October 1999 brought to the attention of the Defendant Respondent that 08 E1 links were awaiting commissioning at their end. Nevertheless, no weight has been given to "P14" in the judgment, despite the fact that it stood uncontroverted by the Defendant-Respondent.

During cross examination Mr. Abeywardena also took up the position that the Plaintiff-Appellant did not provide the necessary infrastructure for commissioning the twenty-two E1 links (*vide* pp. 694-696). At this point, he was questioned as to why he waited till June 2000, if it was apparent very early on, that the necessary infrastructure had not been provided. However, over and above the assertion that the Plaintiff-Appellant knew about the lack of infrastructure, Mr. Abeywardena failed to provide a sufficient explanation for this lapse. Neither has he produced any other proof to substantiate the said fact.

Secondly, the counsel for the Defendant-Respondent while Cross examining Mr. Thygaraja Prabhath—sole witness for the Plaintiff-Appellant, sought to reinforce the position with regard to 415 lines by referring to a rental charge of Rs. 91, 300 in August 2000.

> *"Q: Now there, they are charged the monthly rentals, correct?"*
> *A; Correct*
> *Q: And the monthly rentals are for the telephone lines that have been provided by you?*
> *A; Yes*
> *Q: and how many telephone lines now there are look at the monthly rental is 91, 300 correct?*
> *A: Yes*
> *Q: now that is at 220 is how much, how many links, how many lines? Now look at the detailed bill you have charged per line 220 correct?*
> *A: yes*
> *Q: So that is 220/- rupees right?*
> *A: yes*
> *…….*
> *Q: now 91, 300 divided by 220 comes to 415?*
> *A: Correct"*
>
> *(vide pp. 849, 850 of the brief)*

Accordingly, the Defendant-Respondent sought to argue that the reason why the appellant charged 91, 300/- was because they had only provided 415 lines. The simple math they put forward was that 91, 300 divided by 220 is 415. While there is no doubt as to the accuracy of this calculation, what the Counsel for the Defendant-Respondent failed to appreciate was that the said sum of 91, 300/- was the amount charged for the rental in respect of the activated lines.

In fact, Mr. Thyagaraja consistently maintained that the rental is charged only for the number of activated lines.

> *"Q: Therefore, I am suggesting to you that you did not at any stage supply more than 415 telephone lines?*
> *A: 415 that was in service when it is in use only it is charged for the rental […]*
> *….*
> *Q; I am suggesting to you that you rented or you made available to the defendant only 415 telephone lines?*
> *A: Once the telephone lines are made active and provided when it is used in the service […] so only after that the bill will reflect the rental component. What I was referring is that we have installed the infrastructure and extended the E1facilities to the defendant's premises but it was not in service. Only the 14 were in service others were at his door steps but it was not used because of that it was not coming into the picture.*
> *Q: Now witness, when you rent a telephone to a consumer whether he uses or charge, he has to pay yearly rental is that correct?*
> *A: If he is not using, it is not charged.*
> *Q: The consumer has to pay the rental correct?*
> *A: Once we complete our installations when the customer starts using … that is after commissioning and putting in to service, it is not using still it is charged. But before putting it in to service it is not charged" (vide pp. 950,951 of the brief)*

The evidence of Mr. Thyagaraja remains consistent. His credibility has not been doubted by the learned High Court Judge nor is there any observation to the effect that there were

contradictions in his position. Yet this position has been rejected by the learned trial judge without giving any reasons.

In any event, the charge of 91, 300 /- rupees cannot conclusively prove that the Plaintiff-Appellant had failed to provide all twenty-two E1 links. As clearly stated in the Agreement, the onus to connect the lines to the system remained with the Defendant-Respondent. Thus, at the most, activated 415 lines could only mean two things;

> either the Plaintiff-Appellant did not provide the requisite number of links and therefore the Defendant-Respondent could not activate them; or
>
> the Plaintiff-Appellant provided the requisite number of lines but the Defendant-Respondent did not activate them.

It does nothing beyond confirming that 415 lines were in operation. Regrettably, the learned High Court Judge misdirected herself in assuming that 415 activated lines is synonymous with non-provision of twenty-two E1 links. She had no basis when she concluded that "*Further the above witness was also encountered by the Counsel for the Defendant regarding D3 which clearly indicates the fact that the plaintiff had supplied only 415 telephone lines to the defendant*" (*vide* page 14 of the Judgment)

Where this is the case, the only factor which lent credence to the Defendant-Respondent's version then was the letter "D4." It was through "D4" that the Defendant-Respondent first brought to the attention of the Plaintiff-Appellant that they had received only 415 lines. In contradistinction to this, there is "P14" which indicates that in October 1999 the Plaintiff-Appellant had activated twenty-two E1 links and made them available for commissioning. Thus, it was incumbent on the learned High Court Judge to note her reasons for rejecting "P14", if she in fact decided to reject it.

On page 10 of the judgment, the learned High Court Judge has stated: "*The plaintiff by purported Fax dated 20th July 2000 has admitted that till then only 14 E1 links were in operation. The said fax has been marked D5.*"

This document marked "D5" is an identical copy of "P15". The document "D5" / "P15" establishes two factors that are relevant for the case;

Firstly, that the plaintiff-appellant had sent a fax in October 1999 informing that they have activated twenty-two E1 links on their end and that those lines were available for commissioning; (this fax is the document marked "P14")

Secondly, that on 20th July 2000, the plaintiff-appellant informed that only fourteen E1 links were in operation.

If the learned High Court judge relied on "D5" to state that "only 14 EI links were in operation", she could not have overlooked the other portion of the same document which refers to the fax sent in October 1999 (which is marked "P14"). The document marked "D5/ P15" must be accepted as a whole and not in a piecemeal manner. The learned High Court Judge could not reprobate and approbate portions of one single document.

By relying on "D5/P15", she opened herself to three irresistible findings;

Firstly, that both as at October 1999 and July 2000, only fourteen E1 links were in operation,

secondly, that at both points of time, the Plaintiff-Appellant had activated twenty-two E1 links from their end and

thirdly, that at both points of time the Defendant-Respondent has failed to connect the remaining eight E1 links to their system.

On the other hand, even if the learned High Court Judge rejected "P15", it would still leave "P14" as an outstanding uncontroverted document which discloses that the Plaintiff-Appellant has taken steps to activate twenty-two E1 links as early as in October 1999. In my view, these were findings which had a material bearing on the Defendant-Respondent's case. Yet no regard has been had to these positions in the impugned judgment.

I also observe certain contradictions in the Defendant-Respondent's version. At paragraph 11 (ඌ) of the Answer dated 30th May 2002, the Defendant-Respondent had taken the position that the Plaintiff-Appellant had provided as at September 2000 only 415 lines. At the same time, in paragraph 11 (ඊ) they have alleged that the Plaintiff-Respondent had provided fifteen E1 links. The letter marked "D4" also refers to the fact that only fifteen EI links had been received by them. However, when giving evidence, the

witness had taken the position that only fourteen E1 links were provided. (*vide* pp. 691-696).

> Considering the fact that one E1 links carries 30 simultaneous telephone lines – which is a fact admitted by both parties—this contradiction cannot be overlooked. If the Plaintiff- Respondent allegedly provided only fourteen E1links, then, the Defendant-Respondent ought to have been able to use 420 lines. On the other hand, if fifteen E1 links were provided, then the number of activated telephone lines should come up to a total of 450. In fact, based on the evidence made available by both parties, 415 lines could only have arisen from 13.888 E1 links. Whether the Plaintiff-Appellant could provide decimals in a package which guarantees 30 simultaneous links or whether activation of all 30 links happened in one go, is a question which the learned High Court Judge ought to have given her mind to.

Furthermore, there is also the peculiar act of the Defendant-Respondent continuing to pay approximately 20, 000, 000/- in the months of January 2000, June 2000, and in August 2000. This is demonstrated in "D10" which is a document marked by the Defendant-Respondent himself. The Defendant-Respondent's proposal to vary the minimum commitment came in June 2000. If there was in fact a shortcoming in relation to the number of telephone lines, the dispute with regard to the minimum commitment should have arisen earlier. At the very least, the Defendant-Respondent had the opportunity to pay 2/3rd of the payment as suggested by them post June 2000. However, as per their own document "D10", the payments appeared to have been made taking the Rs. 20, 000, 000 as the basis. The learned High Court Judge has also concurred in this view; "*It is categorically stated by the Defendant that it has paid a sum of Rs. 200, 000, 000/- from September 1999 to September 2000 for the telephone services provided by the Plaintiff […]*" (*vide* p. 10 of the Judgment).

Nevertheless, these contradictions have escaped the scrutiny of the learned High Court Judge. It appears that she has only mechanically noted them down without giving her mind to their veracity or consistency. The totality of Defendant-Respondent's evidence does not support the position taken in "D4". In those circumstances, the finding in the judgment that "*if the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" remains unsubstantiated.

As I noted at the very outset, the Defendant-Respondent raised in appeal that the Plaintiff-Appellant agreed to reduce the minimum monthly commitment. They sought to establish this by referring to a credit note passed by the Plaintiff-Appellant in August 2000. As per "P19", there is a credit note worth Rs. 11, 865, 134/95 passed by the Plaintiff-Appellant on 07th August 2000. The credit note is explained as "*credit note passed in our books to reduce the disputed amount of LKR 31, 865, 134/95 to LKR 20, 000, 000 as agreed with you.*"

The Defendant-Respondent took the position that the words "agreed with you" is proof of the fact that the Plaintiff-Appellant agreed to the modified minimum monthly commitment. However, this position has not been accepted by the Plaintiff-Appellant. Furthermore, there is no evidence that the Plaintiff-Appellant signed and accepted the modification proposed via "D4". This fact was also admitted by Mr. Abeywardena (*vide* pp. 701, 702 of the brief). In his evidence he conceded that if the Plaintiff-Appellant had agreed to his terms, a total of Rs. 31, 865, 134/95 should have been reduced from the bill. (*vide* p.702). At the same time, he also stated that the Plaintiff-Appellant had allegedly communicated to reduce a sum of Rupees 10 million in lieu of 31 million through a purported letter marked "D15" (*vide* p. 703 of the brief) Regrettably, this letter does not form a part of the brief. Therefore, I am unable to ascertain the veracity of that claim. In any event, I observe that there is still a discrepancy in that position. The Credit note is ostensibly made corresponding to a sum of Rs. 20, 000, 000 while Mr. Abeywardena alleged that the Plaintiff-Appellant purportedly agreed to a sum of Rs. 10 million.

The second ground which the Defendant-Respondent alleged was that there were irregularities in Plaintiff-Appellant's accounts. Mr. Abeywardena has asserted in his affidavit that the Plaintiff-Appellant company charged them an extra Rs. 27, 061,026/34 in July 2000. However, in cross examination, Mr. Abeywardena admitted that on the face of the August invoice this amount was later credited to their account on 07th August 2000. (*vide* pp. 707-709). Irrespective of this, Mr. Abeywardena had conceded that even if all alleged extra charges were deducted, the Defendant-Respondent would still not have been able to cover the amount they were due to pay.

The final line of argument taken by the Defendant-Respondent is that the termination was unjustified for being premature. They contend that the September bill had the 6th of October 2000 as the final date for payment and that the Plaintiff-Respondent terminated the contract on the 26th of September in violation of the contract. I am unable to agree with this contention.

The agreement was terminated on account of the failure to settle in full the total of Rs. 69, 309, 219/95 which had been long overdue. In terms of clause 11 (a) of the Agreement, the Plaintiff-Appellant had the right to disconnect the services "*when any service dues have not been paid upon it becoming due and payable in terms of Clause 5.2 and clause 6 above in respect of this Service or in respect of any other service given to the subscriber in pursuance of any other agreement.*"

The first notice in this regard came in August 2000 where the Plaintiff-Appellant brought to the attention of the Defendant-Respondent that they have an outstanding balance of some 75 million rupees. The second reminder came on 11th September 2000. This letter also gave an ultimatum to the Defendant-Respondent to 'settle in full' the outstanding amount by 14th September 2000 or to risk discontinuation of service. Nevertheless, by 25th September the Defendant-Respondent only paid some 28 million rupees. The payment had been made after the 14th September which indicates that the Plaintiff-Appellant had granted a further grace period to the Defendant-Respondent to uphold their end of the bargain.

Therefore, when the Defendant-Respondent only paid 28 million which does not come up to even ½ of the due amount, the Plaintiff-Appellant may have apprehended a real likelihood of defaulting. In those circumstances, they resorted to discontinue the services as notified.

In the totality of the aforementioned circumstances, it is my considered view that the learned High Court judge misdirected herself when she decided in favour of the Defendant-Respondent. "D4" alone is insufficient to substantiate that the Plaintiff-Appellant has failed to provide twenty-two E1 links. There are apparent contradictions and infirmities in the Defendant-Respondent's case, which when taken together, have the force of vitiating the position taken in "D4". Confronted with these, it is difficult to

hold that the Defendant-Respondent has proved the case on a balance of probabilities. In the result, no question of damages could arise.

Nevertheless, in the interest of justice, I will proceed to briefly examine the second ground of appeal raised by the Plaintiff-Appellant.

Learned President's Counsel appearing for the Plaintiff-Appellant contended that both the Roman Dutch Law as well as the English Law, clearly lay down the principle that in a claim for damages for breach of contract, no compensation for loss of reputation can be considered.

The Plaintiff-Appellant placed great reliance on the decision ***Seabridge Shipping Ltd. v Ceylon Petroleum Corporation (2002) 1 SLR 126***, to substantiate that the Respondent is not entitled to claim damages for the goodwill and reputation for breach of contract. In the said case, the Court of Appeal followed the following position found in Anson's Law of Contract:

> "*Damages cannot, in principle, be recovered in a contractual action for injury to reputation . . .*
>
> *An exception, however, exists in the case of a banker who refuses to pay a customer's cheque when he has in his hands funds of the customer to meet it. If the customer is a tradesman, he can recover in respect of any loss to his trade reputation by the breach.*"

They further submitted that the Roman Dutch Law position as illustrated in **Justice Weeremantry's The Law of Contracts (Vol. I, page 890)** is identical: "*Loss of reputation would thus not be treated as a natural result of breach of contract, nor would damages be awarded in contract for injury to the plaintiff's feelings.*"

However, it is the contention of the Defendant-Respondent that the position taken in Anson's law of contract as quoted in Seabridge case has changed ever since. He drew our attention to a more recent edition of Anson's Law of Contract where it is stated that;

> "*Although damages cannot be recovered in a contractual action for injury to reputation per se, they may be where the loss of reputation*

caused by the breach of contract causes financial loss" **(Anson's law of contract, 30th Edn pp. 568-569)**

He further cited the case ***Malik v Bank of Credit and Commerce International SA (1997) 3 All E R 1*** where it was held that;

> "*[the] fact that the breach of contract injures the plaintiff's reputation in circumstances where no claim for defamation would lie is it by itself a reason for excluding from the damages recoverable for breach of contract compensation for financial loss which on ordinary principles would be recoverable. An award of damages for breach of contract has a different objective: compensation for financial loss suffered by a breach of contract, not compensation for injury to reputation*".

There was a further contention that pure Roman Dutch Law never existed in Sri Lanka and that to a great extent, its remnants have been modified and influenced by the infiltration of English law principles. I observe that this position is supported by Justice Weeramantry's treatise which notes that;

> "***The superior development of the subject of contractual damages in English Law has hence resulted in the superimposition of English principles on the Roman-Dutch Law.***" (The Law of Contracts (Vol. I, page 888))

Hence there is no necessity for us to embark on a voyage of discovery to determine the applicable law. The question in narrow terms is to see whether 'patrimonial loss' in Roman Dutch Law or 'damages for contractual breach' in English Law allows damages for reputation and loss of Goodwill.

There is no doubt that a cause of action in respect of injury to reputation lies in the law of delict. The law of delict provides for damages, where the necessary ingredients are present, whether or not the said reputational injury has caused a financial loss. There is no requirement to prove actual damage. On the other hand, an award of damages for breach of contract has a different objective. To quote the words in ***Malik v Bank of Credit and Commerce***, this objective is "*compensation for financial loss suffered by a breach of contract.*"

As often seen in matters involving commercial entities, the distinction between damage to reputation and financial loss can become blurred. Damage to the reputation of professional persons, or persons carrying on a business, frequently causes financial loss. There is no question that, a "supplier who delivers contaminated meat to a trader can be sued for loss of commercial reputation involving loss of trade" [*vide* Malik v Bank of Credit and Commerce].

Thus, in so far as a commercial entity is concerned, **financial losses** incurred by loss of reputation caused by a breach of contract is a 'patrimonial loss' and not a compensation for 'pain or suffering'. There is no punitive element involved. This also accords with the principle in Roman Dutch Law as found in Justice Weeramantry's The Law of Contracts (Vol. I, page 889)

> *"[…] the true damnum in contract is compensation for patrimonial loss. Hence an important difference between contractual and tortious damages is that the former are awarded with the object of giving compensation for loss suffered and are not influenced as tortious damages are by the consideration that the wrongdoer should be punished nor do they concern themselves with the mental or bodily suffering of the injured party."*

The question therefore is one of evidence as oppose to principle. The claimant must prove that the breach of contract which caused a reputational loss and damages to Goodwill gave rise to a financial loss. This was also the position taken in ***Hatton National Bank v Tilakaratne (2001) 3 SLR 295***.

Mr. Abeywardena had stated in his affidavit;

> "*[the defendant] had entered into contract with several satellite service providers as such as Lockheed Martin International and other International Telecommunication Service providers;*
>
> *Had entered into contract for leasing optic fiber international links from Germany where the satellite circuits end to London and New York*
>
> *Purchased and installed 03 Nos. international gateway switches in the United Kingdom with the capacity of 160EI links (4800 telephone circuits)*

Purchased and did the setting up of several satellite earth stations to receive satellite signals for international communications with associated transmission and switching equipment

I state that the defendant was compelled to make payments to such Satellite and Telecom providers and maintain such telecommunication system at heavy costs notwithstanding the termination of services by the plaintiff as International agreements with US companies cannot be terminated arbitrary without paying heavy damages.

I state that the defendant was equipped to carry heavy international telecommunication traffic to Sri Lanka through the plaintiff's telecommunication system" (paragraphs 30-33)

The hardships which are alleged by the Defendant-Respondent does not follow that they have suffered any financial losses by the alleged damages to their Goodwill. There is nothing which indicates that other trader/service providers were not inclined to continue their relationships with the Defendant-Respondent. Neither is there any evidence to suggest that the Defendant-Respondent missed out on other contractual opportunities or business prospects because of the alleged breach of contract. In fact, the only basis as alluded by the Defendant-Respondent, for calculating damages for loss of Goodwill is "*whether a third-party purchaser would pay Rs. 2,000,000,000 over the Net Asset Value of the Respondent to purchase the Respondent in open market as a going concern, considering that the Respondent has an earning potential of over Rs. 18, 000,000,000 in 15 years at the lowest estimations*".

This Court is therefore invited to make a highly technical opinion on business valuation, for which we have neither the expertise required nor any evidence towards this end.

In the absence of cogent evidence, other than the Defendant-Respondent's mere say so, a claim of reputational loss and damages to Goodwill causing financial loss arising out of the breach of contract cannot be sustained. In fact, what the Defendant-Respondent attempts to claim under the purported damage to Goodwill is not a financial loss but compensation for purported 'injury or suffering'. As I indicated earlier, claims involving

pure injury and suffering cannot be deemed patrimonial loss. They are in fact damnum injuria for which the legal remedy lies in the law of delict.

In those circumstances, I hold that the learned High Court Judge erred when she allowed the Defendant-Respondent's claim for 2,000,000,000 rupees for damages to Goodwill. I also take it upon on me to observe that there is a glaring failure on the part of the learned High Court Judge to address her mind to the question of damages. There is nothing in the impugned judgment which indicates that the learned High Court judge deliberated, let alone called for evidence, to ascertain the said claim.

This overall paucity of reasons and loose ends apparent on the face of it, renders the the Judgement to be violative of section 187 of the Civil Procedure Code. The said section reads;

"*The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively*"

It has been established in a series of judgements that failure to comply with the mandatory requirements in Section 187 of the CPC vitiates the judgment. (*vide* ***Dona Lucihamy v. Ciciliyanahamy*** 59 NLR 214, ***Warnakula v Ramani Jayawardena*** (1990) 1 SLR 206, ***Sobanhamy v Somadasa*** (2005) 3 SLR, ***Perera v Calderla*** (20070 1 SLR 165)

In ***Warnakula v Ramani Jayawardena*** (1990) 1 SLR 206, a District Court judgment was vitiated by the Court of appeal for failing to consider the evidence.

> "*The learned counsel for the plaintiff-appellant submitted to court that the learned District Judge had failed to consider and analyse the evidence. He further submitted that the learned District Judge had failed to give reasons for the findings and he had totally failed to consider the complaints and the documentary evidence produced in this case.*
>
> *There is force in the submission of counsel. The learned District Judge had failed to evaluate and consider the totality of the evidence. His judgment was not in compliance of section 187 of the Civil Procedure Code. He has given a very short summary of the evidence of the parties and witnesses*

and without giving reasons he had stated that he prefers to accept the evidence of the defendant-respondent as it was satisfactory and thereafter proceeded to answer the issues."

The case before us raises issues similar to the ones in the ***Waranakula*** case. The learned High Court judge has only given bare answers to the issues raised. We may assume that the learned Trial Judge was satisfied that the claim of the Defendant-Respondent deserved to be decreed. But the judgment of the learned Trial Judge was not final: it was subject to appeal and unless there was a reasoned judgment recorded by the Trial Judge, an appeal against the judgment may turn out to be an empty formality.

Appellate Courts generally attach great value to the views formed by the Judge of First Instance who had seen the witnesses and noted their demeanor. How the Judge who tried the suit, reacted to the evidence of a witness may not always be found from the printed record. It is for this reason that a judgment revealing the trial judge's thought process becomes an essential attribute of a trial. A mere order deciding the matter in dispute not only prejudices the rights of the parties but whittles down the importance attached to the judicial process. (*vide*. ***Swaran Lata Ghosh vs H. K. Banerjee And Another 1969 AIR 1167***) It colors the decision as one of whim or fancy instead of judicial approach to the matter in contest.

In the present case, it is apparent that the learned High Court judge has failed to review and examine evidence germane to each issue. There is unequivocal acceptance of the Defendant-Respondent's position, to the complete exclusion of the Plaintiff-Appellant's position, notwithstanding the infirmities I have discussed above. In the absence of cogent reasons which suggested themselves to the trial judge, her conclusion "*If the plaintiff has provided the 22 E1 links there was no necessity for the Defendant to write the said letter marked D4*" is unacceptable and unconvincing. There is also nothing in the judgment to indicate that the learned judge has given her mind to the question of damages.

For the foregoing reasons, I hold that the judgment by the learned High court judge does not comply with section 187 of the Civil Procedure Code. I also hold that the learned High Court Judge has failed to appreciate the facts and evidence of the case and erred in concluding that the Defendant-Respondent was entitled to reliefs prayed in their

counter-claim. Accordingly, I set aside the judgment given by the learned High Court judge.

Appeal allowed.

Judge of the Supreme Court

Justice Nalin Perera

I agree

Chief Justice

Justice Sisira 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 under and in terms of Articles 17 and 126 of the Constitution.

1. **HIMANSHU SUNETH NANAYAKKARA**
2. **KALAVANA VIDANALAYA KANTHILATHA LAKMINI KUMARI NANAYAKKARA**
3. **THISULI SENETHMA NANAYAKKARA [MINOR]**
   Appearing through her Next Friend
   HIMANSHU SUNETH NANAYAKKARA
   All three of No. 26B, Fife Road, Colombo 05.

PETITIONERS

SC (FR) Application 24/2018

VS.

1. **S.S.K. AVIRUPPOLA**
   Principal, Visakha Vidyalaya, Vajira Road, Colombo 05.

2. **VICE PRINCIPAL [HEAD OF PRIMARY SECTION]**
   Visakha Vidyalaya, Vajira Road, Colombo 05.

3. **CHAIRPERSON OF SCHOOL DEVELOPMENT SOCIETY**
   Visakha Vidyalaya, Vajira Road, Colombo 05.

4. **SUNIL HETTIARACHCHI**
   Secretary, Ministry of Education, Isurupaya, Battaramulla.

5. **DR. JAYANTHA WICKRAMANAYAKA**
   Director of Education, National Schools Branch,
   Ministry of Education, Isurupaya,
   Battaramulla.

6. **L.M.D. DHARMASENA**
   Principal, Mahanama College,
   Colombo 03.

7. **HON. ATTORNEY GENERAL**
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

BEFORE:	Buwaneka Aluwihare, PC, J. Prasanna Jayawardena, PC, J. L.T.B. Dehideniya, J.
COUNSEL:	Dr. Sunil Cooray with Ms. Sithara Jayasundera for the Petitioners. Dr. Avanti Perera, SSC for the Respondents.
ARGUED ON:	28th August 2018.
WRITTEN SUBMISSIONS FILED:	By the Respondents, on 18th September 2018. By the Petitioners, on 05th October 2018.
DECIDED ON:	29th November 2018.

Prasanna Jayawardena, PC, J

The petitioners complain that the respondents' refusal to admit the 3rd petitioner child to Visakha Vidyalaya at the beginning of this year [2018] violated their fundamental rights which are guaranteed by Article 12 (1) of the Constitution. Thus, the question to be decided is whether the 3rd petitioner child - who is a five year old girl - was entitled to be

admitted to the school in terms of the published criteria governing admission to Grade 1 of Government Schools.

The 1st and 2nd petitioners are the parents of the 3rd petitioner child.

The 1st respondent is the Principal of Visakha Vidyalaya. The 2nd and 3rd respondents are the Vice-Principal and Chairperson of the School Development Society of the school. The 4th respondent is the Secretary to the Ministry of Education. The 5th respondent is the Director of Education of National Schools. The 6th respondent is the Head of the Appeals Board constituted to hear appeals and objections arising from applications to admit children to Grade 1 of Visakha Vidyalaya in the year 2018. The 7th respondent is the Hon. Attorney General.

The petitioners filed this application by their petition dated 17th January 2018. The documents marked “P1” to “P19” were annexed to the petition. On 12th March 2018, the petitioners were granted leave to proceed under Article 12 (1) of the Constitution. The 1st respondent - the Principal of Visakha Vidyalaya - has filed her affidavit dated 28th May 2018 and produced the documents marked “1R1” to “1R5”. The 1st and 2nd petitioners filed their counter affidavit dated 05th July 2018 and produced further documents marked “P20” to “P24”.

In their petition, the petitioners state that they submitted the application dated 17th June 2017 marked “P4” to the 1st respondent for admission of the 3rd petitioner child to Visakha Vidyalaya in 2018. “P4” was despatched to the 1st respondent by registered post on 20th June 2017 as shown by the registered postal article receipt marked “P20”.

The scheme of admission of children to Grade 1 of government schools in 2018 is set out in Circular No. 22/2017 dated 30th May 2017 issued by the Secretary to the Ministry of Education and filed with the petition marked “P5”. This circular sets out the procedure to be followed when submitting, receiving, processing and deciding on applications for admission to Grade 1, and the marking schemes, criteria and standards to be applied when doing so.

The petitioners state that they applied to the school under the category of “Children of residents in close proximity to the school” since they reside in an apartment on the second floor of the multi-storied building bearing Assessment No. 26B, Fife Road, Colombo 05.

They state they had resided at these premises continuously from 01st June 2012 onwards and were residing there at the time they submitted the application marked

"P4". The 1st petitioner had leased this residence for a two year period from 01st June 2012 to 31st May 2014, by deed of lease no. 1956, marked "P1". Thereafter, the lease was renewed for a further three year period from 01st June 2014 to 31st May 2017, by deed of lease no. 2273, is marked "P2". Finally, the lease was renewed for two more years from 01st June 2017 to 31st May 2019, by the *registered* deed of lease no. 2912 dated 06th May 2017, a copy of which is marked "P3a". As shown by the stamp placed by the Land Registry of Colombo on the deed of lease marked P3a", this deed of lease was duly registered on 16th June 2017.

When they submitted the application marked "P4", the petitioners annexed copies of the *registered* deeds of lease marked "P1" and "P2" which established that they had leased the premises continuously from 01st June 2012 up to 31st May 2017. It should be mentioned that, in accordance with the standard procedure set out in the circular marked "P5", original deeds which establish residence are not submitted along with the application. Instead, applicants are required to submit copies and then produce original deeds at the interview.

The petitioners state that, at the time they submitted their application to the 1st respondent, the original deed of lease no. 2912 [for the then current period] had been sent to the Land Registry for registration. Therefore, the petitioners had no alternative but to submit with their application a copy of this deed of lease, which had been certified by the Notary Public who attested the instrument. A copy of the deed of lease no. 2912 which was submitted along with "P4" is filed with the petition marked "P3b".

However, since the original deed of lease no. 2912 was at the Land Registry, the copy marked "P3b" submitted with application did not evidence that the deed of lease no. 2912 had been registered at the Land Registry However, here too, the petitioners expected that they will produce the original of the *registered* deed of lease no. 2912 at the interview since by the time the interviews are held in August or September that year, the original deed would have been returned to them by the Land Registry after it was registered.

The petitioners also submitted with their application marked "P4" several other documents marked "P6a" to "P6j".

The petitioners state that although their application was submitted within the specified time limit, they were not called for an interview. However, they were aware that other applicants residing in the neighbourhood of the petitioners' residence had been called. Further, the petitioners had also submitted applications for admission to Sirimavo Bandaranaike Vidyalaya and St. Paul's Girls' School at the same time they submitted

the application marked “P4” to the 1st respondent and had been called for interviews by these schools. It should be mentioned here that both these institutions are reputed National Schools located close to Visakha Vidyalaya.

In these circumstances the petitioners wrote the letter dated 09th July 2017 marked “P7a” to the 1st respondent [Principal, Visakha Vidyalaya] inquiring whether their application had not been received despite it being sent by registered post on 20th June 2017. Sometime later, the petitioners received a notice dated 14th August 2017 marked “P8” from the 1st respondent stating that their application for admission was rejected in terms of the circular marked “P5” due to the inadequacy of the documents submitted by the petitioners to establish residence [“*පදිංචිය සනාථ කිරීමට අදාලව එවා ඇති ලේඛන අඩුපාඩු සහිත වීම/ ප්‍රමාණවත් නොවීම*”].

When the 2nd petitioner sought to enter the school to ascertain why the documents submitted by them were inadequate, she was not permitted to enter. The security officers who were at the gate told her that she could make a written complaint in a log book which would be available at the gate within a few days. The 2nd petitioner later made an entry in the log book stating that the petitioners had submitted copies of the deeds of lease and expected to produce the original deeds at the interview. She stated that the current deed of lease no. 2912 had been sent for registration at the time the application marked “P4” was submitted and, therefore, a certified copy of this deed of lease had been annexed to the application. She stated that the current deed of lease no. 2912 had been registered at the Land Registry on 16th June 2017. She went on to state that she now had the original *registered* deed of lease no. 2912 [*“මේ අනුව මා සතුව අඛණ්ඩව ලියාපදිංචි කරන ලද බදු ඔප්පු සහ අනෙකුත් ලියවිලි මා සතුව ඇත”*]. She requested that the petitioners be called for an interview. A photograph of this log entry is marked “P9b”.

However, when the 2nd petitioner inspected the log book a few days later, she found that that an entry had been made in it by the school stating that, in terms of the circular marked “P5”, only applicants who had submitted copies of a *registered* deed of lease to establish residence were eligible to be called for an interview [“*වක්‍රලේඛයට අනුව ලියාපදිංචි බදු ඔප්පුවලට පමණක් සම්මුඛ පරීක්ෂණයට කැඳවීමට අවස්ථාව ඇති බව කරුණාවෙන් දන්වමි*”]. A photograph of this log entry is marked “P9a”.

The 1st petitioner then wrote the letter dated 11th September 2017 marked “P10” to the 1st respondent stating that the original *registered* deed of lease no. 2912 had been registered at the Land Registry on 16th June 2017 - *ie:* prior to the submission of the application marked “P4” by registered post. He stated that he had despatched the application by registered post on 20th June 2017 without waiting to receive the

registered deed of lease from the Land Registry because there was a postal strike in force and he was apprehensive of postal delays resulting in the application failing to reach the 1st respondent by the deadline [30th June 2015 in terms of clause 17 of "P5']. He stated that, at the time the application marked "P4" was submitted, the deed of lease no. 2912 had been registered and was at the Land Registry.

The petitioners state that, on 15th September 2017, they received a telephone call from the school requesting them to attend an interview on 17th September 2017. On that day, only the 1st petitioner was permitted to enter an interview room. The 1st and 2nd respondent and a few other ladies were in that room. The 1st respondent informed him that the petitioners' application had been rejected because the criteria set out in circular marked "P5" did not permit the application to be considered. When the 1st petitioner tried to produce the original deeds of lease including the original *registered* deed of lease no. 2912, he was not permitted to do so and the 1st petitioner told him that *"there is no need to produce any documents"*. The petitioners aver that the 1st respondent *"did not clearly explain the "exact reason for the denial of their application"*.

Thereafter, the Temporary List and Provisional List of children selected for admission to Grade 1 of Visakha Vidyalaya in 2018 was published in terms of clause 9.3 of the circular marked "P5". The 3rd petitioner child was not named in the list. Therefore, the petitioners submitted the appeal dated 20th November 2017 marked "P15" to the 1st respondent, in terms of clauses 10 and 11 of the circular marked "P5". The petitioners then received a notice dated 01st December 2017 marked "P19" summoning the petitioners for an inquiry into their appeal, to be held on 18th December 2017. It is seen that this notice stipulates that documents which were not produced at the interview cannot be produced at the inquiry into the appeal. [*"ඔබ විසින් මුල් සම්මුඛ පරීක්ෂණ මණ්ඩලය වෙත ලබා දී ඇති ලේඛන ඇතුළත් ගොනුවේ අමුණා නොමැති කිසිදු ආකාරයේ ලේඛනයක් මේ අවස්ථාවේ දී සලකා නොබලන බව ද දන්වා සිටිමී"*]. The petitioners attended the inquiry which was presided over by the 6th respondent. The petitioners were informed that the Appeals Board cannot recommend that the petitioners' appeal be allowed.

Thereafter, the Final List of children selected for admission was published on 04th January 2018. The 3rd petitioner child was not named in the list. The petitioners state that the 'cut-off' mark for admission under the "Children of residents in close proximity to the school" category was 60 marks. The petitioners plead that they were entitled to receive 68.5 marks upon the documents they had submitted with the application [including the current deed of lease no. 2912] and that, therefore, the 3rd petitioner child was entitled to be admitted to Grade 1 of Visakha Vidyalaya in 2018 under the "Children of residents in close proximity to the school" category.

They plead that the 1st respondent has acted arbitrarily, capriciously, and unreasonably and in a discriminating manner when she refused to admit the 3rd petitioner child to the school *and* refused to grant the petitioners an opportunity for a *"proper"* interview. They plead that, thereby, their fundamental rights under Article 12 (1) of the Constitution have been violated.

The 1st respondent [Principal of Visakha Vidyalaya] filed an affidavit along with the documents marked "1R1" to "1R5". She admitted receiving the petitioners' application marked "P4" on 21st June 2017 and admitted that the *registered* deeds of lease marked "P1" and "P2" and the *unregistered* deed of lease no. 2912 marked "P3b" were submitted with the application. The 1st respondent stated that, in terms of clause 7.2.2.1 (iii) of the Circular marked "P5", *"….. only registered lease agreements are admissible as documents in proof of residence under the Proximity Category. Such requirement was strictly and uniformly applied in respect of all applications received by the School.".*

She also stated that the deed of lease no. 2912 marked "P3a" has been registered on 16th June 2017 as shown by the stamp placed by the Land Registry and went on to say that she *"believes"* the *registered* deed had been available with the petitioners at the time they submitted their application dated 17th June 2017 marked "P4" and, therefore, the *registered* deed of lease no. 2912 *"could have been attached"* to the application. She averred that *"However, the petitioners failed to submit such lease agreement with their application and such failure to do so is entirely due to their own fault."*.

The 1st respondent pleaded that 710 applications were received to fill 83 positions under the "Children of residents in close proximity to the school" category. She stated that the school was *"compelled"* not to call the petitioners for an interview because *"the Petitioners did not submit a registered lease agreement to establish residence at the address from which the school admission application was made."*.

The 1st respondent pleaded that, in any event, the Companies Form 40 marked "P6i" submitted with the petitioners' application states that 1st petitioner's residential address was No. 10, Vijithapura, Thalangama South, Battaramulla while the letter dated 30th June 2016 marked "1R3" written to the 1st petitioner by the Ministry of Education is addressed to the 1st petitioner at No. 444, D3, 1/1, Lake Road, Akuregoda, Battaramulla. She averred that these two documents give rise to a *"serious doubt"* as to whether petitioners reside at the address stated in the school application - *ie:* in an apartment on the second floor of the multi-storied building bearing Assessment No. 26B, Fife Road, Colombo 05.

The 1st respondent also pleaded that the fact of rejection of the petitioners' application and the reasons for the rejection were communicated to the petitioners by the notice dated 14th August 2017 letter marked "P8" and that, therefore, the present application to this Court is time barred.

The 1st respondent averred that, at the interview held on 17th September 2017, the 1st petitioner submitted the *registered* deed of lease no. 2912 marked "P3a" which had not been submitted along with the petitioners' application marked "P4". She said the interview panel was chaired by her. She said the interview panel had examined "P3a" and noticed that the deed had been registered on 16th June 2017 and informed the 1st petitioner that, *"as such"*, the *registered* deed of lease no. 2912 should have been annexed to the application marked "P4".

The 1st respondent stated that the 1st petitioner was informed that the *registered* deed of lease no. 2912 marked "P3a" submitted at the interview held on 17th September 2017 could not be considered because only documents which had been submitted along with "P4" could be considered. She pleaded that the interview panel had acted in strict accordance with clause 9.1.5 of the circular marked "P5" which *"specifically provides that the re-evaluation should be done on the documents submitted with the original school admission application."*.

The 1st respondent averred that the 'cut off' marks for the "Children of residents in close proximity to the school" category was 61 marks. She stated that, as set out in the re-evaluation form marked "1R4", the petitioner were entitled to only 57.1 marks. Therefore, the petitioners' application had to be rejected. The Appeals Board had confirmed this position when it considered the petitioners' appeal.

The 1st respondent pleaded that she and the school had acted in strict accordance with the circular marked "P5" and the law and denied any violation of the petitioners' rights guaranteed under Article 12(1) of the Constitution.

In their counter affidavit, the 1st and 2nd petitioners stated that the current deed of lease no. 2912 marked "P3a" had been registered at the Land Registry on 16th June 2017 and, thereafter, the related entry had been made in the folios of the Land Registry on 17th June 2017, as shown in the Extract from the folios of the Land Registry marked "P21". They said that the *registered* deed of lease was not in their possession when they posted their application dated 17th June 2017 marked "P4". The 1st and 2nd petitioners also stated that the address mentioned stated in the Companies Form 40 marked "P6i" is the address of the 1st petitioner's Company which is named in that document, at the time the company was first registered. He went on to state that the

address stated in the letter marked “1R3” is the new address of the same Company. In this connection, the 1st petitioner also produced, marked “P22”, copies of telephone bills sent to the Company at that address.

Having set out the positions taken by the parties, I will now examine whether the refusal of the petitioners’ application constituted a violation of their fundamental rights guaranteed by Article 12 (1) of the Constitution.

In this regard, as I observed recently [in SC FR 412/2016 decided on 31st October 2018 with His Lordship, the Chief Justice and Justice Priyantha Jayawardena, PC agreeing], the complexity of the task which the circular marked “P5” seeks to accomplish must be recognized and this Court, in the exercise of our fundamental rights jurisdiction, would be inclined to question the provisions of such a circular only where the provisions are manifestly inadequate, unreasonable, arbitrary or unfair and, I would add, provided there has been no delay. Further, being well aware of the onerous nature of the task faced by officers who implement the provisions of such circulars and are called upon to balance the rights of a large number of applicants while applying the provisions of the circulars, this Court would be inclined to intervene and exercise of our fundamental rights jurisdiction only where the provisions of the circular have been ignored, violated, misapplied or misinterpreted or where there has been an abuse of process or a mistake which prejudices a child, or other similar grounds. In my view, the present application should be considered from that perspective.

When doing so, it is first necessary to examine clause 7.2.2.1 (iii) of “P5” since the 1st respondent’s position is that the petitioners’ application had to be refused when the provisions of that clause were applied. Thus, the 1st respondent has stated that the *unregistered* deed of lease no. 2912 marked “P3b” was not considered by the school because clause 7.2.2.1 (iii) stipulates that, where an application is made under the “Children of residents in close proximity to the school” category by an applicant who resides in leased premises, a *registered* deed of lease must be submitted with the application.

Clause 7.2.2.1 [including clause 7.2.2.1 (iii)] states, *inter alia*:

“පදිංචියට අදාළ නිමිකම තහවුරු කරන ලේඛන ලෙස පහත ලේඛන පිළිගැනේ :-

- ✓ සින්නක්කර ඔප්පු
- ✓ තෑගි ඔප්පු
- ✓ ……..

(i)……

(ii)……...

(iii) **ලියාපදිංචි බදු ඔප්පු** (අවශ්‍ය වන්නේ නම් බදු දීමනාකරුගේ අයිතිය සම්බන්ධව පත් ඉරු මඟින් සනාථ කළ යුතුය.) ……”.

It is evident that the specification in clause 7.2.2.1 (iii) that a *registered* deed of lease must be submitted to establish residence in a leased premise is an attempt to introduce a safeguard which deters the execution of bogus leases to found applications for admission to Grade 1 of schools under the “Children of residents in close proximity to the school” category. That is because the requirement of registration of a deed of lease makes it possible to subsequently ascertain, where considered necessary, whether there are concurrent leases of the very same premises - *ie:* an examination of the folios at the Land Registry will reveal whether there is another registered deed of lease which is concurrent with the deed of lease which founds the application. While the requirement of registration of a deed of lease may not be a foolproof method of eliminating bogus deeds of lease, it serves a useful purpose at the preliminary stage of determining the applications which are eligible for consideration when preparing the list of applicants to be interviewed. Thus, the requirement of a registered deed of lease in clause 7.2.2.1 (iii) is *ex facie* reasonable.

Next, it is necessary to examine whether the 1st to 3rd and 6th respondents have ignored, violated, misapplied or misinterpreted the provisions of “P5” or whether there has been an abuse of process or mistake which prejudiced the 3rd petitioner child when these respondents refused the petitioners’ application and appeal.

When doing so, it is necessary to keep in mind that clause 7.2.2 read with clause 7.2.2.1(iii) states that, in such cases, the submission of acceptable *registered* deeds of lease with the application will entitle the petitioners to six marks if these instruments establish that the petitioners have resided at the premises bearing Assessment No. 26B, Fife Road, Colombo 05 for a continuous period of five years or more prior to 30th June 2017.

The 1st respondent has made it clear that there was no difficulty in *prima facie* accepting the validity of the deeds of lease marked “P1” and “P2” which established residence at the leased premises from 01st June 2012 to 31st May 2017 - *ie:* a period of five years. However, the petitioners were denied any marks on account of the submission of lease agreements marked “P1” and “P2” because the deed of lease no. 2912 dated 06th May 2017 marked “P3b” - which is the copy of the current deed of lease covering the period when the application was submitted - *was unregistered*.

Thus, it is clear that, if the current deed of lease no. 2912 was taken into account, the petitioners would have received a further six marks if the petitioners had been called for

an interview and produced the registered deeds of lease marked “P1” and “P2” *and* the *registered* deed of lease no. 2912 marked “P3a” at the interview.

The 1st respondent has stated that the petitioners were entitled to receive only 57.1 marks on the basis of the documents they submitted without taking *any* of the deeds of lease into account. Thus, if the three deeds of lease were taken into account, the petitioners would have received a further six marks and ended up with 63.1 marks.

The 1st respondent has stated that the ‘cut off’ mark was 61. Therefore, the conclusion has to be that if these three deeds of lease marked “P1”, “P2” and “P3a” were considered, the 3rd petitioner child would have been entitled to be admitted to Grade 1 of Visakha Vidyalaya in 2018.

There is no dispute that the 1st to 3rd respondents initially rejected the petitioners’ application and did not call them for an interview solely because the current deed of lease no. 2912 marked “P3b” submitted with the application marked “P4” did not establish that the deed of lease had been registered *at the time of* the submission of the application.

It seems to me that the 1st to 3rd respondents acted correctly when they did so because there is nothing on the face of the *unregistered* deed of lease no. 2912 marked “P3b” submitted with the application which established that the said current deed of lease was pending registration at the time the application was submitted. In these circumstances, the 1st to 3rd respondents cannot be faulted for acting in terms of clause 7.2.1.1 (iii) and sending the notice marked “P8” informing the petitioners that their application had been rejected due to the inadequacy of the documents submitted to establish residence.

However, when the petitioners received the notice marked “P8”, they made the entry marked “P9b” in the log book and wrote the letter dated 11th September 2017 marked “P10” informing the 1st to 3rd respondents that the current deed of lease no. 2912 had been sent for registration at the time of the application was submitted and that the petitioners now have the original *registered* deed of lease no. 2912 and are able to produce it at the interview. The petitioners also explained that they had despatched the application by registered post on 20th June 2017 without waiting to receive the *registered* deed of lease from the Land Registry because they were apprehensive of delays in the post resulting in the application failing to reach the 1st respondent within the time limit. Upon receipt of “P10”, the 1st to 3rd respondents have summoned the petitioners to attend an interview which was held on 17th September 2017.

It is plain to see that the petitioners were summoned for an re-evaluation interview to be held on 17th September 2017 in terms of clauses 9.1.5 and 9.1.6 of the circular marked "P5" which provide applicants whose applications are rejected with an opportunity to obtain a re-evaluation interview to demonstrate the basis on which they have made their application and establish their claims to an interview.

Thus, clauses 9.1.5 and 9.1.6 state:

"9.1.5 සුදුසුකම් නිබියදීත් තම දරුවාගේ ඉල්ලුම්පත්‍රය සිව් ගුණයට නොගෙන ප්‍රතික්ෂේප වී ඇත්නම් පමණක් අදාල ලිපි ලේඛන (පෙර අයදුම්පත්‍රය සමග ඉදිරිපත් කරන ලද ලේඛන පමණක්) සහිත ව නැවත ඉල්ලුම්පත්‍රයක් හා ලකුණු සනාථ කිරීම සඳහා තර්කානුකූල ව ඉදිරිපත් කරන තොරතුරු ඇතුළත් ඉල්ලීමක් ප්‍රතික්ෂේපිත ලිපියේ පිටපතක් සමග එම පාසලේ විදුහල්පති වෙත ඉදිරිපත් කළ හැකි ය...

9.1.6 සම්මුඛ පරීක්ෂණ මණ්ඩලය විසින් සම්මුඛ පරීක්ෂණය පවත්වන අතරතුර එසේ ඉදිරිපත් කරන ලද පැමිණිලි සම්මුඛ පරීක්ෂණය අවසන් වීමට සතියකට පෙර හෝ සලකා බලා සුදුසුකම් ලබන අයදුම්කරුවන් සම්මුඛ පරීක්ෂණයට කැඳවිය යුතු අතර, නැවතත් ප්‍රතික්ෂේප වන පැමිණිලිකරුවන් වෙත ඒ බව ලිපියකින් දැනුම් දිය යුතුය. මේ සම්බන්ධ අදාළ ලේඛන ද තබා ගත යුතුය."

However, when the petitioners sought to produce the original *registered* deed of lease marked "P3a" at the re-evaluation interview held on 17th September 2017, the 1st to 3rd respondents refused to consider the original *registered* deed of lease no. 2912 marked "P3a". The 1st respondent has stated in her affidavit that the 1st to 3rd respondents refused to consider the original *registered* deed of lease no. 2912 marked "P3a" because they were of the view that the words *"(පෙර අයදුම්පත්‍රය සමග ඉදිරිපත් කරන ලද ලේඛන පමණක්)"* in clause 9.1.5 of the circular marked "P5" prohibits them from considering the original *registered* deed of lease marked "P3a". This leads to the conclusion that the 1st to 3rd respondents regarded the original *registered* deed of lease no. 2912 marked "P3a" as amounting to a "*new*" document which was not submitted along with the petitioners' application and is, therefore, prohibited by clause 9.1.5.

However, the 1st to 3rd respondents have failed to realise that the original *registered* deed of lease no. 2912 marked "P3a" which the petitioners sought to produce at the interview held on 17th September 2017 was *not* a new document. Instead, it is the very same document as the *unregistered* copy marked "P3b" submitted along with the application other than for the fact that "P3a" bears a stamp establishing that the deed of lease has been registered at the Land Registry on 16th June 2017. The 1st to 3rd respondents failed to realise that a mere glance at the original *registered* deed of lease

no. 2912 marked “P3a” would have shown that it was identical to the *unregistered* copy marked “P3b” submitted with the application other than for the presence of this stamp. The 1st to 3rd respondents have failed to realise that the placing of this stamp does not make “P3a” a *“new”* document but only shows that the deed of lease which [as clearly stated in “P9a” and “P10”] was registered on 16th June 2017 and was at the Land Registry at the time the application was submitted.

Thus, the 1st to 3rd respondents erred gravely and acted arbitrarily and unreasonably when they took the view that they were prohibited from considering the *registered* deed of lease no. 2912 marked “P3a” at the re-evaluation interview held on 17th September 2017.

Further, the 1st to 3rd respondents have failed to comprehend that the particular circumstances in which the petitioners stated they were placed - *ie:* the availability of only an *unregistered* deed of lease no. 2912 at the time of submission of the application because the deed of lease was at the Land Registry - made it impossible for the petitioners to annex a copy of the *registered* deed of lease at the time they submitted their application marked “P4”. Thus, the 1st to 3rd respondents have failed to apply the common sense and equity reflected in the maxim *nemo tenetur ad impossibile* - *ie:* no one is bound to perform an impossibility. That omission on the part of the 1st to 3rd respondents was arbitrary and unreasonable and caused grave prejudice to the petitioners.

The 1st to 3rd respondents have also overlooked the fact that the previous *registered* deeds of lease marked “P1” and “P2” together with the several other documents submitted along with the application marked “P4” constituted clear evidence that the petitioners resided at the premises from 01st June 2012 onwards and that, in this background, the high probability was that deed of lease no. 2912 had, in fact, been sent for registration at the time the petitioners submitted their application. The 1st to 3rd respondents failed to realise that, in the particular circumstances of this case, the petitioners should be given an opportunity at the re-evaluation interview held on 17th September 2017 in terms of clauses 9.1.5 and 9.1.6 of the circular marked “P5”, to produce all the originals of the documents submitted with their application including the original *registered* deed of lease no. 2912 marked “P3a”.

It also has to be noted that clause 6.2.6. of the circular marked “P5” placed a duty upon the 1st to 3rd respondents to analyse and correctly understand the provisions of “P5” and reach an appropriate and correct decision after considering all the factors relevant the petitioners’ application. In this regard, clause 6.2.6. stipulates *“පළමුවන ශ්‍රේණියට ළමයින් ඇතුළත් කිරීම සඳහා පත් කරන සම්මුඛ පරීක්ෂණ මණ්ඩලයට ළමයින් තෝරා ගැනීමට අදාල ව*

සියලුම සාධක සලකා බලා සුදුසු පරිදි තීරණ ගෙන ක්‍රියාත්මක කිරීමේ බලතල හිමි වේ. එහි දී ලබා දී ඇති වක්‍රලේඛ විධිවිධානවලට අනුකූල වන පරිදි තෝරා ගැනීමේ කටයුතු කර ගෙන යා යුතු අතර, වක්‍රලේඛයේ සඳහන් කරුණු පිලිබඳ විග්‍රහ කර ගැනීමද, තෝරා ගැනීමේ ගැටලු පිලිබඳ තීරණ ගැනීමද සම්මුඛ පරීක්ෂණ මණ්ඩලයේ වගකීම වේ. මෙසේ ගනු ලබන තීරණ හා විග්‍රහ කිරීම පිළිබඳ ව සම්මුඛ පරීක්ෂණ මණ්ඩලයේ සභාපති විසින් කෙටියෙන් ලොග් සටහන් තැබිය යුතු අතර, වෙන ම පොතක වාර්තා කර අවශ්‍ය අවස්ථාවල දී ඉදිරිපත් කිරීම පිණිස සුරක්ෂිත ව තබා ගත යුතු ය.”.

Thus, clause 6.2.6 vested the 1st to 3rd respondents with ample authority and, in fact, a duty to adopt a common sense approach when they were faced with the unusual and, perhaps, unique problem presented by petitioners' application. However, instead of exercising that authority and duly performing that duty, the 1st to 3rd respondents appear to have acted mechanically when they refused to even consider the *registered* deed of lease no. 2912 marked "P3a" when the petitioners sought to produce it at the re-evaluation interview held on 17th September 2017. Thereby, the 1st to 3rd respondents failed to understand the purpose and effect of the provisions of clause 7.2.2.1 (iii) read with clauses 9.1.5 and 6.2.6 of the circular marked "P5". The 1st to 3rd respondents failed to correctly apply these provisions at the re-evaluation interview held on 17th September 2017and, thereby, failed to achieve the purpose of these provisions

Thus, the 1st to 3rd respondents erred gravely when they failed to realise that, in the unusual and, perhaps, unique circumstances of this particular case, the petitioner should have been given the opportunity to demonstrate, at the re-evaluation interview held on 17th September 2017 - that the deed of lease no. 2912 had been registered prior to the expiry of the time limit for submission of applications - *ie*: before 30th June 2017. The 1st to 3rd respondents have erred in failing to give the petitioners that opportunity. This failure on the part of the 1st to 3rd respondents resulted in them acting arbitrarily and unreasonably when they rejected the petitioners' application marked "P4".

The 1st respondent has also acted unreasonably and arbitrarily when she speculated that the original deed of lease no. 2912 would have been returned to the petitioners immediately after it was registered on 16th June 2017 and was, therefore, available with the petitioners when they despatched their application marked "P4" on 20th June 2017. By indulging in that speculation the 1st respondent has displayed a seeming lack of awareness of the reality of procedure that a deed which is registered at the Land Registry on 16th June 2017 is unlikely to reach the hands of the person who submitted the deed for registration within three or four days. Further, by seeking to use this speculation to justify the refusal to grant the petitioners an opportunity to produce the original *registered* deed of lease no. 2912 at the re-evaluation interview, the 1st respondent has unfairly and unreasonably caused grave prejudice to the petitioners.

The 6th respondent who chaired the Appeal Board which considered the petitioners' appeal has failed to correct the errors identified earlier. He seems to have simply gone along with the 1st respondent's erroneous decisions without duly performing the duty vested in the Appeals Board of correcting the errors and injustice visited on the petitioners by the 1st to 3rd respondents.

Next, the 1st respondent's contention that the documents marked "P6i" and "1R3" give rise to a *"serious doubt"* as to whether the petitioners reside at the address stated in the school application - *ie:* in the second floor of the multi-storied building bearing Assessment No. 26B, Fife Road, Colombo 05 - is without merit. It is clear that these documents relate to the address of the 1st petitioner's company named Pinnacle Technologies (Pvt) Ltd and not to the petitioners' residence. In any event, if the 1st respondent had a doubt regarding the *bona fides* of the petitioners' position that they resided at the premises bearing Assessment No. 26B, Fife Road, Colombo 05, the correct stage for her to investigate the truth of the petitioners' position was at a full and proper re-evaluation interview at which she asked the petitioners to clarify any doubts she may have had. Further, if the 3rd petitioner child was selected and named in the Temporary List and Provisional List, the inspection which is done to verify residence in terms of clause 9.3.3 of the circular marked "P5" would have ascertained whether or not the petitioners resided at the stated address. The 1st respondent was not entitled to use her alleged *"doubt"* to deny the petitioners the opportunity of a full and proper re-evaluation interview on 17th September 2017 at which all documents submitted by the petitioners, including the *registered* deed of lease no. 2912, were examined.

The claim made in the 1st respondent's affidavit that the present application is time barred is also without merit since the petition has been filed within one month of the inquiry into the petitioners' appeal and, further, within two weeks of the publication of the Final List. Learned Senior State Counsel, correctly, did not seek to press time bar before us.

For the aforesaid reasons, I hold that the 1st to 3rd and 6th respondents violated the petitioners' fundamental rights under Article 12 (1) of the Constitution when they refused the petitioners' application to admit the 3rd petitioner child to Grade 1 of Visakha Vidyalaya in 2018. The 1st and 2nd respondents are directed to admit the 3rd petitioner child to the appropriate Grade at Visakha Vidyalaya subject only to the 1st and 2nd respondents being entitled to first examine the original documents submitted with the petitioners' application marked "P4" and verify the authenticity of these documents. The 1st and 2nd respondents are directed to complete that process without delay upon submission of the original documents by the petitioners. In the event the 1st and 2nd

respondents are of the view that any one or more of these documents are not genuine, they are directed to bring such matter to the attention of this Court and seek an appropriate order from this Court. In the circumstances of this case, the parties will bear their own costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.
I agree.

Judge of the Supreme Court

L.T.B. Dehideniya, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR. No. 56/2012

Suppiah Sivakumar
No. 51/2, Pinnakatiya Watte,
Ellepola, Senerathwela,
Theldeniya.

Petitioner

Vs.

1. Sergeant 6934 Jayaratne,
   Theldeniya Police Station,
   Theldeniya.

2. Civil Security Constable Pathirana,
   24324,
   Theldeniya Police Station,
   Theldeniya.

3. Civil Security Constable 12243 Abeyratne,
   Theldeniya Police Station,
   Theldeniya.

4. Office-in-Charge,
   Theldeniya Police Station,
   Theldeniya.

5. ASP. T.M.S.T. Tennakoon,
   Theldeniya Police Station,
   Theldeniya.

6. N. K. Illangakoon,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Respondents

Before: Buwaneka Aluwihare PC. J
L.T. B Dehideniya J
Murdu N. B. Fernando PC J.

Counsel: Mrs. Ermiza Tegal with T. Piyadasa and Shalomi Daniel for the Petitioner
P.L. Gunawardena for the 1st to the 3rd Respondents
Mrs. Suharshie Herath for the 4th to the 7th Respondents

Argued on: 30. 05. 2018

Decided on: 26.07.2018

Aluwihare PC. J.,

The Petitioner has filed the present application seeking a declaration;

(a) That the actions and/or conduct of the 1st to 3rd Respondents and/or the State have resulted in the infringement of the Petitioner's fundamental rights under Article 11 of the Constitution

(b) That the actions/inactions and/or conduct of the 1st to 3rd Respondents and/or the State have resulted in the infringement of the Petitioner's fundamental rights under Article 12 (1) of the Constitution

(c) That the actions/inactions and/or conduct of the 4th and 5th Respondents and/or the State have resulted in the infringement and continuous infringement of the Petitioner's fundamental rights under Article 12 (1) of the Constitution

(d) That the actions/inactions and/or conduct of the 1st to 4th Respondents and/or the State have resulted in the infringement of the Petitioner's fundamental rights under Article 13 (1) of the Constitution

Leave to proceed was granted for the alleged violation of Article 11, 12 (1) and 13 (1) of the Constitution.

The relevant facts can be stated as follows:

On 15th May 2011 around midnight, the Petitioner had been in the vicinity of the Bambaragala Junction with his wife and his daughter to watch Theru celebrations. Around 1. 30 am, a riot had broken out in the area and as the Petitioner made haste to take his wife and daughter to safety, he alleges that he was assaulted by the 1st to 3rd Respondents with a club. The Petitioner had also alleged that he was subjected to continuous verbal and physical abuse for about 20 minutes by the said Respondents.

During this time, one Sanjika Tharanga had come forward and informed the 1st to the 3rd Respondents that the Petitioner was not a party to the riot. He also provided the names of those who were in fact involved. Despite these interventions, however, the Respondents had continued to beat the Petitioner. He was thereafter dragged down the road towards the Nethulmada Kovil which was, approximately, 8 km away. The Petitioner alleges that the beating continued during this period.

At the Kovil, the 1st Respondent had publicly claimed that he arrested one of the rioters. The Petitioner was made to wait outside the Kovil for over an hour during which time he noticed that there were several of his relatives gathered in the Kovil ground. The Petitioner has averred that he felt humiliated to be treated like an offender in front of his relatives and the general public.

Meanwhile, the Petitioner's wife has gone to the Theldeniya police station to lodge a complaint that her husband was arrested by the police officers without any basis.The officers at the police station, however, had turned her away saying no complaint against a fellow police officer would be entertained by them.

The Petitioner and the Respondents remained at the Kovil till about 6.30 am. Around 6.30 am, a police jeep had arrived and the Petitioner was forcibly mounted on the jeep and taken to the Police station.

Upon arriving, the Petitioner had observed that his family members were already waiting outside the police station. While inside the Police Station, the Petitioner had been asked to sign a statement narrating that he was assaulted by three private individuals during

the course of the riot. The Petitioner had refused to sign the statement and maintained that he was assaulted by Police Officers and not by private individuals. The Petitioner's wife too opposed the idea of signing the statement giving a different account of the incident. At this point, the 1st Respondent had chased her out scolding in foul language and threatening that they could not only beat but could kill as well.

Thereafter, the Petitioner states, that the 1st Respondent coercively obtained his signature to the statement written in Sinhala. He was then locked up in the cell. Around 2 pm, he was joined by two other people. The Petitioner got to know from them that they were involved in the riot and that upon being brought to the Police Station they informed the Police that the Petitioner had nothing to do with the riot.

Around 5 pm, the Petitioner was taken before the 4th Respondent, who directed one sergeant Upali to take a statement and release the Petitioner.

The Petitioner states that he could not walk properly and had to receive assistance from his family members to walk out of the Police station. The family members thereafter had taken him to the Menikhinna government Hospital. He was admitted to the hospital and had been treated for contusions and swellings. On 16th May around 2 pm, a policeman had visited the Petitioner at the hospital and had obtained a statement regarding the incident. At the hospital, the Petitioner alleges that he suffered bouts of vomiting and was thereafter transferred to Kandy General hospital on 18th May. He was admitted to ward No. 10 and subjected to several medical tests and investigations. On 19th May he had been discharged with instructions to attend the clinic on the 24th May.

On the 29th of May, the Petitioner became very ill and admitted himself to the Menikhinne hospital. He was admitted and treated as an 'in patient' there till the 31st. He had got himself discharged to attend his next clinic at the Kandy hospital. After attending the clinic, he was again admitted to the Kandy general hospital and stayed there till the 17th of June.

In between the hospitalization, the Petitioner's wife had complained to the Human Rights Commission, Kandy about the incident. The said complaint is produced marked "P2".

The Petitioner had also written letters of complaint to the Chief Justice, the Attorney General, the Inspector General of Police, Deputy Inspector General of Police, and the National Human Rights Commission Office in Colombo.

On 23rd June, by letter marked "P4 (b)", the Human Rights Commission informed him that the Commission had initiated an investigation into his complaints.

Two days later, the Assistant Superintendent of Theldeniya Police through the letter marked "P5 (a)" had informed the Petitioner to present himself before the Theldeniya police station for an inquiry. On that day, statements were obtained from him and his daughter. On 8th July similarly, statements were made by the Petitioner 's wife's sister as a witness corroborating the complaint of the Petitioner.

Thereafter, the Officer-in-Charge of the Special Investigation Unit of the Central Province through the letter marked "P5 (B)' informed the Petitioner to present himself before the Police office Asgiriya on the 23rd of July to give a statement about the incident. The Petitioner had duly complied and he was informed that appropriate action would be taken.

On 22nd June 2011, the Human Rights Commission informed the Petitioner to respond to the statement filed by the Respondents. He was further asked to file an affidavit of his wife on 18th of July.

As these investigations were progressing, three people had visited the Petitioner's house on 5th September 2011 and had hurled abuses and physically assaulted the Petitioner. When the Petitioner threatened to complain, the assailants had claimed that it was the Police itself, which asked them to attack the Petitioner. Again, on 23rd September when the Petitioner 's wife was alone in the house, the said three persons visited the house and had abused the residents. When a complaint was lodged, the Petitioner and the family were asked to come for an inquiry. He was informed that the persons were charged with affray and were discharged subsequently by the Magistrate's Court.

On 23rd September 2011, the National Human Rights Commission requested the Petitioner to present himself for an inquiry into his complaint on 13. 10. 2011. At the

said inquiry, the parties were advised to come to a settlement. In pursuance, on 15th October 2011 the Petitioner alleges that sergeant Upali along with several others called over at his house and offered money as a settlement. The Petitioner had refused this offer stating that he wants the 1st to the 3rd Respondents to admit their fault.

Thereafter, on 3rd February, the Petitioner was informed by the National Human Rights Commission that they found a violation under Article 11 of the Constitution. The commission has ordered each Respondent to pay Rs.5000 to the Petitioner and has instructed the Attorney General to take steps with regard to the recommendations.

In their objections, the 1st to the 3rd Respondents have claimed that they arrested the Petitioner pursuant to a complaint received at the Police Station about the riot. Upon arriving at the place, they had observed the Petitioner being restrained by several people. The Respondents were further told by the people gathered in the area that it was the Petitioner and several others who were responsible for the riot. In these circumstances, the Respondents claim that they had to use 'minimum force' on the Petitioner to apprehend him. The 1st Respondent has produced 'in-and-out' entries and extracts of the information book marked "1R1 (a)", "IR1 (b)", and "IR2" as proof in this regard.

Before turning to the violation under Article 11, I wish to first address the alleged violation of the Petitioner's rights under Article 12 (1) of the Constitution by the 4th and 5th Respondents. I observe that the facts do not support a finding of Article 12 (1) violation by the 4th and 5th Respondents. Documents filed by the Petitioner marked "P5 (a)" and "P5 (b)" show that the authorities have conducted investigations into the Petitioner's complaint. It is also brought to the attention of the Court that disciplinary action has been taken against the 1st to the 4th Respondents pursuant to those investigations. As such there is no compelling ground to found a violation of Article 12 (1) by the 4th and 5th Respondents.

With regard to Article 13 (1), I observe in both the Petitioner's and Respondents' version, that on the day of the incident there had been a commotion. The incident had taken place past midnight and the place was swarming with people. Given the context in which the arrest took place, I am not inclined to hold that there is a violation of Article 13 (1). The

Respondents had to act according to the exigencies of the situation. They had the onus of maintaining peace and bring order upon in an essentially chaotic situation. In those circumstances, errors in judgment could take place.

However, such errors in judgement cannot under any circumstance condone the subsequent conduct adopted by the Respondents. The prohibition in Article 11 of the Constitution against degrading treatment is absolute and the guarantees therein must be protected irrespective of the victim's conduct. Even if the Respondents had their grounds for suspecting the Petitioner of being involved in the riot, the Respondents could have resorted to the procedure established by law to dispel their suspicion without physically and verbally assaulting the Petitioner. According to 1R1(b), the Petitioner was already restrained by people gathered at the said place.

The entry marked 1R1(b) makes no reference to the fact that the Petitioner attempted to flee or acted uncooperatively. According to the Respondents' own documents, there was no basis or ground whatsoever to use force on the Petitioner. The act of assaulting and verbally abusing the Petitioner was malicious and completely unwarranted.

In **Abeywickrema v Gunaratna** [1997] 3 SLR 225 the Court expressed the view that an aggravated form of treatment or punishment could satisfy the requirements under Article 11. In that case the Police assaulted and arrested a three-wheel driver who had come to the Police station on a hire on the pretext that he reeked of alcohol. It was later revealed the petitioner had not consumed any liquor, and that there were no reasons at all to suspect the petitioner of having committed any offence.

Citing with approval a passage from **Justice A. R. B. Amerasinghe's Our Fundamental Rights of Personal Security and Physical Liberty,** that: "*Something might be degrading in the relevant sense, if it grossly humiliates an individual before others, or drives him to act against his will or conscience*", the Court held that the Respondents in that case violated the Petitioner's rights under Article 11 of the Constitution.

In the present case, the Petitioner was an ordinary citizen out there enjoying Theru celebrations with his family when the Respondents assaulted him. He was dragged along the road and proclaimed to be an offender in front of his relatives and the general public. When a man is assaulted, taken into custody, and locked up in a cell, simply because he happened to be in the vicinity of a riot, in my view, he has been subjected to "degrading treatment". The medical reports forwarded by the Kandy Hospital corroborates the physical suffering the petitioner had to undergo on account of the Respondents' actions. The affidavits filed by his wife and the relatives further confirm that they witnessed the Petitioner being treated like an offender in front of the public. There can be no question that such a conduct caused humiliation to the Petitioner.

Moreover, until this petition was filed in this Court, the Petitioner had complained to persons in authority and followed up on those complaints. He has gone to great lengths to take action against the injustice that was caused to him. Proof of these actions are before us. I do not believe that an ordinary person would go to such lengths of canvassing grievances unless he was in fact wronged by the authorities.

In light of these evidence, I could only conclude that the Respondents heedlessly assaulted the Petitioner. I have no hesitation in holding that the 1st, 2nd and 3rd Respondents have violated the Petitioner 's rights under Article 11 and 12 (1) of the Constitution by subjecting him to degrading treatment.

The Petitioner is entitled to the declaration that his fundamental rights of freedom from torture and cruel, inhuman and degrading treatment guaranteed to him by Article 11 and the right to equal protection of law under Article 12 (1) of the Constitution have been violated by the 1st to 3rd Respondents.

I allow the Petitioner's application and direct the State to pay Rs. 20,000/- , and the 1st, 2nd and 3rd Respondents to pay Rs. 25,000/- each as compensation to the Petitioner.

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree

Judge of the Supreme Court

Justice Murdu N. B. Fernando 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 Application under and in terms Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Menura Nanwidu
   Rambukkanage, No:27, Nihal Silva Mawatha, Kirulapone, Colombo 06.

2. S.T.Kodithuwakku,
   No: 27, Nihal Silva Mawatha, Kirulapone, Colombo 06.

PETITIONERS

Vs.

SC (F/R) Application
No: 62/2018

(1) B.A. Abeyrathne,

The Principal and the Chairman of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo,
Royal College,
Colombo 07.

(2) A. Galahitiyawa
Member of the Interview Board to admit Students to Grade 1 of Royal College Of Colombo,
Royal College,

Colombo 07.

(3) K.D.S. Siyaguna,
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.

(4) Harshana Matharaarachchi,
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.

(5) K.A.H. Karasingha,
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.

(6) K.G. Wimalasena
The Chairman of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.

(7) Amith Dharmapala,
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.

(8) W.N.P. Kumara,
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.

(9) S.P.M. Gunasekara
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.

(10) Charana Gunasekara
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.

(11) Director National Schools,
Ministry of Education,

Isurupaya, Pelawatta,
Battaramulla.

(12) Sunil Hettiarachchi,
Secretary,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla.

(13) Honorable Attorney General,
Department of Attorney General,
Colombo 12.

RESPONDENTS

Before:

S. Eva Wanasundera, PC. J.,
Nalin Perera, J. and
Murdu N.B. Fernando, PC. J.

Counsel:

Thanuka Nandasiri with Susil Wanigapura for the Petitioners.
Dr. Avanthi Perera SSC, for the Respondents.

Argued on: 28.08.2018

Decided on: 12.12.2018

Murdu N.B. Fernando, PC. J,

The Petitioners have filed this application seeking a declaration that the Petitioner's Fundamental Rights guaranteed by Article 12 (1) of the Constitution have been violated by one or more or all of the 1st to 12th Respondents and / or by the State.

Leave to proceed was granted on 06-06-2018 for the alleged violation of Article 12 (1) of the Constitution against the 1st to 12th Respondents.

The facts of this case, as submitted by the Petitioners are as follows,

The 2nd Petitioner who is the mother of the 1st Petitioner tendered an application to Royal College, Colombo 07 for the admission of the 1st Petitioner to Grade one for the year 2018, under the category "Brothers/Sisters of applicants already studying in the School" based on the relevant Circular dated 30-05-2017 (P3).

The Petitioners were called for an interview (P4) on 23-08-2017 and were required to submit documents listed in P4 at the interview, namely proof of residence and proof of brother studying in School. The Petitioners tendered documents P5a to P5f and P6a to P6c respectively in support of their application.

At the interview before the Interview Board consisting of 1st to 5th Respondents the Petitioners were given "0" Zero marks and were informed that the last will submitted to establish title of the property cannot be accepted. The Petitioners state, even if no marks were given for proof of title of property, the Petitioners were entitled to at least 48 marks, as the older brother of the 1st Petitioner is a student of the School from grade 01 grade 10 and for his achievements in School and also for the parents being registered at the given address in the Electoral Registry during the last 5 years. Petitioners also state that Clause 7.1.3 of the Circular categorically provided that refraining from allocating marks under one heading is not a reason to refrain from allocating marks under the remaining heads.

On 28-09-2017 the 2nd Petitioner lodged a complaint with the Human Rights Commission. The first day of inquiry was postponed as the 1st Respondent (Chairman of the Interview Board and Principal, Royal College) was not present. On the next date of inquiry the 1st Respondent was represented and moved time to consider marks and documents pertaining to brother category but did not tender same to the Human Rights Commission until this application was filed before this Court on 30-01-2018.

Petitioners further state that subsequently they were made aware that Clause 7.1.3 of the Circular (P3) referred to above was repealed on 31-07-2017 (P10A) but by letter dated 19-09-2017 (P10B) the 12th Respondent, Secretary, Ministry of Education had clarified that the repeal

of Clause 7.1.3 does not mean that the applicants should be denied marks under the remaining headings only because a particular applicant is not entitled for marks under one heading.

The 1st Respondent in his affidavit filed before this Court states that an endorsement was made at the very beginning on the marking sheet (P7) referring to the absence of a requisite document and in accordance with the relevant Circular as amended, no marks were given to the 1st Petitioner.

1st Respondent further averred that consequent to the processing of the application of the 1st Petitioner, the 12th Respondent's letter dated 19-09-2017 (P10B) was received clarifying the implication of repealing Clause 7.1.3 of P3 inter-alia, that where an applicant has basic qualifications, the repeal did not necessarily mean that the application should be rejected in toto on the basis that marks cannot be awarded under one part of a particular category. However, since the Respondent School did not process any applications after 19-09-2017 the clarification given by the 12th Respondent was not resorted in respect of any application and hence all application were treated alike without discrimination and therefore the Respondent's have not violated the Fundamental Rights of the Petitioners.

The Respondents also submitted that, the Constitution guarantees equal protection of the law and that the Respondents applied the 'applicable law' at the relevant time and did not act contrary to the applicable law, namely the relevant Circular (P3) as amended (P10 A/ 1R1) and further submitted that acting contrary to the amended Circular and applying the original Circular would have been a violation of the applicable law.

In responding to the position taken up by the Petitioners, that the clarification given by the 12th Respondent, Secretary, Ministry of Education should have been taken cognizance at the time the Petitioners appeal was considered by the Appeal Board, the Respondents submitted that it would have led to an overhaul of the entire evaluation process in respect of all applicants whose applications had been rejected on the same premise in order to prevent discrimination.

Petitioner on the other hand submitted that the Respondents have failed to establish that there were more similarly circumstanced applicants and relied on the maxim *vigilantibus et non dormientibus succurrunt jura*, a maxim of Roman Law subsequently embraced by equity, that

the law comes to the assistance of those who are vigilant with their rights, and not those who sleep on their rights which maxim has now been absorbed in to our legal system.

Having referred to the positions taken-up by the Petitioners and the Respondents respectively in this application, I will now advert to the Circular pertaining to Admission of Children to Grade One in Government Schools for the year 2018.

A paramount wish of a parent is to admit a child to a School of their choice and the issuance of the Circular governing Admission to Schools is eagerly awaited, as it lays down the basic qualifications, categories, procedure and time lines that ought to be followed in order to be eligible for admission to grade one every year. The Circular (P3) pertaining to admission to grade one in 2018 was issued on 30-05-2017 and applications had to be submitted by 30-06-2017 to the respective Schools. The basic qualification for admission as stated in Clause 2, is the age of the child and it is undisputed that the 1st Petitioner passed the 1st hurdle.

The 2nd hurdle to overcome is Clause 4.7 wherein it states that the parents should be resident in the Administrative District of the School applied for also referred to as the feeder area. This hurdle too, the parents passed since Kirulapone, Colombo, where the parents reside comes within the Administrative District of Colombo in which Royal College to which admission was sought by the Petitioners is situated.

The 3rd hurdle is Clause 3, the category under which an application should be made. There are six Categories referred to in the Clause under which an application could be made. They are as follows:-

- Children of residents in close proximity to the School
- Children of parents who are past pupils of the School
- Brothers / Sisters of students already studying in the school
- Children of persons in the staff of institutions directly involved in school education
- Children of officers on transfer
- Children of persons returned to Sri Lanka after living abroad.

Clause 7.1 discusses the mode and manner of selections based upon the six different categories referred to above and the percentages upon which the selections will be made.

In this case the 2nd Petitioner a resident in the Administrative District of Colombo submitted an application in respect of the 1st Petitioner under Clause 7.4 “Brother Category” to the Respondent School, as the older brother of the child was studying in the said School. According to the provisions of Clause 7.1 the percentage allocated for Brother Category is 15% of the total number of vacancies for the given year.

The Provisional List and the Final List (P11A and P11B) produced by the Petitioners before this Court indicate the number of vacancies or the selections made for ‘Brother Category’ for the year 2018, was 40 and the cut-off mark under the Brother Category or the marks obtained by the 40th child selected under the ‘Brother Category’ was 22.5. Admittedly the 1st Petitioner was given “0” zero marks or no marks and thus was not admitted to the Respondent School.

In the absence of the 1st Respondent submitting any documentation pertaining to the number of vacancies and cut-off marks for Brother Category, I rely on the documents submitted by the Petitioners as P11A and P11B as correct.

Let me now advert to the Marks Sheet (P7) issued to the Petitioners by the Respondent School. The description column therein is a reproduction of Clause 7.4 *albeit brief* of Circular P3. The description as referred to in P7 *verbatim* is reproduced as follows;

1) Brother in School
2) Registration of Electoral
3) Other documents
4) Proximity
5) Achievements and donations

I observe that the Interview Board, in P7 had not given any marks under any of the items above and had made an endorsement, under the notes column “No deed. Only the Last Will”. Further I observe that the Petitioner had tendered documents under items (1), (2) and (5) and for item (1) Brother in School, 1st Petitioner claims the maximum 25 marks under Clause 7.4.1.1 and 7.4.1.2, for item (2) Registration in the Electoral Register, the maximum 20 marks under Clause 7.4.2.1, and for item (5) 3 marks under Clause 7.4.5 for the achievements of the brother, totalling 48 marks, out of 100 marks.

Thus, the primary question this Court has to answer is whether the decision of the Interview Board was correct in giving zero marks or no marks to this applicant.

In view of the position taken up by the Respondents that marks were not given to the applicant based on the 'relevant law' or the applicable law as at the given date, firstly let me consider Circular (P3) and the provisions of the said Circular without recourse to the original Clause 7.1.3.

The 2nd Petitioner made an application to the Respondent School under 'Brother Category' as the older child of the 2nd Petitioner was already studying in the School. Clause 7.4 has five Sub-Clauses and the said five Sub-Clauses are reflected in the marking sheet (P7) referred to earlier and are now discussed in detail.

i. Brother in School

Under Sub-Clause 7.4.1.1, 20 marks are allocated for the years of study of the older brother in School (2 marks for each grade) and under Sub-Clause 7.4.1.2, an additional 5 marks are given for the older brother if he was admitted to grade one of the School.

Thus, the 1st Petitioner is entitled for the maximum 20 marks (2 marks for each grade to a maximum of 20 marks) as the older brother presently is a student in grade ten, plus another 5 marks as the older brother was admitted to grade one of the School. This would entitle the 1st Petitioner for 25 marks under this description.

(ii) Electoral Register as proof of residency

Sub-Clause 7.4.2 refers to registration in the Electoral Register and the 2nd Petitioner has submitted extracts of the Electoral Register for the last 5 years as proof of being registered at the given address.

Thus, the 1st Petitioner is entitled for 20 marks, the maximum marks under this Sub-Clause.

(iii) Title of property as proof of residency

Sub-Clause 7.4.3 indicates the documents to establish title to the residence. The 2nd Petitioner relied on the last will given by her spouse's father (Child's grandfather) to the spouse (Child's father) to establish the title of the residence. No marks could be given for same as the last will being an entitlement of title to a property is not acceptable as it does not come within the documents indicated in this Sub-Clause.

(iv) Proximity to School

Sub-clause 7.4.4 refers to the Proximity of the School to the place of residence. Marks will only be given under this item, if title of the residence is established and no marks can be given to the 1st Petitioner under this item, as title of the residence was not established.

(v) Achievements and donations.

Sub-Clause 7.4.5 refers to a maximum of 10 marks for achievements and contributions made to the School by the older brother. The certificates tendered (P6A to P6C) by the 2nd Petitioner especially the older brother being a junior prefect, should entitle the 1st Petitioner at least 2-3 marks, under this Sub-Clause.

Thus, I observe that out of the 5 items in Sub-Clause 7.4, excepting 7.4.4 where marks can be given only if 7.4.3 is fulfilled, all the other 4 Sub-Clauses are stand alone Sub-Clauses, independent to each other. One Sub-Clause does not get priority over the other Sub-Clause and there is no justification not to give marks for items (1) and (2) merely because items (3) or (4) are not full filled. On the corollary, in the Brother Category just because an applicant is not entitled to any marks under item (5) achievements and donations, should an applicant not be given marks under item (1) brother in School. I consider such argument to be ludicrous.

The only explanation given by the Respondent School for non-granting of marks under item (1), (2) and (5) of the Brother Category, is that the applicant could not prove to the satisfaction of the Interview Board, the Petitioner's place of residence. The Sub-Clause does not give item (3) priority over item (1) or (2) or (5) i.e. Priority for title of residence over older brother studying in School or Electoral Register or achievements of the brother. All descriptions or items are of equal footing. Thus, Clause 7.1.3 earlier adverted to, is repealed or not is immaterial. The plain reading of Clause 7.4, older brother studying in school is that, if there is an older brother studying in School, a parent can apply under this category and is entitled to the marks reflected therein irrespective of whether he has proved title of residence or not. What is material is to be a resident in the feeder area namely the Administrative District of Colombo which factor was established by the Petitioner by submitting the extracts of the Electoral Register.

The Respondents have tendered the site reports said to have been done after this application was filed in the Supreme Court in the months of April and May 2018, to indicate that the Petitioners are not resident at the given address but only the parents of the 2nd Petitioner are resident at the given address. I place no reliance on these one paragraph site reports, since at the time the decision was made to grant zero marks, these reports were not available with the Respondent School. In any event, the Petitioners have submitted an affidavit of the grand mother of the child to counter the facts stated in the site reports with the counter affidavit and the said reports are disputed.

Thus, on a careful consideration of Clause 7.4 of the Circular, I accept the Petitioners position that a minimum of 45 marks should have been given to the 1st Petitioner under Sub Clause 7.4.1 and 7.4.2 of the Circular which brings him within the cut-off mark of 22.5 for the Brother Category and would place him among the top half or among the 1st twenty places out of the forty places available for Brother Category as evidenced by the Final List (P11B). Petitioners are also entitled for more marks under Sub-Clause 7.4.5 for achievements of the older brother as adverted to earlier.

In **Gayani Geethika Vs Dissanayake SC (FR) 35/2011**- S.C.M. 12.07.2011 a case pertaining to School Admissions under proximity Category, Suresh Chandra J with Marsoof J and Ekanayake J agreeing held that the cumulative effect of all documents submitted along with the grade one school admission application should be considered and assessed carefully in order to establish the genuiness of the residence of an applicant.

Similarly, in another school admission case under proximity category **Pushparajan Rohan Vs Kariyawasam SC (FR) 06/2017** - S.C.M. 03.11.2017 Malalgoda J with Wanasundera J and Perera J agreeing held that it was arbitrary for the School not to grant any marks, merely because one of the documents listed to verify proof of residency had not been submitted.

The Judgements referred to above are in respect of applications under category (1), Children of residents in close proximity, where proximity is the key factor.

In the matter now before this Court, the application was made under category (3) namely, Brother Category, where the older brother studying in school is the key factor. None of the

documents tendered as proof of the older brother studying in school by the Petitioners had been considered by the Interview Board. These include older brothers School Record Book, Junior Prefect Certificate, Boys Scouts Patrol Leader Certificate, Grade V Government Schools Scholarship Exam Merit Certificate and many other Certificates. The failure of the interview board to consider and assess these documents and Certificates and award marks, I consider caused grave injustice to the younger brother, the 1st Petitioner in this application.

At this juncture, I wish to consider Clause 3 of the Circular once again. It refers to six categories, namely;

- Children of residents in close proximity to the School
- Children of parents who are past pupils of the School
- Brothers / Sisters of students already studying in the school
- Children of persons in the staff of institutions directly involved in school education
- Children of officers on transfer
- Children of persons returned to Sri Lanka after living abroad.

When an applicant has fulfilled the basic qualification for admission namely the minimum age and resident in the feeder area or the Administrative District in which the School is situated (excepting for past pupil category) such an applicant can submit an application under any one or more of the above referred categories. The key factor to be established is proximity, sibling studying in School, parents involved in School Education, Public Officers on transfer and Children returned from abroad.

The Admission Circular has been in existence for the last two decades and the 12th Respondent and his predecessors would have had good reasons to categories applications under Clause 3 of the Circular in this manner. The object of separate categorization of applicants would be rendered nugatory, if the key factor is over looked and an additional threshold criteria is applied by schools in admitting children under this Circular creating another hurdle on the parent, not envisaged by the Circular and there by violating the Circular itself.

This Court is very much aware that there is fierce competition within the Categories itself, to be successful to gain a slot for the limited number of vacancies under the particular category. Thus in the absence of an elimination process as envisaged in Sub Clause 7.4.4 (where

it is clearly laid down that no marks will be given, if Sub-Clause 7.4.3 is not fulfilled) marks should be allocated under each and every Sub-Clause of the particular category and selections made based on the total marks to achieve the objects of the Circular. Sub-Clause 7.1.3, heavily relied upon in these proceedings only re-iterates the above proposition. The repeal of the Sub-Clause does not envisage that a threshold criteria should be applied violating the provisions of the Circular.

Let me now advert to the letter of clarification issued by the 12th Respondent, Secretary, Ministry of Education (P10B) dated 19-09-2017. This letter specifically refers to the effect of the repeal of Sub Clause 7.1.3 and clarifies that the basic qualification is residence within the feeder area and proof of residency is only one criteria.

The Respondents submitted to this Court that the application of the interpretation set out in Secretary, Ministry of Education letter did not arise since no grade one applications were processed after receipt of this letter and the School treated all applications alike and did not award marks for the remaining parts of a category when an applicant has not secured marked under one category. In the absence of any documentation to substantiate that no processing of applications took place after 19-09-2017, as averred to by the 1st Respondent and since the Provisional List was published only on 16-11-2017 two months after the issuance of P10B and 3 months after the Petitioners faced the interview and the Appeal Board should have met consequent to the publication of the Provisional List and especially since the Appeal Board proceedings and determinations are not before Court, I cannot accept the reasons given by the Respondents in not re-evaluating the applications in the best interests of the child as contemplated by the letter of the Secretary, Ministry of Education, who is the 12th Respondent before this Court. Furthermore this clarification/interpretation comes from the author of Circular P3 who by virtue of Clause 12.10 is the Authority to monitor and supervise admission of students to grade one of all Government Schools.

I also cannot accept the position taken by the Respondents, that the Respondents in all instances where an applicant to the Respondent School had not secured marks under part of category such applicants were treated alike and marks were not awarded for the remaining parts of that category and therefore all similarly circumstanced persons were treated equally, as no material, documents or statistics are before this Court, to substantiate that position at least in

respect of the Brother Category under which the Petitioners tendered an application to admit the 1st Petitioner to the Respondent School.

I also observe that the Provisional List varies from the Final List (P11A and P11B) and there is no explanation for same before this Court.

The Respondents submission that acting contrary to the amended Circular and applying the original Circular would violate the applicable law too cannot be accepted for the reasons adverted to earlier.

In the above circumstance, I hold that the Petitioners have established that the 1st to 10th Respondents have violated the 1st and 2nd Petitioners Fundamental Rights guaranteed under Article 12(1) of the Constitution by granting zero marks or no marks at the interview to the 1st Petitioner and thus refusing 1st Petitioner admission to Grade One of Royal College, Colombo 07 in the year 2018.

Therefore, the Respondents are directed to take steps forthwith to admit the 1st Petitioner to Grade One or to the appropriate Grade of Royal College, Colombo 07.

Judge of the Supreme Court

Nalin Perera Chief Justice

I agree

Judge of the Supreme Court

S. Eva Wanasundera PC. J

I agree

Judge of the Supreme Court

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

In the matter of 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

Kumarapperuma Arachchige Chandana Prasanna,
No. 835/12, Peradeniya Road, Mulgampala,
Kandy

For and on behalf of:

Kumarapperuma Arachchige Thinuga Sethum

Petitioner

SC /FR/ Application No 70/2017

Vs,

1. R.D.M.P. Weerathunga,
   Principal,
   Kingswood College,
   Kandy.

2. Sunil Hettiarachchi,
   Secretary,
   Ministry of Education,
   "Isurupaya",
   Pelawatta, Battaramulla.

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

Respondents

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

Vijith K. Malalgoda PC J

L.T.B. Dehideniya J

Counsel: Ranga Dayananda with Lilanthi de. Silva and Anuradhi Wickramasinghe for the Petitioner

Suren Gnanaraj SC for the Attorney General

Argued on: 20.03.2017

Judgment on: 25.05.2018

Vijith K. Malalgoda PC J

The Petitioner to the present application Kumarapperuma Arachchige Chandana Prasanna had filed this application on behalf of his minor son Kumarapperuma Arachchige Thinuga Sethum alleging violation of Article 12 (1) of the Constitution of Democratic Socialist Republic of Sri Lanka by failing to admit the said minor to Grade one of Kingswood College, Kandy.

As revealed before this court, the Petitioner as the father of the minor, applied for admission to Grade one of Kingswood College Kandy, 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 the grade one for the year 2017.

Under clause 6.1 of the said circular, 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.

Even though the Petitioner could not furnish a copy of the application he submitted with regard to his son's school admission, it is not disputed that the application submitted to Kingswood College, Kandy by the Petitioner was made under clause 6.1 of the said circular.

However as submitted by the Petitioner, the 1st Respondent by his letter dated 28th July 2016 informed the Petitioner, that his application was rejected on the basis that the title to the Petitioner's residence had not been established.

Being dissatisfied with the said decision of the 1st Respondent, Petitioner had submitted an appeal to the said 1st Respondent under clause 8.1 (e) of the said circular but the said appeal too was rejected by the 1st Respondent by his letter dated 26.08.2016.

Whilst challenging the said decision of the 1st Respondent, the Petitioner had submitted that,

a) The Petitioner resides at the premises built on a land leased out to his grandmother namely Hewapedige Hinniyhami by the Department of Railways.
b) The Petitioner being an old boy of Kingswood College, was residing in the same address for a long period of time
c) The Petitioner had submitted documentary proof as required by the circular 17/2016 including Electricity bills, Water bills, Tax receipts and Electoral Register extracts for the past 5 years in order to establish his residence in the given address
d) It is contrary to the provisions of the circular 17/2016 to reject an application on the basis that the applicant does not have a title to the premises in which he resides, but the maximum the 1st Respondent could have done was to deduct 10 marks allocated for the title deeds

and argued that failure by the 1st Respondent to call the Petitioner for the interview and the rejection of the appeal by the 1st Respondent was irrational, *mala fide* and illegal.

In this regard the Petitioner heavily relied on the decision by this court 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 12.07.2011***, where Suresh Chandra J had observed that,

> "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 allocated would

indicate that the continuity in such residence should be at least for a period of 5 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"

During the argument, before us the learned counsel for the Petitioner informed court that he will restrict his argument to the documents contained in pages 42-70 submitted along with the application before this court. As observed by this court the said documents are the documents the Petitioner had relied to establish his residence when he submitted the application to the Kingswood College.

Clause 6 (G) of the circular 17/2016 requires the applicant to submit the documentation with regard to the house he is presently in occupation in order to establish his residence and under clause 10.6 of the said circular no fresh documents are permitted to be submitted during the appeal process.

In the above circumstances, it is further observed by this court that, it is the duty of the Applicant to satisfy the school authorities that all the documents he submitted along with his application refer to his permanent place of residence under which he has submitted the application to gain admission for his child under clause 6.1 of the said circular.

However, as submitted by the learned Senior State Counsel, the documents relied by the Petitioner when he submitted the application to the Kingswood College in order to gain admission for his son, were insufficient to identify the house, the Petitioner said to have residing during the period relevant to this application. In this regard, our attention was drawn to the documents contained in pages 53, 54-58, 61-63, and 64-65.

As observed by this court the Petitioner's permanent residence, according to the present application and the application he submitted to Kingswood College is No. 835/12 Peradeniya Road, Kandy.

Since the petitioner applied under Clause 6.1, children of residence in close proximity, the Petitioner had to submit a title deed either in his or his spouses name or in the name of his parents. But the title deed he submitted (available at pages 54-58) is a lease in respect of a land bearing No. 835/1 Peradeniya Road in the name of Hewa Pedige Himmihamy. Even though the Petitioner now claims that the said Hinnihamy is his grandmother and therefore he will only lose 10 marks, the position taken up by the learned State Counsel before this court was that the said deed refers to a land bearing No. 835/1 and not 835/12, and the therefore the Petitioner had failed to satisfy the school

authorities that he has permanent residence at No. 835/12 Peradeniya Road when he tendered the application.

In order to satisfy that the Petitioner had paid taxes for his residential premises he has submitted a tax receipt which is at page 53. The said receipt refers the house address as 835/12 but the said receipt is not in the name of the Petitioner but is in name of one of Saimon Appu.

The electricity bills which were in the name of the Petitioner (at pages 61-62) bears the house number as 835/2 Peradeniya Road.

Whilst referring to the discrepancies referred to above, the learned Senior State Counsel submitted before this court that the application submitted by the Petitioner along with the documents, which were produced before this court at pages 42-70 were contradictory to each other and therefore the school authorities could not have entertain the application submitted by the Petitioner as an application which satisfied the residence as required by clause 6.1 of circular 17/2016.

The Petitioner had filed several other documents to establish that the house referred in the deed as 835/1, in the electricity bill as 835/2 and in the tax receipt and other documents including the extracts of the electoral register as 835/12 refers to one and the same house and the said Hewapedige Hinnihamy was his grandmother and Saimon Appu under whose name the tax receipt was issued was his grandfather, but we observe that, none of these material were placed before the school authorities by the Petitioner when he submitted the original application to gain admission for his son to Kingswood College, Kandy.

As referred earlier in this judgment by me, clause 6 (G) requires every applicant to submit documentation with regard to the house, the applicant is presently in occupation and clause 6.1 I (c) specifically stated that the marks can only be allocated to the house the applicant is presently in occupation.

In the said circumstances, it is the duty of the school authorities to identify the permanent residence of any applicant, in order to allocate marks under the provisions of the said circular but, in the absence of any explanation with regard to the contradictory nature of the supporting documents submitted by the Applicant, I am not inclined to conclude that the school authorities have acted in violation of equal protection guaranteed under Article 12 (1) of the Constitution.

It is further observed by me that the decision of the Supreme Court in ***Dasanayakage Gayani Geethika and two others V. D.M.D. Dissanayake Principal, D.S Senanayake College and five others*** and the decision in ***Anjali Thivaak Pushparajah Rohan and another V. Akila Viraj Kariyawasam Hon. Minister of Education and fifteen others SC FR 06/2017*** SC minute dated 27.10.2017 has no applicability to the case in hand since the present case does not refers to the nature of the residence but it refers to the identification of the permanent residence of the applicant at the time he submitted the application under Clause 6.1 of the circular 17/2016.

In the above circumstances, I hold that the Petitioner has failed to establish that his fundamental rights guaranteed under Article 12 (1) of the Constitution had been violated by the 1st to the 3rd Respondents. This application is accordingly dismissed. I make no order with regard to costs.

Judge of the Supreme Court

K. Sisira J. de. Abrew J

I agree,

Judge of the Supreme Court

L.T.B. Dehideniya 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. Hadunnethige Amitha Saman Yuneka
2. Adhikari Dissanayakalage Sumedha Mahesh Jayarathne

   Both of, No. 57/108, 2nd Lane,
   Vidyala Mawatha,
   Avissawella.

Petitioners

SC /FR/ Application No 84/2017

Vs,

1. B.A. Abeyrathne,
   Principal,
   Royal College,
   Colombo.

2. L.W.K. Silva
3. R.M.I.P. Karunaratne
4. L.K. Jayathilake
5. A.G.P.A. Gunawansa
6. T.Tennakoon

   All members of Interview Board for Grade One Admission 2017,
   Royal College,
   Colombo.

7. A.G.N. Jayasekara
8. G.V. Jayasuriya
9. R.M. Ratnayake
10. M.H. Sunny

11. U. Malalasekara
12. Inoka Gunn

    All members of Appeal Board for Grade One Admission 2017,
    Royal College,
    Colombo.

13. P.N. Illapperuma,
    Director, National Schools,
    Department of Education,
    Ministry of Education,
    'Isurupaya' Pelawatte,
    Battaramulla.

14. Sunil Hettiarachchi,
    Secretary,
    Ministry of Education,
    'Isurupaya' Pelawatte,
    Battaramulla.

15. Hon. Akila Viraj Kariyawasam,
    Minister of Education,
    Ministry of Education,
    'Isurupaya' Pelawatte,
    Battaramulla.

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

Respondents

Before: Priyasth Dep PC, CJ

Sisira J. de. Abrew J

Vijith K. Malalgoda PC J

Counsel: Harith de. Mel for the Petitioners Instructed by Alanka Dias,

Suren Gnanaraj SC, for the Attorney General

Argued on: 21.02.2018, 29.06.2018

Judgment on: 06.09.2018

Vijith K. Malalgoda PC J

The two Petitioners namely Hadunnethige Amitha Saman Yuneka and Adhikari Dissanayakalage Sumedha Mahesh Jayarathne made an application in terms of Article 126 of the Constitution for the alleged violation of their fundamental rights guaranteed under Article 12 (1) of Constitution as a consequence of the son of the above Petitioners not being selected for admission to Grade one of Royal College, Colombo 07.

As submitted before this court, the 1st Petitioner had started her carrier as a development assistant at Gammedagama Maha Vidyalaya in Deiyandara on 10.10.2005 and was appointed as a Graduate Teacher in class 3-1 at Walasmulla-Handugala Maha Vidyalaya with effect from 01.06.2008.

By letter dated 07.01.2013 she was given a transfer out of her province and was released to the Western Province. With the said transfer the 1st Petitioner was appointed to Sedawatta Siddartha Vidyalaya with effect from 11.01.2013.

The 1st Petitioner as the mother of minor Sandeep Dissanayake applied for admission to Grade one of Royal College, Colombo 07 under the Education category as laid down in Clause 6.4 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 circular issued by the 14th Respondent.

Clause 6.4 of the said circular refers to the children of employees who directly involved with the School Education in the Ministry of Education, commonly referred to as Education Category. Under the circular, 05% of the total numbers of vacancies were allocated to the children comes under the said category.

As observed by this court maximum of 20 marks were allocated to the period of service of the parent who is employed under the Ministry of Education (2 marks per year) and maximum of 35 marks were allocated for the distance to the school from the permanent residence of the Applicant. An applicant under the said category is further entitled for a maximum of 25 marks for remote service and 20 marks for unutilized leave for past five years (2 marks for 20 days of unutilized leave). The Applicants are further entitled to obtain 10 more marks if the parent works in the staff of the same school.

The 1st Petitioner had applied for the admission of Sandeep Dissanayake to Grade one of Royal College and at the time she submitted the application the 1st Petitioner along with her family was permanently resident at No. 57/108, 2nd Lane, Vidyala Mawatha, Awissawella.

The Petitioners were called for an interview by the School Authorities on 28th August and after considering the documents produced at the interview they were awarded 56 marks by the

Interview Panel. (P-7) Even though cut of marks under the said category was only 48 marks the name of their son was neither included in the Temporary Selection List nor in the waiting list which was published on or about 31st October 2016.

Being aggrieved by the said decision, the Petitioners submitted an appeal under Clause 9 of the said circular to the School Authorities but the Petitioners were not successful at the appeal hearing. However the Petitioners learnt at the appeal hearing, that the reason for non-inclusion of the name of the Petitioners' son was due to the 1st to the 6th Respondents or any one of them not being satisfied as to the residency of the Petitioners' at No.57/108, 2nd Lane, Vidyala Mawatha, Avissawella.

Even though the Petitioners have taken up the position that they were neither explained any reason nor they were aware of any reason for such determination, in paragraph 29 of the Petition filed before the Supreme Court the Petitioners have disclose the following;

29, a) As far as the Petitioners are aware no persons from Royal College came to the residence of the Petitioners to ascertain residency;

b) By or about 9th October 2016 three persons had arrived at the residence of the Petitioners and inquired about the 1st Petitioner and the lessor's daughter B.D. Danushi Samudrika had met such persons and informed that the Petitioners had left to Matara to visit their sick mother.

c) By or about 16th November 2016 some other persons had arrived at the residence of the Petitioners and inquired from the Landlord's wife J.A. Malkanthie as to the Petitioners residence and had been informed that the Petitioners will be back in about an hours time.

d) The Petitioners further state that no person from Royal College had come to their residence as promised at the Appeal Board.

When going through the above averments filed before this court it is clear that the Petitioners were well aware of the fact that they were not at the address they said to have resident, on two occasions when site inspections were carried out, one after the interview and before the Temporary list was published and the other prior to the appeal hearing.

The requirement of ascertaining the correctness of the residence and the allocation of marks for residence under Education category was identified under clause 6.4 (II) as follows;

Distance from the permanent residence to the work place of the applicant is;

Above 100km	- 35 marks
Between 99km to 50km	-25 marks
Between 49km to 25km	-15 marks
Less than 25km	-05 marks

The Applicant is entitled to above marks if he resides only within the feeder area to the school applied. The residence will have to verified under this category.

As revealed during the argument before this court the feeder area of Royal College, Colombo extends up to Avissawella, and the Petitioners who claimed that they reside at No. 15/108, 2nd Lane, Vidyala Mawatha, Avissawella are qualified to gain admission for their son to Royal College provided if they fulfill all the other requirements under the above circular.

According to the provisions of clause 6.4 (II), the School Authorities will have to satisfy with regard to the residence of each applicant comes under the said category and under Clause 8.3 (c) of the same circular the mode of verifying the residence under the Close Proximity Category had been identified as site inspection. In the absence of any specific method in order to verify the residence under the Education Category, I see no reason to reject the method followed by the School Authorities to verify the residence of the applicant in the present application. It is also observed under Clause 8.3 (c) that it had provided to carry out site inspections under any other categories as well.

The 1st Respondent, Principal Royal College, Colombo 07 who admits the fact that, the Petitioner attended the interview on 28.08.2016 and obtained 56 marks as referred to in P-7, had taken up the position before this court that, a site inspection had been carried out at the Petitioners' residence on 09.10.2016, since it was necessary for the Interview Panel to satisfy with the residence of the applicant under clause 6.4 (II) of the circular 17/2016.

The notes prepared by the inspection team is produced marked R1 to the affidavit of the 1st Respondent and the said document confirms the position taken up by the Petitioner in paragraph 29 (b) of the petition that, the inmates have informed that the Petitioner had gone to see their parents.

Since the Petitioner was not found in the address on 9th, a second site inspection was carried out to the same address by the same team on 23.10.2016. That too is prior to the release of the temporary list on 31st October 2016. Repot of the said site inspection is produced marked R-2 and according to R-2, neither the Petitioner nor the owner was available at No. 57/108, 2nd Lane, Vidyala Mawatha, on that day.

The Petitioner is silent on this visit in his petition but speaks of a second visit on 16th November 2016. However according to the Respondents, no such visit was carried out in the month of November but a third visit was carried out on 30.04.2017 two months after the Fundamental Rights application was filed before the Supreme Court on the instruction of the Attorney General. The report of the said inspection is before this court produced marked R-3.

According to R-3, neither the Petitioner nor the child was present at the above address on that day and one Thenuwara Arachchige Malkanthie was present at the house. The said Malkanthie had given a statement to the officers who carried out the inspection stating that the Petitioner is not at the above address at that time. As further observe by me, the said statement is silent on the fact, whether the Petitioner resides at the above address or not but the officers who carried out the inspection had not observed any evidence of the residence of the Petitioner at the above address.

However the Petitioner whilst challenging the position taken up by the Respondents had filed an affidavit marked P-19 along with her counter objection, from the said Thenuwara Arachchige Malkanthie.

In the said affidavit, she confirms the fact that an inspection team had visited her daughter's house on 30th April 2017 around 10.00 p.m and inquired about the Petitioner.

According to the affidavit, she informed them that the Petitioner resides at the house but had gone to a Sinhala New Year dinner and will be returning home late. She further confirms that the members of the said team had taken photographs of the house and got her to sign a document to confirm their visit to the house.

In addition to the said affidavit, another affidavit from Thenuwara Arachchige Malkanthie had been filed along with the petition filed before this court marked P-13 (b).

According to the said affidavit, an inspection team had visited her daughter's house on 20.11.2016 around 8.15 in the morning but the Petitioner was not available in the said address at that time. The said team wanted her to call the Petitioner but according to Malkanthie she could not call the Petitioner in the absence of contact details with her. The team wanted to see the belongings of the Petitioner inside the house but she could not show anything since their belongings were inside their room.

The Respondents have denied this visit in the affidavit filed in the present application. However as the Petitioner admitted in the papers filed before this court, that she made two other applications one to Thurstan College and the other to Mahanama College, there is a possibility that the site inspection referred to in P-13 (b) could be from one of those schools. However, what is important for the consideration of this court is that, even on20/11 when an inspection team visited the house of the Petitioner around 8.15 a.m. the Petitioner was not present at her house, and the inmates of the house had failed to satisfy the inspection team by showing any belongings of the Petitioner in the house.

When considering the material referred to above it is clear that the Petitioner was not present on 4 occasions, when inspection teams visited the address of the Petitioner between October 2016 to April 2017.

As observed by me earlier, under clause 6.4 (II) of the circular 17/2016 which governed school admissions for the year 2016, the School Authorities have a duty to satisfy with the residence of the applicant even though the applicant had submitted documentary proof of the residence before

the Interview Panel. In this regard, the importance of the site inspection was discussed by Sripawan (J) (as he was then) in the case of ***Mohamad Uzman Nazeem V. Upali Gunasekara Principle, Royal College, Colombo 07 and two others SC/FR/ 30/2012*** *SC minutes dated 30.08.2012* as follows;

> "I agree with the learned Senior State Counsel that documentary proof of residency is not enough and the Petitioner was required to establish his residency during site inspections carried out by the school authorities……
>
> It is the duty of the site inspection team to form an unbiased assessment after conducting inspections to ascertain the truthfulness of the claim of the residence at the address furnished by the Petitioners. The members of the inspection team are entitled to such flexibility in their precedence as they think the particular case under consideration requires."

During the arguments before us the learned counsel for the Petitioner heavily relied on the following observations made in the case of ***Anjali Thivaak Pushparajah Rohan and another V. Akila Viraj Kariyawasam, Hon. Minister of Education and 15 others SC/FR/06/2017*** SC minute dated 27.10.2017;

> "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…….
>
> …….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."

However as revealed before this court, the facts and circumstances of the present case are quite different to the facts and circumstances under which the above observation was made by this court. The interview Panel who interviewed the Petitioner and her son had given the full marks entitled by them, well above the cut off mark under the Education Category under which the Petitioner submitted her application to gain admission to Royal College.

As required under clause 6.4 (II) a site inspection was carried out by the School Authorities on two occasions prior to the release of the temporary list but neither the Petitioner nor the child or any other member of their family were present at No. 57/108, 2nd Lane, Vidyala Mawatha, Avissawella during any of those inspections.

In the said circumstances the School Authorities had decided not to include the Petitioner's son into the temporary list and the appeal too was rejected on the same basis.

When considering all the matters discussed in this judgment, I hold that the Petitioner has failed to establish that her Fundamental Rights guaranteed in terms of Article 12 (1) of the Constitution had been violated by the Respondents.

This application is accordingly dismissed.

I make no order for costs.

Judge of the Supreme Court

Priyasth Dep PC;

I agree,

Chief 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 in terms of Articles 12 (1), 14 (1) (g) and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. EPIC Lanka (Private) Limited,
   EPIC Techno Village,
   No.158/`/A, Kaduwela Road,
   Talangama, Battaramulla.

2. Dr. Nayana Darshana Prasad Dehigama,
   Executive Chairman & Managing Director
   EPIC Lanka (Private) Limited,
   No.158/`/A, Kaduwela Road,
   Talangama, lBattaramulla.

PETITIONERS

Application No:
SC/FR 94/18

Vs

1. Hon. S. B. Navinna,
   Minister of Internal Affairs,
   Wayamba Development and Cultural Affairs,
   Ministry of Internal Affairs,
   Wayamba Development and Cultural Affairs,
   8th Floor, Sethsiripaya,
   Battaramulla

2. Controller General
Department of Immigration and
Emigration of Sri Lanka,
"Suhurupaya", Sri Subhuthipura
Road, Battaramulla.

3. Hon. Harin Fernando,
Minister of Telecommunication
and Digital Infrastructure and
Foreign Employment.
Ministry of Telecommunication and
Digital Infrastructure,
No.437A, Galle Road, Colombo 03

4. The Chief Executive Officer,
The Information and
Communication Technology
Agency of Sri Lanka,
No.160/24, Kirimandala
Mawatha,
Colombo 05.

5. The Information Technology
Agency of Sri Lanka,
No.160/24, Kirimandala
Mawatha,
Colombo 05.

6. De La Rue Lanka Currency and
Security Print (Private) Limited,
No.9/5, Thambaiah Avenue,
Off Independence Avenue,
Colombo 07.

7. Secretary,
Ministry of Internal Affairs,
Wayamba Development and
Cultural Affairs

8th Floor, Sethsiripaya,
Battaramulla.

8. Secretary,
Ministry of Telecommunication
and Digital Infrastructure,
No.437A, Galle Road, Colombo
03.

9. Hon. Ranil Wickremasinghe,
Prime Minister, Minister of
National Policies and Economic
Affairs,
58, Sir Earnest De Silva Mawatha
Colombo 7.

10. Hon. John Amarathunga,
Minister of Tourism Development
and Christian Religious Affairs,
200, 53 Vauxhall Lane,
Colombo 2.

11. Hon. Gamini Jayawickrema
Perera,
Minister of Budhasasana,
No.135, Sreemath Anagarika
Dharmapala Mawatha,
Colombo 07.

12. Hon. Ravindra Samaraweera
Minister of Sustainable
Development and Wildlife,
9th Floor, Sethsiripaya Stage I
Battaramulla.

13. Hon. Nimal Siripala de Silva,
Minister of Transport and Civil
Aviation.

7th Floor - Sethsiripaya Stage II
Battaramulla.

14. Hon. Mangala Samaraweera,
Minister of Finance & Mass Media
The Secretariat,
Colombo 1.

15. Hon. Thilak Marapana,
Minister of Foreign Affairs and
Development Assignments,
Ministry of Foreign Affairs,
Colombo 1.

16. Hon. S. B. Dissanayake,
Minister of Social Empowerment,
Welfare, and Kandyan Heritage,
1st Floor, Sethsiripaya, Stage II
Battaramulla.

17. Hon. W. D. J. Seneviratne,
Minister of Labour, Trade Union
Relations and Sabaragamuwa
Development
2nd Floor, Labour Secretariat,
Colombo 5.

18. Hon. Kabir Hashim,
Minister of Higher Education and
Highways,
18, Ward Place, Colombo 7.

19. Hon. (Dr.) Sarath Amunugama,
6th Floor, Sethsiripaya,
Battaramulla.

20. Hon. Rauf Hakeem,

Minister of City Planning and
Water Supply,
35, Lakdiya Medura
New Parliament Rd., Battaramulla.

21. Hon. Anura Priyadharshana Yapa,
Minister of Disaster Management
Vidya Mawatha, Colombo 7.

22. Hon. Susil Premajayantha,
Minister of Science, Technology &
Research,
3rd Floor – Stage I
Sethsiripaya, Battaramula.

23. Hon. (Dr.) Rajitha Senaratne,
Minister of Health Nutrition and
Indigenous Medicine,
Baddegana Wimalwansa Thero
Mw., Colombo 10.

24. Hon. Mahinda Samarasinghe,
Minister of Ports and Shipping,
19, Chaitya Rd., Colombo 1.

25. Hon. Vajira Abeywardena,
Minister of Home Affairs,
Independence Square, Colombo 7.

26. Hon. Rishad Bathiudeen,
Minister of Industry and Commerce
73/1, Galle Rd., Colombo 3.

27. Hon. Patali Champika Ranawaka,
Minister of Megapolis and
Western Development,
17th & 18th Floors, Suhurupaya,
Subuthipura, Battaramulla.

28. Hon. Mahinda Amaraweera,
Minister of Fisheries and Aquatic Resources Development,
New Secretariat, Maligawatta,
Colombo 10.

29. Hon. Navin Dissanayake,
Minister of Plantation Industries
11th Floor, Sethsiripaya – Stage II
Battaramulla.

30. Hon. Ranjith Siyambalapitiya,
Minister of Power and Renewable Energy, 72Ananda Coomaraswamy m
Colombo 07.

31. Hon. Duminda Dissanayake,
Minister of Agriculture,
No.288, Sri Jayawardenapura Mawatha, Rajagiriya.

32. Hon. Vijith Vijayamuni Zoysa,
Minister of Irrigation and Water Resources Management,
No.11, Jawatte Road, Colombo 05.

33. Hon. P. Harison,
Minister of Rural Economy,
R.A.492, R.A.De Mel Mawatha
Colombo 3.

34. Hon. Lakshman Kiriella,
Minister of Public Enterprises and Kandy Development,
Level 36, East Tower, World Trade Center, Echelon Square,
Colombo 01.

35. Hon. Ranjith Maduma Bandara,
Minister of Public Administration
& Management and Minister of
Law & Order,
Independence Square, Colombo 07.

36. Hon. Gayantha Karunathilaka
Minister of Lands and
Parliamentary Reforms,
No.1200/6, Rajamalwatta AV.,
Battaramulla.

37. Hon. Sajith Premadasa
Minister of Housing and
Construction,
2nd Floor, "Sethsiripaya",
Battaramulla.

38. Hon. Mahinda Samarasinghe,
Minister of Ports and Shipping,
No.19, Chaithya Road, Colombo 01.

39. Hon. U. Palani Digambaram,
Minister of Hill Country New
Villages, Infrastructure and
Community Development,
N.45, St. Michaels Road, Colombo 03.

40. Hon. (Mrs.) Chandrani Bandara,
Minister of Women and Child
Affairs,
115/2, Kotte-Bope Rd., Battaramulla.

41. Hon. (Mrs.)Thalatha Atukorala,
Minister of Justice,
Ministry of Justice, Colombo 12.

42. Hon. Akila Viraj Kariyawasam,
Minister of Education,
"Isurupaya", Pelawatta, Battaramulla.

43. Hon. M. H. A. Haleem,
Minister of Posts, Postal Services and
Muslim religious Affairs,
6th & 7th Floors,
Posts Head Office Building,
D. R. Wijewardena MW., Colombo 1.

44. Hon. Faiszer Musthapha,
Minister of Provincial Councils and
Local Government,
No.330, Union Place, Colombo 02.

45. Hon. D. M. Swaminathan,
Minister of Prison Reforms,
Rehabilitation, Resettlement and
Hindu Religious Affairs,
No.356, Caralwill Place,
Galle Road, Colombo 03.

46. Hon. Chandima Weerakkody,
Minister of Skills Development and
Vocational Training,
"NipunathaPiyasa", Elvitigala
Mawatha, Narahenpita, Colombo 05.

47. Hon. Dayasiri Jayasekara,
Minister of Sports,
No.9, Philip Gunawardena Road,
Colombo – 07.

48. Hon. Sagala Ratnayake,

Minister of Youth Affairs and
Southern Development,
Floor – 14, "Suhurupaya",
Subuthipura Road, Battaramulla.

49. Hon. Mano Ganesan,
Minister of National Co-existence
Dialogue and Official Languages,
40, Buthgamuwa Road, Rajagiriya.

50. Hon. Daya Gamage,
Minister of Primary Industries,
6th Floor, Suhurupaya, Battaramulla.

51. Hon. Arjuna Ranatunge,
Minister of Petroleum Resources
Development,
No.80, Sir Earnest De Silva Mawatha,
Colombo 07.

52. Hon. Malik Samarawickrema
Minister of Development Strategies
and Internal Trade,
6th Floor, West Tower,
World Trade Centre, Colombo 01.

53. Field Marshal Hon. Sarath Fonseka,
Minister of Regional Development,
1090, Sri Jayawardenapura, Kotte.

Respondents, together with 1st and 3rd Respondents being members of the Cabinet of Ministers.

54. Mr. Sumith Abeysinghe
Secretary to the Cabinet of Ministers
Office of the Cabinet of Ministers

Republic Building, Sir Baron Jayatilaka Mawatha, Colombo 01.

55. Eng. B. N. F. I. A. Wickramasuriya
Chairman, National Procurement Commission

56. Prof. Mrs. Chitra Weddikkara
Member - National Procurement Commission

57. Christy Perera
Member - National Procurement Commission

58. M. Vamadevan
Member -National Procurement Commission

59. Dr. Palitha Ekayayake
Member -National Procurement Commission
All of at:
Block No.9, 2nd Floor, BMICH,
Bauddhaloka Mawatha, Colombo 7.

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

Respondents

BEFORE: Buwaneka.Aluwihare, PC, J
Nalin Perera, J
L.T.B.Dehideniya, J

COUNSEL: Harsha Fernando with Chamith Senanayake, Ruvendra Weerasinghe instructed by Jagath Thalgaswatte for the Petitioners.

Viraj Dayaratne, Addl. SG with Mahen Gopallawa, DSG for all the Respondents except the 6th Respondent.

Romesh de Silva, PC with Shanaka Amarasinghe and Niran Anketell instructed by Julius & Creasy for the 6th Respondent.

ARGUED ON: 31.05.2018

DECIDED ON: 26.06.2018

ALUWIHARE PC, J:

When this matter was taken up for support the learned President's Counsel for the 6th Respondent challenging the maintainability of this application, raised four preliminary objections which are as follows:

(1) The Petitioner has suppressed material, in that the Petitioner had not made full disclosure of the earlier case filed on the same matter, namely SC FR Application No.447/2017.
(2) The Petitioner's application is time barred.
(3) The same matter has been urged before this Court earlier.
(4) 2nd, 4th, 7th and 8th Respondents cited in this application are neither juristic nor natural persons and as such, this application is misconceived in law.

All parties were heard on the preliminary objections referred to above.

The learned Addl. Solicitor General representing the Respondents save for the 6th Respondent, submitted that he subscribes to the views expressed on behalf of the 6th Respondent as to the preliminary objections.

Of the objections raised, the 2nd objection raised on behalf of the 6th Respondent, was that this application was time barred.

It was the contention of the learned President's Counsel for the 6th Respondent that the Petitioner had invoked the jurisdiction of this court in terms of Article 126 of the Constitution and sought the same relief against the Respondents in a previous case; SC FR 447/17. It was pointed out that the subject matter and the reliefs claimed in the present application are identical to those in SC FR 447/17.When one peruses the petition filed in Application SC FR 447/17 and the petition of the instant Application, it is evident that save for paragraphs 11, 36 and 40, all other averments in the petition of SC FR 447/17 are reproduced verbatim in the petition of the present application. Even the relief prayed in both applications save for minor variations, is identical.

According to the Petition in the present application, the complaint in the main is that, the approval given by the Cabinet of Ministers in granting the e-MRP Project to the 6th Respondent as reflected in the Cabinet Memorandum dated 2nd November, 2017 (P9) and the Cabinet decision (P9A) "breaches and continues to breach" the Petitioners' fundamental rights guaranteed under Articles 12 (1) and 14 (1) (g) of the Constitution (Paragraph 35 of the Petition).

Paragraph 35 of the petition in the instant case corresponds to paragraph 34 of the petition in the case filed earlier, (SC FR 447/17) which are substantially the same. In the averment in paragraph 34, the Petitioner only alleges that the said action of the Cabinet of Ministers was in **"breach of the fundamental rights of the Petitioners"** and had not alleged a **"continuous breach"** as in the instant application. If the violation alleged by the Petitioners was a 'continuous breach' of their fundamental rights, I cannot see any valid reason for them not to have pleaded so in the SC FR Application 447/2017.

In paragraph 40 of the present petition, the Petitioners have admitted that they had invoked the jurisdiction of this court previously in respect of this matter in case No. SC FR 447/2017 which had been filed on the 4th December 2017. The Petitioners state (in paragraph 40) that when the matter was taken up for support on 8th March, 2018, the Hon. Attorney General challenged the maintainability of the said application and in the face of the objections so raised the Petitioners withdrew the said application reserving the right to file a fresh application.

As referred to earlier, the main complaint of the Petitioners is that the Cabinet of Ministers, without calling for open tenders, granted the e-MRP project to the 6th Respondent via direct contracting method by the Cabinet decision dated 7th November 2017 (P9A) pursuant to Cabinet Memorandum submitted by the Hon. Minister of Telecommunication and Digital Infrastructure the 3rd Respondent, dated 2nd November, 2017 (P9).

The Cabinet decision (P9A) without any ambiguity reflects that the Cabinet approval had been granted to engage the 6th Respondent to implement the

e-Passport project. The Petitioners have averred that they became aware of the Cabinet Memorandum dated 2nd November, 2017 (P9) on or about 23rd November, 2017.

It is on that premises aforesaid, that the Petitioners alleged, in SC FR application No.447/17, that the Cabinet Memorandum (P9) and the Cabinet decision (P9A) was in breach of the Petitioners' Fundamental Rights guaranteed under Articles 12 (1) and 14 (1) (g) of the Constitution. The SC FR 447/17 which was *pro forma* dismissed, had been filed on 5th December, 2017. The said application was well within the time stipulation of 30 days from the infringement alleged, prescribed under Article 126 of the Constitution to invoke the fundamental rights jurisdiction of this court.

The Petitioners by filing the present application had invoked the jurisdiction of this court on 12th March 2018 which is clearly outside the stipulation of time referred to above. They claim that the Petition is not time-barred as there is a continuous violation. However, in the same vein, the learned counsel for the petitioners contended that if open tenders are called for the e-MRP project even at this stage, the Petitioners are prepared to withdraw this application. Thus, what the Petitioners attempt to achieve is to re-open a process that reached its completion. This clearly demonstrates that the alleged violation, in contrast to what is claimed by the Petitioners, took place when the Cabinet of Ministers took the decision to engage the 6th Respondent for the project on 7th November 2017, roughly 4 months before filing the present application. As such I cannot agree with the argument of the learned counsel for the Petitioners, that the said Cabinet decision 'continues to breach' the Petitioners' fundamental rights.

As such I uphold the 2nd preliminary objection (time bar) raised on behalf of the 6th Respondent and hold further that this application cannot be maintained due to that reason.

In view of the finding above, I see no reason to consider other objections raised on behalf of the Respondents.

Accordingly, this application is dismissed and in the circumstance of this case I make no order as to costs.

JUDGE OF THE SUPREME COURT

Justice H.N.J Perera
I agree

JUDGE OF THE SUPREME COURT

Justice L.T.B. Dehideniya
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 made under and in terms of Article 17 and 126 of the constitution of the Democratic Socialist Republic of Sri Lanka

Fathima Hishana
43, Buthgamuwa Road
Welikada, Rajagiriya
Appearing by her Next Friend

SC (FR) Application 97/2014

Mohamed hirzi Shahul Hameed
43, Buthgamuwa Road
Welikada, Rajagiriya

Petitioner

-Vs-

1. **Nayana Thakshila Perera**
   Principal
   Janadhipathi Balika Vidyalaya,
   School Lane—Nawala, Rajagiriya

2. **Ms. Hemamali**
   The Vice Principal
   Janadhipathi Balika Vidyalaya,
   School Lane—Nawala, Rajagiriya

3. **Mrs. P. De. S. Naotunna**
   Class Teacher—Grade 7C
   Janadhipathi Balika Vidyalaya,
   School Lane—Nawala, Rajagiriya

4. **J.M.C Jayanthi Wijethunge**
   Provincial Secretary of Education
   Shrawasthi Mandiraya,
   32, Marcus Fernando Mawatha,
   Colombo 07.

4A. M.A.B. Daya Senerath
   Provincial Secretary of Education
   Shrawasthi Mandiraya,
   32, Marcus Fernando Mawatha,
   Colombo 07.

4B. S.G. Wijebandu
   Provincial Secretary of Education
   Shrawasthi Mandiraya,
   32, Marcus Fernando Mawatha,
   Colombo 07.

5. **Mr. P.N. Ilapperuma**
   The Provincial Director of Education,
   Provincial Department of Education
   76, Ananda Coomaraswamy Mawatha, Colombo 7.

5A. Mr. Wiman Gunaratne,

The Provincial Director of Education,
Provincial Department of Education
76, Ananda Coomaraswamy Mawatha, Colombo 7.

6. Anura Dissanayake

Secretary to the Ministry of Education, "Isurupaya"
Pelawatte- Battaramulla.

6A. Upali Marasinghe

Secretary to the Ministry of Education, "Isurupaya"
Pelawatte-Battaramulla.

6B. W.M Banduseana

Secretary to the Ministry of Education, "Isurupaya"
Pelawatte-Battaramulla.

7. Alavi Moulana

The Governor of the Western Province, 98/4 Havelock Road,
Colombo 5.

7A. K.C. Logeswaran

The Governor of the Western Province,

98/4 Havelock Road,
Colombo 5.

8. The Honourable Attorney General
The Attorney General's Department,
Colombo 12.

Respondents

BEFORE : BUWANEKA ALUWIHARE, P.C. J
K.T. CHITRASIRI J
PRASANNA JAYAWARDANE P.C.J

COUNSEL : Faiz Musthapha P.C with Hejaaz Hisbullah instructed by S.Weerasooriya for the Petitioner
Manohara De Silva P.C for the 1st – 3rd Respondents
Thishya Weragoda for the 4th and 5th Respondents
Sanjaya Rajarathnam P.C SASG for the 6th,7th and 8th Respondents

ARGUED ON: 15 -11-2016

DECIDED ON : 27-03-2018

ALUWIHARE PC J

When this matter was taken up for support, the learned President's Counsel appearing for the 1st to the 3rd Respondents raised two preliminary objections with regard to the maintainability of this application. The objections were that;

(a) The document marked P4 was not a genuine document and that in itself is a ground to dismiss the application of the petitioner;

And

(b) That the Petitioner's application is time barred

The contention in relation to the first objection was that the document "P4", which the Petitioner in paragraph 21 of the Petition refers to as a circular issued by the Ministry of Education in 1995, is not genuine. The learned President's Counsel for the said Respondents argued that although the Petitioner has pleaded that P4 is the circular No. 37 issued in 1995, the date on the face of the document was 12/12/1980. It was his contention therefore, that the Petitioner's application must be dismissed *in limine* as the averments in the Petition and affidavits are false in so far as "P4" is concerned. It was further pointed out that the adjudicative process in the present application would be greatly prejudiced on account of the said false averments.

The said reference to "P4" in paragraph 21 of the Petition is as follows:

"Furthermore, the then Secretary to the Ministry of Education by *circular bearing no: 37/95 dated December 12, 1980* has permitted female Muslim students to attend school in their cultural attire"

As correctly pointed out on behalf of the Respondents, there is a glaring discrepancy on the face of "P4". Mr. Hisbullah, the learned counsel who appeared for the petitioner at the hearing, submitted that the same document marked "P4", has on a previous occasion been produced and relied upon by this Court in S.C F.R Application No.688/12 (S.C.minutes19. 02.2013) which dealt with an identical matter. Furthermore, it was pointed out by the learned Counsel for the Petitioner that the order of the Supreme Court in the said case makes explicit reference to the present "P4" document (which in the previous case was also marked and produced as "P4"). The relevant portion of the order of the Supreme Court in the case referred to, is as follows; " She (the learned State Counsel) also gives an undertaking to the Court that within one week to send the *circular issued by the*

Department of Education (marked as P4) which is annexed to the Petition dated 12/12/1980 which permits students to attire themselves in the traditional Punjabi costume and wear the hijab" (emphasis added).

Thus, it was strenuously argued by the Counsel for the Petitioner that the Petitioner cannot be faulted for producing the same document in the present case as she has in good faith relied on the order in SC FR 688/2012.

I believe there is merit in the argument put forth by the learned Counsel for the Petitioner. The order in SC FR 688/2012 is before us and there has been no dispute about the genuineness and/or the authenticity of the document "P4" in that case. This Court and the parties to the said action have validly relied on it. Furthermore, the document marked "P4" in fact bears the date "1980-12-12". Thus, the Petitioner could not have had any other option but to rely on the said date as it appears on the face of it. I have perused the document marked and produced as P4 in these proceedings and the document marked and produced as P4 in SCFR application 688/2012 and I am satisfied that both are copies of one and the same document which is a letter purported to have been issued by the Secretary, Ministry of Education and Higher Education. Although, the said letter refers to the circular No. 37/95, for some inexplicable reason it is dated "1980.12.12". In those circumstances, I do not see a basis to hold that the Petitioner has acted in bad faith or that she has not come before this Court with clean hands.

In any event, pursuant to this Court's direction on 4th July 2016, the present Secretary to the Ministry of Education by affidavit dated 26th July 2016 has affirmed the existence and operational effect of the said Circular 37/95. He has also produced the correct Circular No. 37/95 and I observe that the content of the impugned "P4" and the document produced by the present Secretary to the Ministry of Education are identical. Therefore, the averment in Paragraph 21 of the Petition that "*the then Secretary to the Ministry of Education by circular bearing no: 37/95 dated December 12, 1980 has permitted female Muslim students to*

attend school in their cultural attire" cannot be deemed as misleading or false. As such no prejudice could be caused to the adjudicative process on account of the said averment.

The document marked "P4" has only a discrepancy with regards to the date of the issuance. If we uphold the objection of the Respondents and dismiss the Petitioner's application on this technical ground, we would be causing grave injustice to the Petitioner. As Abrahams CJ pointed out in ***Velupillai v The Chairman, Urban Council Jaffna 34 NLA 364,*** the Supreme Court "is a Court of law and not an academy of law" and it should not be trammeled by technical objections. In ***Elias Vs. Gajasinghe & another SC Appeal 50/ 2008 (S.C. Minutes of 28.6.2011)*** Justice Suresh Chandra, with whom their lordships, Justice Tilakawardane and Justice Amaratunga agreed, has also stated that: "*For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases.*" I am of the view that this Court should not be fettered by technical matters, particularly in relation to fundamental rights where it is vested with an equitable jurisdiction, unless it can be shown that the infirmity or the non-compliance complained of, is of such gravity that merits the dismissal of the application.

Accordingly, I overrule the first preliminary objection.

The second preliminary objection raised on behalf of the Respondents was that the Petitioner's application is time barred under Article 126 (2) of the Constitution.

According to paragraphs 33 to 46 of the Petition of the Petitioner, she came before this Court against an alleged infringement that is said to have taken place on the 3rd March 2014 where the Petitioner was deprived by the 1st and the 2nd Respondents from wearing the traditional school attire for Muslim girls in Sri Lanka. The Petition is dated 18. 03. 2014 and *prima facie* well within the one-month, the period stipulated in Article 126 of the Constitution to invoke the jurisdiction of this court against any infringement of fundamental rights. However, it was contended

by the learned President's Counsel on behalf of the 1st to 3rd Respondents that the Petitioner's alleged infringement did not take place on 03. 03. 2014 but at the point where she was admitted to the school. It was his submission that the parents of the Petitioner were informed of the school uniform at the point of admission and having slept on their rights for years, they are now barred from coming before this Court to canvass their grievances.

The learned Counsel for the Petitioner in turn pointed out that the Respondents' argument on time bar is based on certain facts which are disputed by the Petitioner. As such, the Court cannot make a determination in this regard without going into the merits and inquiring into the factual veracity of the two claims.

I am in agreement with the submission made by the learned Counsel for the Petitioner. Preliminary objections are taken at the beginning of the adjudicative process to assist in the management of cases by determining those matters which can be determined in isolation of other issues in the case. Thus, where the objection in law is contingent on a fact in dispute which cannot be determined in isolation at the beginning of the case, this Court necessarily will have to rely on presumed facts if it was to rule on it. In my opinion, such an action would result in stifling the legitimate adjudicative process of this Court.

In the present case, the alleged infringement which gave rise to the cause of action is a fact in dispute, without the determination of which no ruling can be made on the issue of the time bar. I am of the view that in the interest of justice this preliminary objection should be considered along with the merits of the case.

In conclusion, I wish to quote Justice Shiranee Tilakawardena's words in the case of ***Wijesekara v Gamini Lokuge [2011] 2 SLR 329*** where her Lordship observed that;

"*Indeed, in a matter where the violation is of a serious nature, affecting material rights which are pertinent and critical to the Petitioner, where mala fides, bias or caprice can be established and if it is a continuing violation, this Court will not*

dismiss the case in limine, without at least considering the grievance of the Petitioners especially in a matter that affects youth and young persons."

Therefore, I am not inclined to dismiss the present application *in limine* and overrule the second preliminary objection as well, raised on behalf of the Respondents.

Preliminary objections overruled

JUDGE OF THE SUPREME COURT

JUSTICE K.T. CHIITRASIRI

I agree

JUDGE OF THE SUPREME COURT

JUSTICE PRASSANA JAYAWARDANE 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 application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. **R.M. Premil Priyalath de. Silva,**
2. **P.W.Reka Samanthi,**
3. **R.M.D.S.R.de. Silva** (Minor)
   All at 20/1,
   R.E. de. Silva Mawatha,
   Ambalangoda.

Petitioners

SC /FR/ Application No 97/2015

Vs,

1. **Akila Viraj Kariyawasam** (M.P)
   Hon. Minister of Education,
   Ministry of Education,
   "Isurupaya" Battaramulla.

2. **Upali Marasinghe,**
   Secretary- Ministry of Education,
   "Isurupaya" Battaramulla.

3. **Sumith Parakramawansha,**
   Principal- Dharmashoka Vidyalaya,
   Galle Road, Ambalangoda.

4. **R.N. Mallawarachchi**
5. **Diyagubaduge Dayarathne**
6. **M. Shirley Chandrasiri**
7. **N.S.T. de, Silva**
   3rd to 07th above all
   Members of the Interview Board
   (Admissions to Year 01)
   C/o: Dharmashoka Vidyalaya,
   Galle Road, Ambalangoda

8. **W.T.B. Sarath**
9. **P.D.Pathirathne**
10. **K.P.Ranjith**
11. **Jagath Wellage**
    04th and 08th to 11th above all
    Members of the Appeal Board
    (Admissions to Year 01)
    C/o: Dharmashoka Vidyalaya,
    Galle Road, Ambalangoda

12. **Mr. 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**
Nalin Perera J
Vijith K. Malalgoda PC J

Counsel: **Chrishmal Warnasuriya** for the Petitioners

Rajitha Perera, SSC for the Hon. Attorney General

Argued on: 09.01.2018

Judgment on: 20.02.2018

Vijith K. Malalgoda PC J

The 1st and the 2nd Petitioners are the parents of the 3rd Petitioner minor who sought admission to Grade 1 at Dhamashoka Vidyalaya, Ambalangoda.

The 1st Petitioner as the father applied through his wife, for admission of the 3rd Petitioner to grade one of Dharmashoka Vidyalaya, Ambalangoda for the academic year 2015 under the category "Old Boys", to schools as laid down in clause 6.0 (a) (II) of the circular No 23/2013 dated 23.05.2013 which governed the school admission to the grade one for the year 2015, since the 1st Petitioner is a past student of the said school.

The 2nd Petitioner who is the wife of the 1st Petitioner and the mother of the 3rd Petitioner had submitted the said application to Dharmashoka Vidyalaya on behalf of her husband who was employed in the United Arab Emirates, as a Licensed Security Officer.

Clause 6 (a) of the said circular issued by the 2nd Respondent had identified six 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. It is not disputed that the application submitted to Dharmashoka Vidyalaya by the 2nd Petitioner on behalf of the 1st Petitioner was under the category of "Old Boys".

Under clause 6.2, 25% of the total number of vacancies were allocated to the children come under the said category and how such parents should establish the requirements and how the marks should be allocated based on the documents produced by the old boy is identified under the said clause.

As observed by this court, maximum of 26 marks were allocated to the period the old boy had studied at the school and another 25 marks were allocated for the educational achievements

during the said period. Another 25 marks were allocated to extracurricular activities during this period and the balance 24 marks had been allocated for the membership of the Old Boys Association, achievements after leaving the school and contribution for the school development.

Even though the learned counsel for the Petitioner made some remarks with regard to some of the documents produced under P-14, to the effect that the said circular had made provisions to allocate marks to financial contributions, the learned counsel did not challenge the marks allocated to the Petitioners under the said heading. it is observed by me that, by the said circular the maximum marks that could be awarded to an applicant was restricted to six marks and the Petitioner too had scored the maximum marks under the said heading and therefore see no merit in the Petitioners argument. As further observed by me, neither the circular nor the marking scheme adopted by Dharmashoka Vidyalaya had made provisions to give marks for financial contributions but made provision to allocate marks to the contributions made for the betterment of the school, and as evident from the documents submitted by the Petitioners, the contributions were not limited to financial contributions.

The fact that the Petitioners faced the interview, under the said category was not in dispute but, what was disputed before this court was the marks allocated to the Petitioners, by both the Interview Panel and the Appeal Board. With regard to the allocation of marks with regard to the II, III and IV categories identified under clause 6.2 of the circular, the Interview Panel was given discretion for the distribution of marks under each heading within the limits of the circular.

It is further observed that the Petitioner did not challenge the marking scheme adopted by the Interview Panel, but what was in dispute was the allocation of marks under the said scheme adopted by the Interview Panel.

The Petitioners alleged that the allocation of marks by the Interview Panel to some of the old boys were discriminatory and unfair and named 07 such old boys under paragraph 26 as follows;

> "The following are such applicants who the Petitioners reliably aware had benefited from such favoritism;
>
> OB- 57 R.M.K.Daminda
>
> OB-82 A.I.C. Anurapala
>
> OB-87 D.J.I. Assalarachchi
>
> OB-152 I. Upendra
>
> OB-160 M.G.I. Niranjala
>
> OB- 104 G.P.M. Mendis
>
> OB- 125 I.P. Apsara"

However the Petitioners have failed to submit any material before court to establish the allegation of favoritism against neither the Interview Panel nor the Appeal Board. In the said circumstances I have no doubt that the marking scheme adopted by the Interview Board was applied equally to all the applicants who faced the interview under the said category.

In this regard I am further mindful of clause 9.1 of the circular 23/2013 which provides for challenging any selection on the temporary list. The Petitioners have failed to make use of the said provisions in order to challenge any of the above selections.

Based on the marking scheme adopted by the Interview Board, the Petitioners have calculated their entitlement for marks under paragraph 15 of their petition as follows;

i.	For the classes the applicant had studied in the school up to "year 13"	26.0
ii.	For the academic achievements	7.5
iii.	Cadet provincial competition medals	6.0
iv.	Membership of the cadetting unit	1.5
v.	Scout membership	1.0
vi.	Swimming certificates	1.0
vii.	School house meet competition	2.0
viii.	Member of the Art Society	1.0
ix.	Life member Old Boys Association	2.00
x.	Member ship Old Boys Association [1 mark per year]	2.56
xi.	Academic achievements after leaving school	2.0
xii.	Assistance given to school development	6.00
		58.56

When considering the above entitlement identified by the Petitioners, I observed that the 3rd Respondent, Principal, Darmashoka Vidyalaya had admitted the entitlement of the above marks identified by the Petitioners except under (ii) Academic achievements, (vii) School House meet competition (viii) member of the Art Society and (xi) Academic achievement after leaving the school.

As further submitted by the 3rd Respondent the Petitioners entitlement for academic achievement is only 5.4 marks, since his G.C.E. O/L Examination results in his 1st attempt was only 1-S and 4-C. He was given additional 0.5 marks for the simple pass he obtained for maths on his second sitting but was not entitled to get more marks for the other subjects he got through on the 2nd sitting (3R6). Since there was an alteration visible in the certificate referred to under (vii) Petitioner was not given any marks under the said category and there is no entitlement of marks

for becoming a member of a society when the Petitioner was at school and therefore there is no entitlement for another one mark under category (viii).

The Petitioner claimed 2 marks for a Diploma Certificate he obtained after leaving the school but, his entitlement for a Diploma was only 1.5 marks.

According to the 3rd Respondent, at the interview the Petitioners were only allocated 49.07 marks and therefore not selected for the temporary list, since the cut off marks under the said category was 57.12. However at the appeal the marks given to the Petitioners were adjusted as admitted by the 3rd Respondent referred to by me above and the Petitioners were awarded 54.07 marks but the said mark was still below the cut off mark for the selection.

As observed by me, the Petitioners were struggling to obtain few marks to get through the cut off mark but as referred above, the marks allocated to the Petitioners were based on the marking scheme which was not challenged before this court. Even though the Petitioners could not challenge the reductions of marks under categories (ii), (viii) and (xi), Petitioners have produced marked P-15 an affidavit from one Aruna Prasad Weerasuriya challenging the decision to reject a certificate produced marked P-11 which was issued in the year 1983, when the 1st Petitioner said to have participated in an inter house meet for High Jump event under 12 category.

In the absence of any official document to establish that the said person namely Aruna Prasad Weerasuriya had become 2nd in the said event as claimed by him, I am not inclined to consider the said affidavit in favour of the Petitioners.

When considering the material already discussed, it appears that the 3rd Respondent as well as the other Respondents (Specially the 4th and 8th to the 11th Respondents, who are members of the Appeal Board) had strictly adhered to the provisions laid down in the circular pertaining to the admission of children to grade one for the year 2015 and the marking scheme adopted by the Interview Panel for giving marks under clause 6.2 of the said circular. The Petitioners never

challenged the said marking scheme. As further observed by me the Petitioners and the 3rd Respondent are in agreement of granting marks to the Petitioners under most of the headings as referred to above, but was in dispute under few areas. However the Petitioners were not successful in establishing, that the said discrepancies were due to the conduct of the said Respondents in violation of the said circular and/or the marking scheme adopted under clause 6.2 of the said circular.

In the said circumstances there is no doubt that the Respondents referred to above have allocated the marks in terms of the provisions laid down under the circular issued by the 2nd Respondent.

The Petitioners have alleged violation under Article 12 (1) of the Constitution by the above Respondents when the 3rd Petitioner was not admitted to Dharmashoka Vidyalaya, Ambalangoda.

In the case of ***Samadi Suharshana Ferdinandis and another Vs, S.S.K. Aviruppola, Principal, Visakha Vidyalaya and others SC/FR Application 117/2011*** SC minute dated 25.06.2012 Dr. Shirani Bandaranayake CJ discussed the concept of equality under Article 12 of our Constitution as follows;

> "Our Constitution has clearly spelt out the concept of equality before the law and there are numerous instances where that right had been accepted and upheld. In the process this court has also noted that 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. Accordingly, it is necessary for the Petitioners not only to establish that they had been treated differently from others, but also that such treatment was so different as the others were similarly circumstanced and there were no grounds to differentiate them from him."

As referred to above in this judgment, the Petitioners have failed to place before this court any material to establish that they were treated differently by any of the above Respondents when they decide not to admit the 3rd Petitioner to Dharmashoka Vidyalaya, Ambalangoda. In the said circumstances I hold that Petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12 (1) of the Constitution had been violated by the Respondents.

The Application is accordingly dismissed. I make no order for costs.

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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Tirathai Public Co. Ld,
   516/1, Moo 4 Bangpoo Industrial Estate,
   Praksa Muang,
   Samutprakan 10280,
   Thailand.

2. H.R. Holdings (Pvt) Ltd.
   476/10, Galle Road,
   Colombo 03.

Petitioners

SC/FR No. 108/2016

- Vs -

1. Ceylon Electricity Board,
   No. 50, Sir Chittampalam Gardiner Mawatha,
   Colombo 02.

2. Dr. B.M.S. Batagoda,
   Secretary,
   Ministry of Power & Renewable Energy,
   72, Ananda Coomarswamy Mawatha,

Colombo 07.

3. Mr. S.A.N. Saranatissa,
   Chairman,
   Ministry Procurement Committee
   (Ministry of Power & Renewable
   Energy)
   Additional Secretary,
   72, Ananda Coomarswamy
   Mawatha, Colombo 07.

4. Mr. M.C. Wickramasekera,
   Member,
   Ministry Procurement Committee
   (Ministry of Power & Renewable
   Energy)
   General Manager,
   50, Sir Chittampalam A. Gardiner
   Mawatha,
   Colombo 02.

5. Dr. A.M. Asanga Dayarathne,
   Member,
   Ministry Procurement Committee
   (Ministry of Power & Renewable
   Energy),
   Additional Secretary,
   Ministry of Policy Planning,
   Economic Affairs, Child, Youth and
   Cultural Affairs,
   72, Ananda Coomarswamy
   Mawatha,
   Colombo 07.

6. Mr. L.D.J. Fernando
   Chairman,
   Technical Evaluation Committee,
   DGM (P&D), DD4
   Ceylon Electricity Board,
   No. 1, Fairline Road, Dehiwala

7. Mr. R.S. Wimalendra,
   Member,
   Technical Evaluation Committee,
   DGM (P&D), DD4
   Ceylon Electricity Board,
   No. 1, Fairline Road, Dehiwala

8. Mr. S.R. Weerasinghe,
   Member,
   Evaluation Committee,
   DGM (P&D), DD4
   Ceylon Electricity Board,
   Sri Devananda Mawatha,
   Piliyandala.

9. Mr. J.A. Gnanasiri,
   Member,
   Evaluation Committee,
   DGM (P&D), DD4
   Ceylon Electricity Board,
   Sri Devananda Mawatha,
   Piliyandala.

10. Mr. R.P.D.A. Premalal,
    Member,

Technical Evaluation Committee,
Chief Finance Manager (Ministry of Power & Renewable Energy)
Additional Secretary,
72, Ananda Coomarswamy Mawatha, Colombo 07.

11. Mrs. Indrani Vithanage,
Senior Assistant Secretary (Tenders)
Ministry of Power & Renewable Energy,
72, Ananda Coomarswamy Mawatha, Colombo 07.

12. Mrs. Champa Satharasinghe,
Project Director
(LECO Supply Source Enhancement Project)
Deputy General Manager – (P&HM)
Ceylon Electricity Board,
Sri Devananda Mawatha,
Piliyandala.

13. General Manager,
Ceylon Electricity Board,
No. 50, Sir Chittampalam Gardiner Mawatha, Colombo 02.

14. Emco Limited,
N-104, MIDC Area, Mehrun,
Jalgaon – 425003,
Maharashtra, India

15. Queens Radio Marine Electronics
(Pte) Limited,
861, Aluthmawatha Road,
Colombo 01.

16. Sociate Elettromeccanica
Arzignanesespe SPA,
Visa L Da Vincl, 14 C.P. 50 36071
Tezze Di Arzignano (IV), Italy.

17. Crompton Greaves Ltd.,
CG House, 6th Floor,
Dr. Annie Besant Road,
Worli,
Mumbai – 400 030, India.

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

Respondents

Before : Priyasath Dep PC, CJ
Priyantha Jayawardena PC, J
Nalin Perera, J

Counsel : Romesh de Silva, PC with Palitha Kumarasinghe, PC and Ms. Pubudini Wickramaratne for the Petitioners

Viraj Dayaratne, SDSG with Surekha Ahamed, SC for the 1st – 13th and 18th Respondents.

Argued on : 16th of January, 2017

Decided on : 11th of October, 2018

Priyantha Jayawardena, PC, J

The 1st Petitioner is a company incorporated in Thailand and the 2nd Petitioner is its local agent appointed to act on the 1st Petitioner's behalf for the tender that is the subject matter of this Application. The Ceylon Electricity Board is the 1st Respondent.

The 1st Respondent called for tenders for the supply and delivery of four numbers of 10 MVA 33kV/11kV, 3 Phase Power Transformers with "On Load Tap Changer and Transformer Control Panel" for the Katubedda and Angulana Primary Substations by notice bearing No. DD4/LSSEP/ICB/2015/002/M (hereinafter referred to as the 'Tender').

The Petitioners submitted a bid for the Tender. Including the Petitioners' bid, only five bids had been received for the Tender.

The Tender was opened on the 23rd of September, 2015 and a representative of the opening committee read out the names of the Bidders, the details listed in the price schedule including the FOB price, the freight component, and the local clearing and delivery charges.

Thereafter, Tenders were assessed by the Technical Evaluation Committee (hereinafter referred to as the 'TEC') and the Ministerial Procurement Committee (hereinafter referred to as the 'MPC') who were appointed by the Secretary to the Line Ministry (hereinafter referred to as the 2nd Respondent). The MPC consisted of the 3rd to 5th Respondents while the TEC consisted of the 6th to 10th Respondents. The 2nd Respondent did not sit on either committee.

By a letter dated 16th November, 2015 the Project Director of the LECO Supply Source Enhancement Project (hereinafter referred to as the '12th Respondent') informed the 1st Petitioner that the MPC had endorsed the recommendation of the TEC to negotiate for a discount in light of the fall in steel and copper prices. At the meeting on 20th November 2015, the 1st Petitioner stated that although copper prices had fallen, silicon and steel prices had risen which prevented any reduction in price.

The Senior Assistant Secretary (Tenders) of the Ministry of Power and Renewable Energy (hereinafter referred to as the '11th Respondent') notified all unsuccessful bidders by a letter dated 5th January 2016, that the MPC had recommended the award of the Tender to the 1st Petitioner and that any representations against this recommendation must be made to the 2nd Respondent in his capacity as the Secretary to the Line Ministry within one week in terms of Clause 8.5 of the Procurement Guidelines 2006 (Goods and Works) (hereinafter referred to as the 'Procurement Guidelines').

By a letter dated 2nd February 2016, the 11th Respondent invited the Petitioners to a Joint Committee meeting on 11th February, 2016. The Joint Committee was composed of the members of the MPC, namely the 3rd to 5th Respondents, and members of the TEC, the 6th to 10th Respondents. The 2nd Respondent sat as the chairperson of the said Joint Committee.

Representatives of the unsuccessful bidders were present at the aforementioned Joint Committee meeting; namely Emco Limited of India, Queens Radio Marine Electronics (Pte) Limited of Sri Lanka, Sociate Elettromeccanica Arzignanesespe SPA of Italy (hereinafter the '14th Respondent', the '15th Respondent' and the '16th Respondent', respectively). Each of the said representatives held discussions separately with the members of the Joint Committee.

At the Joint Committee meeting, the 2nd Respondent had informed the 2nd Petitioner's Managing Director that although the 2nd Petitioner's bid was commercially and technically responsive, it was of a higher value in comparison to the other unsuccessful bidders.

The 2nd Petitioner's Managing Director had informed the Joint Committee, that the inability to reduce price was due to a rise in silicon steel prices which had been explained to and accepted by the TEC at the meeting held on 20th November, 2015.

The 2nd Respondent further informed that three rival bidders had appealed against the award of the Tender and although one company had a bid bond issue, the other two only had technical issues and further documentation would be requested from them.

By letters dated 11th February, 2016 and 1st March, 2016, the 1st Petitioner had objected to the request of further documents being called and/or clarifications from unsuccessful bidders, on the basis that it was contrary to the Procurement Guidelines.

The Petitioners, through their Attorney-at-Law, had sent a Letter of Demand dated 01st March, 2016 to the 2nd Respondent stating that failure to implement the decision of the MPC to award the Tender to the 1st Petitioner was illegal.

As the Petitioners did not receive a favourable response, the Petitioners filed the instant Fundamental Rights Petition on the 24th of March, 2016 and prayed for, *inter alia*, the following:

a) A declaration that the Petitioner's Fundamental Right guaranteed under Article 12(1) of the Constitution had been infringed by the 2nd Respondent and/or 2nd to 13th Respondents or in the alternative, for a declaration of imminent infringement of their Article 12(1) right;
b) A declaration that the purported decision of the 2nd Respondent to appoint a Joint Committee consisting of the 2nd Respondent and the members of the TEC and the MPC to consider the representations against the decision of the MPC to award the Tender to the 1st Petitioner is wrongful, unlawful and in violation of Procurement Guidelines 2006 and is void; and
c) An order directing the 1st and/or 2nd and/or 13th Respondents to implement the MPC's original recommendation to award the Tender to the 1st Petitioner.

Having heard the submissions of the Learned President's Counsel for the Petitioners and the Senior Deputy Solicitor General appearing for the 1st – 13th and 18th Respondents, the court had granted leave to proceed on the 09th of November, 2016, for the alleged violation of the Petitioners' Fundamental Rights, enshrined in Article 12(1) of the Constitution.

Submissions on behalf of the Petitioners

The learned President's Counsel for the Petitioners submitted, *inter alia*, that they had complied with the Tender conditions and provided a bid that was the sole commercially and technically responsive bid. Further, the TEC and the MPC had made recommendations that the Tender be awarded to the Petitioners.

It was further submitted that the 2nd Respondent chairing the Joint Committee violated Procurement Guidelines as the Procurement Guidelines do not empower the 2nd Respondent to sit as a member of the Joint Committee by virtue of his post as Secretary to the Line Ministry.

Moreover, the Procurement Guidelines state that the representations made against a notice of award must be considered at a joint meeting of the TEC and MPC and their recommendation must be implemented by the 2nd Respondent in his capacity as Secretary to the Line Ministry.

Additionally, the 3rd Respondent sat as the Chairman of the Joint Committee and was neither a member of the MPC nor the TEC. Therefore, he was not entitled in law to participate, or chair the Joint Committee meeting.

It was further submitted that the role of the Secretary who did not chair the MPC is limited to convening a Joint Committee.

Moreover, Section 8.5.1(b) of the Procurement Guidelines which states that findings/recommendations of the Joint Committee must be forwarded to the 2nd Respondent in his capacity as Secretary. The learned President's Counsel for the Petitioners submitted that Section 8.5.1(b) thus acted as a restriction against the Secretary sitting on or chairing the Joint Committee.

The learned President's Counsel for the Petitioners further relied on *Nobel Resources International Private Limited v Hon Ranjith Siyamabalapitiya and Others* SC FR No. 394/2015; wherein Chief Justice Sripavan held that if the Procurement Guidelines are departed from, the evaluation process is rendered void.

Submissions on behalf of the 1st to 13th and 18th Respondents

The learned Senior Deputy Solicitor General who appeared for the above Respondents submitted that, in terms of Section 2.7.4 of the Procurement Guidelines, the Chief Accounting Officer or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the Chairperson of the MPC. It was further submitted that since the Secretary to the Line Ministry is the Chief Accounting Officer (hereinafter referred to as the 'CAO'), he was lawfully entitled to act as a Chairperson to the MPC.

Moreover, it was submitted that at the Joint Committee of the MPC and TEC, the senior most official of the two committees should chair the meeting and thus, the 2nd Respondent chaired the Joint Committee meeting as he was the most senior officer present.

Learned Senior Deputy Solicitor General further submitted that the decision to obtain clarifications from unsuccessful bidders was taken by the Joint Committee and not solely by the 2nd Respondent.

He further contended that out of the five bids, the 1st Petitioner had submitted the highest bid and the price difference between the said bid and the lowest bid was Rs. 42,569,718.88/- and the purpose of the Joint Committee was to obtain the best option in terms of cost and quality.

Furthermore, a letter dated 08th June, 2016 was produced during the hearing which was issued by the Department of Public Finance, which stated that there was no reason to prevent the Secretary to the Line Ministry from acting as the Chairperson of the MPC. This position was confirmed in a second letter issued by the National Procurement Commission.

The Respondents further contended that in the absence of an express bar to the Secretary chairing the Joint Committee in the Procurement Guidelines, the Secretary can lawfully be the Chairperson; therefore, the actions of the 2nd Respondent were lawful.

Is a Secretary to the Line Ministry empowered to chair the Joint Committee meeting?

The Procedure for Government Procurement

Government procurement procedure is governed by the Procurement Guidelines and the Procurement Manual as amended. The procurement process is initiated by a Procurement Entity.

Page xi of the Procurement Guidelines states as follows;

> "*... a Government ministry, provincial council, Government Department, statutory authority, government corporation, government owned company, local authority or any subdivision thereof or any other body wholly or partly owned by the Government of Sri Lanka or where the Government of Sri Lanka has effective control of such body, that engages in Procurement."*

In the instant Application, the Procuring Entity is the Line Ministry, due to the value of the Procurements.

Section 2.2.1 of the Procurement Guidelines states:

> *"The responsibility of Procurement actions shall be vested with the Secretaries of the respective Line Ministries, who are deemed to be the Chief Accounting Officers of such Ministries."*

This is a blanket provision which vests the responsibility of the procurement process with the Secretary to the Line Ministry. Thus, it is necessary to consider the powers of the Secretary in the procurement process.

Section 2.7.4 of the Procurement Guidelines was amended by "Supplement 7" to the Procurement Manual dated 11th October, 2006 (hereinafter referred to as "Supplement 7") which provides:

> *"The CAO shall appoint the MPC to handle Procurement actions as indicated in Guideline 2.7.4 ..."*

The composition of the MPC for major contracts is set out in the said "Supplement 7" of the Procurement Manual:

> *"a) The number of members in a MPC shall be three;*
> *b) The CAO or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the chairperson.*
> *c) Where the Ministry is not the Procuring Entity, one member shall be the Head of Department or Project Director of the PE.*
> *d) The third member shall be from outside the ministry who is conversant in subject of procurement.*
> *The Chairperson of the TEC or his nominee – from amongst the members of the TEC, shall participate as a non member at all meetings of MPC to make clarifications.*
> *The Procurement Liaison Officer of the Procuring Entity shall be the non member Secretary for MPC. If Liaison Officer is unavailable, a senior officer from the Line Ministry, not below the rank of an Assistant Director (or equivalent) may serve as the non member Secretary for MPC."*[emphasis added]

The appeal procedure in the Procurement Guidelines depends on whether the Tender was awarded by the Standing Cabinet Appointed Procurement Committee ('SCAPC'), the Cabinet Appointed Procurement Committee ('CAPC') or the MPC.

In the instant Application, the Tender was awarded by the MPC and therefore, the applicable appeal procedure is found in Section 8.5 of the Government Procurement Guidelines which is set out below:

> *"8.5.1*
> *(a) The Secretary to the Line Ministry shall within one week of being informed of the determination of the MPC inform in writing simultaneously to all the bidders:*
> *(i) of the selection of the successful bidder and the intention to award the contract to such bidder.*
> *(ii) to make their representations, (if any) to him/her against the determination of the MPC within one week of being so notified. Such representations should be self-contained.*

(b) If any representations are received within the said one week period, the Secretary to the Line Ministry in consultation with the Chairperson of MPC and TEC shall organise a joint meeting of the MPC and TEC to consider such representations.

(c) The Joint Committee so appointed shall adopt its own procedure for expeditious inquiry and disposal.

(d) The findings/recommendations of the Joint Committee will be forwarded to the Secretary of the Line Ministry no later than fourteen (14) days of appointment of such committee and the Secretary shall act in accordance with such findings/recommendations.

8.5.2

If no such representations are received, the Secretary to the Line Ministry shall promptly award the contract to the successful bidder." [Emphasis added]

A careful consideration of the aforementioned sections show that in terms of the applicable Government Procurement Guidelines in respect of the instant application, the Secretary to the Line Ministry is the one who is empowered to award a tender.

Procedure for appeals by the unsuccessful bidders

If representations are made against a decision to award a tender by the MPC, the Secretary shall organise a joint meeting in consultation with the Chairperson of the MPC and TEC. The Joint Committee shall consider such representation and submit its findings/recommendations to the Secretary, and he shall act in accordance with such findings/recommendations.

In view of the above provisions the following steps should be taken in respect of an appeal;

(a) the Secretary in consultation with the Chairperson of the MPC and TEC shall organize a Joint meeting to consider the representations of the unsuccessful bidders,

(b) the Joint Committee shall forward its findings/recommendations to the Secretary of the Line Ministry, and

(c) the Secretary to the Line Ministry shall act in accordance with such findings/recommendations.

The issues that need to be considered in the instant application

Based on the responsibilities and duties stated above, the following questions will arise for consideration, in this application;

(a) The guidelines requires the Secretary to appoint a Joint Committee to consider the representation in consultation with the Chairperson of the MPC and TEC,

Thus, is it possible for the Secretary of the Line Ministry to appoint himself as the Chairperson of the Joint Committee?

(b) The Joint Committee shall submit its findings/recommendations to the Secretary.

If the Secretary is a member of the Joint Committee, can he submit the findings/recommendations to himself?

(c) Further, the Secretary is required to act in accordance with the findings/recommendations of the Joint Committee.

If the Secretary is a member of the Joint Committee, is it lawful to implement his own findings/recommendations?

(d) Moreover, it is necessary to consider whether the decision of the 2nd Respondent to sit as the Chairman of the Joint Committee is contrary to the principles of natural justice.

(e) Is "Supplement 7" of the Procurement Guidelines violating the principles of Natural Justice?

I shall now consider whether the aforementioned procedure is in accordance with the principles of natural justice when a Line Ministry is procuring goods/services.

"Supplement 7" of the Procurement Guidelines and the principles of Natural Justice

As discussed above, in terms of section 2.2.1 of the Procurement Guidelines the responsibility of the Procurement action is vested with the Secretaries of the respective Line Ministries, who are deemed to be the Chief Accounting Officers of such Ministries.

"Supplement 7" to Section 2.7.4 of the Procurement Guidelines state that the Chief Accounting Officer shall appoint the MPC to handle Procurement actions.

Further, the MPC for major contracts shall consist of three persons. The CAO or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the chairperson of the MPC, in terms of "Supplement 7" read with Section 2.7.4 of the Procurement Guidelines.

Therefore, in terms of the said Supplement, a Secretary to a Line Ministry is empowered to sit as a member of the MPC by virtue of him being the Chief Accounting Officer.

Moreover, in terms of Section 8.5.1 of the Government Procurement Guidelines, the Secretary to the Line Ministry shall within one week of being informed of the determination of the MPC inform all the bidders of the selection of the successful bidder and the intention to award the contract to such bidder.

Further, he should inform the unsuccessful bidders to make representations to him against the decision of the MPC within one week (if any).

If there are any representations against an award of a tender, the Secretary of a line Ministry shall take steps to appoint a Joint Committee in consultation with the Chairman of the MPC and the TEC in terms of 8.5.1(b) the Procurement Guide Lines.

In this context it is pertinent to note that if a Secretary to a line Ministry sits as the Chairman of an MPC he is not only required to notify the successful bidder of the tender but also is empowered to receive the representations of the aggrieved parties.

Therefore, it is necessary to consider whether the said procedure violates the principles of natural justice.

The decision of the 2nd Respondent to sit as the Chairman of the Joint Committee and the principles of natural justice.

In terms of Section 8.5.1, if any representations are received, the Secretary to the Line Ministry in consultation with the Chairperson of the MPC and TEC, shall organise a joint meeting of the MPC and TEC to consider such representations.

However, if the Secretary sits as the Chairman of the MPC in terms of Section 8.5.1(b) of the Government Procurement Guidelines, the Secretary of a Ministry cannot consult the Chairman of the MPC as envisaged by the said section.

Moreover, the findings/recommendations of the Joint Committee will have to be forwarded to the Secretary of the Line Ministry no later than fourteen (14) days of appointment of such committee and the Secretary shall act in accordance with such findings/recommendations.

If the Secretary of a Line Ministry sits as the Chair of the Joint Committee to consider the representations of the unsuccessful bidders, such a Joint Committee cannot forward its findings/recommendations to the Secretary. This will lead to a conflict of interest and violation of the principles of natural justice.

One of the principle rules of natural justice is *nemo judex in causa sua* i.e. no man may be a judge in his own cause, to ensure fairness in decision making and the rule against bias.

Accordingly, a judge is disqualified from determining any case in which he may actually be or fairly suspected to be biased. The rule also applies in scenarios where there is an intermingling of functions whereby an adjudicator had been involved in the case in a different capacity.

This rule is relevant in this scenario as the Secretary is bound to implement the recommendations of the Joint Committee in terms of the Procurement Guidelines.

If a Secretary to a Line Ministry is permitted to participate in the decision making process, he is disqualified from handling appeals against such a decision leading to awarding of a tender and later considering the appeals of the unsuccessful bidders.

In *The King v Salford Assessment Committee, Ex parte Ogden* 1937 KB 1, an officer of a rating authority who took minutes regarding transactions of the authority was appointed as an acting clerk to an assessment committee which reviewed objections by the rating authority to a proposal to amend the valuation list. Despite the fact that the said officer did not participate in decision making in either of his roles and merely advised the assessment committee with regard to procedure, the Court of Appeal held;

> *"It is the particular fact that Mr. Brown, who must be taken for all the reasons I have stated to have knowledge of all the transactions of the rating authority at*

> *which he takes the minutes, advises the assessment committee of the same area on procedure which makes it impossible for me to hold that this a case where justice appears manifestly and undoubtedly to be done."*

Similarly in *Cooper v Wilson* [1937] KB 309, the Court of Appeal held that where a police officer was purported to have been dismissed after an inquiry by the Chief Constable, the presence of the Chief Constable at the subsequent Tribunal, although he did not participate in the Tribunal's decision making, was in violation of the principles of rule against bias.

Further, in *Regina v Barnesley Council, Ex parte Hook* [1976] WLR 1052, the Court of Appeal held that, where a person had participated in a decision to revoke a market licence and subsequently participated in the appeals related to that decision violated the rule against bias.

Thus, in the above instances, the courts have held that there is a violation of the rule against bias even though the people in question were not directly involved in decision making.

When addressing such instances, H.W.R. Wade and C.F. Forsythe (Administrative Law, 10th Edition) cautioned as follows at page 396:

> "…[T]he court must try to avoid impeding the work of citizens who give their services in more than one capacity, while at the same time the principle of fair and unbiased decisions must at all costs be upheld."

Conclusion

In view of the above the following questions are answered as follows;

(i) The guidelines require the Secretary to appoint a Joint Committee to consider the representation in consultation of the Chairperson of the MPC and TEC,

Thus, it is not possible for the Secretary of the Line Ministry to appoint himself as the Chairperson of the Joint Committee.

(ii) The Joint Committee shall submit its findings/recommendations to the Secretary.

If the Secretary is a member of the Joint Committee, he cannot submit the findings/recommendations to himself, if he was the Chairman of the said committee.

(iii) Further, the Secretary is required to act in accordance with the findings/recommendations of the Joint Committee.

If the Secretary is a member of the Joint Committee, which heard the representations of the unsuccessful bidders, the Secretary cannot implement his own findings/recommendations.

The composition of the MPC for major contracts is set out in the said "Supplement 7" of the Procurement Manual:

"a) The number of members in a MPC shall be three;
b) The CAO or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the chairperson. …
c) ……
d) ……
……." [Emphasis added]

I am of the opinion that, if a Secretary of a Line Ministry sits as the Chairman of the MPC in terms of the above selection and later participates in the Joint Committee, he cannot perform the functions stated in Section 8.5.1 of the Government Procurement Guidelines.

Further, I am of the opinion that the current procedure set out in "Supplement 7" (b) creates a scenario that violates the principle of *nemo judex in causa sua* which leads to a conflict of interest.

Therefore, I am of the opinion that the word "CAO" in "Supplement 7" of the Procurement Manual and all relevant sections in the Procurement Manual empowering the Secretary to chair the MPC and a Joint Committee, violates the principles of natural justice when a Line Ministry is the Procuring Entity for purposes of a procurement action.

Thus, I hold that a Secretary to a Line Ministry is disqualified in sitting at the MPC as well as sitting as the Chairman / member of the Joint Committee. Further, a Secretary of a Line Ministry shall refrain from participating in the deliberations of MPC as well as a Joint Committee.

Accordingly, we direct the Joint Committee to consider the representations made by the unsuccessful bidders without the participation of the 2nd Respondent.

We further direct that the Joint Committee shall not consider additional documents and/or clarifications.

I declare the decision of the 2nd Respondent to appoint a Joint Committee consisting of himself and members of the MPC and TEC to consider representations of the unsuccessful bidders violates the principles of natural justice and is unlawful.

The Procurement Manual has been amended by the State. Hence, taking into consideration of the facts and circumstances of this case, I hold that the State has violated the Fundamental Rights of the Petitioners, enshrined in Article 12(1) of the Constitution.

This judgement is applicable only to the instant application and for future procurement actions by Line Ministries, and shall not apply to the procurement actions that have been already awarded.

No Costs.

Judge of the Supreme Court

Priyasath Dep, PC, CJ

I agree **Chief Justice**

Nalin Perera, J

I agree **Judge of the Supreme Court**

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

Dr. (Mrs.) Chandini Perera,
33/3, Jambugasmulla Road,
Nugegoda.

Petitioner

SC FR No. 120/2017

1. Dr. J.M.W. Jayasundara Bandara,
Director General of Health Services,
Ministry of Health, Nutrition and
Indigenous Medicine, 385,
'Suwasiripaya', Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

1A. Dr. Anil Jasinghe,
Director General of Health Services,
Ministry of Health, Nutrition and
Indigenous Medicine, 385,
'Suwasiripaya', Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

2. Dr. Anil Jasinghe,
Director General of Health Services,
Ministry of Health, Nutrition and
Indigenous Medicine, 385,
'Suwasiripaya', Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

2A. Dr. W.K. Wickremasinghe,
Acting Deputy Director General of
Health, The National Hospital of
Sri Lanka, Colombo 10.

3. Dr. (Mrs.) Samiddhi Samarakoon, Deputy Director, Neurotroma Accident and Orthopaidec Services, The National Hospital of Sri Lanka, Colombo 10.
4. Dr. Cyril de Silva, Deputy Director, The National Hospital of Sri Lanka, Colombo 10.
5. Hon. Dr. Rajitha Senaratne, MP, Minister of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.
6. Mr. Anura Jayawickrema, Secretary, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

6A. Mr. Janaka Sugathadasa, Secretary, Ministry of Health, Nutrition and Indigenous Medicine, 385, 'Suwasiripaya', Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

7. Dharmasena Dissanayaka, Chairman
8. Prof. Hussain Ismail, Member
9. Ms.ShiranthaWijayatilake,Member
10. Dr. Prathap Ramanujam, Member
11. Mrs. V. Jegarasasingam, Member
12. Santi Nihal Seneviratne, Member
13. S.Ranugge, Member
14. D.L.Mendis
15. Sarath Jayathilaka, Member

7^{th} to 15^{th} Respondents, All of the

Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 5.

16. Dr. Dulip Perera,
Consultant Plastic Surgeon,
The National Hospital of Sri Lanka,
Colombo 10.

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

Respondents

BEFORE : **PRIYASATH DEP PC CJ.,**
S. EVA WANASUNDERA PCJ., &
PRASANNA JAYAWARDENA PCJ.

COUNSEL : Senany Dayaratne with Ms. Eshanthi Mendis and Nisala Seniya Fernando, Ms. Indika Demuni de Silva PC , ASG for 1A to 15th and 17th Respondents
Romesh de Silva PC with Harith de Mel for the 16th Respondent.

ARGUED ON : 17.01.2018.

DECIDED ON : 26. 03.2018.

S. EVA WANASUNDERA PCJ

This Application was filed by the Petitioner on 23.03.2017. She is a Consultant Plastic Surgeon of the Burns Unit of the National Hospital of Sri Lanka who functioned as the Head of the Burns Unit thereof. She alleges that she was unlawfully wrongfully and illegally divested and deprived of her position as the

Head of the Burns Unit, in a manner which confronts the general rules of Natural Justice. Leave to proceed was granted by this Court on 12.05.2017 for the alleged violation of the fundamental rights of the Petitioner under Article 12(1) and 14(1) (g) of the Constitution.

The Petitioner who was the Head of the Burns Unit was removed from that post and was directed to hand over the management of the Burns Unit to Dr. Dulip Perera, the 16th Respondent by P 17 dated 21 .03.2017. This letter was addressed to the Petitioner by the Deputy Director General of the National Hospital of Sri Lanka, Dr. Anil Jasinghe, the 2nd Respondent consequent to a decision taken by the Director General of the National Hospital, Dr. J.M.W. Jayasundara Bandara, the 1st Respondent by letter dated 13.03.2017 marked as P16. The Petitioner has marked as P 23, the minutes of a meeting dated 20.03.2017 held by the 2nd Respondent with the participation of 11 other persons including the 12th Respondent, pertaining to the Burns Unit prior to the removal of the Petitioner as the Head of the Burns Unit. The attendees of the said meeting included officers of the Burns Unit who were subordinate to the Petitioner and consultant surgeons under whom burn patients are not admitted but did not include the Petitioner. The Petitioner alleges that the persons who gathered at that meeting do not have the capability and credibility to question the competency of the Petitioner and/or take decisions pertaining to the Burns Unit and as such the said meeting had been convened with ulterior motives.

The Petitioner alleges that before issuing P 23, the Respondents had failed to record or consider the version of events as contended by the Petitioner. By P15, a letter dated 10.03.2017, the Petitioner had requested the 2nd Respondent for a meeting to discuss the issues in the Burn Unit to reach a speedy resolution for the same. She has submitted that there was no response from the 2nd Respondent. According to the letter P16, one of the decisions reached by the Respondents against the Petitioner is that the Petitioner be directed to go before a Medical Board. The Petitioner contends that this is a decision which is so serious and permanently affecting against the Petitioner. However, this decision has now been withdrawn by letter P32 dated 15.06.2017 after leave to proceed was granted by this Court to the Petitioner.

The Petitioner complains that there was no preliminary inquiry held by the authorities against her prior to taking the decisions against her. However, by

letter dated 27.04.2017 marked as P21 she was directed to be present before a committee and give a statement. It was done after the present case was filed. The head of the committee is allegedly the spouse of the 4th Respondent, which the Petitioner states, is indicative of having no intention by the authorities of granting her a fair and impartial hearing to the Petitioner.

The 1st Respondent has filed objections by way of an Affidavit and answered the averments of the Petition. The position taken up by him is that the Application is time barred, misconceived in law and that the Petitioner has failed to make a full and fair disclosure of facts before this Court.

The facts revealed by the 1st Respondent are as follows. The Petitioner being the Head of the Burns Unit, had reduced the number of beds therein from 18 to 4 and had kept the ward empty for allegedly the reason of prevention of intra ward infection. As a result, a large number of patients had to be accommodated in other general wards and be given necessary treatment. This situation had been discussed from time to time from the year 2012 and in 2015, when there had been complaints by consultants regarding negligence with regard to burns patients in those wards. The Petitioner had been advised to restore the 18 beds. The Petitioner initially had complied with that advice but later on, she had once again reduced the number of beds to 4. The up-grading of the Unit had been done and the new building had all the facilities. The patients are required to be regularly seen and treated by the Burns Unit staff for better care towards the patients. Due to the fact that within the Unit there were only a maximum of 4 patients and that the other patients were in other wards, the Medical staff of the Unit were faced with difficulties in doing routine visits to the patients who needed care by the Burns Unit staff.

In addition to the difficulties faced by the staff regarding the burns patients being placed in different other wards , the Consultants, Medical Officers, Nursing staff and patients had complained against the Petitioner regarding aggressive behavior and harassment caused to the staff as well as patients, thus creating administrative problems in the Unit. The 2nd Respondent had summoned the Petitioner to his office and had informed her of the contents of the complaints but not handed over the petitions/ letters to her with a view to arriving at a settlement of the matters in a smooth way. The Nurses' Union, the Medical Officers and the staff had urged the 2nd Respondent to inquire and grant relief to

them. Two Medical Officers had requested for transfers out of the Unit. One Ms. Wedisinghe, the daughter of a patient had complained of mismanagement of the patient, her father who had died while he was getting treated at the Burns Unit. The Petitioner had directed that the medicine named be bought from outside when sufficient stocks were available in the Unit.

By January, 2017, due to the complaints from all sides against the Petitioner, the 2nd Respondent had appointed an ad hoc committee headed by the 4th Respondent to look into the ' adverse situation in the Burns Unit '. The recommendations of the report dated 26.01.2017 were to the effect that the number of beds should be restored to the earlier number of 18 and that acute burn cases should be managed by the Unit and that the administration should try to ensure smooth running of the Unit.

On 13.03.2017 , 3 out of 4 Medical Officers had refused to work in the Unit. The Petitioner had decided to manage the Unit with only one Medical Officer without any replacements or any approvals from the 2nd Respondent. One letter was marked and submitted under confidential cover to this Court marked as 1R1. The contents of that letter was read by the members of this Bench. It seems that the Petitioner had deviated from the standard procedure. The Medical Officers had urged the administration to take action to provide a solution to their issues or else had begged that they be given transfers to other medical units in the hospital.

By another letter marked 1R2, dated 20.12.2016 the other staff members of the Unit had addressed their problems arisen in the Unit. The Petitioner's work had commenced at 5.30 a.m. every day in the Unit thus causing problems to everybody including the security personnel in the Unit. The writers of 1R2 had begged the 2nd Respondent to grant redress to the writers. Then again, the Medical Officers, nurses and other staff members of the Unit had a further letter dated 17.01.2017 urging the 2nd Respondent to inquire into the matters complained of by them and to investigate without delay.

On 13.03.2017, the Medical Officers had again addressed a letter to the 1st Respondent setting out the situation in the Burns Unit and urging him to resolve the issues as soon as possible.

By 1R11 dated 16.03.2017 the 2nd Respondent had issued a letter stating that Dr. Dulip Perera should take the over-all acute burn care unit and that the Petitioner should handle the follow up care of the patients. The Petitioner had declined to abide by that direction and as such it had been very difficult to take over the unit immediately. Yet, it had been done by the 16th Respondent on 23.04.2017. Thereafter on 01.06.2017 a meeting had been formally held with all the members of the Unit being present and a progress report of the situation at that time had been submitted.

A preliminary investigation had commenced against the Petitioner, for the purpose of ascertaining the truth of the allegations made against her. The Petitioner had been afforded an opportunity to give a statement at the preliminary investigation but she has not done so. The Petitioner had been asked to be present to give a statement on 30.08.2017 and she had requested for time till 18.09.2017. After a brief statement she had moved for further time till 08.10.2017.

I observe that what is contained in P16 is a decision taken to ensure the smooth functioning of the Burns Unit. There are two preliminary investigations going on against the Petitioner. On 15.06.2017 , the said decision in P16 was rescinded since the investigations have not been concluded. I find that, it is due to the prevailing situation at the Burns Unit at that time, that the administration of the hospital had acted in a manner to save the Unit as a smoothly functioning Unit rather than just having it with all the problems getting aggravated by the day. The Petitioner had not compromised in any way her course of action which had prevailed during that time in the Burns Unit and she had neglected and failed to rectify any given situation despite the discussions the 2nd Respondent had with her and also despite the discussions the other Specialist Consultants had with her. As a result, it was inevitable that administrative measures had to be taken.

The matter is in the preliminary investigations stage and it is only when the said investigations are over and only if they would reveal whether there is prima facie sufficient material to prefer charges against the Petitioner, that the administration would decide to go ahead with a disciplinary inquiry. The documents filed before this Court by all the parties have revealed an over view of the total problematic situation within the Burns Unit of the National Hospital of Sri Lanka. When the whole hospital has to be administered by the administration,

no administrative authority can ignore a problematic situation in any unit. Prompt action has to be taken to control a crisis situation. I find that it is in that scenario that the Petitioner has been taken out of the post held by her as the Head of the Unit but she is still functioning as a consultant within the unit doing the follow up care. I am of the view that any worker in the public service cannot have a legitimate expectation to be the Head of a Unit right through out until retirement or for any length of time as expected.

It is evident that the Petitioner had been quite a good Consultant Plastic Surgeon in the former years of her service according to the certificates produced before us. Unfortunately, the period commencing from the latter part of 2016 and within the year of 2017 and from there onwards her attitude seems to have changed and it had created a problematic environment within the Burns Unit. The documents regarding the care of patients by the Petitioner having placed the patients under 'conservative management' at the sole discretion of the Petitioner seems to have given rise to a series of problems. The language used on the other medical officers and the staff and the unreasonable behavior of the Petitioner also has contributed to the issues within the Unit. Anyway a preliminary investigation has commenced. There is an assurance that proper procedure would be followed.

I conclude that the decision made by the authorities to remove the Petitioner from the post of the Head of the Burns Unit were not arbitrary, capricious or unreasonable because when I drew my attention to all the documents before court produced by all parties, it is obvious that , the said decision was very much called for by all the other members of the staff who had been suffering in one way or the other due to the actions of their boss. The Burns Unit could not have gone forward with the day to day work regarding the patients who got burnt due to accidents or who had mentally depressed feelings and therefore had set fire to themselves etc. when the team in the Unit could not work together with the Head of the Unit and with themselves to attend to the patients in a proper manner. The Hospital administration, it seems to me, were compelled to take action immediately to grant redress to the staff and the patients. It is due to that reason that the Petitioner had been taken out of the position she was holding as the Head of the Unit. I have carefully gone through all the documents submitted by the Petitioner and the other documents explaining the position of the other Respondents. The Petitioner has to face the preliminary investigation and co-operate with the investigation by the administration of the Hospital, if she wants

to pave way for her goals. The documents speak for themselves and the submissions made are helpful to assess the situation. The hospital administration had handled a crisis situation in the Burns Unit.

On the facts placed before this Court by all parties, I do not find that any fundamental rights of the Petitioner has been infringed. The Application is dismissed without costs.

Judge of the Supreme Court

Priyasath Dep PC, Chief Justice.
I agree.

Chief Justice of the Supreme Court of Sri Lanka

Prasanna Jayawardena PC
I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 12(1) and 12(2) read with Article 126 of the Constitution

1. **T.M.V.K. THENNAKOON**
   No. 98, Thennakoon Traders, Belummahara, Mudungoda.

2. **T.M.G. TENNAKOON**
   No.148/4, Belummahara, Mudungoda.

3. **H.G. LILINONA**
   No. 78/B, Belummahara, Mudungoda.

4. **N.W. UNDUGODA**
   No. 190/3A Mudungoda.

5. **W.A. SHAMINDAPRIYA PATHMAKUMARA**
   No. 75, Bogaha Road, Gothatuwa, Angoda.

6. **M.G. INOKA DILRUKSHI**
   No. 935/3, Bogaha Junction Road, Gothatuwa.

7. **P.S.U.K. PERERA**
   No. 110/2, Kandy Road, Belummahara, Mudungoda

PETITIONERS

SC (FR) Application 137/2016

VS.

1. **HON. ATTORNEY GENERAL**
   Attorney General's Department, Colombo 12.

2. RAVI KARUNANANYAKE
Minister of Finance,
Ministry of Finance,
The Secretariat, Colombo 01.

2A. MANGALA SAMARAWEERA
Minister of Finance,
Ministry of Finance, The
Secretariat, Colombo 01.

3. DIRECTOR GENERAL OF CUSTOMS
No. 40, Main Street,Colombo 11.

4. COMMISSIONER GENERAL OF MOTOR TRAFFIC
Department of Motor Traffic,
No. 341, Elvitigala Mawatha,
Narahenpita, Colombo 05.

5. A.K. SENEVIRATNE
Director General, Department of Fiscal Policy, Ministry of Finance, The Secretariat, Colombo 01.

5A. K.A. VIMALENTHIRAJAH
Director General, Department of Fiscal Policy, Ministry of Finance, The Secretariat, Colombo.

6. SRI LANKA PORTS AUTHORITY
No. 19, Chetiya Road,
Colombo 01.

RESPONDENTS

BEFORE: Buwaneka Aluwihare, PC, J.
Prasanna Jayawardena, PC, J.
Vijith K. Malalgoda, PC, J.

COUNSEL: J.C. Weliamuna PC with Senura Abeywardena for the Petitioners.
Ms. Shaheeda Mohamed Barrie SSC for the Hon. Attorney General.

WRITTEN SUBMISSIONS FILED: By the Petitioners on 15th May 2018.
By the Respondents on 24th May 2018.

ARGUED ON: 06th April 2018

DECIDED ON: 21st November 2018.

Prasanna Jayawardena, PC, J.

The 7th petitioner is a businessman who carries on business under the name, style and firm of M/S "Gampaha Enterprises". He imports used cars from Japan and sells them in Sri Lanka. The 2nd to 6th petitioners are persons who are said to have imported used Nissan "Leaf" electric cars through the 1st petitioner's business, in the year 2015.

The petitioners' case is that, in terms of the Orders made by the Minister of Finance under the Excise (Special Provisions) Act No. 13 of 1989, as amended, and related directives issued by the Ministry of Finance, the petitioners are liable to pay Excise Duty at a rate of only 5% of the value of these cars prior to clearing these cars through customs and having them released from the port in Hambantota. The petitioners complain that the respondents have arbitrarily and unlawfully required the petitioners to pay Excise Duty at the rate of 50% of the value of the cars. The petitioners state they have not paid Excise Duty at the rate of 50% because they are not liable to do so and that, as result of this stalemate, the cars are still at the port. The petitioners annexed the documents marked "P1" to "P10" with their petition.

This Court granted the petitioners leave to proceed under Article 12 (1) of the Constitution. The 5th respondent - who is the Director General of the Department of Fiscal Policy - filed his affidavit along with the documents marked "R1" to "R8". The 7th petitioner filed a counter affidavit with the documents marked "P11" to "P13".

It is common ground that, from 27th February 2015 onwards, used Nissan "Leaf" electric cars imported into Sri Lanka were regarded as motor vehicles falling with the description *"Other electric, not more than three years old"* bearing the classification H.S. Code 8703.90.30 [the Harmonized Commodity Description and Codification System which is internationally used for purposes of tariff nomenclature]. This and other classifications in the H.S. Code are used, *inter alia*, for the purposes of fixing the Excise Duty payable at the time articles are imported into Sri Lanka. It is also common ground that the Order dated 26th February 2015 marked "P1" made by the 2nd respondent [Minister of Finance] under the Excise (Special Provisions) Act, fixed at 5% the Excise Duty payable on cars falling within the classification bearing H.S. Code 8703.90.30. The petitioners state that this Excise Duty of only 5% was fixed to

encourage the use of energy efficient and environmentally friendly cars such as Nissan “Leaf” electric cars. They say that, therefore, the 1st to 6th petitioners decided to import Nissan “Leaf” electric cars for their *personal use*.

The petitioners go on to aver that the 1st to 6th petitioners obtained the services of the 7th petitioner and placed orders with him to import Nissan “Leaf” electric cars falling within the classification of H.S. Code 8703.90.30. The 1st to 6th petitioners say they made advance payments to the 7th petitioner for that purpose and authorized him to import these cars for and on their behalf. They say the 7th petitioner established letters of credit to import these cars for their personal use. These letters of credit were marked “P2A” to “P2F”. They have been established on 29th October 2015 or on 30th October 2015. A perusal of these documents show that the letter of credit marked “P2A” is for the import of one car. The letter of credit marked “P2B” is for the import of three cars and both “P2C” and “P2E” are copies of “P2B”. The letter of credit marked “P2D” is for the import of two cars and “P2F” is a copy of “P2D”. Thus, the documents marked “P2A to “P2F” show that the 7th petitioner established three letters of credit to import a total number of six cars. The petitioners say these six cars were imported *for the personal use* of the 1st to 6th petitioners.

The 2016 Budget of the Government presented by the 2nd respondent [Minister of Finance] proposed to increase the Excise Duty payable on Nissan “Leaf” electric cars imported into Sri Lanka to 50% of the value of the car. In terms of that proposal, the 2nd respondent made the Order dated 20th November 2015 marked “P3” under the Excise (Special Provisions) Act fixing such Excise Duty at 50% with effect from 21st November 2015. The 2016 Budget was passed by Parliament on 19th December 2015.

The petitioners say that they believed that the increased Excise Duty of 50% which came into effect from 21st November 2015 onwards would be not be applied to the electric cars imported for them since the aforesaid letters of credit had been established long prior to that date - *ie:* that they were liable to only pay Excise Duty at the earlier rate of 5% which prevailed prior to 20th November 2015. The ship carrying these six cars reached the port at Hambantota on or about 02nd December 2015 and the vehicles were unloaded. When the petitioners tried to clear the six cars on payment of 5% Excise Duty, they were not allowed to do so.

Thereafter, the 2nd respondent made the Order dated 11th January 2016 marked “P4” under the Excise (Special Provisions) Act amending the earlier Order marked “P3” and stating, *inter alia*, that Excise Duty will apply at the rate of 5% specified in “P1” in respect of *“A motor vehicle imported solely for private use in respect of which the Letter of Credit (LC) was opened on or before 20.11.2015 and registered the vehicle on or before 31.03.2016 in the name of the person who uses it for his/her private purposes and shall not be transferred for a period of five (05) years from the date of registration without prior approval from the General Treasury.”*. Thus,

notwithstanding the increased rate of Excise Duty of 50% specified in "P3", "P4" stated that Excise Duty was to be applied at the earlier rate of 5% for cars imported under letters of credit established prior to 20th November 2015 *provided* the car had been imported *"solely for private use"* and the car was registered *"in the name of person who uses it for his/her private purposes"* on or before 31st March 2016.

However, the respondents later realized that there was a business practice in the motor vehicle import trade, for vehicle importers to sometimes establish letters of credit in their own names when they were executing orders placed by customers to import vehicles for the customer's personal use. To meet this type of situation the Ministry of Finance issued a notification dated 13th January 2016 marked "P5" stating *"Further, vehicle importers who have imported motor vehicles for personal use on LCs opened before Budget 2016 are permitted to be cleared from the Customs by paying the Duties under the rate prevailed at 20.11.2015, without paying any demurrages."*. Thus, "P5" clarified that the scope of the Order marked "P4" extended to instances where a car had been imported for the *"personal use"* of a person under a letter of credit that had been established prior to 20th November 2015 in the name of a vehicle importer.

Thereafter, the Deputy Secretary to the Treasury wrote the letter dated 21st January 2016 marked "P6" to the 3rd respondent [Director General of Customs]. This letter sets out how a person who is claiming that he is liable to pay Excise Duty at the earlier rate of 5% should demonstrate that the car has, in fact, been imported for his *"personal use"* even though the letter of credit is established in the name of a vehicle importer. In this regard, "P6" explains that such a person will be entitled pay Excise Duty at only 5% *"….. if sufficient proof is furnished to the satisfaction of the Director General of Department of Fiscal Policy that the vehicle is imported for such individuals' personal use. For this purpose, documentary evidence obtained from a bank that he/she has paid full or partial payment to the importer should be submitted along with the other documents."*.

In March 2016, the 1st to 6th petitioners submitted applications to the 5th respondent [Director General of the Department of Fiscal Policy] in terms of "P6" seeking approval to pay Excise Duty at the earlier rate of 5%. The petitioners submitted the documents marked "P7(a)" to "P7(f)" seeking to establish that the cars had been imported for the "*personal use"* of the 1st to 6th petitioners and that the 1st to 6th petitioners had *"paid full or partial payment"* to the 7th petitioner [*ie:* to the vehicle importer]. However, by his letters dated 28th March 2016 marked "P9A" to "P9F", the 5th respondent advised the 1st to 6th petitioners that their applications had been refused since the evidence submitted did not substantiate the requirements of "P4".

The petitioners allege that the rejection of their applications was arbitrary, unlawful and contrary to the principles of natural justice, and also that they had a legitimate expectation to have their applications approved. Further, they say that they have

been subjected to unfair discrimination because other similarly circumstanced importers have been permitted to pay Excise Duty at the earlier rate of 5% and, in this connection, produce the letter marked “P10”. The petitioners state that, in these circumstances, their rights guaranteed by Article 12 (1) of the Constitution have been violated.

In his affidavit, the 5th respondent denied the allegations made in the petition. He states that the petitioners failed to furnish satisfactory evidence to establish the requirements specified in “P6”. He averred that the documents marked “P7(a)” to “P7(f)” only depict that the 1st to 6th petitioners withdrew various sums of money from their bank accounts and that the 7th petitioner deposited other sums of money to his bank account. The 5th respondent stated that the documents furnished by the petitioners do not establish that the 1st to 6th petitioners paid any monies to the 7th petitioner for the purpose of establishing letters of credit. The 5th respondent’s position was that, in these circumstances, the petitioners are required to pay Excise Duty at the rate of 50% as specified in the Order marked “P3” prior to clearing the cars from the port.

The 5th respondent denied the petitioners’ allegation that other similarly circumstanced importers have been permitted to pay Excise Duty at 5%. He said that the importer named in the letter marked “P10” - *ie:* Ms. Rathnayaka - had furnished satisfactory documentary evidence to establish that the car was imported for her personal use and to establish that her husband [acting on her behalf] had made a payment to the vehicle importer. The documents furnished by Ms. Rathnayaka to the 5th respondent were marked “R4” to “R8”.

In his counter affidavit, the 7th petitioner stated that the respondents have failed to disclose any criteria which were to be used when determining applications to clear cars on payment of Excise Duty at the earlier rate of 5%. He alleged that the failure to state such criteria led to arbitrary and capricious decisions by the 5th respondent when he evaluated applications. The 7th petitioner stated that the petitioners had submitted appeals to the 3rd respondent on 31st May 2015 and these appeals were marked “P11”. He averred that, at the time of importing the cars, the petitioners were unaware that they would be called upon to submit documents to satisfy the requirements of the respondents and that the petitioners have *“submitted all possible and available evidence to substantiate the claims of the 1st-6th Petitioners and mine.”*. The 7th petitioner produced a letter dated 17th October 2016 sent to the 7th petitioner by the Assistant Manager of the Gampaha Branch of Hatton National Bank PLC, which was marked “P12(a)”. This letter enclosed five copies of bank deposit vouchers which were marked “P12(b)” to “P12(f)”. The 7th petitioner also produced a specimen deposit voucher marked “P13”.

I will first examine the petitioners’ complaint that the 5th respondent’s decision to refuse the petitioners’ applications to pay Excise Duty at the earlier rate of 5% was arbitrary and unlawful.

It is self-evident that the Order marked "P3" dated 20th November 2015 making a ten-fold increase in the rate of Excise Duty payable on electric cars, would have imposed an unexpected and very substantial financial burden on persons who had *previously* opened letters of credit to import electric cars believing that Excise Duty was payable at only 5%. This burden was particularly difficult in the case of individuals who had imported electric cars for their *personal use*. In this background, the Cabinet of Ministers has taken the Cabinet Decision dated 06th January 2016 marked "R2" that taxes and levies on cars imported under letters of credit established prior to 20th November 2015 should be charged at the rates which prevailed prior to 20th November 2015, *provided* the car was imported for the official or personal use of the person for whom the car was imported and *not* for any commercial purpose. It is also evident that the Order dated 11th January 2016 marked "P4" was issued a few days later in pursuance of that decision taken by the Cabinet of Ministers. Thus, the Order marked "P4" stipulated, *inter alia*, that Excise Duty was to be applied at the earlier rates specified in "P1" if the car was "*imported solely for private use"*.

The Cabinet Decision marked "R2" goes on to state that the Cabinet of Ministers directed the Secretary to the Treasury *"to formulate a suitable methodology to implement the* [aforesaid] *decision…."* taken on 06th January 2016.

In pursuance of this direction, on the same day that the Order marked "P4" was made - *ie:* on 11th January 2016 - the Secretary to the Treasury wrote the letter marked "R3" instructing the 3rd respondent [Director General of Customs] to release motor vehicles which have been imported for the *"personal use"* of importers on payment of Excise Duty at the earlier rates specified in "P1" provided the motor vehicle has been imported in the name of the person who has established the related letter of credit. However, since as mentioned earlier, there were many cases where persons who had imported cars for their personal use through a vehicle importer who established a letter of credit in the name of that vehicle importer, the Deputy Secretary to the Treasury later wrote the letter marked "P6" to the 3rd respondent stating that the aforesaid concession should also be extended to cases where a person has imported a car for his or her *"personal use"* but has done so using a letter of credit established in the name of the vehicle importer.

"P6" goes on to state how, in such cases, a person who is claiming that he is liable to pay Excise Duty at the earlier rate of 5% should demonstrate that the car has, in fact, been imported for his *"personal use"*. In this regard, "P6" explains that such a person will be entitled pay Excise Duty at the earlier rate of 5% only *"if sufficient proof is furnished to the satisfaction of the Director General of Department of Fiscal Policy that the vehicle is imported for such individuals' personal use. For this purpose, documentary evidence obtained from a bank that he/she has paid full or partial payment to the importer should be submitted along with other documents."*.

As set out earlier, the 1st to 6th petitioners fall within the category of persons contemplated in "P6". Therefore, as specified in "P6", the petitioners had to first adduce sufficient proof to satisfy the 5th respondent that the cars were imported for the *"personal use"* of the 1st to 6th petitioners. Second, the petitioners had to adduce *"documentary evidence obtained from a bank"* that the 1st to 6th petitioners had *"paid full or partial payment to the vehicle importer….."* [*ie:* to the 7th petitioner] for the cars that were to be imported under the letters of credit.

With regard to the first requirement - *ie:* that the cars were imported for the *"personal use"* of the 1st to 6th petitioners - the documents marked "P7(a)" to "P7(f)" include signed declarations by the 1st to 6th petitioners that the Nissan "Leaf" cars were imported for their personal use [*"වාහනය ගෙන්වන ලද්දේ මාගේ පුද්ගලික පාවිච්චියට බවත් මේ සියලු කරුණු සත්‍ය හා නිවැරදි බවත් මෙයින් දිවිරා ප්‍රකාශ කරන අතර..."*]. The 1st to 6th petitioners have each signed a declaration before a Justice of the Peace, who has placed his official seal on each declaration and signed them. The truth of these declarations is supported by the fact that the 7th petitioner subsequently established the letters of credit marked "P2A" to "P2F" for the import of six Nissan "Leaf" electric cars.

When deciding whether these declarations were enough to establish that the cars were imported for the personal use of the 1st to 6th petitioners, one has to be alive to the fact that, until the 1st to 6th petitioners had the opportunity to clear the cars from the port, register and insure the cars in their own names and take the other steps which manifest use, possession and ownership of a car, the 1st to 6th petitioners could have had little or no documents which *ex facie* established that the cars were imported for their personal use. While large scale vehicle importers may have a practice of receiving written orders and entering into written contracts prior to executing orders to import vehicles for the personal use of their customers, small scale vehicle importers who operate more informally may not necessarily obtain such formal documentation. In these circumstances, insisting on the 1st to 6th petitioners submitting written orders and written contracts to pass the hurdle of proving that the cars were imported for their personal use, would amount to imposing an unrealistic and unfair standard of proof upon them. In my view, it is necessary to keep in mind the purpose for which "P4", "P5" and "P6" were issued and the fact that the petitioners were placed in the unexpected situation of being called upon to now produce documentation which they may not have seen any reason to insist on at the time the orders and advance payments were made. In this light, I consider it irrational and improper for the 5th respondent to impose an unrealistically or impractically high standard of proof when dealing with these applications. Doing so would run contrary to the purpose of "P4", "P5" and "P6".

In any event, a perusal of the documents marked "R4" to "R8" furnished to the 5th respondent by the importer named Ms. Rathnayaka shows that the 5th respondent did not require her to furnish a written order to the vehicle importer or a contract with the vehicle importer prior to determining that she had imported the vehicle for her

personal use. In fact, it appears that, unlike in the case of the 1st to 6th petitioners, Ms. Rathnayaka had not even furnished a signed declaration that the car was imported for her personal use. However, the 5th respondent has taken the view that the documents marked "R4" and "R5" which only proved that Ms. Rathnayaka's husband had paid Rs. 2,953,500/- to the vehicle importer's bank account, were sufficient to establish that the car had been imported for her personal use. This is seen from the letter marked "P10" written by the 5th respondent to the 3rd respondent which states *"Mrs. Rathnayaka has submitted documentary evidence that an advance payment for importing of this vehicle is paid by his personal bank account to the importer (Copies of those letters of evidence are herewith attached). As such, it fulfills the requirement that the vehicle is imported for the individual's personal use and satisfies that the vehicle is imported solely for the private use ….."*. It should be mentioned here that the letter of credit and commercial invoice marked "R6" and "R7" do not given any indication that the car mentioned in those documents was imported for or on behalf of Ms. Rathnayaka or that she had made full or partial payment to the vehicle importer. The document marked "R8" is another copy of the letter marked "P10".

It has to be also kept in mind that the concessions referred to in "P4", "P5" and "P6" are all subject to the condition that electric cars cleared upon payment of Excise Duty at the earlier rate of 5% can be registered only in the name of the person who states it was imported for his or her personal use. A further restriction is placed by prohibiting that person from transferring the car to someone else for a period of five years without prior approval from the General Treasury. This makes it more likely that a person who submits to these restrictions does, in fact, intend to use the car for his or her personal use.

Taking into account the factors set out above and the observations made earlier with regard to the appropriate standard of proof which the 5th respondent should use in this type of application made to him, I am of the view that, in the circumstances of this particular case, the 5th respondent should have regarded the signed declarations by the 1st to 6th petitioners as sufficient to meet the first requirement specified in "P6" - *ie*: that the cars were imported for the personal use of the 1st to 6th petitioners.

With regard to the second requirement - *ie: "documentary evidence obtained from a bank"* which demonstrated that the 1st to 6th petitioners had *"paid full or partial payment"* to the 7th petitioner - the documents filed with the petition marked "P7(a)" to "P7(f)" include: (i) the aforesaid signed declarations by the 1st to 6th petitioners which also state that they withdrew specified sums of money from their bank accounts to make advance payments to the 7th petitioner for him to import electric cars for their use; (ii) letters issued by the banks at which the 1st to 6th petitioners maintain their bank accounts confirming that the 1st to 6th petitioners withdrew those specified sums of money from their bank accounts; (iii) receipts issued by the 7th petitioner to the 1st to 6th petitioners when he received those advance payments.

These receipts record that advance payment was made [by the petitioner who paid the money] for the purpose of importing a Nissan "Leaf" electric car and bear dates ranging from 08th September 2015 to 29th October 2015; (iv) letters issued by the 7th petitioner stating that the advance payments made by the 1st to 6th petitioners were later deposited in his bank account; (v) letters issued by the 7th petitioner's bank - the Gampaha Branch of the Hatton National Bank PLC - confirming that the sums specified in the letters were deposited to the credit of the 7th petitioner's bank account; and (vi) copies of the *face* of five deposit vouchers issued by the Gampaha Branch of the Hatton National Bank PLC which record the deposit to the 7th petitioner's bank account No. 051020142155 on the dates specified thereon, of the sums stated in these letters. It should be mentioned here that one letter issued by the bank confirming the deposit of Rs. 2,200,000/- to the 7th petitioner's bank account on 26th October 2015 and one deposit voucher recording a deposit of Rs.2,200,000/- on 26th October 2015 have been produced in respect of both the 5th and 6th petitioners.

The following instruction is stated on the *face* of these deposit vouchers: *"Please complete the 'Additional Details' required overleaf for deposits in excess of Rs. 200,000/- made by a person other than the Account Holder"*. Each of these deposit vouchers record a payment of much more than Rs.200,000/- and, therefore, one would expect that the `Additional Details" required by the aforesaid instruction were written down on the reverse of each voucher. However, copies of the *reverse* of the vouchers were not included among the documents marked "P7(a)" to "P7(f)".

As learned Senior State Counsel has pointed out, the letters issued by the 1st to 6th petitioners' banks described in (ii) above only establish that the 1st to 6th petitioners withdrew specified sums of money from their bank accounts. The documents which indicate that these sums of money were then paid by the 1st to 6th petitioners to the 7th petitioner are the receipts described in (iii) above. The respondents have sought to cast doubt on these receipts because they do not bear a printed serial number.

In this regard, it is seen that, in every case, the amounts which have been withdrawn by the 1st to 6th petitioners from their bank accounts [as confirmed in the letters issued by the 1st to 6th petitioners' banks] are substantial. These amounts range from Rs. 500,000/- to Rs.1,600,000/-. The 1st to 6th petitioners are unlikely to have withdrawn such large sums of money from their bank accounts unless the withdrawal was for the specific purpose of making a significant purchase or meeting a financial commitment. These are certainly not amounts which would have been withdrawn for ordinary day-to-day expenses. It has to be also kept in mind that the sums were withdrawn from their bank accounts long prior to any hint of the increase in Excise Duty on 20th November 2015. This lends credence to the 1st to 6th petitioners' statements that they withdrew these large sums for the specific purpose of making advance payments to the 7th petitioner.

Thereafter, the receipts issued by the 7th petitioner are in exactly the same amounts that were withdrawn from the 1st to 6th petitioners' bank accounts and the 7th petitioner has issued these receipts on the same day on which each of the petitioners withdrew the money from their banks. With regard to the respondents' submission that the receipts should be rejected because they do not bear a printed serial number, I do not think that the absence of a serial number necessarily negates the authenticity of the receipts. It could well be that the 7th petitioner saw no need to print serial numbers on receipts he used. It could also be said that, if the 7th petitioner had intended to fabricate false receipts, he could have easily inserted appropriate serial numbers, and perhaps the fact that this was not done suggests that the receipts are *bona fide*.

Here too, it is necessary to keep in mind that the imposition of substantially increased Excise Duty on 20th November 2015 was unexpected and, therefore, the 1st to 6th petitioners, who say they simply wished to import electric cars for their personal use using the services of the 7th petitioner, would have seen no reason to ensure that they hold a picture perfect documentary trail so long as they trusted the 7th petitioner. We have no reason to think they did not trust the 7th petitioner.

Taking into account the several factors set out above including the observation made earlier with regard to the appropriate standard of proof, I am of the view that, in the circumstances of this particular case, the letters issued by the 1st to 6th petitioners' banks taken together with receipts issued by the 7th petitioner, are sufficient to establish that the 1st to 6th petitioners paid the amounts specified in these documents to the 7th petitioner.

However, as mentioned earlier, the second requirement specified in "P6" is documentary evidence obtained *from a bank* that the 1st to 6th petitioners had made full or partial payment to the 7th petitioner. Clearly, the letters issued by the bank confirming that the 1st to 6th petitioners withdrew sums of money from their bank account and the receipts issued by the 7th petitioner when these monies were paid to him by the 1st to 6th petitioners [described in (ii) and (iii) above] do not, in themselves, satisfy this requirement - *ie:* because these receipts have not been issued *by a bank.*

In this regard, in their petition, the petitioners relied on the letters issued by the 7th petitioner's bank described in (v) above which confirm that the sums specified in the letters were deposited to the credit of the 7th petitioner's bank account and the copies of the *face* of the deposit vouchers described in (vi) above which record the deposit of these amounts to the 7th petitioner's bank account on the dates specified thereon. All these dates are after the aforesaid advance payments were made by the 1st to 6th petitioner. That accords with the petitioners' position that their advance payments were deposited by the 7th petitioner in his bank account. However, it is seen that the amounts deposited in the 7th petitioner's bank account are all considerably more than the amounts of the advance payments. The advance payments made by the 1st to

6th petitioners and the amounts deposited by the 7th petitioner in his bank account are set out below:

Petitioner	Amount and Date of Advance Payment to the 7th Petitioner	Amount and Date of Deposit to the 7th Petitioner's Bank Account
1st petitioner	Rs.500,000/- on 01/10/2015	Rs.1,750,000/- on 05/10/2015
2nd petitioner	Rs.1,600,000/- on 12/10/2015	Rs.2,300,000/- on 28/10/2015
3rd petitioner	Rs.1,400,000/- on 08/09/2015	Rs.3,190,000/- on 11/09/2015
4th petitioner	Rs.1,050,000/- on 29/10/2015	Rs.1,300,000/- on 30/10/2015
5th petitioner	Rs. 800,000/- on 19/10/2015	Rs.2,200,000/- on 26/10/2015
6th petitioner	Rs.1,000,000/- on 19/10/2015	-*do*-

To sum up, the petitioners' position is that: (i) the advance payments made by the 1st to 6th petitioners and recorded in the letters and receipts described in (ii) and (iii) above were held by the 7th petitioner and were later deposited to his bank account along with other sums of money; (ii) the full amounts deposited by the 7th petitioner to his bank account [which *include* the advance payments made by the 1st to 6th petitioners] are recorded in the letters and deposit vouchers described in (v) and (vi) above.

In this regard, learned Senior State Counsel submits that there is *"no independently verifiable evidence"* that the sums of money deposited to the 7th petitioner's bank account [which are set out in the third column of the above table] do, in fact, include advance payments made by the 1st to 6th petitioners to the 7th petitioner [which are set out in the second column of the above table]. Learned Senior State Counsel submits that the petitioners have only shown that 1st to 6th petitioners withdrew various sums from their bank accounts and, thereafter, the 7th petitioner deposited different amounts to his bank account. She submits that the petitioners have failed to demonstrate *"….. a credible nexus between the two,….."*. Learned Senior State Counsel contends that, therefore, the petitioners have failed to meet the requirement specified in "P6" of proof by means of *"documentary evidence obtained from a bank"* that the 1st to 6th petitioners had *"made full or partial payment to the importer"*.

If the documents submitted by the petitioners had remained at only the documents marked "P7(a)" to "P7(f)", I would have agreed with learned Senior State Counsel. However, the petitioners have, with their counter affidavit, submitted the documents marked "P12(a)" to "P12(f)" which establish their position that the advance payments made by the 1st to 6th petitioners were deposited to the 7th petitioner's bank account.

In this regard, “P12(a)” is a letter dated 17th October 2016 written to the 7th petitioner by the Assistant Manager of the Gampaha Branch of Hatton National Bank PLC. The letter states:

“Confirmation of the deposits made to Savings Account No. 051020142155

With reference to the above, we forward herewith certified copies of the deposit slips (both sides) made to the above Account on the following dates to purchase Vehicles as detailed in the respective deposit slips.

11.09.2015	*-*	*Rs. 3,190,000/-*
05.10.2015	*-*	*Rs. 1,750,000/-*
26.10.2015	*-*	*Rs. 2,200,000/-*
28.10.2015	*-*	*Rs. 2,300,000/-*
30.10.2015	*-*	*Rs. 1,300,000/-*

This letter is issued at your request.”.

Thus, although the petitioners had only filed with their petition marked “P7(a)” to “P7(f)” copies of the *face* of the five deposit vouchers by which the 7th petitioner deposited sums of money to his bank account, the bank has later provided copies of *both* the face *and* the r*everse* of each of these five deposit vouchers. These copies are marked “P12(b)” to “P12(f)” and are listed in the letter marked “P12(a)”.

The *face* of each of these deposit vouchers is the same as the deposit vouchers described in (vi) above and included in the documents filed with the petition marked “P7(a)” to “P7(f)”. However, the documents marked “P12(b)” to “P12(f)” show that the *reverse* of each of these deposit vouchers state the personal details of the 1st to 6th petitioners.

Thus, the reverse of the deposit voucher marked “P12(c)” states the name, address, identity card number and mobile telephone number of the 1st petitioner with the notation *“buy a car”*. The reverse of the deposit voucher marked “P12(e)” states the name, address and identity card number of the 2nd petitioner with the notation *“Leaf එකක් ගැනීම”*. The reverse of the deposit voucher marked “P12(b)” states the name, address, identity card number and mobile telephone number of the 3rd petitioner with the notation *“වාහනයක් මිලදී ගැනීම”*. The reverse of the deposit voucher marked “P12(f)” states the name, address and identity card number of the 4th petitioner with the notation *“විදුලි කාරයක් මිලදී ගැනීම”*. The reverse of the deposit voucher marked “P12(d)” states the names, address and identity card numbers of both the 5th and 6th petitioners with the notation *“buy two cars”*.

The same officer of the Gampaha Branch of the Hatton National Bank PLC who has signed the letter marked “P12(a)” has signed each of the documents marked “P12(b)” to “P12(f)” upon the seal of the Gampaha Branch of Hatton National Bank PLC.

The document marked "P13" is a specimen deposit slip used by Hatton National Bank. As in the case of the *face* of the deposit vouchers described in (vi) above and included in the documents filed with the petition marked "P7(a)" to "P7(f)", the specimen marked "P13" also bears the instruction requiring *"Additional Details"* in case of deposits on excess of Rs. 200,000/-. These *'Additional Details'* have to be stated on the reverse of each deposit voucher and are the *"Name/Address of Depositor"*, *"Depositor's N.I.C. No."*, *"Purpose"* and *"Telephone No."* It is well known that banks insist on obtaining these details when accepting deposits of large sums of money - especially cash deposits, as in this case - since banks have to comply with "Know Your Customer" requirements and similar duties placed upon banks by modern day compliance and regulatory standards, anti-money laundering rules and so on.

In view of these duties and regulations, it is reasonable to conclude that the Gampaha Branch of Hatton National Bank PLC would have insisted on these *"Additional Details"* being filled in *at the time* the deposits were made and the deposit vouchers were issued.

The documents marked "P12(b)" to "P12(f)" are copies of the original deposit vouchers which are in the custody of the bank. We have no reason to doubt the authenticity of "P12(b)" to "P12(f)" or to doubt that they show what was written on the deposit vouchers *at the time* the monies were deposited to the credit of the 7th petitioner's bank account.

Accordingly, the conclusion must be that the *"Additional Details"* stating the names, addresses, identity card numbers and telephone numbers of the 1st to 6th petitioners and the stated purpose of the deposit - *ie:* to buy cars - were written on the deposit vouchers *at the time* the deposits were made to the 7th petitioner's bank account.

Next, as stated above, these deposits were made during the period from 11th September 2015 to 30th October 2015. That is long before the Order marked "P3" was made on 20th November 2015 increasing the Excise Duties with effect from the next day.

In these circumstances, there was no reason for the 7th petitioner or his employee who filled in the deposit vouchers during the period from 11th September 2015 to 30th October 2015 to have written the names, addresses, identity card numbers, and telephone numbers of the 1st to 6th petitioners and stated that the purpose of the deposits was to buy cars, *unless* those details were, in fact, *true.*

Further, there is no reason to suspect that that the 7th petitioner knew that the Order marked "P3" will be made on 20th November 2015 and, therefore, fraudulently inserted these personal details on the deposit vouchers in September and October 2015 as part of an elaborate deception to gain a concessionary rate of Excise Duty. In any event, the 7th petitioner would not have had the 1st to 6th petitioners' names, addresses, identity card numbers and telephone numbers unless the 1st to 6th

petitioners had, in fact, furnished these details to the 7th petitioner when they placed orders for the import of the electric cars and made the advance payments to him.

As for the difference in the advance payments made by the 1st to 6th petitioners and the amounts deposited in the 7th petitioner's bank account, it appears that other monies received by the 7th petitioner in the course of his business and other activities were deposited along with the advances paid by the 1st to 6th petitioners. That would not be unusual for a business such as the 7th petitioner's venture. While the *'Additional Details'* furnished by the 7th petitioner to his bank would then be only partly correct and, therefore, in breach of the 7th petitioners' duty to the bank as a customer, that misconduct will not negate the fact that the *'Additional Details'* written on the vouchers in September and October 2015 establish that the advance payments made by the 1st to 6th petitioners to the 7th petitioner were deposited in the 7th petitioner's bank.

In my view, the documents marked "P12(b)" to "P12(f) taken together with the documents marked "P7(a)" to "P7(f) constitute sufficient material to satisfy the requirement specified in "P6" that there must be "*documentary evidence obtained from a bank that he/she has paid full or partial payment to the importer."*.

Next, it is common ground that the documents marked "P12(b)" to "P12(f)" have been considered by the 5th respondent. In paragraph [41] of the respondents' written submissions, learned Senior State Counsel has, very correctly, acknowledged the fact that the 5th respondent considered these documents. Learned Senior State Counsel has gone on to submit that *"….. the uniform criteria applied in respect of assessing documents was whether bank slips, along with a confirmation from a bank or a confirmation of a payment by cheque was furnished by the applicant. In the instant case the Petitioners had failed to provide a confirmation of payment by them from a bank. As such, whilst the Respondent did consider the new documents tendered the said documents could not be considered as meeting the requirement of 'documentary* ***evidence obtained from a bank*** *that he/she has paid full or partial* ***payment to the importers'****."*

Although the respondents claim that they applied *"uniform criteria"* when they considered applications made under "P4", "P5" and "P6", they have not furnished any document which sets out these *"uniform criteria"*. In any event, if the 5th respondent had formulated a set of *"uniform criteria"* or standards which were to be applied when determining applications made under "P4", "P5" and "P6", such criteria and standards should have been made known to applicants. There is nothing to suggest that this was done.

A proper examination and understanding of the composite effect of the documents marked "P12(b)" to "P12(f)" together with "P7(a)" to "P12(f)" would have shown that these documents demonstrated, on a balance of probability at the least, that advance payments made by the 1st to 6th petitioners were included in the amounts

deposited by the 7th petitioner to his bank account. Thus, it appears that the 5th respondent has failed to carefully examine these documents and understand what they established. It seems he has acted mechanically and rejected the petitioners' applications simply because there was no document issued by a bank stating that the 1st to 6th petitioners had each *directly* paid monies into the 7th petitioner's bank account. He has failed to see what was plainly before him - *ie:* that when "P12(a)" to "P12(f)" are viewed together with "P7(a)" to "P7(f)", they show that the advance payments made by the 1st to 6th petitioners to the 7th petitioner were later deposited by him to his bank account and, therefore, the petitioners had satisfied the requirements set out in "P6". Thereby, the 5th respondent has failed to properly apply "P4", "P5" and "P6" and he has failed to ensure the purpose for which these Orders and directions were made and issued. In these circumstances, the 5th respondent's refusal of the petitioner's application made under "P4", "P5" and "P6" is irrational, unreasonable, arbitrary and improper.

Accordingly, I hold that respondents have violated the petitioners' rights guaranteed by Article 12(1) of the Constitution and also grant the reliefs prayed for in prayers (c), (d), (e), (f) and (h) of the petition which must necessarily follow that determination. In view of this conclusion, I need not examine the other grounds urged by petitioners. The parties will bear their own costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application under and in terms of Article 17 and 126 of the Constitution of the Republic of Sri Lanka

SC FR 168/2010 with
SC FR 170/2010,
SC FR 189/2010,
SC FR 190/2010 and
SC FR 246/2010

SC FR 168/2010

1. Rajapaksha Senarathge Gamini Jayakodi,
   Pasala Idiripita, Thiladiya,
   Puttalam.

   and 119 others

PETITIONERS

Vs.

1. Inspector General of Police,
   Police Headquarters,
   Colombo 01.

   and 324 others

RESPONDENTS

SC FR 170/2010

1. M.K.M.B. Jayawardena,
   No. 106, "Barathywass",

Koralawella,
Moratuwa.

and 35 others

PETITIONERS

Vs.

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

and 324 others

RESPONDENTS

SC FR 189/2010

1. M.A. Harsha Dammika Perera,
1/2/1, Anderson Flats,
Colombo 05.

and 43 others

PETITIONERS

Vs.

1B. Poojith Jayasundera,
Inspector General of Police,
Police Headquarters,
Colombo 01.

and 564 others

RESPONDENTS

SC FR 190/2010

1. Rannathige Aruna Shantha,
   A-400-1-Pirivena Area,
   Ampara.

2. Kamal Priyantha Kodithuwakku,
   251/11, Samagi Mawatha,
   Kadawatha.

   and 45 others

PETITIONERS

Vs.

1. Mahinda Balasuriya,
   Former Inspector General of Police,
   Police Headquarters,
   Colombo 01.

   and 613 others

RESPONDENTS

SC FR 246/2010

1. Hendawasam Manil Bhathiya,
   Jayasinghe Wenamulla,
   Ambalangoda.

and 50 others

PETITIONERS

Vs.

1. Secretary,
   Ministry of Defense, Public Security,
   Law & Order,
   Colombo 01.

and 20 others

RESPONDENTS

Before: Buwaneka Aluwihare PC. J
Nalin Perera. J
L.T.B. Dehideniya. J

Counsel: Sanjeewa Jayawardena PC with Rajeev Amarasuriya instructed by Ms. Ashoka Niwunhella for the Petitioners in SC FR 168/2010 & SC FR 170/2010

Manohara de Silva PC, for the Petitioners in SC FR 189/2010

Dr. Jayampathi Wickremaratne with Pubuduni Wickramaratne & Chandrika Silva for the Petitioners in SC FR 190/2010

Saliya Pieris PC, with Pasindu Tilakarathne for the Petitioners in SC FR 246/2010

Asthika Devendra for the 1st to 15th for the Intervenient- Petitioners in SC FR 246/2010

Upul Kumarapperuma for the 16th to 21st Intervenient- Petitioners in SC FR 246/2010

Senany Dayarathne with Nisala Seniya Fernando for some of the parties seeking intervention in SC FR 246/2010.

Rajiv Goonetileke SSC for Respondents.

Argued on: 06.02.2018

Decided on: 30. 10. 2018

Aluwihare PC. J.,

At the outset, it should be noted that all the Petitioners in SC FR 168/2010, SC FR 170/2010, SC FR 189/2010, SC FR 190/2010, SC FR 246/2010 and the parties permitted to be heard in SC FR 246/2010 agreed to abide by a single judgment given in respect of all the cases referred to above.

The Petitioners filed the present fundamental rights applications in March 2010 shortly after being promoted to the rank of Inspector of Police with effect from 08th February 2010. The Petitioners were initially enlisted into the Sri Lankan Reserve Police as Reserve Sub-Inspectors between the years 1989 to 1991 and remained in active service in that rank for periods ranging from 13 to 21 years. In February 2006, pursuant to a

Cabinet Memorandum, police officers in all ranks in the Reserve Police who possessed requisite eligibility and had no adverse disciplinary records were absorbed into the Regular police. The scheme of absorption stipulated *inter alia* that officers in the reserve cadre who possessed basic academic qualifications required for the Regular Force or those who had served a minimum of 8 years active service would be eligible to be absorbed. The said scheme further disclosed that those who are absorbed would be placed just below their counter parts in the regular cadre.

Days prior to the Petitioners being absorbed into the regular force, namely on 06th February 2006, a large number of Sub-inspectors who were then in the Regular service or who had already been absorbed into the regular service, were promoted to the rank of Inspector of Police purely based on the length of their service. The Petitioners could not apply for this round of promotions as their absorption took place only on the 24th February 2006.

It was only in September 2007 that the Petitioners were informed that their absorption was in fact backdated to 1st February 2006. Since the relay of this message took place nearly after a year, the Petitioners were prevented from applying for the aforesaid round of promotions.

In the same month, *i.e.* September 2007, the Inspector General of Police called for fresh applications for promotions to the rank of Inspector of Police. In contrast to the previous round of promotions which was based purely on the length of service, the present promotions were to be made on the basis of both 'seniority' and 'merit'. [hereinafter referred to as the "2007 seniority and merit scheme"]

Accordingly, the Petitioners duly submitted their applications, self-calculated the marks and went through the interview process. They were confident that they had obtained the required marks to qualify for the promotions.

In the meantime, several officers belonging to the Petitioners' cadre filed a series of Fundamental Rights cases numbered SC FR 330/2007, 331/2007, 347/2007, 348/2007, 358/2007 and a Writ Application numbered CA Writ 980/2007 seeking to aggregate their service in the Reserve Police and the service in the Regular Police to

fulfil the required years of service to be eligible for promotion to the rank of Inspector of Police under the promotion scheme.

The Court of Appeal in the aforesaid CA Writ 980/2007 issued an interim order staying the grant of promotions under the 2007 Seniority and Merit scheme till the cases were resolved.

An out of court settlement was reached among the several parties, in 2010, to promote the Petitioners in the aforesaid SC FR 330/2007, 331/2007, 347/2007, 348/2007, 358/2007 and CA Writ 980/2007, to the rank of Inspector of Police purely based on the length of their service.

This batch of promotees included those who duly qualified under the 2007 Seniority and Merit scheme and those who got in based on the 'length of service' pursuant to the out of court settlement. Since the out of Court settlement took nearly 3 years, these promotions were backdated to take effect from the 25th of September 2007-the day on which the applications were called.

As a considerable number of vacancies, which were initially reserved for the successful candidates under the promotion scheme, were thus filled by the promotees pursuant to the out of court settlement, the promoting authority had to increase the cut off marks to choose candidates for the remaining vacancies. This unavoidable development resulted in prejudicing the present petitioners as they could not meet the high cut off mark and thereby became ineligible under the promotion scheme.

Naturally, the aforesaid state of affair caused frustration among police officers and His Excellency the President subsequently intervened and directed that all Sub-Inspectors of Police who had completed 8 years of service be promoted to the rank of Inspector of Police with effect from 8th February 2010.

It was pursuant to the said intervention that the present Petitioners received their promotions to the rank of Inspector of Police with effect from 8th February 2010. However, the Petitioner still had an outstanding grievance as they received their promotions with effect from 2010 whereas several officers, who obtained lower marks

than them under the promotion scheme, received their promotions with effect from September 2007 pursuant to the out of court settlement.

When this case was taken for hearing, the Public Service Commission (the appointing authority at that point) indicated that they could arrive at an out of court settlement. Accordingly, by a motion dated **17th March 2014, the PSC filed three documents marked respectively as "A", "B" and "C" whereby the PSC brought to the attention of the Court the basis of the settlement, the conditions and the list of petitioners whose promotions could be backdated to 25th September 2007. The aforesaid list of petitioners whose promotions could be backdated is reflected in the document marked "C" filed by the motion dated 17th March 2014.** The document marked "C" is a composite document that carries the names of those who are eligible to have their promotions backdated (in each of the present cases) and those who are not. Hereinafter, the officers who have been recognized in the said document "C" as being eligible to have their promotions backdated will be referred to as "eligible petitioners". **On 12th November 2014, the Court has agreed to accept the said motion dated 17th March 2014 as the basis of settlement**.

Therefore, the remaining question, *viz a viz*, the settlement is to see whether backdating should be done on a notional basis. In the event this Court were to hold so, it would not allow the Petitioners to count the backdated years for the purposes of future promotions and would leave them with only the actual service to be made eligible for future promotions.

Prior to addressing the above issue, I wish to first address the preliminary objection raised by the learned Senior State Counsel against the following Petitions for intervention in SC FR 246/2010. These Petitions include the Petition dated 12/09/2012 filed by Mr. Asthika Devendra, the petitions dated 02/05/2011, 26/ 08/ 2011 and 28/11/2011 filed by Mr. Upul Kumarapperuma and a motion dated 03/12/2014 filed by Mr. Senany Dayarathne.

The learned Senior State Counsel objected to the said Applications on 12. 05. 2016 stating that they were filed out of time. A perusal of the journal entry on 12.05.2016 in

SC FR 246/2010 indicates that the Court has allowed the aforesaid Counsel to make submissions. No order permitting intervention has been made.

The several intervenient petitioners have come before this Court claiming the same relief *i.e.* to have their promotions backdated to 27th September 2010. The alleged violation, against which they have come before this Court, had taken place in February 2010. However, I observe that they have filed their intervention papers respectively in 2011, 2012 and 2014—several years after the alleged violation. Prima facie, their applications fall outside the time period stipulated under Article 126 (2) of the Constitution.

Nevertheless, it is accepted that a preliminary objection on time bar should be taken at the earliest opportunity. In **Ranaweera v Sub-Inspector Wilson Siriwardena and Others [2008] 1 SLR 260** it was held that;

"*In a fundamental rights application, the first opportunity available to a respondent to put forward any defence available to him including the plea of time bar is the stage at which he has to file his objections after the Court has granted leave to proceed*"

In the present instance, leave to proceed for Application SC FR 246/2010 was granted on 06. 09. 2012. On the said day, Counsel for Intervenient-Petitioners in Petitions dated respectively, 12/09/2012 (Mr. Asthika Devendra) and 02/05/2011 and 28/11/2011 (Mr. Upul Kumarapperuma) had informed the Court that they have filed papers for intervention. The observation made by the Court as shown in the journal entry is as follows;

"*Mr. Kumarapperuma and Mr. Devendra inform Court that they have filed papers to intervene in this application. Mr. Kumarapepruma inform Court that there are two applications for intervention and all together there would be seven Intervenient-Petitioners. Mr. Devendra informs the Court that he has one Petition which consists of 20 petitioners. Mr. Devendra further submits that he will have to amend those papers and after the amendment there would be 15 intervenient petitioners. The said papers to be sent to the Learned counsel for the petitioners and the learned senior state counsel within one week form today. No further interventions would be allowed in this*

application or in any other connected applications since this matter has been pending since 2010 and these matters will have to be concluded"

On 06. 05. 2016, the Court has again fixed these petitions for support for intervention. By this time, the last batch of Petitioners seeking to be heard (the petitioners in the Petition dated 03.12.2014 represented by Mr. Senany Dayarathne) had filed papers for intervention. On 12.05.2016 parties were heard in relation to intervention and I observe that the learned Senior State Counsel on that occasion has raised a preliminary objection on time bar.

According to the above sequence of events, the Court, most likely due to an oversight, has on two occasions proceeded to hear parties on the issue of intervention. It appears to me that the observation made by this Court on 06. 09. 2012 suggests that the Court permitted the Petitioners in petitions dated 12/09/2012 (represented by Mr. Asthika Devendra) 02/05/2011, 26/ 08/ 2011 and 28/ 11/ 2011 (represented by Mr. Upul Kumarapperuma) to intervene in the proceedings, on the same day leave to proceed was granted. The aforesaid Petitioners have appeared before the Court and have time to time appraised the Court on the progress of the settlement process. Accordingly, I do not think the learned Senior State Counsel could take up the position 4 years later that those intervening Petitions are filed out of time. In fact, it would be inequitable to do so.

However, the said objection remains valid in relation to the Petitioners seeking to intervene through the Petition dated 03.12.2014. According to **Ranaweera v Sub-Inspector Wilson Siriwardena and Others (supra)**;

"*A time bar or prescription which affects jurisdiction of Court must be specifically pleaded in the very first opportunity and if it is not so pleaded, the Court is entitled to proceed on the basis that the respondent has waived his right to raise the defence of time bar in defence of the claim raised against him.* "

It was only on 12. 05. 2016 that the Court for the first time heard the Petitioners in the Petition dated 03. 12. 2012 (represented by Mr. Senany Dayarathne) in support of the intervention. As I have already adverted to, the learned Senior State Counsel has raised the objection on the very first opportunity that the papers have been filed out of time.

I further observe that the Petitioners in the said Petition dated 03. 12. 2014 have filed their Petition after the settlement has been arrived between the parties and approved by this Court. (by motions dated 17th March 2014, the PSC brought to the attention of the Court a list of petitioners whose promotions could be backdated to 25th September 2007. On 12th November 2014, the Court ordered that the said motion dated 17th March 2014 be accepted as the basis of settlement). Thus, there can be no question that the motion for intervention dated 03. 12. 2014 has been filed out of time.

It must be stated that the Supreme Court has consistently held in a number of cases involving alleged violation of fundamental rights that the time limit within which an application for relief for any fundamental right or language right violation may be filed is mandatory and must be complied with. (See **Edirisuriya Vs. Navaratnam [1985] 1 SLR 100, Illangaratne Vs. Kandy Municipal Council [1995] BALJ Vol.VI Part 1 p.10**) In a fit case, however, the Court would entertain an application made outside the time limit provided an adequate excuse for the delay could be adduced.

The learned Counsel for the party seeking to be heard has stated in their written submission that the Petitioners have pursued other avenues of redressal such as lodging a complaint in the Human Rights Commission and appealing to the Inspector General of Police. Proof of said complaints are produced marked X4(a) and X4(b) respectively. It must be borne in mind that it is only section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 that has the power to interrupt the passage of time in Article 126 (2) of the Constitution. As Justice Fernando enunciated in **Gamathige v Siriwardena [1998] 1 SLR 384** pursuing other avenues *per se* does not interrupt the time.

"If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point of time, the filing of an appeal or an application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time-limit. […] The Constitution provides for a sure and. expeditious remedy, in the highest Court, to be granted according to law, and not subject to the uncertain discretion of the very Executive of whose act the aggrieved person complains; if he decides to pursue other remedies, particularly administrative remedies, the lapse

of time will (save in very exceptional circumstances) result in the former remedy becoming unavailable to him."

The Petitioners have complained to the Human Rights Commission on or before 5th March 2010. On 5th March 2010 (X4(a)) the Human Rights Commission has informed the Petitioners that the Commission commenced an inquiry into the complaint. However, over and above this document, the Petitioners have not stated what became of the inquiry thereafter. The Petition for intervention is dated 3rd December 2014—4 years after the commencement of the said inquiry—and there is no material to see whether the investigation has been concluded and if so, at which point. I also observe that the Petitioners seeking intervention have already invoked this Court's Jurisdiction in respect of the same matter and have sought the same reliefs in SC FR 193/2012. In paragraph 22 of the Petition in SC FR 193/2012, the Petitioners have stated that the Human Rights Investigation was pending at the time of invoking the Court's Jurisdiction. In contrast, it is stated in paragraph 5(a) of the present Petition for intervention, that "*We, along with several others similarly circumstanced, complained to the Human Rights Commission by complaint dated 5th March 2010, bearing number HRC 898/2010, which was to no avail.*" In the absence of any evidence indicating the continuance of the inquiry, I could only construe that the investigation may have concluded after 2012. Furthermore, as adverted to above, the Petitioners have invoked this Court's jurisdiction in respect of the same matter in SC FR 193/2012. On their own admission leave to proceed has been refused in the first instance. By filing papers for intervention in the present case, they have sought to achieve indirectly what they have been unable to achieve directly.

In these circumstances, I am inclined to believe that the Petition dated 03. 12. 2014 for intervention has in fact been filed out of time. The only instance, if at all, which could compel the Court to allow an Application filed out of time is when the circumstances clearly give rise to a situation of *lex non cogit ad impossibilia.* Even in such circumstances, the Court must look to see that there is no lapse, fault or delay on the part of the petitioner. With regard to the Petition dated 03. 12 2014, I observe no such circumstances that could have prevented the Petitioners seeking to be heard from filing their papers for intervention before 2014.

For the foregoing reasons, I uphold the preliminary objection against the Petitioners in the petition dated 03. 12. 2014. However, I wish to emphasize that this dismissal does not in any manner preclude the Authorities from considering the grievances of the Petitioners in the Petition dated 03. 12. 2014 and providing administrative relief where possible.

With that I proceed to answer the main issue whether the promotions of the "eligible petitioners" named in document marked "C" filed by the motion dated 17th March 2014 should be antedated on a notional basis.

The learned Senior State Counsel placed great reliance on SC FR 94/2002 in which the Supreme Court has ruled that backdating must be done on a notional basis. However, in the said case, the Court arrived at that decision based on the facts peculiar to that case. The opinion of the Court in that case reflected the rationale in the Cabinet Memorandum which clearly stipulated that promotions to Class I of the SLEAS should be made in strict compliance of the applicable service minute. i.e. "*In order to be qualified to hold a permanent post, promotions will have to be obtained in accordance with the relevant schemes of promotions, e.g. passing a competitive examination or on merit*".

In any event, parties to the said case did not dispute the notional date of appointment. The issue was the purported cancellation of all appointments made on that basis as oppose to pronouncing on the acceptability of the notional basis. The Court quashed the decision to cancel the appointments and ordered that all future promotions be given based on the requirements in the promotion scheme. The Court when pronouncing the decision in the above case did not lay down as a principle that backdating must always be notional.

In those circumstances I do not believe that SC FR 94/2002 can be taken as decisive authority for issues involving antedating.

In the present case, it is undisputed that the "eligible petitioners" are equally circumstanced as Petitioners in the previous cases (who received their promotions backdated on account of the out of court settlement). They were absorbed into the

regular force along with the petitioners of the previous cases. The only differentiating factor between the two groups is the date on which they received their respective promotions. The former group received it on 25th September 2007 while the present "eligible petitioners" received it on 02nd February 2010. However, this difference was effectuated not based on any overarching rational policy but due to the interplay of certain circumstances.

I am mindful that at the inception, the Petitioners were blanketly claiming to have their promotions backdated while the previous petitioners who received their promotion in 2007 had to go through a review process by the PSC. However, it has been brought to the attention of the Court that the present settlement was arrived at pursuant to a criterion approved by the Inspector General of Police and the Public Service Commission and later endorsed and adopted by the National Police Commission. Accordingly, 300 individuals who have scored above 28.5 marks at the interview, and those who (i) are confirmed in their rank (ii) possess six years of active service (iii) have an unblemished record of service in the last five years and (iv) have passed the first aid examination, would qualify to have their promotions antedated. **They will not receive back wages and their seniority will be determined according to the marks they received at the interview. This settlement along with the names of the eligible petitioners [document marked "C"], has been produced by the Respondents by a motion dated 17. 03. 2014. The National Police Commission by motion dated 5th October 2016 has endorsed the said settlement.**

Thus, it appears that the antedating of promotions would take place on a rational basis which would favor only the most eligible candidates.

In those circumstances, the only outstanding concern which, if at all, could have had the effect of placing the present petitioners on a different footing has been nullified. In my opinion, the "eligible petitioners" in the list marked "C" in the motion dated 17th March 2014, are equal and perhaps more deserving of the promotions than the Petitioners in the previous cases. There is nothing that militates against giving them the same privileges that the petitioners in the previous cases were entitled to.

On the contrary, if this Court were to artificially deprive the Petitioners from aggregating their services for future promotions, it would create an anomaly for which no reasonable explanation could be given. It would render nugatory a process of negotiations which had run a course of 8 years and more particularly permit a classification which is unsupported by any intelligible differentia.

In this regard it is pertinent to note Justice Amerasinghe's observation in ***Ragunathan V. Jayawardene, Secretary, Ministry of Transport and Highways and Others*** **[1994] 2 SLR 255** that;

"*The public services exist to supply an efficient administration and Article 12 of the Constitution does not preclude the imposition of qualifying examinations, selective tests and other criteria for selecting or promoting public officers to assure efficiency. The distinction between those qualified for promotion and those who were not was therefore founded upon an intelligible differentia. It was rational. The scheme of promotion was not arbitrary or artificial or evasive in its formulation or relation to its purpose or in its application.*"

In matters relating to promotions, as it is the case in all other instances impugned under Article 12 (1) of the Constitution, there ought to be a rational, an intelligible basis which permits differentiation. That is the only form of classification which law recognizes.

In the present instance, the mere fact that the present petitioners chose to follow the 2007 Promotion scheme instead of resorting to litigation does not place them in a category different to the one which the Petitioners in the previous cases belonged. As has been clearly demonstrated in the well known case of **Ram Krishna Dalmia v. Justice Tendolkadz** ***A. I. R. 1958 S.C. 538***, classifications are permitted provided that "*the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group*"

If the "eligible petitioners" in Document "C" in the motion dated 14th March 2014, were less qualified or had no merit, this Court undoubtedly would have come to a different conclusion. However, as demonstrated, these "eligible petitioners" have

obtained marks higher than 28.5 and rightfully earned their promotions under the 2007 promotion scheme; yet due to factors beyond their control, they were deprived of claiming that benefit. They have come before this Court requesting to be instated in the position which they would have otherwise received. In those circumstances, if this Court were to hold that the shortlisted "eligible petitioners" would only be entitled to have their promotions backdated on a notional basis, it would place them in a different category purely because they decided against litigating in 2007. Needless to say, such a classification would not be 'intelligible' within the meaning of Article 12 (1) of the Constitution.

It has also been brought to our attention that section 1:11:2 of Chapter II of the Establishment Code and the PSC Procedural Rules 30 and 31 published in Gazette 20. 02. 2009 prohibit antedating an appointment. In **Abeywikcrema v Pathirana [1986] 1 SLR 120** and **Public Service United Services Union v The Minister of Public Administration [1988] 1 SLR 229**, the Supreme Court has observed that the Establishment Code has statutory force.

While being mindful of these restrictions, I wish to nevertheless emphasize that in terms of rule 140 of the PSC Procedural Rules, the Supreme Court has the overarching power to determine the seniority of Public Officers. In the case at hand, the parties having already arrived at a settlement envisaging antedating, the question is one of determining whether attaching a notional value to the said settlement would discriminate the present Petitioners *viz a viz* their equals.

In the absence of any justification, which is apparent on the facts of this case, I am of the opinion it would be so.

In those circumstances, I declare that the "eligible Petitioners" rights have been violated under Article 12 (1) of the Constitution and make an order that the promotions of the "eligible Petitioners" in the document marked "C" filed by the Respondents by way of motion dated 17. 03. 2014 be antedated to 25th September 2007 and **only** allow such promotees to aggregate the past years to their service.

As already reflected in the said motion, such "eligible petitioners" will not be entitled to back wages and their seniority will be determined according to the marks they received at the interview.

Application allowed.

Judge of the Supreme Court

Justice Nalin Perera.

I agree

Chief Justice

Justice L.T.B. Dehideniya

I agree

Judge of the Supreme Court

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

In the matter of an Application in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Rohini Manel Hettiarachchi
   Parathalakanda,
   Erathne.

2. Walimuni Senaratne Mendis,
   5th Post, Batathota,
   Kuruwita.

PETITIONERS

S.C. (F.R) Application. No. 191/17

Vs.

1. Central Environmental Authority,
   No. 104, ParisaraPiyasa,
   DenzilKobbekaduwa Mawatha,
   Battaramulla.

2. Sri Lanka Sustainable Energy Authority,
   3G-174 A, BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

3. Mr. Anura Satharasinghe,
   Conservator General of Forest,
   Department of Forest,
   Rajamalwatta Road,
   Battaramulla.

4. A.S.J. Godellawatta,

Former Divisional Secretary of
Kuruwita,
Presently at Provincial
Commissioner of land,
Sabaragamuwa Provincial
Council,
New town,
Ratnapura.

5. Mr. Sunil Kannangara,
(Former District Secretary o
Ratnapura),
Currently,
District Secretary of Colombo,
District Secretariat,
Thimbirigasyaya.

6. Hon. Attorney General,
(To represent His Excellency
Hon. Maithripala Sirisena,
Minister of Environment)
Attorney General's Department,
Colombo 12.

7. Kuruganga Hydro (Pvt) Ltd,
No. 27-02, East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

8. Mrs. MalaniLokupathagama,
District Secretary,
Ratnapura.

9. Mrs. Dilini Dharmadasa,
Divisional Secretary of
Kuruwita,
Divisional Secretariat,
Kuruwita.

10. Hon. Attorney General,
Attorney General's Department,
Colombo12.

RESPONDENTS

BEFORE: Buwaneka Aluwihare PC, J.

Vijith K. Malalgoda PC, J.

COUNSEL: Mr. Ravindranath Dabare with N. Wickramasinghe and Chathurika Sewwandi for the Petitioners

Mr. Suren Gnanaraj, SSC for the 1st, 2nd, 3rd, 6th, 8th, 9th and 10th Respondents

Saliya Pieris PC with Thanuka Nandasiri for the 7th Respondent

ARGUED ON: 14-11-2017

DECIDED ON: 05.09.2018

Aluwihare PC. J.,

Preliminary objections were raised by the Respondents regarding the maintainability of this application.

The first objection was that, the alleged infringements of the Petitioners' fundamental rights, had been dealt with by this Court in the application bearing No; SCFR 54/2017 and as such the Petitioners are not entitled to urge the same matter for adjudication by this Court for a second time.

In addition, it was also the position of the Respondents that the Petitioners are guilty of suppression of material facts and in any event the instant application had been filed out of time.

It was the contention of both the learned President's Counsel for the 7th Respondent as well as the learned Senior State Counsel for the other Respondents that the SC FR Application No.54/2017 is identical to the instant application, both in substance and the relief sought.

It is common ground that both the instant application as well as the Application No; SCFR 54/2017 were filed in the form of 'public interest litigation' relating to the same environmental concern which the Petitioners in both Applications alleged, had resulted in the infringement of their fundamental rights.

In refusing leave to proceed with SCFR Application No; 54/2017, this Court observed that the Petitioners have even failed to establish a *prima facie* case.

The Court observed that the 1st Petitioner in SC FR Application No; 54/2017 is the Secretary of a non- governmental organisation "Kuruwita Water Resources Conservation Organisation" whereas the two Petitioners to the instant application are members of the said NGO. Both the 1st Petitioner in SC FR Application 54/2017 and the Petitioners in the present case have averred that they are residents "living by the side of 'Kuruganga' and enjoy the riparian rights of the river reservation under the authority of the license issued to them by the Divisional Secretary".

As far as the Respondents are concerned, all eight Respondents cited in SC FR Application No.54/2017 are cited as Respondents in the instant Application as well. It is to be noted that the prayer of the SC FR Application No.54/2017 is identical to the prayer of the instant Application save for the fact that the earlier Application carried an additional prayer seeking interim relief. Save for the additional relief referred to, the prayer in the instant application is a reproduction of the prayer in SC FR Application No.54/2017.

It was the contention on behalf of the Respondents that the Petitioners in the instant Application, admittedly being part of the same aggrieved community and members of the 'Kuruwita Water Resources Conservation Organisation', were bound by the decision of this Court on the very same subject matter, in SCFR Application 54/2017.

The Respondents argued that the Petitioners are prevented by Article 118 of the Constitution from canvassing the very issue again on the premise that the issue had been finally decided by this Court. The Respondents further contended that the subject matter of this application is *"res judicata"* and moved that this application be dismissed *in limine* due to that reason.

The learned counsel for the Petitioners on the other hand, argued that there are remarkable differences in the documents relied on by the Petitioners and remarkable differences 'in some paragraphs of both cases'. Citing the case of ***Sugathapala Mendis and another v. Kumaratunga and Others SCFR 352/ 2007*** SC minutes of 1.10.2008, the learned counsel argued that the **present matter should not be treated as another Fundamental Rights application, but an environment related Application,** where the Supreme Court has given special concern and broadened the provisions of Article 126 of the Constitution in relation to issues concerning environmental matters. (emphasis is mine).

I have carefully considered the judgement referred to by the learned counsel for the Petitioners and in my view, the decision of the case referred to, has no application to the issues that are to be dealt in the present case. No doubt, the jurisprudence, that had evolved over the years since the fundamental rights were made justiciable upon the promulgation of the 1978 Constitution, has enhanced the scope and application of the fundamental rights jurisdiction. I cannot, however, agree with the contention of the learned counsel for the Petitioners that there should be a variance in the standards as to how the alleged violations should be treated, depending on subject matter that is linked to the violation alleged.

In considering the objections raised on behalf of the Respondents, I had the benefit of perusing the petition filed in SCFR Application No.54/21017. In addition to the identical nature of the prayers of the two Applications referred to earlier, I find that the paragraphs 5, 8 to 15 and 19 of the instant application are identical, if not reproductions, of the corresponding paragraphs of the petition filed in SC FR Application 54/2017. Further, paragraphs 21 to 81 of the present petition are a reproduction of paragraphs 23 to 85 of the petition

filed in SCFR Application 54/2017.Thus there is no doubt that what is agitated in these proceedings are the same as what was agitated in SC FR Application 54/2017.

In paragraph 83 of the petition in the present case and paragraph 85 of the petition in SCFR Application 54/2017, the Petitioners have averred that the jurisdiction of this Court is invoked in their own interest as well as **of the interest of the public**.

It was in this backdrop, that the Respondents raised the objection that the present application is *res judicata*.

In explaining the events that followed, the Petitioners have taken up the position that, the Court refused to grant leave to proceed in Application SCFR 54/2017, as the Petitioner Ananda Padmasiri had not attached a copy of the permit or any other document to the petition, to establish that he is a resident adjacent to the banks of Kuruganga, although he claimed in the petition that he holds a permit to do so. It must be said that the manner in which a case is presented before the Court is the prerogative of the counsel, in proceedings which are adversarial in nature and the counsel is free to decide what he wishes to place before the Court. Once an issue is adjudicated, I do not think there is room to re-agitate the same matter on the basis that there were shortcomings in the earlier proceedings as the doctrine of *res judicata* stands in the way against such an exercise.

In the case of ***Hettiarchchi v. Seneviratne, Deputy Commissioner and others 1994 3 SLR 293*** His Lordship Justice Mark Fernando observed:

> *"Proceedings under Article 126 are essentially adversarial in nature. Of course, the Court has ample power to probe a matter for the purpose of ascertaining the truth; to expedite the work of the Court by suggesting the consideration of issues of fact and law which seem to arise; and by indicating how a submission might be clarified or refined; and by guiding an argument in the direction of the matters of fact and law actually in issue. But it will nevertheless leave Counsel entirely free to decide what he wishes to place before*

the Court, and how he proposes to do so. The Court recognizes and respects Counsel's right to do so. It will not encroach on Counsel's rights, especially when he repeatedly insists on following a plan of action he appears to have set himself and disregards suggestions from the bench as to an alternative course that might be followed. We must take the case as Counsel deems it best presented in the interest of his client. Moreover, the Court must take care to guard itself against any appearance of bias which might result from intervention, for justice must not only be-done, but must be seen to be done. As Judges, we are expected to be neutral. Therefore, the Court must refrain from entering into the arena by initiating and presenting legal and factual submissions on behalf of a party."

There is no doubt that in these proceedings the Petitioners have invited this Court to consider the very issue this Court dealt with in the SCFR Application No.54/2017.The Supreme Court being a creature of the statute, its powers are statutory and the Court is not vested with the jurisdiction by the Constitution or by any other law for that matter to review its decisions. In effect, the Court would be doing exactly that, if this Petition is permitted to proceed.

In this respect, I am in agreement with the dicta of this Court in the case of ***Jayraj Fernandopulle v. Premachandra de Silva 1996 1 SLR 70*** at pg. 89 when the Court observed that:

"The Supreme Court is a creature of statute and its powers are statutory. The Court has no statutory jurisdiction conferred by the Constitution or by any other law to re-hear, review, alter or vary its decision. The decisions of the Supreme Court are final…. ..the use of the phrase "shall finally dispose of" in Article 126 (5), in dealing with the exercise of the Court's powers in relation to fundamental rights and language rights petitions, and the phrase "final and conclusive" in Article 127 in dealing with the Court's appellate jurisdiction, signified that once a matter was decided by the Supreme Court, the thing is over. There is nothing more that can be

done. As far as the matters which are the subject of the decision are concerned, it is all over. There is an end to such litigation - as needs must be with all litigation.

In the case of ***Dr. P.B Jayasundera v. The Attorney General 2009 2 SLR 1***, Justice Saleem Marsoof stressing the need for finality of the decisions of the Supreme Court held:

> *"In my view, the jurisdiction conferred on the Supreme Court by Article 126 of the Constitution to redress alleged infringements, or imminent infringements of fundamental and language rights is unique in that it is an original jurisdiction vested in the apex Court of the country without any provision for review through appeal or other proceedings. While our hierarchy of Courts is built on an assumption of fallibility, with one, two or sometimes even three rights of appeal, as well as the oft used remedy of revision, being available to correct errors that may occur in the process of judicial decision making, in the absence of such a review mechanism,*
>
> *the remedy provided by Article 126 is fraught with the danger of becoming an "unruly horse", and for this reason has to be exercised with great caution. This Court has generally displayed objectivity, independence and utmost diligence in making its decisions and determinations, conscious that it is fallible though final. The decision of this Court in the Fernandopulle case stressed the need for finality, and very clearly laid down that* ***this Court is not competent to reconsider, revise, review, vary or set aside its own judgement or order (in the context of a fundamental rights application)*** *except under its inherent power to remedy a serious miscarriage of justice, as for instance, where the previous judgement or order was made through manifest error per incuriam".*

In deciding the issues before us, it would also be relevant in my view to consider the decision in ***State of Karnataka v. All India Manufactures Organisation 2006 AIR 1846*** cited by the learned Senior State Counsel, wherein the Indian Supreme Court considered the applicability of the doctrine of res *judicata* in public interest litigation.

In that case, a series of writ petitions were filed challenging the construction of a Bangalore-Mysore Express High way at different stages. The first petition was the public interest litigation filed by one Somashekar Reddy. Thereafter, at regular intervals, different parties came before the Court seeking to achieve the same result by agitating different issues. They sought to argue that res judicata as a principle does not bind on Public Interest Litigation and further sought to argue that even if the previous cases constitute res judicata in respect of the cause of action, it would not constitute res judicata in respect of the 'issues' which vary at every point.

The Supreme Court, however, having dealt exhaustively with the submissions, concluded that *res judicata* as a principle does bind on Public Interest Litigation as long as the previous litigation was not a frivolous, busy body agitation.

"*As a matter of fact, in a Public Interest Litigation, the petitioner is not agitating his individual rights but represents the public at large.* ***As long as the litigation is bona fide, a judgment in a previous Public Interest Litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the Court and raising any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a Public Interest Litigation.***" (*emphasis added*)

It was also pronounced that as a principle, *res judicata* is not only confined to the 'issues' agitated, but even extends to every other matter which the parties might and ought to have litigated on and have had decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence.

In view of above, I am of the opinion that the instant application cannot be maintained as the subject matter is "*res judicata"* as the same issue was canvassed in the SC FR Application No.54/2017 and which was adjudicated on by this Court. Hence, I uphold the first preliminary objection raised on behalf of the respondents

Accordingly, this Application is dismissed *in limine* on the ground of *"Res Judicata" and* I see no reason to consider the rest of the preliminary objections raised on behalf of the Respondents.

In the circumstances of the case I do not make any order as to costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

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 application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Pankumburage Rohitha Anura Kumara,
Malmeekanda, Bodhiya Asala,
Opanayaka.

` **Petitioner**

SC /FR/ Application No 194/2013

Vs,

1. H. Harisan Hettihewa,
   Inspector of Police,
   Police Station, Boralesgamuwa.

2. Lakshman Alwis,
   Inspector of Police,
   Police Station, Boralesgamuwa.

3. Jinadasa (22085)
   Police Sergeant
   Police Station, Boralesgamuwa.

4. Kariyawasam,
   Inspector of Police,
   Police Station, Opanayaka.

5. Upali,
   Sub-Inspector of Police,
   Police Station, Opanayaka.

6. W.M.M. Wickramasinghe,
   Senior Superintendents of Police,
   Nugegoda Division,
   Police Station, Mirihana.

7. Inspector General of Police,
   Police Headquarters,
   Colombo 01

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

Respondents

Before: **S.E. Wanasundera PC J**
B.P. Aluwihare PC J
Vijith K. Malalgoda PC J

Counsel: Ms. Thushari K. Hirimuthugodage for the Petitioner
Gamini Hettiarachchi for the 2nd Respondent
Sanjeewa Dissanayake, SSC for the Attorney General

Argued on: 09.02.2018

Judgment on: 22.05.2018

Vijith K. Malalgoda PC J

Petitioner to the present application namely Pankumburage Rohitha Anura Kumara of Malmeekanda, Opanayaka had come before this court alleging that his fundamental rights guaranteed under Articles 12 (1), 13 (2), 13 (5) and 14 (1) (h) of the Constitution had been violated by the 1st to the 7th Respondents. When this matter was supported before the Supreme Court for leave to proceed on 27/07/2013, this court after considering the submissions, had made the following order;

> "Having heard submissions of counsel this court grants leave for an alleged violation in terms of Articles 12 (1), 13 (1) and 13 (2)

> The Petitioner has indicated to the state that some of the Respondents have not involved in this incident and that she would be satisfied if relief is granted against the 2nd Respondent"

In the said circumstances the State Counsel continued to appear only for the Attorney General and the 2nd Respondent against whom leave to proceed was granted and relief was claimed, was represented by his counsel.

The Petitioner was a Junior Health Assistant at National Cancer Institute, Maharagama since 2006. On 16th March 2013 the Petitioner had quit his job without informing the authorities and left for his village in Opanayaka since he could not face some of his friends from whom he had borrowed monies. In the meantime the Petitioner was served with a letter of interdiction dated 18.04.2013 by Director, National Cancer Institute, Maharagama.

Somewhere around 23rd March 2013 the Petitioner had got to know by news, that one Medical Laboratory Technician of National Cancer Institute, Maharagama named Thilaka Nandani Jayasinghe had been murdered on 22.03.2013.

When the Petitioner was at home, on 4th May 2013 around 2.30 p.m. the 2nd and the 5th Respondents whom they identified as officers attached to Boralesgamuwa Police Station, had visited his house and had taken him to Opanayaka Police Station in order to question him in connection with the death of the said Thilaka Nandani Jayasinghe.

The two officers were clad in civil and had come to the Petitioner's house in a three-wheeler. Petitioner had gone along with the two officers to Opanayaka Police Station, and waited for nearly one hour at the said Police Station to meet the Office-in-Charge (4th Respondent) since he was busy with some meetings. Finally the 2nd Respondent who met the 4th Respondent without the Petitioner, had informed him that he will have to take him to Boralesgamuwa Police Station to record his statement. According to the Petitioner, he was never arrested by the 2nd or the 5th Respondent at any stage, but he was made aware by them that he will be taken to Boralesgamuwa Police Station in order to record a statement with regard to the death of Thilaka Nandani Jayasinghe.

Since 4th night the Petitioner was at Boralesgamuwa Police Station and on the 5th, after he was questioned by the 1st Respondent the Office-in-Charge, had put him in to the cell around 3.00 a.m.

Two friends of the Petitioner, who visited the Police Station on 6th and 7th May, had signed a bail bond at the Police Station on 7th and the Petitioner too had signed a book on the same day but was never released on bail.

Out of the two friends who visited the Petitioner at Boralesgamuwa Police Station one Dushan Ajith Nilanga had submitted an affidavit confirming the above position and had stated that,

a) He, along with one Sudeera Udeshika Jayalath Premarathne, had visited the Petitioner at Boralesgamuwa Police Station on 7th around 9.30 a.m.
b) When they met the 2nd Respondent, he informed them that he can release the Petitioner on a bail bond.
c) The said Sudeera Udeshika Jayalath Premarathne stood as the surety and signed a register along with Rohitha (the Petitioner) before a police officer unknown to them.
d) Even after signing the bail bond the Petitioner was never released and all attempts to meet the 2nd Respondent failed thereafter.

As further submitted on behalf of Petitioner, he was finally produced before the Magistrate's Court of Nugegoda on the 10th May under the Poisons Opium and Dangerous Drugs Ordinance for allegedly committing an offence under the said Act and he had been taken back to the Police Station to be detained for a further period of 7 days, under the provisions of the said Act. The Petitioner was finally granted bail by the Magistrate Nugegoda on 16.05.2013, when the police filed plaint under section 78 of the Poisons Opium and Dangerous Drugs Ordinance. According to the charge sheet which is produced marked P-1 it was alleged that the Petitioner was in possession of 40 mg of heroin on or about 09.05.2013.

However, as submitted by the Petitioner he was never apprehended by police on 09.05.2013 with a quantity of heroin as alleged in P-1, but he was kept at Boralesgamuwa Police Station from 4th night until he was produced before the Magistrate's Court of Nugegoda on 10th May 2013.

In the said circumstances the Petitioner had alleged that;

a) The 2nd Respondent had failed to explain the reasons for his arrest on 04.05.2013 when he was first taken to Opanayaka Police Station
b) He was unlawfully detained at the Boralesgamuwa Police Station for more than 5 days
c) He was not enlarged on police bail even though a bail bond was signed at the Police Station on 07.05.2013
d) He was never arrested by the officers attached to the Boralesgamuwa Police Station with a quantity of heroin on 09.05.2013 as alleged in the charge sheet produced marked P-1
e) The officers of the Boralesgamuwa Police Station had misled the Hon. Magistrate, Nugegoda when they reported the above facts before the Magistrate on 09.05.2013 and obtain an order to detain the suspect for a further period of 7 days under the provisions of the Poisons Opium and Dangerous Drugs Ordinance.

In addition to the above position taken up by the Petitioner, it was further submitted during the argument before this court that, the learned Magistrate Nugegoda had discharged the Petitioner from the case filed against him by the Boralesgamuwa Police referred to above, since the only witness to the said case, the 2nd Respondent failed to appear before the Magistrate's Court on several trial dates.

Having considered the material placed before this court on behalf of the Petitioner, as referred to above I will now proceed to consider the position taken up by the Respondents before this court.

As observed above, it was submitted on behalf of the Petitioner that the Petitioner was satisfied if relief is granted only against the 2nd Respondent. The learned Senior State Counsel who represented the Attorney General (8th Respondent) brought this to the notice of this court and submitted that, in the said circumstances no objections were tendered on behalf of the other Respondents. The 2nd Respondent who was represented by his own counsel had tendered objections on behalf of him.

In the said objection tendered before this court the 2nd Respondent had taken up the position that;

a) He was attached to the Boralesgamuwa Police Station as Officer-in-Charge of the crimes branch as at 23.03.2013

b) Medical Laboratory Technician of the National Cancer Institute, Maharagama named Thilaka Nandani Jayasinghe had been murdered on 23.03.2013

c) He being the Officer-in-Charge of crimes branch was assisting the investigations into the said offence

d) He received reliable information, that the petitioner and the deceased had close relationship and during the relevant period, the petitioner had not reported to duty and had left the Cancer Hospital.

e) On inquiries made, he received information that the petitioner is a resident from Opanayaka, and had left to Opanayaka with PC 79603 on 05.05.2013 in order to arrest the petitioner with the permission he obtained from the Senior Superintendent of Police of his Division

f) He visited the house of the petitioner at Malmeekanda, Opanayaka and questioned him with regard to his involvement with the deceased. Since he could not satisfy with the explanation provided by the petitioner, the petitioner was arrested at the said address at 19.30 hours, after explaining the reasons for his arrest i.e. that he was suspected for the death of Thilaka Nandani Jayasinghe

g) He informed the said arrest to the Officer-in-Charge of the Opanayaka Police Station and thereafter proceeded to Police Station Boralesgamuwa.

h) After his return on the 6th morning he produced the petitioner at the reserve after informing the Officer-in-Charge of his Police Station and the Senior Superintendent of Police of the area

i) When a suspect is brought to the Police Station, all the responsibilities with regard to release on bail, producing before court, detaining in the police custody and conducting inquiry, is vested with the Officer-in-Charge of the Police Station and therefore the 2nd Respondent has no responsibility on those matters, but he was aware of the fact that the petitioner was released on bail

j) He re-arrested the petitioner on 09.05.2013 at Katuwawala on some information and at the time of his arrest the petitioner was in possession of one packet of heroin. This arrest was made around 18.15 hours. After his arrest he was once again produced at the reserve along with the production taken into custody.

When going through the objections tendered on behalf of the 2nd Respondent I observed that there exists a major discrepancy with regard to the date of arrest of the Petitioner. According to the Petitioner, the so called arrest took place on 4th May but the notes tendered on behalf of the 2nd Respondent including "out" and "in" entry of the 2nd Respondent indicate that the arrest took place on 5th May 2013 at 19.30 hours and was produced at Boralesgamuwa Police Station at 08.30 hours on 6th May 2013.

The only way the accuracy of the above notes can be tested, is by comparing them with the other notes made at Boralesgamuwa Police Station and/or Opanayake Police Station, but with the own application made on behalf of the Petitioner, this court is deprived of ascertaining the correctness of the positions taken up by both parties before this court. In this regard I am mindful of the submissions made by the learned Senior State Counsel and therefore this court is unable to make any conclusions with regard to the date of arrest of the Petitioner.

As observed by this court, the Petitioner's complaint before this court can be summarized as follows;

a) That he was not explained the reasons for his arrest on 04.05.2013
b) That he was detained illegally at Boralesgamuwa Police Station until he was enlarged on bail by the Magistrate, Nugegoda on 16.05.2013
c) That he was never arrested on 09.05.2013 with a quantity of heroin by the officers attached to Boralesgamuwa Police station at Katuwawala

However the Petitioner has admitted in his pleadings that the 2nd Respondent had made him to understand that the Petitioner was taken from his house at Malmeekanda to Opanayaka Police Station at the very first instance and thereafter from Opanayaka Police Station to Boralesgamuwa Police Station for the purpose of recording a statement with regard to the murder of Thilaka Nandani Jayasinghe. It was further revealed that both the said Thilaka Nandani Jayasinghe and the Petitioner were attached to National Cancer Institute, Maharagama and the Petitioner had kept away from his work place during the time the said murder had taken place and in the said circumstances it is clear that the investigators who investigated into the death of the said deceased, had reasons to suspect the Petitioner's involvement. In this regard the 2nd Respondent

had produced his out entry and therefore it is evident from the material before this court that the 2nd Respondent along with PC 79603 had gone to Opanayaka looking for the Petitioner.

The 2nd Respondent further admits meeting the Petitioner and questioning him with regard to the death of the deceased Thilaka Nandani Jayasinghe, but he was not satisfied with the answers he received from the Petitioner and therefore decided to arrest him and explained the said reasons for the arrest to him.

When considering all the circumstance referred to above, I see no reason to disbelieve the 2nd Respondent on the question of arrest, since there is adequate material placed before this court by the 2nd Respondent that there was a reason for the arrest of the Petitioner and in fact the 2nd Respondent had left for Malmeekanda, Opanayaka along with PC 79603 with the permission of the Senior Superintendent of Police of the area for that purpose.

The next issue before this court is to consider the questions of illegal detention of the Petitioner by the 2nd Respondent. As alleged by the Petitioner he was detained at Boralesgamuwa Police Station initially until 10th May without any court order and subsequently till the 16th on a court order obtained by submitting incorrect information. Petitioner admits the 1st Respondent the Officer-in-Charge of the Police Station questioning him during this period and obtaining his signature to some forms and his friend signing a bail bond.

As revealed during the argument before this court, investigation, detention and release of a suspect who was produced before a Police Station, is the function of the Officer-in-Charge of the said Police Station and not with the other officers. The Petitioner had further submitted that the 2nd Respondent spoke to his friend when he came to the Police Station prior to signing the bail bond. The affidavit submitted by Dushan Ajith Nilanga confirms the fact that the Petitioner was kept in custody, even though a bail bond was signed on behalf of the Petitioner by Sudeera Udeshika Jayalath Premarathne on 7th May 2013. According to Nilanga all efforts to meet the 2nd Respondent thereafter failed until the Petitioner was produced before court. The 2nd Respondent in his objection admits his knowledge with regard to releasing the Petitioner on bail, but had taken up the position that he has nothing to do with the detention and/or release of the Petitioner. He only submits documentary proof of the re-arrest of the Petitioner.

Due to the own decision of the Petitioner not to proceed against any other Respondents, this court is deprived of the most important material which needs to consider,

a) Whether the Petitioner was detained illegally at Boralesgamuwa Police Station from 05.05.2013 to 16.05.2013
b) Whether the Petitioner was in fact enlarged on bail prior to his arrest on 09.05.2013.

The 2nd Respondent, who admits the re-arrest of the Petitioner on 09.05.2013, had submitted his notes of arrest and the notes pertaining to the production of the suspect and the productions at the reserve but has failed to submit any document with regard to the release of the suspect prior to 09.05.2013.

During the argument before this court, our attention was drawn to the fact that the so called initial arrest was with regard to an ongoing investigation in to an unsolved murder, and in the said circumstances it was unlikely that a person who was suspected of that offence could enlarge on police bail during the investigation and therefore the court should reject the fact when it was submitted that the Petitioner was re-arrested by the 2nd Respondent on 09.05.2013 with a quantity of heroin. The above position taken up by the Petitioner is further strengthen from the fact that the Petitioner was subsequently discharged from the Magistrate's Court proceedings filed against him for possessions of 40 mg of heroin for non-prosecution of the case due to the repeated absence of the material witness namely the 2nd Respondent.

As observed earlier I am not inclined to conclude that the initial arrest of the Petitioner by the 2nd Respondent is illegal but, the legality of the subsequent detention after he was produced at the Boralesgamuwa Police Station on 06.05.2013 at 08.30 hours as documented before this court is in doubt.

In this regard the 2nd Respondent had failed to submit any material to establish that the Petitioner was enlarged on police bail prior to 09.05.2013. As this court has already observed, the material the 2nd Respondent had furnished with regard to the re-arrest on 09.05.2013 is doubtful and I am not inclined to act upon the notes tendered on behalf of the 2nd Respondent with regard to the above arrest.

Due to the own decision of the Petitioner not to proceed against the Respondents other than the 2nd Respondent, some of the important material with regard to the detention of the Petitioner and those who were Responsible for violations of the Petitioner's fundamental rights are not before this court.

However as concluded in the case of ***Sri Thaminda, Dharshane and Mahalekam V. Inspector General of Police 2007 ii SLR at 294*** by Saleem Marsoof J that,

> "Despite the failure on the part of the Petitioner to identify those who violate the fundamental rights, they are entitled to a declaration that their fundamental rights have been violated by executive and administrative action."

Even though 2nd Respondent had taken up the position that, he being the officer in charge of the crimes division, he is not responsible for the investigation, detentions, discharge and/or enlarging bail, his subsequent conduct, clearly revealed his involvement with regard to the detention of the Petitioner.

In the said circumstances I declare that the fundamental rights of the Petitioner guaranteed under Articles 12 (1), and 13 (2) of the Constitution had been violated by the 2nd Respondent and several other Respondents who were not identified in these proceedings.

I further make order directing the 2nd Respondent to pay Rs. 50,000/- and state to pay Rs. 100,000/- as compensation to the Petitioner. The state is further directed to pay Rs. 50,000/- as cost for this case.

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 SUPRME 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. K. J. A Chathumi Sehasa,
2. K. J. A Aminda Kumara,

Both of 26A, Viyananda Mawatha, Weliwatta, Galle

S.C. [FR] Application No. 201/2017

PETITIONERS

-Vs-

1. Mrs. S. Irani Pathiranawasam,
   Principal, Southlands Balika Vidyalaya
   Light House Street, Fort, Galle.

2. Mr. Ranjith Tilakarathne,
   Principal, Aloysius College,
   Templers Road, Galle.

3. S. K. De Silva

4. D. L. Chitra

5. Ranga Mohotti

6. Upali Amaratunga

   2nd to 6th Respondents are Members of the Appeals and Objections Investigations Board, Southlands Balika Vidyalaya, Light House Street, fort, Galle.

7. Mr. Sunil Hettiarachchi,
   Secretary, Ministry of Education, 3rd Floor,
   Isurupaya, Battaramulla.

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

RESPONDENTS

BEFORE:	Buwaneka Aluwihare PC, J. Priyantha Jayawardena PC, J. Murdu N. B Fernando PC, J.
COUNSEL:	Ms. Thushani Machado for the Petitioners Mr. Fazly Razik, SSC for the Respondents
ARGUED ON:	02. 04. 2018
DECIDED ON:	30. 05. 2018

Aluwihare PC, J.

The 1st Petitioner to the application was 5 years and 9 months old at the time of this application. The 2nd Petitioner is the father of the 1st Petitioner and is prosecuting this application as the next friend of the 1st Petitioner. In the present application, they claim that the 1st to the 7th Respondents have violated their right to equality and equal protection of law guaranteed under Article 12 (1) of the Constitution by denying school admission to the 1st Petitioner to Grade 1 in year 2017.

A brief account of the facts is as follows.

The 2nd Petitioner states that Southlands Balika Vidyalaya (hereinafter the 'school') published a Gazette Notification in June 2016 calling applications for the admission of students for Grade1. The 2nd Petitioner dispatched a duly completed application along with the supporting documents on or about 9th June 2016.

The instrument which regulates the procedure for School admission is the Education Ministry Circular No. 17/2016 (Admission of Students to Year I for the year 2017). According to Clause 6.1 of the Circular, an applicant can submit an application for school admission under one or more of the following categories:

(i) Children of Residents in close proximity to the School
(ii) Children of Parents who are past pupils
(iii) Brother/Sister of student already in the School
(iv) Children of officials employed in the Education Service
(v) Children of officers employed in the Government sector and transferred on exigencies of work
(vi) Children of persons presently in Sri Lanka after residing abroad with children

Although the 2nd Petitioner's wife is a past pupil of the Southlands Balika Vidyalaya, the 2nd Petitioner states that they only applied under the "proximity to the school" category as they were confident of obtaining admission under that category. As a response to this application, the petitioners were asked to present themselves for an interview on 18. 08. 2016.

At the interview, the panel examined the documents to verify whether the Petitioner fulfils the requirements under the said category. As per Clause 6.1 (III) of the Circular, an applicant who applies under the "proximity to the school" category loses 5 marks per school where there are schools, other than the one applied for admission, in the vicinity. The number of schools are determined by drawing a circle taking the distance between the residence and school as the radius. The map pertaining to the Petitioners is marked and produced as "P4".

Accordingly, the Petitioners state that they were awarded 90 marks at the interview—the missing 10 points being deductions made in view of two intervenient schools namely, Sangamiththa Vidyalaya and Covenant Balika

Vidyalaya within the said radius. The Petitioner has marked his copy of the marks sheet given by the interview panel marked "P 6" which shows the breakdown of the 90 marks;

a) The Applicant (2nd Petitioner) and the spouse have been registered in the Electoral Register for the past 5 years from the year prior to the application.	35 marks
b) Documents in proof of residency (Title deed)	10 marks
c) Additional documents in proof of Residency (NIC, Electricity and water bills, life insurance etc)	5 marks
d) Proximity to the school from the place of residence	40 marks

As per clause 8.3(b) of the Circular, once the interviews are concluded the relevant school must display a provisional list and a waiting list where the applicants who obtained the highest marks are listed in chronological order. Clause 8.3 (g) provides that objections and appeals to and against the interim list should be preferred within two weeks from the date of display. The School must constitute an Appeal and Objection Inquiry Board and refer all the appeals and objections to the said Board. In particular, where an objection is tendered the Board must interview the parties separately and verify the veracity of the objection. At the end of this process, as per clause 10. 9, the Board must enter the new marks (if there are additions/reductions) both in a separate registry maintained by them and in the 'objections/appeals' column in the applicant's copy of the marks sheet.

The 'Provisional List' of the Southlands Balika Vidyalaya was displayed on the School's Notice Board on 17. 12. 2016 and the 1st Petitioner's was ranked 12th in the said list. However, they were subsequently informed that an objection has been tendered against the 1st Petitioner's admission to the school. Accordingly,

they were required to present themselves for an inquiry before the School's Appeals and Objections Inquiry Board. The 2nd Petitioner states that at the said inquiry he was informed that no reduction of marks would take place. However, when the 'Final List' of students admitted to the School appeared on the School Notice Board on 14. 01. 2017 the Petitioners observed that the 1st Petitioner's name was not listed.

The 2nd Petitioner states that he attempted to prefer an appeal but that the 1st Respondent declined to accept it. He further claims that the list bore the names of several others who had obtained lower marks than him at the interview. Thereafter, the 2nd Petitioner complained to the Human Rights Commission, Matara on 08. 02. 2017 alleging that the 1st Respondent violated his right to equality. An inquiry was conducted by the HRC on 09. 05. 2017 and the 2nd Petitioner was informed on 31. 05. 2017 that there was no violation of his fundamental rights.

The Petitioners thereafter invoked the jurisdiction of this Court under Article 126 of the Constitution, pleading *inter alia*;

> To declare that the failure to admit the 1st Petitioner to Grade one for the year 2017 at Southlands Balika Vidyalaya, Galle by the 1st Respondent is an infringement or continuing infringement of the Petitioner's fundamental rights guaranteed to them under Article 12 (1) of the Constitution by the 1st to the 7th Respondents or any one or more of them;
>
> To declare that the 1st Petitioner is entitled to be admitted to Grade 1 for 2017 at Southlands Balika Vidyalaya Galle;
>
> To direct the 1st to the 7th Respondents or anyone or more of them to admit the 1st Petitioner to Grade 1 for 2017 at Southland Balika Vidyalaya Galle;

In their observations, the Respondents claim that the Court cannot grant the reliefs claimed by the Petitioners as it contravenes Circular No.17/2016. They

point out that although the Petitioners received 90 marks at the interview, pursuant to a site visit carried out by the Appeals and Objections Inquiry Board, it was revealed that there were not 2 but in fact 6 intervening schools within the radius. On account of this discovery, 5 marks per school were deducted—which in the end left the 1st Petitioner with only 75 marks. The 1st Respondent submitted that the cut off mark for that year under the "proximity to the school' category was set at 76 and as such, the 1st Petitioner was ineligible for admission. The 1st Respondent further states that a letter informing reasons for non-selection was sent by normal post to the Petitioners. They have produced a list marked "R2" containing the names of all persons to whom such letters had been sent.

With that, I turn to consider the legal question presented in the present application. The gravamen of the Petitioner is that the 1st to the 7th Respondents' failure to admit the 1st Petitioner to Grade one for the year 2017 at Southlands Balika Vidyalaya is arbitrary, capricious, unreasonable, discriminatory and amounts to an infringement of the Petitioners' right to equality and equal protection of law under Article 12 (1) of the Constitution.

For the complaint of an unequal treatment of law to succeed the petitioner must show that the unequal treatment was meted out in the performance of a lawful act. It is a cardinal principle that equal treatment should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is illegal in law.

In fact, the decision in ***C. W. Mackie and Co. Ltd. v Commissioner-General of Inland Revenue and others*** **(1986) 1 SLR 300** had considered this legal point where it was held that Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. In that case, Sharvananda, C.J., was of the view that,

"[…] the equal treatment guaranteed by Article 12, is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of an

illegal act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is valid in law."

In ***Gamaethige v Siriwardene (1988) 1 SLR 384*** the petitioner was the General Secretary of the Sri Lanka Government Clerical Union and was released for full time Trade Union work. In view of petitioner's participation in a strike from 17.07.1980 to 12.08.1980, he was treated as having vacated his employment, but later on appeal he was reinstated. Earlier in 1973 the petitioner's name had been registered in the waiting list for Government Quarters. In June 1984 prior to the petitioner's reinstatement in service, the petitioner's eligibility for quarters was re-examined, and upon it being reported that he was not in service, his name was deleted from the waiting list for Government Quarters. He alleged discrimination stating that preferential treatment was accorded to the respondent and four others who were not in the waiting list and another employed on contract after retirement who had been given Government Quarters though their names were not in the waiting list. Justice Mark Fernando, refusing the application observed that;

"*Here the petitioner's allegation that these persons were not in the waiting list and/or were not eligible for General Service Quarters amounts to an allegation that quarters were allocated in breach of the relevant rules. Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong.*"

In ***T. V. Setty v. Commissioner, Corporation of the City of Bangalore (1968) Mysore 251*** the petitioner complained that the Bangalore City Municipal Corporation violated Article 14 of the Indian Constitution, which corresponds to Article 12 of our Constitution, by refusing him a licence to carry on manufacture of soaps in the premises in which he has been so doing, while permitting a

number of other soap manufacturers to carry on the same in similar circumstances. Dealing with this submission Chandrashekhar J. expressed that:

"*Assuming that the Corporation has issued to those persons licences improperly and against the provisions of the Corporation Act and by laws thereunder, Article 14 of the Constitution cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases*".

This principle was followed by G.P.S De Silva J. (as he then was) in ***Jayasekera v Wipulasekera (1988) 2 SLR 237*** and by Dr. Shirani Bandaranayake J. (as she then was) in ***Seelawansa Thero And Two Others v Tennakoon, Additional Secretary, Public Service Commission (2004) 2 SLR 241.***

In the present case, as per the map marked "P4" it is clear that there are in fact 6 other schools within the perimeter. Although it is surprising as to how the said 6 intervening schools escaped the attention of the 1st Respondent during the first interview and resulted in the award of 90 marks, the Respondents have not committed an illegality by subsequently reducing the marks from 90 to 75. The 2nd Petitioner alleges that the Respondents have not reduced the marks of other applicants despite there been a similar number of schools intervening in their respective cases. While this speaks of an unfortunate turn of events, in so far as the Court is concerned, the conduct of the Respondents in admitting other applicants who have presumably received lower marks than the Petitioners cannot give rise to a 'legitimate' expectation. The petitioners cannot request this Court to compel the Respondents to act illegally in this case for the mere reason that they have acted illegally in previous cases. The relief which the Petitioner claims is a relief which this Court as a Court of law and Equity cannot provide since "Illegality and equity are not on speaking terms".

Before concluding, I wish to address certain other grievances which the Petitioners have complained of in the application. The Petitioner strenuously argued that, contrary to what the 1st and the 2nd Respondents claim in paragraph

14 in their respective objections, no site visit was carried out by members of the Appeals and Objections Inquiry Board on or about 30. 12. 2016. It is also observed that save and except for the aforesaid paragraphs in the objections, no other documentary proof substantiating the Respondents' position is before this Court. This is despite clause 8.3(c) of the Circular requiring them to maintain a separate comprehensive record of all the site visits, inclusive of the names of persons who conducted the visit, the date and their signatures. However, the 1st Respondent has brought to the attention of this Court that the officials of the Bribery Commission have taken custody of files relevant for school admission for the year 2017. In those circumstances, the Court is precluded from ascertaining the veracity of the respective claims. In any event, a finding in this regard would not make the Court come to a different conclusion.

In addition, the Petitioners also assert that a verbal assurance was given by the members of the Objections and Appeals Inquiry Board that no marks will be deducted. The Petitioners have adduced "P6" which proves this position. In terms of clause 10. 9 of the Circular, the members of the Appeals and Objections Inquiry Board must note the amended marks in red ink, in the Appeals and Objections Column in the applicant's copy of the mark sheet. However, there are no such marking on "P6", which lends credence to the Petitioners' position.

Nevertheless, the failure to mark the amended marks by itself does not preclude the Respondents from subsequently altering their position. In terms of clause 10.10 of the Circular, the Respondents are empowered to take steps which are necessary to ascertain the facts relevant for an application. This includes making site inspection. Furthermore, as per clause 8.2 (a) the Respondents are also authorized to subsequently deduct marks where any irregularity is detected. In terms of clause 8.2 (a) this risk was made known to the 2nd Petitioner when he signed and obtained the mark sheet "P6" at the very first interview. Thus, while in the ordinary course it is prudent that the amended marks be duly noted and

communicated to the applicants at the desired point, one must also be mindful that late discoveries that vitiate the eligibility of the applicant makes an exception to this practice.

In the result, I hold that the petitioners have not been successful in establishing that their fundamental right guaranteed in terms of Article 12(1) was violated by the respondents. This application is accordingly dismissed.

In the circumstances of the case I make no order as to costs.

Judge of the Supreme Court

Justice Priyantha Jayawardena PC.

I agree

Judge of the Supreme Court

Justice Murdu Fernando PC.

I agree

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. K.L.W.Perera
2. Rohini Sudasinghe
3. A.S.J.Wijayashantha
4. B.M.Chandrawathi
5. H.M.D.Kumari Herath
6. H.A.L.Wijerathna
7. A.W.P. Kulathunga
8. M.D.R.C. Dissanayake
9. P.H.Chulakanthi
10. T.D. anoma Chithrani
11. P.A. Sugathapala
12. T.D.Ranaweera
13. W.K.Lakshmi
14. N.H.K. Navarathna
15. M.S.S.Chandrasekara
16. S. Ariyarathna
17. K.L.W.Priyanyhi
18. H.P.C.S.Kumarihamy

All of Sri Jayawardenapura General Hospital, Thalapathpitiya, Nugegoda.

Petitioners

SC/FR 210/2001

Vs

1. Sri Jayawardenapura General Hospital Board, Thalapathpitiya, Nugegoda.
2. G.Chandima De Silva

2(a). Dr. H.A.P.Kahandaliyanage (Chairman)

3. Dr. J.B. Peiris
4. Dr. A.L.M. Beligaswatta

4(a). Dr.V.K.P Indraratne

5. Abeysinghe
6. Dr.H.H.R. Samarasinghe
6(a) P.J.Ambawatte
7. Dr.(Mrs.) C.N. Karunarathne
7(a). Dr. Harsha Kumudini Samarasinghe
8. K.V.P.Ranjith De Silva
8(a) Mr. Chamath De Silva
9. Dr. D.L.D. Lanerolle
9(a).Dr. N.S.A. Senaratne
10.D.G.Dayarathne
10(a).Mr.S.M. Nanda Lalitha Senanayake
11.Dr. P.G.Maheepala
12.Prof. Janaka De Silva
13.Hon. Attorney General
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

Before : Priyasath Dep CJ
Sisira J de Abrew J
Nalin Perera J

Counsel : Manohara de Silva PCwith Boopathi Kahathuduwa
for the Petitioners.
Ranjan Mendis with B.S. Peterson for the 1st 2(a), 4(a) and 9(a) Respondents.
Yohan Abeywickrama SSC for the 4th and 5th Respondents.

Argued on : 15.1.2018

Decided on : 21.6.2018

Sisira J De Abrew J.

This court by its order dated 14.10.2009, granted leave to proceed for alleged violation of Article 12(1) of the Constitution. The petitioners have stated the following facts.

The petitioners were appointed to the post of Grade III clerk in Sri Jayawardenapura General Hospital during the period commencing from 1995 to 1997. When the petitioners were appointed to the post of Grade III clerk, there were clerks already in the Sri Jayawardenapura General Hospital. The said clerks had been appointed during the period commencing from 1984 to 1995 before the petitioners were appointed to the post of Grade III clerk and they (the clerks appointed during the period commencing from 1984 to 1995) had not been placed on any grade when they were appointed. By a document dated 24.11.2000 marked P5, the clerks in the Sri Jayawardenapura General Hospital have been graded into three classes in the following manner.

Post	Salary Scale
Class I	T-2-5
Class II Segment A	T-2-2
Class II Segment B	T-2-1

The Sri Jayawardenapura General Hospital by the said letter marked P5, has placed the Petitioners in Class II Segment B the salary scale of which is T-2-1. The clerks who were appointed during the period commencing from 1984 to 1995 have been placed on the salary scale of T-2-2 by the said document marked P5. Learned

President's Counsel for the petitioners contended that as a result of the said procedure introduced by the document marked P5, the petitioners would have to wait for 20 years to reach Class I, but the clerks who had been appointed during the period commencing from 1984 to 1995 would be in a position to reach Class I in 10 years. This was the argument of the petitioners. On the strength of the said argument, the petitioners move this court to direct the Respondents to place the petitioners in the same Grade of the other clerks who had been appointed as clerks during the period commencing from 1984 to 1995. The petitioners also move this court to direct the 1st to 10th Respondents to prepare a proper scheme of grading according to law. The petitioners contended that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the Respondents. The petitioners have narrated the above facts in their petition.

The Respondents in their statement of objections admit that there are certain mistakes in the document marked P5.

The petitioner's application is to place them in the same grade of the other clerks who had been appointed as clerks during the period commencing from 1984 to 1995. The petitioners have been appointed as clerks during the period commencing from 1995 to 1997. If the petitioners' application is allowed, a person who had been appointed as a clerk in 1984 would be equal to a person who had been appointed as a clerk in 1997. If the petitioners' application is allowed, it would be unreasonable by the clerks who were appointed as clerks in 1984. Such a decision would undoubtedly affect the rights of the clerks who were appointed during the period commencing from 1984 to 1995. They are not even before court. It has to be noted here that the people who were appointed as clerks during the period commencing from 1984 to 1995 have been in clerical service in Sri

Jayawardenapura General Hospital long prior to the appointments of the petitioners as clerks. Therefore, it is unreasonable to equalize two categories now. For the above reasons I hold the view that said application of the petitioners cannot be allowed.

When I consider all the above matters, I am unable to hold that the Respondents have violated the fundamental rights of the petitioners guaranteed by Article 12(1) of the Constitution. I therefore refuse to grant the relief claimed by the petitioners. For the aforementioned reasons, I dismiss the petition of the petitioners with costs.

Petition dismissed.

Judge of the Supreme Court.

Priyasath Dep PC Chief Justice

I agree.

Chief Justice.

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.

1. **KARUWALAGASWEWA VIDANELAGE SWARNA MANJULA**
   Tilakapura, Kalakarambewa.

2. **NAWARATHNA HENALAGE ROSALIYA**
   Tilakapura, Kalakarambewa.

PETITIONERS

S.C. F.R. No. 241/14

VS.

1. **C.I.V.P.J. PUSHPAKUMARA**
   Officer-in- Charge,Police Station, Kekirawa.

2. **RATNAYAKE**
   Acting Officer-in- Charge, Police Station,Kekirawa.

3. **BHODINARAYAN ACHARIGE SWARNASHEELI**
   Kottalbadda,Kekirawa.

4. **ANURA PRIYATHILAKA**
   Kottalbadda,Kekirawa.

5. **N.K. ILLANGAKOON**
   Inspector General of Police, Police Head Quarters, Colombo 01.

6. **HON. ATTORNEY-GENERAL**
   Attorney-General's Department, Colombo 12.

RESPONDENTS

5A.PUJITHA JAYASUNDERA
Inspector General of Police,
Police Head Quarters,
Colombo 01.
ADDED RESPONDENT

BEFORE: S. Eva Wanasundera, PC J.
H.N.J. Perera J.
Prasanna Jayawardena, PC J.

COUNSEL: Saliya Pieris, PC with R.D. de Silva for the Petitioners instructed by Ms. G.S. Thavarasa.
Ms. Varunika Hettige, DSG for the Respondents.

ARGUED ON: 23rd January 2018.

WRITTEN SUBMISSIONS FILED: By the Petitioners on 14th February 2018.
Not filed by the Respondents.

DECIDED ON: 18th July 2018

Prasanna Jayawardena, PC J.

The two Petitioners are mother and daughter. The 2nd Petitioner, who is the mother, is 58 years of age. She has three children, one of whom is the 1st Petitioner. The 1st Petitioner is 35 years old. She has two children of her own. Both petitioners and their families live in the village of Kalakarambewa. The village is situated about 8 kilometres North West of Kekirawa, which is the closest large town. There is ready access to Kalakarambewa from Kekirawa since the village is sited just off the Kekirawa-Talawa B213 road.

Kalakarambewa falls within the area of the Kekirawa Police Station. The 1st Respondent is the Officer-in-Charge of the Kekirawa Police Station in March 2014. The 2nd Respondent is a Chief Inspector attached to the Kekirawa Police Station, at that time.

The 3rd Respondent is a 43 year old woman. The 4th Respondent is a 37 year old woman. They live in the village of Kottalbadda, which adjoins Kalakarambewa.

The 5th Respondent is the Inspector General of Police and the 6th Respondent is the Hon. Attorney General.

Both Kalakarambewa and Kottalbadda are little rural villages in the North Central Province. As is the case in most such villages in the Province, the overwhelming majority of the inhabitants are Buddhists. Their main livelihood is agriculture. The traditional Raja Rata culture of the *weva, dagaba, gama, pansala, keth vathu yaya* - irrigation tank, stupa and the village with its temple and agricultural lands - still holds to a considerable extent in such villages - a trait which is to be cherished and nurtured, if I may add a personal note.

In their application to this Court, the petitioners allege that the 1st and 2nd respondents violated several of the petitioners' fundamental rights. The case urged by the petitioners and the positions taken in the 1st and 2nd respondents' affidavits and documents annexed thereto, all require careful scrutiny. Therefore, I will set out, in some detail, the petitioners' narrative of the alleged events upon which they base their application to this Court and the positions taken by the 1st and 2nd respondents in their affidavits and the contents of the documents they have annexed.

In their application, the two petitioners state that: they are both Jehovah's Witnesses and that, at the time of the incident which occurred on 01st March 2014 and gave rise to this application, the two petitioners had been Jehovah's Witnesses for about 6 years

`Jehovah's Witnesses' are a Christian denomination which had its origins in the late 19th century, in the United States of America. The tenets of the denomination are restorationist and non-trinitarian. They differ, in some significant aspects, from the doctrines of the mainstream Christian Churches, both Catholic and Protestant. It is said that there are more that 8 million Jehovah's Witnesses, worldwide. The denomination was first introduced to Sri Lanka in 1910. The official websites of Jehovah's Witnesses state that, there are over 6000 members of the denomination in Sri Lanka, who form over a 100 congregations.

In their application, the two petitioners go on to state that: in the course of one of their public ministries carried out in February 2014, they met a woman named Niluka Maduwanthi, with whom they discussed the Bible; on that occasion, Niluka Maduwanthi invited them to visit her home; in pursuance of this invitation, on 01st March 2014, the two petitioners set off for the village of Kottalbadda to visit Niluka Maduwanthi; while walking on a public by-lane towards Niluka Maduwanthi's house, another young woman, whose name they cannot recall [who can now be identified, from the document marked "1R3" annexed to the 1st respondent's affidavit, as one B.P Chandima who is the daughter-in-law of N.A. Baby Nona], had invited them into her house; the petitioners remember having met Chandima earlier and, on that occasion, she had obtained religious publications from the petitioners; on the invitation given by Chandima, the two petitioners entered the compound of her house, at about 10.30am; Chandima invited the petitioners to sit down on some

chairs at the entrance to the house; Chandima then said that she would like to discuss the Bible in the context of family life and, therefore, the petitioners and Chandima started discussing the Bible and the message it carries and the petitioners gave some religious publications to Chandima; during this discussion, an unidentified man came into the compound of Chandima's house and inquired as to what the petitioners were doing; he then took some of the religious publications which were in Chandima's hand and went away; later, at about 10.45am, two Buddhist monks and two uniformed police officers entered the compound; one of the monks *"berated"* the petitioners for *"attempting to forcefully convert persons for monetary gain"*; the petitioners denied that they were trying to *"forcibly convert"* Chandima and stated that they were only discussing the Bible with her at her invitation; by then, about 20-25 persons had gathered there; the two monks told the petitioners that they must go to the Police Station; then, two police officers arrived at the premises; at about 10.55am, the two police officers directed the petitioners to get into a three-wheeler which was parked nearby; when the petitioners got into the three wheeler, they found another woman in the vehicle; the petitioners had never met that woman until that moment; the petitioners were then taken, in the three wheeler, to the Kekirawa Police Station; the two police officers, the two Buddhist monks and three other villagers had followed the three wheeler to the Police Station; the petitioners described the aforesaid two police officers as *"Arresting Officers"*; the petitioners say that they are unaware of the names of these two police officers; the 1st and 2nd respondents also have not furnished the names of these police officers even though they would have known their identities since, as set out later on in this judgment, it has been clearly established that police officers attached to the Kekirawa Police Station went to Chandima's house, on 01st March 2014, and brought the petitioners to the Police Station.

The petitioners go on to state that: they reached the Kekirawa Police Station at about 11.15am; the 1st respondent [who is the Officer-in-Charge] first invited the two Buddhist monks into his office and had a discussion with them; the petitioners were kept outside the office; later, the petitioners were taken into the office and the 1st respondent *"berated"* the petitioners for *"being Jehovah's Witnesses"* and for *"selling religion for money"*; the two Buddhist monks then said they regret not having assaulted the petitioners before bringing them to the Police Station; the 1st respondent became aggressive and said that the petitioners should have been assaulted and this had caused the petitioners to fear for their safety; at around 12 noon on the same day, the petitioners were *"detained outside the police cell"*; by then, the 1st petitioner's husband, who the 1st petitioner had been able to telephone before being brought to the Police Station, had come to the Kekirawa Police Station and attempted to obtain Police Bail on behalf of the petitioners; however, he was not successful and he was informed that a Case would be filed against the petitioners in Court; thereafter, the petitioners were detained overnight at Kekirawa Police Station; during this time, the petitioners were berated by several police officers.

The petitioners state that: at around 10.45am on the following day - *ie:* on 02nd March 2014 - the petitioners were released on Police Bail, on the condition that they would both attend an investigation to be held at the Kekirawa Police Station on the next day

- *ie:* on 03rd March 2014; the petitioners attended the Kekirawa Police Station on 03rd March 2014; however, no investigation or inquiry was held on that day and the petitioners were not informed what the charges against them were or of who had made a complaint against the petitioners; instead, the petitioners were asked to return to the Kekirawa Police Station to attend an inquiry on another date; eventually, the proposed inquiry was held at the Kekirawa Police Station, on 15th March 2014; the two petitioners were present together with the 1st petitioner's husband and three other Jehovah's Witnesses; the woman who had been in the three wheeler on 01st March 2014 and was now identified as the 3rd respondent [Swarnaseeli] was also present together with the 4th respondent [Anura]; the investigation commenced before the 2nd respondent [who was the Acting Officer-in-Charge on that day]; the 2nd respondent informed the petitioners that, Swarnaseeli and Anura had lodged complaints against the petitioners *"for forcibly entering premises and forcibly carrying out religious conversions."*; the 2nd respondent asked the petitioners to explain why they entered the complainants' houses without their permission; the petitioners denied having entered the premises of the complainants and said that they had not met the alleged complainants previously; when the 2nd respondent inquired from the complainants, they admitted that they had not met the petitioners and said the complainants had lodged the complaint *"under the dictation of"* the two police officers who, on 01st March 2014, had arrived at Chandima's premises; nevertheless, the 2nd respondent berated the petitioners and said that they had acted in a manner that caused a breach of the peace; further, the 2nd respondent directed the petitioners not to discuss their religion with Buddhists and prohibited the Petitioners from engaging in public ministry in the Kekirawa area; thereafter, the 2nd respondent directed the petitioners to sign an undertaking that they would not, in the future, act in a manner that would cause a breach of the peace; when the petitioners said they had not acted in such a manner and refused to sign any such document, the 2nd respondent *"threatened the Petitioners with criminal legal action with penal consequences,…*.; finally, the 2nd respondent directed the petitioners to come to the Magistrate's Court at Kekirawa on 17th March 2014 and concluded the investigation; however, no case was filed or has been later filed against the petitioners.

Subsequently, the petitioners filed the present application in this Court, under and in terms of Article 17 and Article 126 of the Constitution of the Republic. They annexed to their petition, marked "P1", copies of some religious publications carried by Jehovah's Witnesses and, marked "P2", an affidavit by the 1st petitioner's husband. The petitioners complained to this Court that, the alleged facts and circumstances set out above establish the unlawful arrest and detention of the petitioners and violated the petitioners' fundamental rights which are guaranteed by Articles 10, 11, 12(1), 13(1), 13(2), 13(5), 14(1)(*a*) and 14(1)(*e*) of the Constitution.

On 02nd October 2014, this Court granted the petitioners leave to proceed against the 1st and 2nd respondents with regard to alleged violations of the petitioners' fundamental rights guaranteed by Articles 12(1), 13(1) and 14(1)(*e*) of the Constitution.

The 1st respondent [*ie:* the Officer-in-Charge of the Kekirawa Police Station] has tendered an affidavit in which he denies the petitioners' claims and states that he has conducted his duties lawfully. He says that, the 3rd respondent [Swarnaseeli] had made a complaint *"regarding the Petitioners causing a nuisance by forcing religion without the consent, which caused fear."* and goes on to say that, *"there was a possibility of breach of peace and a chaotic situation arising by this"* and *"to prevent the Petitioners from any eminent [sic] danger, they were kept in the Police Station, with full protection"*. He categorically states that, *"the petitioners were not arrested."* and goes on to say, *"when it was manifest that the lives of the Petitioners were not in danger anymore, they were released."*. He says with regard to the inquiry held on 15th March 2014, that, *"as no breach of peace was observed and the parties agreed to maintain cordiality, the inquiry was terminated according to the provisions of the Criminal Procedure Code, by the 2nd Respondent."*.

In his affidavit, the 1st respondent referred to and annexed Extracts from the Information Book of the Kekirawa Police Station, which were marked "1R1", "1R2", " "1R3" and "1R4". The Extract marked "1R1" contains an Entry made by Police Sergeant 21211, Dhanapala at 1.30pm on 01st March 2014 at the Kekirawa Police Station which records, *inter alia, a* statement made by the 3rd respondent [Swarnaseeli] at that Police Station. The Extract marked "1R2" contains a statement made by the 4th respondent [Anura] at 2.10pm on the same day, at the Police Station. The Extract marked "1R4" records that, at 2.25pm on the same day, Police Constable No. 47682, Bandara took custody of two religious publications which had been handed to him by the 4th respondent [Anura]. The Extract marked "1R3" contains a statement made by one N.A. Baby Nona, at about 5.00pm in the evening of the same day, at her house in Kottalbadda.

It is seen that, the contents of the Extracts marked "1R1", "1R2" and "R4" reveal what, in fact, happened, on 01st March 2014, in Kottalbadda and at the Kekirawa Police Station and expose the falsity of the aforesaid positions taken by the 1st respondent, in his affidavit. Therefore, it is will be useful to, at this point, set out the relevant contents of these Extracts marked "1R1", "1R2" and "R4", which have been produced by the 1st respondent.

As mentioned earlier, the Extract marked **"1R1"** is an Entry made on 01st March 2014, at 1.30pm, by Police Sergeant Dhanapala, at the Kekirawa Police Station. He commences the Entry by recording that, the 3rd respondent [Swarnaseeli] together with some other persons brought the two petitioners to the Kekirawa Police Station and complained that the two petitioners had forcibly entered the 3rd Respondent's house and threatened the 3rd respondent and others - *vide:* *"මෙම අවස්ථාවේදී කොට්ටල්බද්ද, කැකිරාව යන ලිපිනයේ පදිංචි බී.ඒ. ස්වර්ණශීලී යන අය හා තවත් පිරිසක් කාන්තාවන් දෙදෙනෙකු කැඳවා ගෙන තමන්ගේ නිවසට උදේ කාලයේදී අයුතු ඇතුල් වී තර්ජනය කල බවට සඳහන් පැමිණිල්ලක් කිරීමට ඇවිත් දන්වයි. ඒ අනුව මෙම අයගේ පැමිණිල්ල පහත පො.සැ. 21211 ධනපාල වන මා සටහන් කරමි."*

Thereafter, "1R1" records the statement made by the 3rd respondent. In her statement, the 3rd respondent says that: at about 10.30am on 01st March 2014 she went to her sister's [Baby Nona's] house and was talking with Baby Nona together with one Ashoka Manel Kumari; at about 10.45am, the two petitioners entered the premises and stated that they wished to convert the 3rd respondent and the other two ladies [*ie:* Baby Nona and Ashoka Manel Kumari] to Christianity and pressurized them to adopt Christianity as their faith; the 3rd respondent and the other two ladies were frightened by these efforts on the part of the petitioners; the 3rd respondent and the other two ladies said that they were Buddhists and that they had no wish to convert to another religion and they asked the two petitioners to leave the premises; despite this request, the petitioners refused to do so and remained on the premises against the wishes of the 3rd respondent and the other two ladies; the petitioners continued with their efforts to convert the 3rd respondent and the other two ladies to Christianity; these actions of the petitioners caused great shame to the 3rd respondent and the other two ladies and made them frightened; therefore, they informed other residents of the village who, in turn, informed the Buddhist monk who was at the village temple; several residents of the village then came to the premises and prepared to take the two petitioners to the Police Station; the petitioners threatened them at this point too; then, the 3rd respondent and some other residents of the village took the two petitioners to the Police Station; the 3rd respondent's sister - *ie:* Baby Nona - could not come with them to the Police Station; but Baby Nona had instructed the 3rd respondent to make a complaint that the two petitioners had forcibly entered her premises against Baby Nona's wishes; the 3rd respondent proceeds to hand over the petitioners to the Police; the 3rd respondent requests the Police to take action against the petitioners for threatening her and the others and for attempting to forcibly convert them to Christianity.

Having recorded the 3rd respondent's aforesaid statement, Police Sergeant Dhanapala has stated in "1R1" that, on the basis of this complaint made by the 3rd respondent against the two petitioners who had been brought to the Police Station by the 3rd respondent and others, he proceeds to arrest the two petitioners on suspicion of the offences of `criminal trespass' and `criminal intimidation' and to take the two petitioners into custody - *vide:* ඉහත කී බී. ඒ. ස්වර්ණගීලී යන අයගේ ප්‍රකාශය පො.සැ. *21211* ධනපාල වන ම අවංකවත් නිවැරදිවත් වාර්තා කල බවට ප්‍රකාශ කරමි. මා දැන් ඉහත පැමිණිලිකාරිය සහ පැමිණිි පිරිස විසින් කැඳවාගෙන රැගෙන එන ලද පැමිණිලිකාරිය අසල අයුතු ඇතුල් වීමක හා සාපරාධී බිය ගැන්වීම, බලහත්කාරයෙන් ආගම් වලට පුද්ගලයන් බඳවා ගැනීමට උත්සහා කරන ලද බවට සඳහන් තැනැත්තියන් දෙදෙනා වන *01.*කරුවල ගස්වැව විදානයලාගේ ස්වර්ණා මංජුලා කුමාරි ..... *02.* නවරත්න හේනලාගේ රොසලිනා ..... යන දෙදෙනා අයුතු ඇතුල් වීම සහ සාපරාධී බිය ගැන්වීම යන වරද කියා දී පැය *13.15*ට පොලිස් ස්ථානයේ චෝදනාගාරයේදී අත්අඩංගුවට ගනිමි.*"*.

In view of the references made by both the 1st respondent and Police Sergeant Dhanapala to having received a complaint from the 3rd respondent [Swarnaseeli] that the petitioners had attempted to "forcibly convert" her to the petitioners' religion, it is

incumbent on me to state here that, our law, as it now stands, does not envisage an offence of "forcible conversion". Attempts towards religious conversion can become unlawful only if some offence or nuisance, as is recognised by law, is committed in the course of such an exercise. In 2004, a Bill titled "Prohibition of Forcible Conversion of Religion Bill" was considered by this Court in the exercise of its constitutional jurisdiction, in SC SD 2/2004 to SC SD 22/2004. In those determinations, this Court found several provisions of that Bill to be violative of several Articles of the Constitution. Consequently, the Bill did not proceed towards enactment. The Legislature has not sought to enact similar legislation after that.

The Extract marked **"1R2"** contains a statement made by the 4th respondent [Anura] at the Kekirawa Police Station at 2.10pm on 01st March 2014 - *ie:* shortly after the petitioners were taken into custody at the Police Station. In "1R2", the 4th Respondent states that: she was passing Baby Nona's house on that day, when she saw some persons on those premises and joined them; she recognised these individuals as persons who had come to Kottalbadda on an earlier day and preached another religion and handed out some publications; these persons had tried to convert the residents of Kottalbadda to that religion; at that time, the residents of Kottalabadda had decided to apprehend these persons if they returned to Kottalbadda and hand them over to the Police; therefore, on 01st March 2014, she and some other residents of Kottalbadda informed the Police who had come to Baby Nona's house and taken the petitioners to the Police Station - *"මේ සම්බන්ධයෙන් පොලීසියට දැන්වූ පසු පොලීසියෙන් ඇවිත් තමයි පොලීසියට ඒ අය එක්ක ආවේ"*.

It is to be noted that, the 4th respondent does not state that, at the aforesaid time, Baby Nona was on the premises or that Baby Nona wished to make any complaint against the petitioners.

The Extract marked **"1R3"** records a Statement made at about 5.00pm on 01st March 2014, by one A.N Baby Nona, at her house in Kottalbadda. She states that: she left her house at 9.30 am on that day to work in her *chena* and returned only at 11.30am; when she returned, she found the two unknown ladies discussing the Bible with her daughter-in-law, Chandima and turning the pages of a large Bible; these two ladies had then tried to convert her to Christianity; she had asked them to leave but they had not left; she had later spoken to the Buddhist monk at the village temple who spoken to the Police; some police officers had come there and taken the petitioners away - *"පොලීසියේ මහත්තුරු වගයක් ඇවිත් ඔවුන්ව එක්ක ගියා."*.

It springs to attention that, Baby Nona's statement that she left her house at 9.30am on 01st March 2014 and returned from her *chena* only at 11.30am, exposes as a total falsehood, the 3rd respondent's claim that she and Baby Nona were talking with each other from 10.30am on that day when the petitioners came to Baby Nona's house, at about 10.45am.

Next, contrary to the claims made by the 3rd and 4th respondents, Baby Nona does *not* state that, either the 3rd respondent or the 4th respondent entered her premises and she does not state that a group of villagers came to her premises.

Most importantly, Baby Nona does *not* state that, she asked the 3rd respondent to make a complaint of `criminal trespass' against the petitioners. Thus, the 3rd respondent's claim made in "1R1" that Baby Nona had instructed her to make a complaint, is also shown to be a barefaced lie.

A further two documents were annexed to the 1st respondent's affidavit marked "1R5" and "1R6" but were not referred to in his affidavit. The document marked "1R5" is, on the face of it, an Extract from the Information Book of an Entry made by the 2nd respondent at 2.10pm on 03rd March 2014, which records that the two petitioners had come to the Police Station for the inquiry to be held on that day but that neither complainant - *ie:* the 3rd respondent [Swaranseeli] or the 4th respondent [Anura] - were present and that the 2nd respondent has sent a message to the complainants to attend the inquiry on 04th March 2014. The document marked "1R6" is, on the face of it, the first page of a Report, dated 14th March 2014, to be made to the Magistrate under Chapter III of the Code of Criminal Procedure. It is captioned "අත් අඩංගුවට ගන්නා ලද සැකකාරියන් දෙදෙනෙකු පොලිස් ඇප මත මුදාහරින ලද බව ගරු අධිකරණය වෙත වාර්තා කිරීම."

Learned Deputy Solicitor General, who appeared for the Respondents referred to these documents and I have no reason to doubt that these documents are records of the Kekirawa Police Station. Learned President's Counsel who appeared for the petitioners has not made an application that these documents be disregarded on the ground that they are not specifically referred to in the petition. In these particular circumstances, I will consider these documents since they assist this Court in determining this application.

The 2nd respondent has also tendered an affidavit in which he denies the petitioners' claims and states that he has conducted his duties lawfully. He says he agrees with the statements made in the 1st respondent's affidavit. He says that he carried out the inquiry on 15th March 2014 because the 1st respondent was on leave on that day. He says that, at this inquiry, *"having heard the parties I took steps to conclude the matter according to the provisions of the law,."* The 2nd respondent annexed Extracts from the Information Book marked "2R1" and "2R2". The Extract marked "2R1" is a record by the 2nd respondent of the proceedings of the aforesaid inquiry held by him on 15th March 2015. The Extract marked "2R2" contains further statements made by the two complainants [*ie:* the 3rd and 4th Respondents], on 15th March 2015, at the Kekirawa Police Station. I will refer to the relevant contents of these documents later on in this judgment.

The 1st petitioner has tendered a counter affidavit denying the truth of the statements made by the 1st and 2nd Respondents in their affidavits and reiterating the positions taken by the petitioners in their petition. The 1st petitioner states that she and the 2nd

petitioner were arbitrarily arrested by the 1st and 2nd respondents. She also states that, 3rd and 4th respondents [*ie:* Swarnaseeli and Anura] *"…..made a complaint against the Petitioners, under the directions of the officers of the Kekirawa Police Station, and have acted in collusion with such officers."*. .

This Court has granted the petitioners leave to proceed against the 1st and 2nd respondents only with regard to the alleged violation of the petitioners' fundamental rights guaranteed by Articles 12(1), 13(1) and 14(1)(*e*) of the Constitution. Therefore, questions of whether there were violations of the petitioners' fundamental rights guaranteed by the *other* Articles of the Constitution which are referred to in the petition, do not arise for consideration.

Before I move on to consider the alleged violations of the petitioners' fundamental rights, it should be mentioned here that, the respondents have not contended that the police officers who are said to have come to Chandima's house and brought the petitioners to the Kekirawa Police Station and Police Sergeant Dhanapala, should have been named as parties to these proceedings.

I will first consider whether the material before us establishes that, the 1st and/or 2nd respondents violated the petitioners' fundamental rights under **Article 13(1)** of the Constitution which states that, *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*.

In order to determine whether there has been a violation of the petitioners' rights guaranteed by Article 13(1), I should first consider whether the petitioners had, in fact, been "arrested". Needless to say, it is only if the petitioners were "arrested" that, this Court is required to examine the material before us in relation to the other limbs of Article 13(1).

In this regard, as set out above, the petitioners complain that, on 01st March 2014, they were wrongfully and unlawfully arrested by two unidentified police officers attached to the Kekirawa Police Station, who had come to Chandima's house and directed and compelled the petitioners to get into a three-wheeler to be taken to the Kekirawa Police Station, with the two police officers following the petitioners to the Police Station to make sure the petitioners proceeded to the Police Station; and that, thereafter, the petitioners were wrongfully and unlawfully detained overnight at that Police Station, until they were released on Police Bail, the next morning.

In contrast, in his affidavit, the 1st respondent admits that the petitioners were *"kept"* overnight at the Police Station but denies that the petitioners were arrested. In fact, he specifically states that, that, *"the petitioners were not arrested."*. The 1st respondent says he is *"unaware"* of the truth of the chain of events narrated by the petitioners and says that he denies the petitioners' claim that they were compelled to proceed to the Police Station by two police officers.

However, the truth of the petitioners' statement that, two police officers came to Chandima's house and took the petitioners to the Kekirawa Police Station is confirmed by the 4th respondent [Anura] in "1R2" when she states *"මේ සම්බන්ධයෙන් පොලීසියට දැන්වූ පසු පොලීසියෙන් ඇවිත් තමයි පොලීසියට ඒ අය එක්ක ආවේ"* and also by N.A. Baby Nona in "1R3" who says *"පොලීසියේ මහත්තුරු වගයක් ඇවිත් ඔවුන්ව එක්ක ගියා."*.

In this background, I consider that, the material before us is sufficient to safely conclude that, as stated by the petitioners, two police officers did come to Chandima's premises on 01st March 2014 and require the petitioners to get into the three-wheeler to go to the Kekirawa Police Station and then follow that three-wheeler to ensure that the petitioners immediately went to the Police Station and nowhere else. These facts make it evident that the petitioners did not voluntarily go to the Police Station. In any event, I can see no reason why the petitioners would have, on their own free will, wished to come to the Police Station on 01st March 2014. It is very probable that, if not for that compulsion exerted on them by the two police officers, the two petitioners would have, in view of the hostility shown to them, left Kottalbadda and gone back to their homes in Kalakarambewa or gone elsewhere. It is safe to conclude that, the petitioners went to the Police Station against their own wishes and only because they were compelled to do so by the two police officers.

It has been long established, in cases such as **PIYASIRI vs. FERNANDO** [1988 1 SLR 173] and **NAMASIVAYAM vs. GUNAWARDENA** [1989 1 SLR 394] that, when a person is required or directed by a police officer to go to a Police Station and he is, thereby, compelled, by the nature of that requirement or direction, to go to the Police Station against his wishes, that person has been "arrested", insofar as Article 13(1) is concerned. Thus, in **PIYASIRI vs. FERNANDO**, H.A.G. De Silva J [at p.180], quoted, with approval, Dr. Glanville William's article titled "Requisites of a valid arrest" [1954 Criminal Law Review 6 at p.8] where the learned author wrote: *"….. an arrest may be made by mere words and the other submits….. If an officer merely makes a request to the suspect, giving him to understand that he is at liberty to come or refuse, then there is no imprisonment or arrest. If however the impression is conveyed that there is no such option, and the suspect is compelled to come, it is an arrest ….. "*. In **NAMASIVAYAM vs. GUNAWARDENA**, Sharvananda CJ said [at p.401], *"in my view, when the 3rd Respondent required the Petitioner to accompany him to the Police Station and took him to the Police Station, the Petitioner was in law arrested by the 3rd Respondent. The Petitioner was prevented by the action of the 3rd Respondent from proceeding with his journey in the bus. The Petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; threat of force used to procure the Petitioner's submission was sufficient. The Petitioner did not go to the Police Station voluntarily. He was taken to the Police by the 3rd Respondent.".* As Fernando J succinctly put it in **SIRISENA vs. PERERA** [1991 2 SLR 97 at p.107] *" Whether or not a person has been arrested depends not on the legality of the arrest* ***but on whether he has been deprived of his liberty to go where he pleases.****"*.

An application of these well-established principles of the Law to the facts and circumstances of this case, leaves little doubt that, the petitioners were arrested by the two police officers, at Chandima's premises.

Next, these two police officers are, undoubtedly, attached to the Kekirawa Police Station, of which the 1st respondent is the Officer-in-Charge. It is reasonable to infer that, when, on 01st March 2014, the residents of Kottalbadda informed the Kekirawa Police Station about the presence of the petitioners in the village, the two police officers proceeded to Chandima's house upon orders given by the 1st respondent, possibly in terms of section 109 (5) (*a*) of the Code of Criminal Procedure Act No. 15 of 1979, as amended. In any event, it can be assumed that, upon their return to the Police Station the two police officers reported the fact of the arrest to the 1st respondent, *inter alia*, in terms of section 109 (4) or section 109 (4A) of the Code of Criminal Procedure Act. Thereupon, the 1st respondent has, himself, interviewed the petitioners at the Police Station, presumably acting, *inter alia*, in terms of section 109 (5) (*a*) of the Code of Criminal Procedure Act. Soon thereafter, the petitioners have been taken into custody and detained. Thereby, the 1st respondent has also ratified the earlier arrest of the petitioners by the two police officers. In any event, the 1st respondent has *not* suggested that these police officers were acting without his directions or outside of authority given to them by him. These circumstances establish that the two police officers acted under the directions of or with the authority of the 1st respondent, when they arrested the petitioners and brought them to the Police Station.

In any event, the fact that the petitioners were arrested and detained on 01st March 2014 is established, beyond any doubt, by the Extract marked "1R1" in which Police Sergeant Dhanapala has recorded that, the petitioners were taken into custody, at 1.15pm on that day, at the Kekirawa Police Station. The relevant part of that Extract was reproduced earlier in this judgment, when I was setting out the contents of "1R1".

It should be stated here that, the reasonable conclusion is that, soon after the petitioners were interviewed by the 1st respondent, they were taken into custody by Police Sergeant Dhanapala, on the directions of the 1st respondent, who was the Officer-in-Charge of the Police Station. In any event, the 1st respondent has *not* suggested that Police Sergeant Dhanapala took the petitioners into custody without his directions or outside of authority given to him by the 1st respondent. The 1st respondent also did not act in terms of section 109 (5) (b) or section 114 of the Code of Criminal Procedure Act and end the investigation and release the petitioners after he interviewed them. Instead, he has directed Police Sergeant Dhanapala to proceed in terms of the arrest which had been effected and take the petitioners into custody. These circumstances establish that, the petitioners were taken into custody and, thereafter, detained on the directions and with the authority of the 1st respondent. Further, I have no doubt that, the Entry made by Police Sergeant Dhanapala in "1R1", which was made soon after the 1st respondent interviewed the petitioners, was made with the full knowledge of the 1st respondent and on his directions.

It is evident that, soon after the petitioners were arrested by the two police officers and brought to the Police Station, they were interviewed by the 1st respondent and then taken into custody, on the 1st respondent's directions, at 1.15pm on the same day. I am of the view that, these events must be regarded as constituting one seamless act within which the petitioners were arrested and taken into custody. It is not possible to artificially divorce the initial arrest of the petitioners by the two police officers at Chandima's house from the petitioners being placed in custody at the Police Station, soon thereafter. That sequence of events, which occurred within a short span of time, are constituent elements of the arrest of the petitioners, on 01st March 2014.

Despite the clear record which establishes that the petitioners were arrested, the 1st respondent has, in his affidavit, falsely stated that, *"the petitioners were not arrested."* The 2nd respondent has, in his affidavit, agreed with that false statement made by the 1st respondent.

These deliberate falsehoods go to the root of the 1st and 2nd respondents' case and gravely impugn the credibility of the positions taken by them. The 1st and 2nd respondents have sought to misrepresent what, in fact, happened on 01st March 2014 with regard to the arrest and detention of the petitioners.

Since the "arrest" of the petitioners has been established and since Article 13 (1) declares that, *"No person shall be arrested except according to procedure established by law …."*, the next step is to examine whether the arrest of the petitioners was carried out according to procedure established by the Law.

It is common ground that the Police claimed to have proceeded under and in terms of the provisions of the Code of Criminal Procedure Act and not under any special procedure authorised by some other Law. It is also common ground that, no warrant had been issued for the arrest of the petitioners.

In this regard, it hardly needs to be said here that, section 32 (1) of the Code of Criminal Procedure Act empowers a police officer to arrest a person *without a warrant* only in one of the instances enumerated in sub-sections (*a*) to (*i*) of section 32 (1). A glance at these circumstances described in sub-section (*a*) and sub-section (*c*) to (*i*) shows that these sub-sections are inapplicable to the facts and circumstances of this case. That leaves only sub-section (*b*) of section 32 (1) as possibly applicable to the arrest of the petitioners.

Next, as set out above, the Extract marked "1R1" clearly records that the petitioners were arrested on suspicion of the offences of **`criminal trespass'** and **`criminal intimidation'**. No other suspected offence is mentioned, as an alleged reason for the arrest.

It is convenient to first consider whether the arrest of the petitioners on suspicion of the offence of **`criminal intimidation'** was done lawfully. In this regard, as is well known, the power of arrest given to a police officer by section 32 (1) (*b*) to arrest

without a warrant, is only in respect of *cognizable* offences. However, a perusal of the First Schedule to the Code of Criminal Procedure Code establishes that, `criminal intimidation', which is defined and referred to in section 483 and section 486 of the Penal Code, is *not* a "cognizable offence". In fact, the First Schedule expressly states that, a police officer or other peace officer shall not arrest, without a warrant, a person on suspicion of the offence of `criminal intimidation'.

Therefore, the police officers were not empowered by section 32 (1) (*b*) to arrest the petitioners, without a warrant, on suspicion of the offence of `criminal intimidation'. For purposes of completeness, it is also necessary to mention here that, the circumstances referred to in section 33 of the Code of Criminal Procedure - which empower a police officer or other peace officer to arrest a person accused of committing a non-cognizable offence if that person refuses to give his name and address to the police officer or gives a name and address which the police officer has reason to be believe to be false - did not arise in the present case.

It then follows that, the arrest of the petitioners on suspicion of the offence of **`criminal intimidation'**, was *ex facie* unlawful since a warrant had not been first obtained.

Nevertheless, as recorded in the Extract marked "1R1", the petitioners were also arrested on suspicion of the offence of **`criminal trespass'**. Therefore, I am also required to consider whether that arrest - *ie:* on suspicion of the offence of `criminal trespass' - was done *"according to procedure established by law …."* and, therefore, in compliance with the requirement stipulated in Article 13 1).

In this regard, the offence of `criminal trespass' is defined and referred to in section 427 and section 433 of the Penal Code and *is* listed as a "cognizable offence" in the First Schedule to the Criminal Procedure Code. Therefore, the police officers were empowered by section 32 (1) (*b*) of the Code of Criminal Procedure Act, to arrest the petitioners, without a warrant, on suspicion of the offence of `criminal trespass' and the arrest of the two petitioners on that ground would be valid if it has been done lawfully. Thus, in **JIFFRY vs. NIMALASIRI** [1997 1SLR 45] where, as in the present case, the petitioner was arrested without a warrant on suspicion of the offences of `criminal intimidation' and `criminal trespass', it was held that, held that, even though the arrest on suspicion of `criminal intimidation' was unlawful because there was no warrant, the arrest on suspicion of `criminal trespass' was lawful since it was done in compliance with 32 (1) (*b*).

However, the matter does not end there since section 32 (1) (*b*) empowers a police officer to arrest a person without a warrant ***only*** if that person is one *"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 follows that, if the arrest of the petitioners was not effected in compliance with the criteria listed in section 32 (1) (*b*) of the Criminal Procedure Code, the arrest would *not* have been made *"according to procedure established by law …."* and would, consequently, amount to a violation of the petitioners' fundamental rights guaranteed by Article 13(1) of the Constitution. As

Amerasinghe J observed in **CHANNA PIERIS vs. ATTORNEY GENERAL** [1994 1 SLR 1 at p. 27] *"The procedure generally established by law for arresting a person without a Warrant are set out in Chapter IV B (Sections 32-43) of the Code of Criminal Procedure. Where a person is arrested without a warrant otherwise than in accordance with these provisions, Article 13(1) of the Constitution will be violated.*. On similar lines, Gratien J had earlier stated in **MUTTUSAMY vs. KANNANGARA** [52 NLR 324 at p.330], *" ….. the legality of the arrest depended upon whether the accused were persons `against whom a* ***reasonable*** *complaint had been made or* ***credible*** *information had been received or a* ***reasonable*** *suspicion existed' of their having been concerned in the commission of the offence of theft. (Section32(1)(b) of the Criminal Procedure Code.)"*

Applying these requirements specified in section 32 (1) (*b*) of the Criminal Procedure Code, this Court has, time and again, taken the view that, an arrest will be lawful only if the arresting officer had *reasonable* grounds, either upon the personal observations or knowledge of the arresting officer or upon a *"reasonable complaint"* or *"credible information"* received by him, which enables him to form a *"reasonable suspicion"*, that the person he proceeds to arrest has been concerned in a cognizable offence. In **CHANNA PIERIS vs. ATTORNEY GENERAL**, Amerasinghe J carried out a learned and exhaustive analysis of the judgments which have considered this issue. It will suffice, for the purposes of the present judgment, to cite His Lordship's following exposition [at p.45-47] which draws on the previous decisions and sets out the applicable principles: *"The provisions relating to arrest are materially different to those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting point of criminal proceedings while the other constitutes the termination of those proceedings and is made by the Judge after the hearing of submissions from all parties. The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. What the officer making the arrest needs to have are* ***reasonable grounds*** *for suspecting the persons to be concerned in or to be committing or to have committed the offence. ….. A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both …. A suspicion does not become "reasonable" merely because the source of the information is creditworthy. If he is activated by an unreliable informant, the officer making the arrest should, as a matter of prudence, act with greater circumspection than if the information had come from a creditworthy source. However, eventually the question is whether in the circumstances, including the reliability of the sources of information, the person making the arrest could, as a reasonable man, have suspected that the persons were concerned in or committing or had committed the offence in question …… However the officer making an arrest cannot act on a suspicion founded on* ***mere*** *conjecture or* ***vague*** *surmise. His information must give rise to a* ***reasonable*** *suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague*

nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence.".

It also remains to be said here, that this Court has, time and again, held that, an *objective test* will be applied when determining whether the arresting officer had reasonable grounds to decide that an arrest should be made because one or more of the circumstances enumerated in section 32 (1) (*b*) of the Criminal Procedure Code [or other applicable provision of the Law] were present. Thus, in **DISSANAYAKE vs. SUPERINTENDENT, MAHARA PRISON** [1991 2 SLR 247 at p.256], Kulatunga J observed *" ….. it is well settled that the validity of the arrest is determined by applying the objective test….."* - see also similar observations made by Kulatunga J in **PREMALAL DE SILVA vs. INSPECTOR RODRIGO** [1991 2 SLR 307 at p. 318] and **CHANDRA PERERA vs. SIRIWARDENA** [1992 1 SLR 251 at p.260] In **CHANNA PIERIS vs. THE ATTORNEY GENERAL** Amerasinghe J stated [at p. 45] that the question of whether there was sufficient material before the arresting officer to enable him to reasonably take the view that the arrest should be made must b*e "….. objectively regarded, - the subjective satisfaction of the officer making the arrest is not enough -….."*.

Accordingly, since the Entry marked "1R1" clearly identifies and records that, the two petitioners were arrested on suspicion of the specific offence of **`criminal trespass'**, I am now required to apply the aforesaid principles and consider whether: the material before the 1st respondent when he decided to proceed with the arrest and take the petitioners into custody on 01st March 2014; was sufficient to *reasonably* suspect, at the time, that the petitioners have, as envisaged in 32 (1) (*b*) of the Code of Criminal Procedure Act, been *"concerned in"* the offence of `criminal trespass'.

In this regard, the only material before the two police officers who first arrested the two petitioners at Chandima's premises, would be what they saw or heard. However, the 1st respondent has chosen to remain silent on what led these two police officers to arrest the petitioners at Chandima's premises. The 1st respondent has also chosen not to produce any related Entries made by these two police officers in the Information Book in terms of the provisions of section 109 of the Code of Criminal Procedure Code. The 1st respondent has also not produced affidavits made by these two police officers setting out what they saw and heard and what led them to first arrest the petitioners. As observed earlier, these two police officers were under the directions of the 1st respondent and were acting with his authority. Therefore, the 1st respondent was entirely able to provide such material to this Court, if he had wished to.

The inability or failure to submit such Entries or affidavits leads to the inference that, the 1st respondent is unable to state any circumstances which were before the two police officers at Chandima's premises, which could have led to a *reasonable* suspicion that the petitioners had been concerned in the offence of `criminal trespass'.

Next, it is necessary to examine what material was before the 1st respondent when he decided to proceed with the arrest and take the petitioners into custody and detain them, on 01st March 2014, on suspicion of the offence of `criminal trespass'.
In this regard, the offence of `criminal trespass' is defined in section 427 of the Penal Code which states: *"Whoever enters into or upon property in the occupation of another with intent to commit an offence, or to intimidate, insult, or annoy any person in occupation of such property, or having lawfully entered upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit `criminal trespass'"*.

It follows that, since the 1st respondent should have, in the words of Amerasinghe J, had *"**reasonable grounds** for suspecting"* that the petitioners had committed the offence of `criminal offence' before he could lawfully proceed with the arrest and take the petitioners into custody, there should have been sufficient material before him to enable him to form a *reasonable* suspicion that the two petitioners had been concerned with the commission of an offence of `criminal trespass', as described in section 427 of the Penal Code.

Further, when I proceed to determine whether the 1st respondent did have *"**reasonable grounds** for suspecting"* that the petitioners had committed the offence of `criminal trespass', I am required, as set out above, to apply an *objective* test. The subjective state of mind of the 1st respondent is not the determining factor. Instead, the determining factor is whether, when objectively regarded, there was sufficient material for the 1st respondent to reasonably suspect that the petitioners had been concerned with the offence of `criminal trespass'.

In this regard, as observed earlier, the ***only*** material furnished to this Court by the 1st respondent, as being the material before him when he decided to proceed with the arrest and take the petitioners into custody, **is the aforesaid statement made by the 3rd respondent and recorded in "1R1"**.

Therefore, the contents of the Extract marked "1R1" and also the accuracy and *bona fides* of what was recorded in "1R1" are relevant when determining whether there was sufficient material before the 1st respondent to enable him to *reasonably* suspect that the petitioners had committed the offence of `criminal trespass'. It should be noted here that, I have earlier held that, the Entry in "1R1" was made with the full knowledge of the 1st respondent and on his directions.

In this regard it is significant to note that, as set out in the passage from "1R1" which was reproduced earlier in this judgment, the Entry commences with a categorical statement that, the 3rd respondent and some other persons brought the two petitioners to the Kekirawa Police Station and made a complaint against the two petitioners - *ie: without* any prior involvement or participation on the part of any police officers.

But, that position is false because, as set out above, the factual position was that the two petitioners were brought to the Kekirawa Police Station by the two police officers who had come to Chandima's house and compelled the petitioners to proceed to the Police Station. It seems to me that, this false record in "1R1" assumes significance because it impugns the *bona fides* of the 1st respondent's actions. That is because, it stands to reason that, if the 1st respondent had acted *bona fide*, he would have ensured that the fact that two police officers brought the petitioners to the Police Station, be recorded in "1R1". Further, if the 1st respondent had acted *bona fide*, he would have ensured that, at the same time the Entry "1R1" was recorded, the information given by those two police officers, who had first-hand and personal knowledge of the events which led to the 3rd respondent's complaint, was also recorded in the Information Book, *inter alia*, in terms of the provisions of section 109 of the Code of Criminal Procedure Act. Common sense dictates that, if the 1st respondent was to act *bona fide*, he would have decided whether or not he should proceed with the arrest and take the petitioners into custody, *only after* considering such information given by the two police officers *vis-à-vis* the 3rd respondent's complaint and its merits.

In this regard, as set out earlier, our law requires a police officer to act reasonably when deciding whether or not he should arrest a suspected offender under the provisions of section 32 (1) (*b*) of the Code of Criminal Procedure Act. Further, as set out above, section 32 (1) (*b*) allows an arrest of a person based on a complaint made against him, *only* if that complaint is a *"reasonable complaint"*.

It seems to me that, a consequence of this requirement is that, where a police officer is considering making an arrest and taking a person into custody solely based on an complaint received by him from a member of the public without that police officer having any first-hand knowledge of the facts relating to the alleged offence *and* the circumstances are such that the police officer has a readily available and *prima facie* reliable source from which he can quickly and conveniently obtain information which will enable him to assess whether that complaint is a *"reasonable complaint"* as envisaged in section 32 (1) (*b)*, he should, where practically possible and, particularly, where there is no likelihood of the suspected offender `escaping' before such information can be obtained, obtain that information before deciding whether there are *"reasonable grounds"* to arrest the suspected offender and take him into custody based on that complaint made by a member of the public.

In taking this view I am also guided by Scott LJ's observations in **DUMBELL VS. ROBERTS** [1944 1 AER 326] - a decision which has been referred to, with approval, by this Court on several occasions - *vide:* for instance, **MUTTUSAMY vs. KANNANGARA** [at p.330], **CHANNA PIERIS vs. THE ATTORNEY GENERAL** [at p.51] and **FAIZ VS. THE ATTORNEY GENERAL** [1995 1 SLR 372 at p.399]. Scott LJ said [at p.329] *"The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty,*

applies also to the police function of arrest - in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or to guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who ex-hypothesi aroused their suspicion, that he is probably an 'offender' attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. I am not suggesting a duty on the police to try to prove innocence; that is not their function; but they should act on the assumption that their prima facie suspicion may be ill-founded. That duty attaches particularly where slight delay does not matter because there is no probability, in the circumstances of the arrest or intended arrest, of the suspected person running away. The duty attaches, I think, simply because of the double-sided interest of the public in the liberty of the individual as well as in the detection of crime.".

Applying this approach, I am of the view that, there was a duty cast on the 1st respondent to have first asked the two police officers as to what they personally saw and heard and what led them to bring the two petitioners to the Police Station and then, based on such information, assess whether the 3rd respondent had made a *"reasonable complaint"* that the petitioners had been concerned in the offence of `criminal trespass'. The 1st respondent, who was required by the Law to act *reasonably*, should have decided whether or not he should proceed with the arrest and take the petitioners into custody and detain them, *only after* considering such information given by the two police officers *vis-à-vis* the 3rd respondent's complaint and its merits. In this regard, it is to be kept in mind that, the two police officers would have been close at hand or readily contactable and there was no risk of the petitioners going anywhere before these simple and quick steps were taken.

In these circumstances, the 1st respondent's failure to take the steps referred to earlier, leads to the inference that, he did not act *reasonably* when he decided to proceed with the arrest and take the petitioners into custody, based solely on the complaint made by the 3rd respondent [Swarnaseeli]. Further, as mentioned earlier, the false record made in "1R1" that the petitioners were brought to the Police Station by the 3rd respondent and the deliberate omission of the fact that two police officers brought the petitioners to the Police Station, impugns the 1st respondent's *bona fides*. All this gives a measure of credibility to the petitioners' charge that the 3rd and 4th respondents *"….. made a complaint against the Petitioners, under the directions of the officers of the Kekirawa Police Station, and have acted in collusion with such officers."*.

However, I consider it necessary to examine the circumstances further and ascertain whether, in any event, there was sufficient material before the 1st respondent to enable him to have *"reasonable grounds for suspecting"* that the petitioners had committed the offence of `criminal trespass'.

It is evident from the definition of `criminal trespass' in section 427 of the Penal Code which was cited earlier, that one of the essential constituent elements of the offence of 'criminal trespass' is that, the offender must have unlawfully entered or remained on a property which is *in the occupation of another person* and also have done so with the intent to commit an offence or with the intent to intimidate, insult or annoy a person who was *in occupation of that property*.

It is long and well established Law that, as section 427 makes plainly clear, the offence of `criminal trespass' is committed against a person who is in *"occupation of such property"* [or his agent who is on the property representing him] and ***not*** against a mere bystander or visitor who happens to be on that property at the time of the commission of the alleged offence.

Thus, in **ROWTHER vs. MOHIDEEN** [1914 1 Bal. Notes 1 at p. 2] Wood Renton J made it clear that, the offence of `criminal trespass' as defined in section 427 of the Penal Code, is *"….. confined I think to a trespass committed against the person in apparent occupation of premises ….."*. On similar lines, in **NALLAN CHETTY vs. MUSTAFA** [19 NLR 262 at p.263], De Sampayo J observed, *"….. it is necessary that the property should be in the `occupation' of a person …. the offence of criminal trespass is one that affects not so much the property which is entered upon as the person who is in occupation."*. In **KING vs. SELVANAYAGAM** [51 NLR 470 at p.474], the Privy Council referred to section 427 of the Penal Code and observed *"It is to be noted that the section deals with occupation, which is a matter of fact , ….. there must be an occupier whose occupation is interfered with, and whom it is intended to insult, intimidate or annoy (unless the intent is to commit an offence)."*. and [at p.475] *"To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant….."* In **ANNAPAN vs. MURRAY** [75 NLR 342 at p.344]. Alles J, referring to section 427 of the Penal Code, said, *"….. the prosecution must prove that the real or dominant intention of the entry was to commit an offence or to insult, intimidate or annoy the occupant."*.

Therefore, in the present case, the petitioners could have committed the alleged offence of `criminal trespass' only against the *occupant* of the property they are said to have entered into or remained on.

In the present case, the 3rd respondent's complaint recorded in "1R1" and set out earlier in this judgment, specifically states that, the Baby Nona was the occupant of the property which the petitioners are said to have entered into or remained upon and that Baby Nona has asked the 3rd respondent to make a complaint against the petitioners. The 3rd respondent has made it very clear that she was, at best, only a visitor who happened to be at that property at the material time. Therefore, *prima facie,* the petitioners could have committed the offence of `criminal trespass' only against Baby Nona. The petitioners could not have committed that offence against the 3rd respondent.

These facts were staring the 1st respondent in his face and he was very well aware that the complainant [the 3rd respondent] was not the *"occupier"* of the property in question and that the alleged offence of `criminal trespass' could not have been committed against her. In this connection, as mentioned earlier, I have held that, the Entry in "1R1" was made with the full knowledge of the 1st respondent and on his directions. The 1st respondent would have had full knowledge of what the 3rd respondent said and what was recorded in "1R1".

It is to be also seen that, although the 3rd respondent said that Baby Nona had asked her to make a complaint against the petitioners, the other complainant - *ie:* the 4th respondent [Anura] – did *not* state in "1R2" that, Baby Nona was present at the time of the alleged incident or that she made any complaint against the petitioners.

Thus, the *only* material before the 1st respondent which suggested that the petitioners had committed an offence of criminal trespass, was the verbal claim made by the 3rd respondent that the *"occupier"* of the property - *ie:* Baby Nona - had asked the 3rd respondent to make a complaint against the petitioners.

While I do not suggest that, the 1st respondent was required to carry out a lawyerly analysis of the elements of the offence of `criminal trespass' prior to arresting the petitioners, he was, nevertheless, required by Law, to have *"reasonable grounds for suspecting"* that the petitioners had been concerned with the commission of an offence of `criminal trespass', as described in section 427 of the Penal Code, prior to deciding to proceed with the arrest of the petitioners and take them into custody. At the minimum, this required him to first satisfy himself that, there were *reasonable* grounds to suspect that an offence of `criminal trespass' had been committed against the *"occupier"* of the property in question.

In these circumstances, the 1st respondent, who was required to act *reasonably*', was under a duty to take the elementary step of ascertaining the facts from the *"occupier"* of the property in question [*ie:* Baby Nona] and verifying from Baby Nona that she wished to make a complaint of `criminal trespass' against the petitioners. He was obliged to take these steps *before* he decided whether or not he should proceed with the arrest and take the petitioners into custody on suspicion of an offence of criminal trespass. He could not have *"reasonable grounds for suspecting"* that the petitioners had committed the offence of `criminal trespass' unless and until he obtained that information. He was not lawfully entitled to have acted on the mere verbal claim made by the 3rd respondent that Baby Nona had asked her to make a complaint. For all he knew, the 3rd respondent could have been making a false and malicious complaint, either for her own reasons or on the instigation of another. Equally possibly, the 3rd respondent might have been merely an interfering busybody who had no knowledge of what happened. In fact, subsequent events strongly point to one of those conclusions. In this connection, it has to be kept in mind that, Baby Nona lived in Kottalbadda, which is close to the Kekirawa Police Station. Therefore, the 1st respondent would have had no difficulty in checking with Baby Nona first.

Further, there was no risk of the petitioners going anywhere before this simple and quick step was taken.

I am of the view that, the 1st respondent's failure to ascertain the facts from the *"occupier"* of the property in question - *ie:* Baby Nona - and his failure to ascertain from her whether she wished to complain that the petitioners had committed the offence of `criminal trespass' against her, establish that, the 1st respondent did *not* have *"reasonable grounds for suspecting"* that the petitioners had been concerned with an offence of `criminal trespass' at the time he decided to proceed with the arrest and take the petitioners into custody.

The validity of the above conclusion is reinforced when one reads the statement made by Baby Nona and recorded in "1R3". Baby Nona's statement was obtained when the 1st respondent eventually realized that he had been under a duty to obtain a statement from her - *ie:* from the *occupier* of the property insofar as section 427 of the Penal Code is concerned. That had led to Police Constable 35316, Bandara being despatched to Baby Nona's house in Kottalbadda to record her statement. Bandara has recorded her statement at 5.00pm on 01st March 2014 - *ie:* several hours *after* the petitioners had been arrested and placed in custody. The relevant contents of Baby Nona's statement have been set out earlier in this judgment.

As set out earlier, Baby Nona's statement exposes, as an utter falsehood, the 3rd respondent's claim that she and Baby Nona were talking with each other from 10.30am on 01st March 2014 when the petitioners came to Baby Nona's house at about 10.45am. Most importantly, Baby Nona does *not* state that she asked the 3rd respondent to make a complaint of `criminal trespass' against the petitioners and establishes that, the 3rd respondent's claim made in "1R1" that Baby Nona had instructed her to make a complaint, was a barefaced lie. This fact highlights the importance of the 1st respondent's duty to have checked with the occupant of the property - *ie:* Baby Nona - *before* he proceeded with the arrest of the petitioners and took them into custody.

For the reasons I have set out above, I hold that, there were no *reasonable* grounds for suspecting that the petitioners had committed the offence of `criminal trespass' at the time the petitioners were first arrested at Chandima's premises and brought to the Police Station where the 1st respondent decided to proceed with the arrest and take the petitioners into custody. As observed earlier, this was all part of the sequence of events in which the petitioners were arrested on 01st March 2014.

Next, despite all the grave infirmities which came to light when the statement made by Baby Nona was recorded in the evening of 01st March 2014, the 1st respondent continued to keep the petitioners - one a 58 year old woman and the other a 35 year old woman - in custody from 1.15pm on 01st March 2014 onwards and overnight and until they were released on Police Bail at about 10.45am next day.

I am of the view that, at least when the falsity of the 3rd respondent's complaint [*solely upon* which the petitioners had been arrested] came to light in the evening of 01st March 2014, the petitioners should have been forthwith released from custody instead of the detention being needlessly continued overnight. In somewhat comparable circumstances, in **ABEYWICKREMA vs. GUNARATNA** [1997 3 SLR 225] Bandaranayake J [as she then was] took the view that, where the Police had arrested the petitioner and it later became known to the Police that there was no basis for that arrest, there was no need for the Police to have continued to detain that petitioner.

Accordingly, I hold that, the arrest of the petitioners on 01st March 2014 by the 1st respondent, was unlawful and that the 1st respondent has violated the petitioners' fundamental rights guaranteed by Article 13(1) of the Constitution.

There is no material before this Court to suggest that the 2nd respondent played a part in this violation of the petitioners' fundamental rights under Article 13(1), all of which occurred during 01st March 2014 and 02nd March 2014.

Before I turn to considering whether there has also been a violation of the petitioners' fundamental rights guaranteed by Article 12(1) and Article 14(1)(*e*) of the Constitution, I should also mention that, the Extract marked "1R5" shows that, perhaps unsurprisingly in the background of the aforesaid contradictions and discrepancies, neither the 3rd respondent [Swarnseeli] or the 4th respondent [Anura] attended the inquiry into their complaint, which was to be held on 03rd March -2014.

Next, it is disturbing to note that, the Report dated 14th March 2014 to be made to the Magistrate by the Kekirawa Police and marked "1R6", states that the petitioners were arrested on suspicion of the offence of `criminal trespass' and then falsely claims that, the property in question was one occupied by the 3rd respondent - *vide:* කැකිරාව පොලිස් වසමේ කොට්ටල්බද්ද කැකිරාව යන ලිපිනයේ පදිංචිව සිටින බී. ඒ. ස්වර්ණගීලී යන අය ස්ථානයට පැමිණ *2014.03.01* වන දින තම නිවසේ තම අසල්වාසී කාන්තාවන් වන අසෝකා මානෙල් කුමාරි යන අය සමගින් නිවසේ සිටින විට මෙදින පෙරවරු *10.45*ට පමණ තමා නොදන්නා කාන්තාවන් දෙදෙනෙකු නිවසට පැමිණ එම අය ක්‍රිස්තියානි ආගමේ බවත් එම ආගමට බැඳෙන ලෙස තමාට දැනුම් දුන්න බවත් තම එයට අකමැති වීම නිසා තමාට බල කර සිටි බැවින් ..... පැමිණිල්ලක් කරන ලදී.*"* This constitutes a misleading report submitted to the Magistrates' Court since the Kekirawa Police have falsely stated that the property in question was occupied by the 3rd respondent despite full well knowing that the 3rd respondent was *not* the occupant of the property in question.

Another step in this sorry saga took place on 15th March 2014 when the petitioners and the 3rd and 4th respondents attended an inquiry held by the 2nd respondent at the Kekirawa Police Station. Baby Nona did not attend. The proceedings at this inquiry are recorded in the Extract marked "2R1". What is to be noted from "2R1" is that, any thought of an alleged offence of `criminal trespass' seems to have disappeared by then and the 2nd respondent has, instead, dwelt on the likelihood of the petitioners' alleged actions causing a `breach of the peace'. The petitioners had steadfastly

denied that they had committed any such offence. Thereupon, the 2nd respondent has recorded that he informed the petitioners that criminal proceedings will be instituted against the petitioners since it is likely that they will cause a 'breach of the peace' on a future date.

On the following day - on 16th March 2014 - the 2nd respondent has summoned the 3rd and 4th respondents to the Kekirawa Police Station and, as set out in the Extract marked "2R2", the 3rd and 4th respondents have stated that they did not wish to press charges against the petitioners and that they request the Police to terminate these proceedings.

In passing it should be mentioned here that, a perusal of the Extract marked "2R2" reveals that, the 3rd respondent has acknowledged the fact that she did *not* meet Baby Nona - who was the *"occupier"* of the property in question in so far as the alleged offence of `criminal trespass' is concerned - prior to the 3rd respondent making the complaint to the Police - *vide: "*මේ අවස්ථාවේදී අක්කා ගෙදර හිටියේ නැහැ. ඇය හේනට ගොස් සිටි නිසා මම පොලීසියට ආවා.*"*. This further reinforces the validity of the conclusion reached earlier that, at the time the 1st respondent decided to proceed with the arrest and direct that the petitioners be taken into custody and detained, he did *not* have *"reasonable grounds for suspecting"* that the petitioners had committed the offence of `criminal trespass' since he had *not* ascertained the facts from the *"occupier"* of the property in question and had *not* ascertained from the *"occupier"* of the property in question, whether she wished to make a complaint against the petitioners. In fact, as stated earlier, the *"occupier"* of the property in question - *ie:* Baby Nona - has *not* made a complaint against the petitioners, at any stage. As mentioned earlier, no case was filed against the petitioners.

Next, this Court has also granted the petitioners leave to proceed under **Article 12(1)** of the Constitution.

The history of the events which emerges when the facts and documents presented to this Court are examined, suggests to me that the officers of the Kekirawa Police and the residents of Kottalbadda were concerned and disturbed by previous visits made by the petitioners in the course of their public ministries and house-to-house visits. It seems to me that, the Kekirawa Police had intended to deter the petitioners from carrying out any further visits of this nature to the area and that, on 01st March 2014, the petitioners were unnecessarily, unreasonably and unlawfully *arrested* on unsustainable charges and, thereafter, detained overnight, in order to give effect to that intention. The police officers were probably motivated by a desire to prevent disharmony in their community and, even perhaps, a desire to protect their own religion from what they saw as incursions of another faith. Those motives are human traits and are understandable. However, police officers must act lawfully and also act respectfully of the rights of all persons in the country including persons who profess different beliefs or who are different in some other way, even where those different beliefs or ways are distasteful to the police officers. Zealotry and harassment in its

cause by police officers, are not to be countenanced. As Sharvananda CJ tellingly said in **JOSEPH PERERA vs. THE ATTORNEY GENERAL** [at p. 225], *"One of the basic values of a free society to which we are pledged under our Constitution is founded on the conviction that there must be freedom not only for the thought we cherish, but also for the thought we hate."*.

It has also been established that, the petitioners were unnecessarily, unreasonably and unlawfully *detained* overnight on 01st March 2014 despite the fact that, they could have been released in the evening of that day as soon as it became known that the *occupier* of the property in question [*ie:* Baby Nona] has *not* made a complaint of `criminal trespass' against the petitioners and, further, when it came to light that, the 3rd respondent's complaint was utterly false. Further, in the circumstances of this case, the petitioners' statement that they were berated, humiliated and threatened at the Kekirawa Police Station, first by the 1st respondent in the evening of 01st March 2014 and, thereafter, throughout that night by other police officers, rings true and I am inclined to believe it. It should also be noted that, although the petitioners were detained overnight, they were never produced before a Magistrate and, further, as mentioned earlier, the Report marked "1R6" said to have been submitted to the Magistrate by the Kekirawa Police, was falsified.

The aforesaid facts establish that the 1st respondent and officers acting under his directions and with his authority have acted in a manner which is manifestly unreasonable, arbitrary and unlawful.

It is very apparent that, the aforesaid acts and omissions of the 1st respondent and officers acting under his directions and with his authority, were intentionally done and were deliberate. They were not inadvertent mistakes.

In these circumstances, I am of the view that, the aforesaid acts and omissions of the 1st respondent have denied the petitioners their fundamental right, guaranteed by Article 12(1), to the equal protection of the Law. Accordingly, I hold that the 1st respondent has also violated the petitioners' fundamental rights guaranteed by Article 12(1).

The 1st respondent and his men would have done well to keep in mind the teaching of the Lord Buddha who counselled that, teachers of other doctrines and their followers, should be treated with respect. The Enlightened One taught in the Brahmajala Sutta, which is very first *Sutta* in the *Sutta Pitaka* [Digha Nikaya 1.1.5], *"Monks, if anyone should speak in disparagement of me, of the Dhamma or of the Sangha, you should not be angry, resentful or upset on that account. If you were to be angry or displeased at such disparagement, that would only be a hindrance to you. For if others disparage me, the Dhamma or the Sangha, and you are angry and displeased, can you recognise whether what they say is right or not ? `No Lord'. If others disparage me, the Dhamma or the Sangha, then you must explain what is incorrect as being incorrect, saying `that is incorrect, that is false, that is not our way, that is not found among us."*. [Translation of the Digha Nikaya by M. Walshe]. In the

Madhupindika Sutta [Majjhima Nikaya 18.4], the Thathagata said to Dandapani, the Sakyan: *"Friend, I assert and proclaim [my teaching] in such a way that one does not quarrel with anyone in the world with its gods, its Maras and its Brahmas, in this generation with recluses and brahmins, its princes and its peoples …."*. In the Upali Sutta [Majjhima Nikaya 56.17], when the householder Upali, who till then had been a follower of Nigantha Natapuththa, entered into a discourse with the Buddha and became the Buddha's lay follower, the Buddha counselled Upali: *"Householder, your family has long supported the Niganthas and you should consider that alms should be given to them when they come."*. [Translation of the Majjhima Nikaya by M. Walshe]. In his Rock Edict XII, which stands to this day on Mount Girnar in Jungadh, Gujarat, the great Emperor Dharmashoka, exhorted his people, saying: *"Beloved-of-the-Gods, King Piyadasi, honors both ascetics and the householders of all religions, and he honors them with gifts and honors of various kinds. But Beloved-of-the-Gods, King Piyadasi, does not value gifts and honors as much as he values this - that there should be growth in the essentials of all religions. Growth in essentials can be done in different ways, but all of them have as their root restraint in speech, that is, not praising one's own religion, or condemning the religion of others without good cause. And if there is cause for criticism, it should be done in a mild way. But it is better to honor other religions for this reason. By so doing, one's own religion benefits, and so do other religions, while doing otherwise harms one's own religion and the religions of others. Whoever praises his own religion, due to excessive devotion, and condemns others with the thought "Let me glorify my own religion," only harms his own religion. Therefore contact (between religions) is good. One should listen to and respect the doctrines professed by others. Beloved-of-the-Gods, King Piyadasi, desires that all should be well-learned in the good doctrines of other religions."*. [Translation by Ven.S.Dhammika in "The Edicts of King Ashoka" 1993 BPS].

Regrettably, the 1st respondent and police officers acting under his directions and with his authority, failed to live up to these noble standards. Their conduct calls for a reiteration here of Gratien J's observation in **MUTTUSAMY vs. KANNANGARA** [at p.325] with regard to, *inter alia*¸ the powers of police officers to arrest without a warrant, that the Courts must be vigilant to ensure that the powers given to police officers *"are not abused through inexperience, excess of zeal or `insolence of office'."*.

This Court has also granted the petitioners leave to proceed against the 1st and 2nd respondents under **Article 14(1)(e)** of the Constitution of the Republic, which states that, every citizen is entitled to *"the freedom, either by himself, or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching;"*. It is one of the nine freedoms relating to civil rights which are granted to our citizens, as fundamental rights, by Article 14, to which Sharvananda CJ referred when he said in **JOSEPH PERERA vs. THE AG** [at p.21] citing *"Article 14 of the Constitution deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country."*. The petitioners are admittedly citizens of the Republic and, therefore, have this right as one guaranteed to them by the Constitution.

Next, although Article 15(7) of the Constitution provides that, the exercise and operation of the rights stipulated by Article 14(1)(*e*) are subject to such restrictions as may be prescribed by law [or regulations made under law relating to public security] in the interests of national security, public order, the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society, no suggestion has been made that any such law or regulation applies to the present issue.

In these circumstances, this Court, as the guardian appointed by the Constitution to vigilantly protect and give real effect to the fundamental rights to which every citizen of our country is constitutionally entitled to, has a duty to ensure that the petitioners' rights under Article 14(1)(*e*) are meaningfully given effect to. It must always be remembered that, this Court has a sacrosanct duty to safeguard each and every one of the nine *"great and basic rights"* listed in Article 14 and to make them real and living freedoms which are the birthright of every citizen of our free country. It is the duty of this Court, to give these rights, their fullest proper meaning.

At the same time, this Court also has to exercise due care and alertness when examining applications made under Article 17 and Article 126 alleging violations of these rights, since this Court has a concomitant duty to ensure it does not unwittingly extend the reach of the fundamental rights protected by Article 14 outside the extent of their fullest proper meaning, which is to be gathered from the specific words used in Article 14 and the relevant principles of the Law.

Accordingly, this Court is required to carefully examine the material before us and determine whether, there has been, in fact, a violation of the petitioners' fundamental rights which are guaranteed by Article 14(1)(*e*). That examination should be done objectively and dispassionately, if one is to seek to ensure the Rule of Law. Particularly so, when a Court examines issues, such as the one before us, which some may consider to be emotive.

What Article 14(1)(*e*) confers is the freedom to manifest one's *"religion"* or *"belief"* in *"worship, observance, practice and teaching;"* and to do so either alone or with others and in public or in private.

The word *religion* has its root in the Latin word *religio* which Cicero once described as meaning *"cultum deorum"* - which could be said to translate to mean `piously worshipping the gods' [Cicero's Deo Natura Deorum - Book 1 at sections 116-117]. The word *"religion"* is hard to define. It can mean different things to different people and, as a result, there has been much interesting philosophical, philological and etymological debate among scholars, on what the word means. However, it is unnecessary, for the purposes of this judgment, to venture into those issues since it is evident that the word *"religion"* is used in Article 14(1)(*e*) in its modern day context of meaning a particular system of beliefs - either belief in an essentially non-theistic doctrine and its aligned code of living which achieves one's spiritual, mental and material development [including agnostic or atheistic beliefs] or a theistic belief in a

divine being or divine beings to be worshipped and obeyed and whose doctrine and code of living, one must believe in and live by. It is evident that, the word *"belief"* is used in the same context in Article 14(1)(*e*) and that there is little to be gleaned from seeking to ascertain whether it has a significantly different meaning to the word *"religion"* with specific reference to its use in Article 14(1)(*e*). In fact, the definitions of the word *"belief"* in the Shorter Oxford Dictionary [5th ed.] include *"faith"* and *"Trust in God; religious faith; acceptance of any received theology"* and also *"a religion"*.

Next, there can be no doubt that, the petitioners' religion of Christianity is a *"religion"* within the meaning of Article 14(1)(*e*) and that, therefore, the petitioners are entitled to the full compass of their rights under Article 14(1)(*e*) to manifest their *"religion …. in worship, observance, practice and teaching;"* and to do so either alone or with others and in public or in private. The fact that, the petitioners are members of the "Jehovah's Witnesses", which may appear to some to be a somewhat singular denomination within the Christian faith, and are not members of a mainstream Christian Church - whether Catholic and Protestant, makes no difference to the petitioners' right to the freedom granted by Article 14(1)(*e*). The fact that the tenets of the denomination differ, in some significant aspects, from the doctrines of the mainstream Christian Churches, makes no difference.

Thus, what remains to be examined is whether the events of 01st March 2014 violated the petitioners' freedom to manifest their religion *"in worship, observance, practice and teaching;"* and to do so either alone or with others and in public or in private. It has to be remembered that, the burden of proving such a violation is placed on the petitioners.

In this regard, the petitioners say that, on 01st March 2014, they set off for Kottalbadda to visit Niluka Maduwanthi who had invited them to visit her house. The petitioners have not annexed an affidavit from Niluka Maduwanthi in proof of this invitation. The petitioners have also not furnished any explanation for not producing such an affidavit. In the absence of such corroboration, I am not inclined to place much credence on the petitioners' claim that they were bound only for Niluka Maduwanthi's house when the events relating to this application took place. It should be said here, in the interest of clarity, that this finding does not take away from the validity of the petitioners' complaints with regard to their unlawful arrest and detention.

Instead, I am of the view that, in the totality of the circumstances of this case, it is much more probable that, the petitioners set off for Kottalbadda on 01st March 2014, as part of a public ministry in the course of which their objective was to carry out house-to-house visits seeking to spread their faith among members of the public. I reach that conclusion for the two reasons, which I have set out below.

Firstly, as I understand it, Jehovah's Witnesses see the Bible as the inerrant word of God as propounded by the Christian faith and consider what is written in the Bible, as historically accurate to the last word and detail. Accordingly, they believe that

Jesus Christ *"….. went through every city and village, preaching and shewing the glad tidings of the kingdom of God:"* [Luke 8:1] and that Jesus Christ exhorted his disciples to *"Go ye into all the world, and preach the gospel to every creature"* [Mark 16:15]. Jehovah's Witnesses also believe that, Jesus' disciples honoured those instructions and that the disciples *"….. daily in the temple, and in every house, they ceased not to teach and preach Jesus Christ."*. [Acts 5:42]. [All the citations are from the King James Version of the Bible]. Those beliefs are often regarded as being part of the Christian faith and are to be respected by all right thinking persons.

However, what is important for the purposes of the present case is that, Jehovah's Witnesses believe that each of them have a duty to follow in those footsteps of Jesus and his disciples and *"teach and preach"* the gospel of their denomination in public and *"and in every house"*, whenever possible. They believe that, doing so includes public ministries in the course of which they carry out house-to-house visits seeking to spread their faith and also distribute their publications such as "The Watchtower" and "Awake" which set out the teachings of the denomination. Individual Jehovah's Witnesses have a duty to carry out house-house visits. Such visits are usually carried out by two or more Jehovah's Witnesses. Although it hardly needs to be said here, let me hasten to add, in the interests of clarity, that such public ministries would, ordinarily, be lawful. A contravention of the Law may arise only if some offence or nuisance, as is recognised by Law, is committed in the course of such an exercise.

Secondly, in their petition, the petitioners say that, the events which led to their arrest and detention on 01st March 2014 commenced when they were engaged in a discussion with Chandima seated on chairs at the entrance to her house and *"During the discussion, an unidentified man, from a near-by house, approached the Petitioners and demanded to know what they were doing, and in fact took the religious literature that was in the woman's hand and walked off"*. I can think of no reason why that man would have behaved in such an unusual manner, unless he had seen the petitioners in Kottalbadda on an earlier occasion when they were on a public ministry and had decided to interrupt a repetition of such an exercise if the petitioners came to Kottalbadda on another day. It seems to me that, unless that man had seen the petitioners engage in a public ministry earlier, he would have had no cause to react in that manner to the passing sight of two ladies, seated down and having an amicable chat with a neighbor. This conclusion is strengthened by the 4th respondent's [Anura] statement in "1R2" saying that the petitioners had come to Kottalbadda on an earlier occasion and sought to spread their faith among the residents of that village – "ඒ වේලාවේ මීට පෙර දවසක ආගමක් සම්බන්ධයෙන් දේශන දීපු කට්ටිය බව මම හඳුනා ගත්තා. මේ අය පත්රිකා වගයක් අපිට දුන්නා, එයාලගේ ආගමට බැඳෙන්න කියලා. අපේ ගමේ අය දැනුවත් කරලා තිබුණේ, මේ අය නැවත අවොත් පොලීසියට අල්ලා දෙමු කියලා.".

For these reasons, I conclude that, on a balance of probabilities, the petitioners were engaged in a public ministry in Kottalbadda on 01st March 2014 during the course of which they would carry out house-to-house visits, distribute publications and seek to

spread their faith among the people of that village. It then follows that, the petitioners were engaged in a discussion with Chandima at her house, in the course of one such house-to house visit.

It is clear that, the petitioners' complaint that their freedom guaranteed by Article 14(1)(*e*) was violated, flows from the undisputed fact that they were prevented from continuing with their discussion with Chandima when they were bundled off to the Police Station by the two police officers who had come to Chandima's house.

Accordingly, what has to be now decided is whether the acts of the 1st respondent and police officers acting under his directions and with his authority, which prevented the petitioners from continuing their discussion with Chandima, violated the petitioners' freedom, which is guaranteed by Article 14(1)(*e*), to manifest their religion *"in worship, observance, practice and teaching;"*.

This requires me to first seek to ascertain what, on a standard of probability, was likely to have transpired during that discussion. In that regard, the petitioners state, in their petition, only that they *'discussed the Bible"* with Chandima. In contrast, the 3rd respondent's statement in "1R1" say that the petitioners tried to convert her to the petitioners' faith and Baby Nona's statement in "1R3" also says that the petitioners tried to convert her to the petitioners' faith and that the petitioners spoke of Armageddon and the salvation of only those who were adherents of their faith. In the light of the many discrepancies which were identified earlier, I am not inclined to attribute credibility to what has been written in "1R1" and "1R3". We also do not have the benefit of an affidavit or a statement made by Chandima since neither party has seen fit to produce such a document. Chandima remains a shadowy figure.

However, when seeking to ascertain what was likely to have transpired during the discussion the petitioners were engaged in, considerable insight is gained by a perusal of the publications annexed to the petition marked "P1", in particular the principal publication captioned "සැබෑ දෙවියන්ගෙන් ප්‍රීතිමත් පණිවිඩයක්", coupled with an examination of the website maintained by Jehovah's Witnesses, which is cited and referred to in the publications. These publications and the website, read together, make clear the nature and character of the house-to-house visits made by Jehovah's Witnesses. It is seen that, members of the denomination are expected to go from house-to-house in an effort to meet people and engage in discussions with whoever is willing to listen. It is also seen that, the members of Jehovah's Witnesses who are on such exercises, carry copies of their publications which they hand out. It is evident that, members of the denomination who are engaged in such house-to-house visits are expected to follow a somewhat structured script which helps to guide the conversation to the areas they wish to discuss. These areas for discussion, include: a description of their faith and its theology coupled with references to appropriate passages from the Bible which are set out in the publications; an extolling of the faith held by Jehovah's Witnesses as the sole truth and only redemption; and, though couched in subtle language, an unmistakably clear message that the only hope of a person escaping damnation and eternal suffering is

to subscribe to the faith held by Jehovah's Witnesses. In fact, the website maintained by Jehovah's Witnesses acknowledges that they seek to spread this message "*to the most distant part of the earth"* and to do so *"publicly and from house to house"*. The website rejects accusations that Jehovah's Witnesses engage in acts of proselytizing or forcible conversions but freely acknowledges that Jehovah's Witnesses actively engage in spreading their message among the public. It is said that, each month, Jehovah's Witnesses print and distribute over 83 million publications, worldwide.

I think it reasonable to conclude that, the visit which the petitioners made to Chandima's house on 01st March 2014 and the discussion they were having with her, would have been no different. In this regard, it has to be kept in mind that, as concluded earlier, the petitioners were engaged in this discussion in the course of an intended campaign of house-to-house visits.

Therefore, the issue to be decided now is whether that discussion was an exercise of the petitioners' freedom to manifest their religion *"in worship, observance, practice and teaching;" or* whether that discussion did not fall within the ambit and scope of that phrase used in Article 14(1)(*e*). If the answer is that the discussion did fall within that phrase, the prevention of the discussion by the 1st and 2nd respondents and the officers under their command, would constitute a violation of the petitioners' freedom guaranteed by Article 14(1)(*e*). In contrast, if the discussion does not properly fall within the phrase *"worship, observance, practice and teaching;"* used in Article 14(1)(*e*), the prevention of the discussion would not have violated Article 14(1)(*e*).

The meaning of the words *"worship"* and *"observance"* in relation to a religion or set of beliefs, are well known. For purposes of completeness, the Shorter Oxford Dictionary [5th ed.] defines *"worship"* as meaning *"Honour or adore as divine or sacred, esp. with religious rites or ceremonies; offer prayer or prayers to (a god)"* and defines *"observance"* as meaning *"an act performed in accordance with prescribed usage, esp. one of religious or ceremonial character; a customary rite or ceremony.".* It is obvious that, the discussion the petitioners were having with Chandima could not have been the manifesting of an act of *"worship"* or *"observance"* of the petitioners' religion, within the meaning of Article 14(1)(*e*) of the Constitution.

As for the word *"practice"* which features in Article 14(1)(*e*), the Shorter Oxford Dictionary defines the word as meaning *"The habitual doing or carrying out of something; usual or customary action or performance".* I am inclined to consider that, the fact that the word *"practice"* is placed in Article 14(1)(*e*) together with and following from the words *"worship"* and *"observance"*, suggests that, the word *"practice"* is used in Article 14(1)(*e*) to mean and refer to a customary or traditional ritual, ceremony or act which is performed in the course of or allied to or consequent to acts of *"worship"* and *"observance"* of a religion or a set of beliefs. This conclusion is warranted by the maxim *noscitur a sociis* which postulates that, in matters of statutory interpretation, the coupling of words which have analogous meanings suggests that they should be understood to be used in their cognate sense and that

their colour is to be taken from each other - *vide:* Maxwell's `The Interpretation of Statutes' [12th ed. at p.289] and Broom's `Legal Maxims' [10th ed. at p. 396].

As a result, I am of the view that, the word *"practice"* is used in Article 14(1)(*e*) to mean and refer to a customary or traditional ritual, ceremony or act which is performed in the course of or allied to or consequent to acts of *"worship"* and *"observance"* of a religion or a set of beliefs.

Consequently, the discussion the petitioners were having with Chandima in the course of a programme of house-to-house visits, could not have been the manifesting of a "*practice"* of the petitioners' religion, within the meaning of Article 14(1)(*e*) of the Constitution.

In reaching this conclusion, I am fortified by the views expressed by the Supreme Court of India in **THE COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS vs. SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT** [1954 AIR SC 282]. In that case, Mukherjea J [as he then was] said, *"If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character;* ***all of them are religious practices*** *and should be regarded as matters of religion ……"* [emphasis added by me]. In **RATILAL PANACHAND GANDHI vs. STATE OF BOMBAY** [AIR 1954 388 at p.392] Mukherjea J, referring to rites and ceremonies performed at specified times and in a particular manner by adherents of the Jain religion and Parsi religion, stated *"Religious practices or performances of acts, in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines."*. In **SARDAR SYEDNA TAHER SAIFUDDIN SAHEB vs. STATE OF BOMBAY** [1962 SC 853] Sinha CJ referred to practices such a sacrifices, *Sati* immolations and the dedication of very young girls as *devadasis*, as being *"religious practices"* which had been restrained by law. The learned Chief Justice commented [at p. 864] *"We have therefore, to draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion.* Then, in **ACHARYA JAGDISHWARANAND AVADHUTA vs. COMMISSIONER OF POLICE, CALCUTTA** [1984 AIR SC 51], the Supreme Court of India appears to have thought that a ritualized *Tandava* dance which is performed by followers of the Anada Marg sect, may constitute a *"practice"* of that sect but held that, in any event, it was not essential that such a *"practice"* be performed in public.

In this regard, the petitioners have submitted that, the tenets of Jehovah's Witnesses require them to engage in house to-house visits for the purposes of evangelizing and that, therefore, such house-to-house visits are a *"practice"* of their religion, which

brings these acts within the ambit of Article 14 (1)(*e*). I do not agree with that contention because, in my view, engaging in house to-house visits for the purpose of evangelizing, is in the nature of a religious duty or obligation placed on the petitioners, similar to other religious duties or obligations such as obedience to the Ten Commandments, loving one's neighbor and Christian charity. Engaging in house to-house visits is not in the nature of a *"practice"* which is referred to in Article 14(1)(*e*) of the Constitution and which, as identified earlier, means and refers to customary or traditional rituals, ceremonies or acts which are performed in the course of or allied to or consequent to acts of *"worship"* and *"observance"* of a religion or a set of beliefs. If I may also say here, by way of a comment only, it seems to me that the performance of a religious duty or obligation is, usually, personal to the individual adherent of a religion or belief and is done by him alone or together with others who are also performing the same religious duty or obligation. The acts done in the performance of a religious duty or obligation, usually, do not require the participation of others who do not share the same religious duty or obligation and are, usually, of no concern to them and do not affect them. I doubt there can be an enforceable right to unilaterally perform one's religious duties and obligations in a manner which affects others who may be disinterested or unwilling to participate or listen or even hostile. Those questions, if they are to be decided, will have to await due consideration in an appropriate case.

As a result of the conclusions reached with regard to the import of the words *"worship, observance, practice"* used in Article 14(1)(*e*), the discussion which the petitioners were having with Chandima would fall within the ambit of Article 14(1)(*e*) only if it can be regarded as properly falling within the scope of the word *"teaching;"* used in Article 14(1)(*e*).

In that connection, as is well known, the word *"teaching"* is used, in common usage, to mean the act of imparting knowledge to another, who is the student of the teacher. Thus, the Shorter Oxford Dictionary defines the verb *"teach"* as meaning *"Impart information about or the knowledge of (a subject or skill); give instruction, training, or lessons (in a subject etc), Impart information or knowledge to (a person); educate, train, or instruct (a person) ;give (a person) moral guidance"* and *"Enable (a person) to do something by instruction or training; show or explain to (a person) a fact or how to do something by instruction, lessons, etc"* and *"Impart knowledge or information; act as a teacher; give instruction, lessons or training."* The noun *"teaching"* is defined as *"The action of TEACH verb; the imparting of information or knowledge; the occupation, profession or function of a teacher."*.

It is necessary to now examine and determine whether the discussion the petitioners were having with Chandima on 01st March 2014 can be properly regarded as being an act of *"teaching"* within the ordinary meaning of the word, which has been described above.

When determining this question, it is necessary to first examine and determine the nature of the overall exercise within which this discussion took place. That is

required because the discussion the petitioners were having with Chandima was not a discussion which occurred on its own and unrelated to any other events. If that was the case, it would have been proper to examine the nature of the discussion in the context of it being a stand-alone act. However, in the present case, the discussion occurred in the course of and as an integral part of a programme of house-to-house visits which the petitioners intended to carry out as a public ministry of the Jehovah's Witnesses. Therefore, the discussion with Chandima should be regarded within the context of the intended programme of house-to-house visits and as an incident of that intended programme. It should not be artificially separated from the overall exercise within which it occurred. The discussion must be regarded as having the same character and nature as the programme which it was a part of.

As a result, the real question before this Court is not whether the discussion the petitioners were having with Chandima can be properly regarded as being an act of *"teaching"* but, instead, whether the programme of house-to-house visits which the petitioners intended to carry out [and within which the discussion with Chandima occurred] can be properly regarded as being an act of *"teaching"* within the ordinary meaning of the word.

In this regard, it is evident from the definitions of the word cited earlier that, the act of *"teaching"* involves a process of the education of a student [or group of students] by a teacher who, by means of instructions, lessons and training, imparts knowledge and skills to the student [or students]. The resulting process of *"teaching"* is usually consensual since, on the one hand, the teacher voluntarily agrees to perform the duty of teaching and, on the other hand, the student voluntarily seeks the teacher because he wishes to learn from the teacher. The act of *"teaching"* is usually pre-arranged and entered into with deliberation and for the individual benefit of both the teacher and the student. It usually takes place at a pre-determined place which is known to and convenient to both teacher and student. Usually, the identity of both the teacher and the student are known to each other or their agents, before the act of *"teaching"* commences. No doubt, there will be instances where the act of *"teaching"* occurs spontaneously, as for example where an elder teaches a child or a friend teaches another friend. However, in general, it can be fairly said that, the act of *"teaching"* is usually pre-arranged and consensual. Further, the act of *"teaching"* usually involves a personal relationship between the teacher and the student

However, when one looks at the nature [this was examined and identified earlier] of a typical programme of house-to-house visits which the petitioners engage in as part of a public ministry of the Jehovah's Witnesses, it is very clear that these characteristics of the act and process of *"teaching"* are absent. Such programmes of house-to-house visits would entail members of the denomination setting off in groups of two or more in order to meet strangers by knocking on doors or speaking with them upon sight and then seeking to engage them in a discussion of the type described earlier. Some of the persons they accost will brush off the attempt to make a contact. Others will agree to a discussion. There is a distinctly random quality in the manner in which members of the denomination find persons they are able to

engage in discussions with. The overall process of house-to-house visits cannot be said to be consensual or pre-arranged or pre-determined. The identities of the parties to the process are not known to each other prior to the house-to-house visit. A programme of house-to-house visits in the course of a public ministry carried out by Jehovah's Witnesses is more in the nature of an exercise which attempts to communicate a message on a mass scale and uses a "hit or miss" strategy.

On the basis of this analysis, I am of the view that, a discussion which takes place between members of Jehovah's Witnesses and a member of the public during the course of a programme of house-to-house visits carried out as part of a public ministry of Jehovah's Witnesses, does not constitute an act or process of *"teaching"* within the meaning of Article 14(1)(*e*) of the Constitution.

For the reasons set out above, I conclude that, the discussion the petitioners were having with Chandima cannot be properly regarded as being an instance of petitioners manifesting their religion *"in worship, observance, practice and teaching;"*, within the meaning of and as contemplated by Article 14(1)(*e*) of the Constitution. Consequently, the prevention of the continuation of that discussion by the 1st respondent and police officers acting on his directions and with his authority, does not constitute a violation of the petitioners' fundamental rights guaranteed by Article 14(1)(*e*) of the Constitution.

In their petition, the petitioners have alleged that, at the inquiry held on 15th March 2014, the 2nd respondent directed the petitioners not to discuss their religion with Buddhists. However, the proceedings of that inquiry marked "2R1" do not suggest that such a direction was made by the 2nd respondent. The affidavit marked "P2" affirmed by the 1st petitioners' husband also does not specifically state that the 2nd respondent directed the petitioners not to discuss their religion with Buddhists. In these circumstances, the claim made by the petitioners that the 2nd respondent directed the petitioners not to discuss their religion with Buddhists, remains unsubstantiated.

For the reasons set out above, I hold that, there has been no violation of the petitioners' rights guaranteed by Article 14(1)(*e*).

I must make it clear that, the determination I have just made is that, the petitioners' fundamental rights under Article 14(1)(*e*) were not violated. As I mentioned earlier, the discussion the petitioners and Chandima were having, would, ordinarily, have been lawful. But, the issue before this Court, was not the *legality* of the discussion. Instead, the issue before this Court was whether the prevention of the continuation of that discussion, denied the petitioners' their fundamental right guaranteed by Article 14(1)(*e*) to manifest their *"religion ….in worship, observance, practice and teaching;"* It must be understood that, the petitioners were not breaking any Law when they were having that discussion. They should not have been arrested and I have previously held that the arrest was unlawful. In addition, the petitioners may have civil remedies against the police officers and others. It hardly needs to be said that,

discussions about religion between people of different beliefs and faiths are lawful and are a valued trait of a civilized society.

Before concluding, it is incumbent on me to try and identify, from the standpoint of the law, the character of a programme of house-to-house visits in the course of a public ministry carried out by Jehovah's Witnesses. This question should not be left hanging in the air.

In India, where the right to *"propagate"* a religion is conferred by Article 25 (1) of the Constitution of India, Mukherjea J, in **COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS vs. SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT** [at p.289] that, referred to the word *"propagate"* in the sense of the right conferred on a person to *"disseminate his ideas for the edification of others.".* In **REV. STANISLAUS vs. MADHYA PRADESH** [AIR SC 1977 908 at p. 911] Ray CJ was of the view that, the word *"propagate"* used in Article 25 (1) conferred a right *"to transmit or spread one's religion by an exposition of its tenets."*. In arriving at this view, Ray CJ drew on the definition of the word *"propagate"* in the Shorter Oxford Dictionary which defined the word to mean *"to spread from person to person, or from place to place, to disseminate, diffuse (a statement, belief, practice etc)"*. and the definition of the word in the Century Dictionary which states *"To transmit or spread from person to person or from place to place, carry forward or onward; diffuse; extend; as to propagate a report; to propagate the Christian religion"*. The more recent 5th edition of the Shorter Oxford Dictionary defines the verb *"propagate"* as meaning *"Cause to grow in numbers or amount; extend the bounds of; spread (esp.an idea, practice etc) from place to place."* and *"Grow more widespread or numerous, increase, spread."*. The noun *"propagation"* is defined as *"The action of spreading an idea, practice etc, from place to place."*.

It is evident to me that, the character of a programme of house-to-house visits carried out as part of a public ministry of Jehovah's Witnesses [which was identified earlier], falls squarely within the description of an act of *"propagation"*.

Although the Constitution of India, which is a secular State, confers the right to *"propagate"* a religion, our Constitution does not. The Constitution of India would have, undoubtedly been considered by the drafters of our Constitution and, having done so, they appear to have taken a considered decision to omit granting a right to *"propagate"* religion or beliefs in Sri Lanka and to grant only a more private and confined right to *"teach"* religion or beliefs. There could have been reasons for that decision, including the vital importance of taking measures to preserve social harmony and amity, which have proved to be fragile at times, in a geographically small country with a rapidly growing population which is multi-ethnic, multi-religious and economically disparate. Regrettably, there have been many lessons in our history, of the horrendous consequences of fractures in social harmony and amity. The drafters of our Constitution may have also had in their minds, that, unlike in avowedly secular India, Article 9 of our Constitution vests in the Republic, a duty to give Buddhism the foremost place.

In any event, the duty of this Court is to uphold and give effect to the Constitution and as our Constitution now stands, the citizens of this country do not possess a constitutionally protected freedom to *"propagate"* their religion or beliefs. In S.C. Determination No. 2/2001 and S.C. Determination No. 19/2003, this Court has adverted to the fact that there is no constitutionally protected right to propagate religion or beliefs.

To conclude, I hold that the petitioners' fundamental rights under Article 12(1) and Article 13(1) have been violated by the 1st respondent. I hold that the petitioners are entitled to compensation for the wrongful arrest and wrongful detention they were forced to undergo and for the harassment that was unnecessarily, unreasonably and unlawfully meted out to them by the 1st respondent and police officers acting under his directions and with his authority. I direct the State to pay the petitioners Rs.50,000/- each, as compensation.

Judge of the Supreme Court

S. Eva Wanasundera, PC 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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. JPC Trade Company Ltd
   East Lower Block
   World Trade Centre,
   Colombo 01

2. R. Lahiru Rakshitha,
   Country Manager,
   JPC Trade Company Ltd
   East Lower Block
   World Trade Centre,
   Colombo 01

Petitioners

SC FR Application 290/2014

Vs,

1. Mr. Jagath P. Wijeweera,
   Director General of Customs,
   Sri Lanka Customs,
   No. 40, Main Street,
   Colombo 11.

1(**a**).Mr. Chulananda Perera,
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

1(**b**).Mrs. P.S.M. Charles,
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

2. Mr. M. Paskaran,
Director of Customs (Social Protection Directorate)
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

2(**a**). Mr. Athula Lankadewa,
Director of Customs (Social Protection Directorate)
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

3. Mr. P. Gallage,
Superintendent of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

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

Respondents

Before: Justice Buwaneka P. Aluwihare PC

Justice Prasanna Jayawardena PC

Justice Vijith K. Malalgoda PC

Counsel: Rasika Dissanayake for the Petitioners

Sumathi Dharmawardena Senior Deputy Solicitor General for the 4th Respondent

Argued on: 17.07.2018

Judgment on: 28.09.2018

Justice Vijith K. Malalgoda PC

The two Petitioners namely J.P.C. Trade Company Ltd. and R. Lahiru Rakshitha had come before this court alleging the violation of the Fundamental Rights guaranteed under Article 12 (1), 13 (1) and 13 (4) of the Constitution.

As submitted by the Petitioners, the 1st Petitioner is a duly incorporated company in Japan and it is registered with the Registrar General of Companies in Sri Lanka as an overseas company under the provisions of the Companies Act No 07 of 2007, and the 2nd Petitioner who is a citizen of Sri Lanka, is employed as the country manager of the 1st Petitioner company. The 1st Petitioner is an exporter of Motor Vehicles from Japan to Sri Lanka and was not allowed or permitted by the Laws of Sri Lanka to import Motor Vehicles into the Country.

The Petitioners have alleged the involvement of some custom officers in conducting an investigation against the 1st and the 2nd Petitioners with regard to 63 vehicles the 1st Petitioner had exported under the provisions of the Customs Ordinance and other Laws of the country.

In this regard a team of custom officers had visited the 1st Petitioner's office and inspected the documents pertaining to the said 63 vehicles and later the Petitioners were made to understand that an inquiry was commenced for alleged violation of sections 129 and 163 of the Customs Ordinance for importation of undervalued vehicles into Sri Lanka.

The Petitioners have challenged the authority of the 1st to the 3rd Respondents or any employee of the Department of Customs to conduct such inquiry against the Petitioners under section 129 of the Customs Ordnance, since the 1st Petitioner was not involved in importing any goods into the country. In this regard the Petitioners have brought to the notice of this court the provisions of section 129 of the Customs Ordinance which reads as follows;

Section 129;

> "Every person who shall be concerned in importing or bringing into Sri Lanka any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited, or into whose hands and possession any such goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of customs with intend to defraud the revenue of such duties or any part thereof, or who shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one hundred thousand rupees, at the election of the Director General."

The Petitioners complaint before this court refers to 16 vehicles said to have imported by the Peoples Leasing Company a subsidiary company of the People's Bank and had further submitted that, the 1st Petitioner being the exporter had no reason to undervalue the said

vehicles exported, as it gain no benefit whatsoever. Therefore it is the importer that should be liable as per section 129 of the Customs Ordinance since the importer has a duty to declare the value of the imported goods and also to pay taxes as required under such ordinance or any other law.

As submitted by the Petitioners, at the conclusion of the Customs Inquiry where the 2nd Petitioner faced charges for abetment for importation, the 2nd Petitioner was imposed a forfeiture, which was conveyed to him by P-20 which reads as follows,

Order,

> "I impose a mitigated forfeiture of Rupees six million (LKR 6,000,000/-) on Mr. R. Lahiru Rakshitha, Country Manager representing M/S JPC Trade Company Ltd. East Lower Block, World Trade Centre, Colombo in terms of sections 129 and 163 of the Customs Ordinance"

However the Petitioners have submitted that the offender, the People's Leasing Company the importer of the said 16 vehicles have been exonerated with an ulterior motive of punishing the Petitioners irrespective of the fact that if at all only the said People's Leasing Company was liable to pay any such custom duties or penalties to Sri Lanka Customs.

The Respondents have filed comprehensive objections before this court including the statements recorded from, Lahiru Rakshitha Ranthatige (the 2nd Petitioner) and from one Akbar Mohamed Ilham during the Customs Inquiry held against several persons, marked 1R1 and 1R2 respectively.

The 1st Respondent, Director General of Sri Lanka Customs in his affidavit filed before this court had taken up the position that;

a) During the course of audit control, the Port Control Branch of the Customs suspected that there had been a loss of revenue due to undervaluation of vehicles imported into Sri Lanka

b) In this regard, investigations were carried out with regard to several imports into Sri Lanka by Japanese exporters including the following suppliers,

   i. M/S J.P.C. Trade Company Ltd. (the 1st Petitioner)

   ii. My Direct Cars (Pvt) Ltd

   iii. Asho Cars Japan (Pvt) Ltd.

c) The said investigations revealed that declaration on the vehicles imported reflected the transaction price as much lower than the actual price

d) It was further revealed that most of the pro forma invoices with regard to the said vehicle imports were issued by the local office of the said companies for establishing the letters of credit

e) The remaining component of the transaction price had been paid under the description of “Local Handling Charges”, “Warranty Fee” and “Advanced Payments”

f) By using this method the vehicle importers with the help of the exporter had defrauded the customs and the tax base had been considerably and unlawfully reduced, resulting in the under payment of the applicable customs duties and other levies for the vehicles so imported

g) One A.A.M Ilham making a statement to Sri Lanka Customs had admitted that he allowed the 1st Petitioner company to make use of his Bank Account at Sampath

Bank, Pettah branch to collect the balance component of the transaction price (real value of the vehicle) from the prospective buyers, and the money so collected was subsequently deposited to the Japanese Account of the 1st Petitioner with the help of another friend of Ilham who lives in Japan. According to Ilham, he was paid a commission by the 1st Petitioner for transferring these monies to Japan

h) According to the statement of Ilham, it is the 2nd Petitioner who contacted him, when such transactions took place and on the instructions received from the 2nd Petitioner, monies were deposited in the Japanese Account with the help of his friend who lives in Japan.

Even though the Petitioners were silent on their involvement in defrauding Sri Lanka Customs by using the above method, the second Petitioner whilst making a statement to Sri Lanka Customs during the said investigation (1R1) had admitted undervaluing vehicles exported by his company and sending the balance money to Japan through their local agent Ilham. According to 2nd Petitioner, when Ilham deposited the money in 1st Petitioner's Japan account, a picture of the deposit slip is sent to him in order to prove the transaction. Several such photographs were collected during the investigation carried out by the custom officials and those photographs were produced before this court marking them under 1R5.

In addition to the photographs referred to above, several e-mails exchanged between the prospective buyers and the 1st Petitioner Company either through the 2nd Petitioner or some other sales co-ordinators of the 1st Petitioner, giving bank details of Ilham as**, A.A.M. Ilham**, **Sampath Bank, Account No. 004250027791, Main street branch, Mobile No. 0777 3888717** for the purpose of depositing the balance money, were also produced under 1R5 by the Respondents before this court.

When going through the material placed on behalf of the Respondents it is clear that the above conduct of the Petitioners have resulted in a loss to Sri Lanka Customs when the importers used the *per-forma* invoices issued by the Petitioners to the undervalued price in order to open letters of credit. It is further observed that the Petitioners whilst issuing a *per-forma* invoice to an undervalued price for the importer to avoid a major part of the tax component, had collected the full value of the vehicle using another illegal method of transferring the money outside the country.

With all these illegal and defrauding activities, being carried out, the Petitioners have come before this court complaining that the Petitioners were treated differently by the 1st to 4th Respondents and thereby the Petitioners are entitled for a declaration that the Respondents have violated their fundamental right for equal protection guaranteed under Article 12 (1) of the Constitution.

The Petitioners have further prayed to quash and/or annual the decision of forfeiture by the 3rd Respondent contained in his letter dated 18.02.2014 marked P-20.

The Petitioners complaint of discrimination has taken place as against the People's Leasing Company a subsidiary of the People's Bank. The Petitioners complaint refers to 16 vehicles said to have imported by the said People's Leasing Company on *per-forma* invoices issued by the 1st Petitioner at an undervalued price. Petitioners have collected the balance amount i.e. the difference between the actual price and the undervalued price through the account of one Ilham, directly from the person who got down the vehicle through People's Leasing Company.

The material already discussed clearly shows that, the Petitioners have aided and abetted the importers of the vehicles referred to in this application to import such vehicles at an

undervalued price. If not for the Petitioners *per-forma* invoices at an undervalued price, the said importer would not be able to open the letters of credit to get down those vehicles for the price referred to in the *per-forma* invoice.

When a Petitioner allege that his Fundamental Rights has been infringed by any party, the powers of this court to grant such relief is discussed in Article 126 (4) of the Constitution, which reads as follows;

126 (4) **"**The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to Court of Appeal if in its opinion there is no infringement of a fundamental right or language right."

Is it just and equitable for this court to make an order to quash and/or annual the decision of forfeiture by the 3rd Respondent in the circumstances referred to by me in this judgment?

In the case of ***C.W. Mackie and Company V. Hugh Molagoda Commissioner General of Inland Revenue and others 1986 1 Sri LR pages 300 at 308, 309*** the Supreme Court had considered a similar situation with regard to the payment of turnover tax by the Petitioner and observed that;

> "It is not disputed that the sum of Rs. 2,109,001. 43 claimed by the Petitioner does not represent any turnover tax paid in excess of the amount with which he was properly chargeable. The said sum was what was lawfully due from it as turnover tax for the period in question and was lawfully paid by the Petitioner in the discharge of its legal liability. If the Petitioner's prayer is that the Commissioner General of Inland Revenue

should be directed by this court to make a refund of this Rs. 2,109,001. 43 paid by the Petitioner as turnover tax on rubber up to 31. 12. 1982, we have to look for justification outside the Act to make the refund. Counsel for Petitioner invoked the jurisdiction of this court under Article 126 (4) of the Constitution to make such directions as it may deem just and equitable in respect of the petition preferred under Article 126 (2) to warrant the refund set off against future taxes.

The power of this court to issue such directions stems from proof of the infringement of a fundamental right. It is only on such an infringement that this court will have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances. This preliminary fact has to be established by the Petitioner to warrant the invocation of this equitable jurisdiction. In the instant case, the Petitioner pleads breach of its right to equality as the basis of its application. Article 12 (1) of the Constitution provides “all persons are equal before the law and are entitled to the equal protection of the law.” The essence of the right of equality guaranteed by Article 12 (1) and the evil which the article seeks to guard against is the avoidance of designed and intentional hostile treatment or discrimination on the part of those entrusted with administering the law. In order to sustain the plea of discrimination based upon Article 12 (1) a party will have to satisfy the court about two things, namely **1.** That he has been treated differently from others, and **2.** That he has been differently treated from persons similarly circumstanced without any reasonable basis.

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. I respectfully agree with what the court said in *Venkata Subbiah Setty V. Bangalore Municipality* (1)"

"Article 14 (corresponding to our Article 12) cannot be understood as requiring the authorities to act illegally in one case, because they have acted illegally in other cases.

In ***Ram Prasad Vs. Union of India*** (2) the latter court quoted with approval the above statement of the law in ***Venkata Subbiah Setty V. Bangalore Municipality*** (supra) and added-

That the guaranteed under Article 14 cannot be understood as requiring the authorities to act illegally in one case because, they have acted illegally in other cases. No one can contend that wrong must be extended to him as well in order to satisfy the provisions of Article 14."

From the facts I have already discussed in this judgment, it is clear that the Petitioners were involved in submitting undervalued *pro-forma* invoices for the purpose of importing vehicles in to the country and abetted the importer to defraud the customs. The 2nd Petitioner in his statement to Sri Lanka Customs had admitted this position. In the said circumstances the Petitioners are not entitled to allege, the violation of Article 12-1 of the Constitution.

When the Petitioners came before this court alleging the violation of their fundamental rights guaranteed under Article 12 (1) of the Constitution, they were silent on their conduct in submitting undervalued *pro-forma* invoices and in paragraph 15 of the petition filed before this court had taken up the position that,

> "The Petitioners state that thereafter the 2nd Respondent took, a statement on 16th September in which the 2nd Petitioner stated that the 1st Petitioner being the exporter had no reason to undervalue the vehicles exported as it gains no benefit what so ever….."

However in his statement made to Sri Lanka Customs (1R1) the 2nd Petitioner had taken up the following position with regard to the undervaluing of vehicles,

> "I accept that most of the vehicles we handled to ship from Japan to Sri Lanka is undervalued. I undertake to give this undervaluation figure of vehicles which I can find out."

When considering the position the Petitioners have taken, when coming before this court and the material revealed thereafter, it appears that the Petitioners have deliberately suppressed their involvement in submitting *pro-forma* invoices to undervalued amounts. By suppressing the said fact from this court, the Petitioners have presented a completely distorted version before this court.

In this regard I am mindful of the decision in ***Alponso Appuhamy Vs. Hettiarachchi 1973 NLR 131*** where *Pathirana J* had observed as follows;

> "The necessity of a full and fair disclosure of all the material facts to be placed before the court when an application for a writ or injunction is made and the process of the court is invoked is laid down in the case of *The King V. The General Commissioners for the purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmond de Poignac* - (1917) Kings Bench Division 486. Although this case deals with a writ of *Prohibition* the principles enunciated are applicable to all cases of writs or

> injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of *Prohibition* without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the court would not go into the merits of the application, but will dismiss it without further examination."

Even though the said case referred to Writ Application filed before court, I am of the view that the said principle extends to Fundamental Rights applications as well, when the Petitioners alleged that their fundamental rights guaranteed under the Constitution had been violated by the conduct of the Respondents. A Petitioner who comes before the Supreme Court alleging the violation of his fundamental right is bound to a fair disclosure of all material facts.

In the said circumstance I further observe that the Petitioners have suppressed material facts from this court, when they allege violation of Article 12 (1) of the Constitution.

The Petitioners have further alleged the violation of Articles 13 (1) and 13 (4) of the Constitution but I see no merit in the said allegations, since the Respondents before this court are bound to act under the provisions of the Customs Ordinance and the other relevant legal provisions in order to implement the lawful findings reached by an inquiry proceeded under the provisions of the Customs Ordinance.

In the said circumstances I hold that the Petitioners have failed to establish, that their fundamental rights guaranteed under Articles 12 (1), 13 (1) and 13 (4) of the Constitution have

been infringed by the Respondents. I therefore dismiss this application with costs fixed at Rs. 1,000,000/-.

Judge of the Supreme Court

Justice Buwaneka P. Aluwihare PC

I agree,

Judge of the Supreme Court

Justice Prasanna Jayawardena PC

I agree,

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Republic.

K.W.S.P. JAYAWARDHANA
No. 2b 9/R.N.H.S,
Raddolugama.

AND 24 OTHERS.

PETITIONERS

S.C.F.R. Application 338/2012

VS.

1. **GOTABHAYA JAYARATNE**
   Secretary, Ministry of Education, Isurupaya, Battaramulla, as at July 2012 and his successor, **D.M.A.R.B. DISSANAYAKE**, as at September 2013,

2. **DR. DAYASIRI FERNANDO**
   Chairman,
   Public Service Commission.

AND 8 OTHER MEMBERS OF THE PUBLIC SERVICE COMMISSION AS AT JULY 2012.

11. **HON. D.M.JAYARATNE**
    Hon. Prime Minister,
    Colombo.

AND 59 OTHER MEMBERS OF THE CABINET OF MINISTERS AS AT JULY 2012.

71. **HON. ATTORNEY GENERAL**
    Attorney General's Department,
    Colombo.

RESPONDENTS

1A. W.M.BANDUSENA
Secretary, Ministry of Education,
Isurupaya, Battaramulla.

1B. SUNIL HETTIARACHCHI
Secretary, Ministry of Education,
Isurupaya, Battaramulla.

2A. DHARMASENA DISSANAYAKE
Chairman,
Public Service Commission. ,

AND 8 OTHER MEMBERS OF THE PUBLIC SERVICE COMMISSION AS AT NOVEMBER 2015.

11A. HON. RANIL WICKREMASINGHE
Hon. Prime Minister,
Colombo.

AND 39 OTHER MEMBERS OF THE CABINET OF MINISTERS AS AT MAY 2015.

11A. HON. RANIL WICKREMASINGHE
Hon. Prime Minister,
Colombo.

AND 45 OTHER MEMBERS OF THE CABINET OF MINISTERS AS AT OCTOBER 2015.

ADDED RESPONDENTS

158A. P.V.WICKREMASINGHE
No. 146, Welioyagammana Road, Lolugasweva Road,
Galnewa.

AND 141 OTHERS
INTERVENIENT PETITIONERS - ADDED RESPONDENTS

BEFORE: S.E. Wanasundera, PC, J.
Prasanna Jayawardena, PC, J.
L.T.B. Dehideniya J.

COUNSEL: J.C. Weliamuna, PC with Pulasthi Hewamanne for the Petitioners.
Faisz Musthapha, PC with Rajeev Amarasuriya for the Intervenient-Petitioners.
Viraj Dayaratne, SDSG for the Hon. Attorney- General.

ARGUED ON: 30th January 2018.

WRITTEN SUBMISSIONS FILED: By the Petitioners on 23rd February 2018
By the Respondents on 22nd February 2018.
By the Intervenient Petitioners-Added Respondents on 06th March 2018.

DECIDED ON: 07th September 2018.

Prasanna Jayawardena, PC, J.

Before getting to the particular application which is before us, it is useful to sketch out the background in which the petitioners made this application alleging that their fundamental rights guaranteed by Article 12(1) of the Constitution, have been violated by the Respondents.

The Ministry of Education has three Education Services in which public officers who teach in Government Schools and administer Government Schools, serve. They are the Sri Lanka Teachers' Service, the Sri Lanka Principals Service and the Sri Lanka Education Administrative Service.

The members of the **Sri Lanka Teachers' Service** perform the important function of teaching and educating students in Government schools. At present, young men and women who are below the age of 35 are recruited to the Sri Lanka Teachers' Service. The **Sri Lanka Principals Service** consists of Principals, Deputy Principals and Assistant Principals serving in Government Schools, who perform the function of administering and managing Government schools and implementing the Government's education policies in Government schools. At present, recruitment to the Sri Lanka Principals Service is solely from the ranks of the Sri Lanka Teachers' Service. The members of the **Sri Lanka Educational Administrative Service** [which has been renamed the "Sri Lanka Education Administrative Service' on or about 21st August 2015] assist in the formulation of the Government's education policies, implement these policies in Government schools and other institutions in the education system and manage and supervise Government schools and other

institutions in the education system. Officers serving in all three of these Services are public officers and are transferrable and are required to serve throughout the island.

The **Service Minute of the Sri Lanka Educational Administrative Service** which was in force at the time material to this application, has been filed with the petition marked “P2”. As set out in “P2”, the total Cadre of the Sri Lanka Educational Administrative Service was 2283 officers, who are placed in three Classes - *ie:* Class I, Class II and Class III.

As set out in the `Schedule of Posts’ in “P2”, **Class I** of the Sri Lanka Educational Administrative Service consisted of 200 officers who hold senior posts such as those of Directors of Education, Commissioner of Examinations and Principals of National Schools. **Class II** of the Sri Lanka Educational Administrative Service consisted of 300 officers who are placed either in the `General Cadre’ within Class II or in the `Special Cadre’ within Class II. Officers serving in the `General Cadre’ within Class II hold posts such as those of Deputy Directors of Education, Principals and Deputy Principals of Government schools [which are not National Schools]. Officers serving in the `Special Cadre’ within Class II hold posts such as those of Chief Education Officers and Deputy Commissioners of Education. **Class III** of the Sri Lanka Educational Administrative Service consisted of 1783 officers who are also placed either in the `General Cadre’ within Class III or in the `Special Cadre’ within Class III. Officers serving in the `General Cadre’ within Class III hold posts such as those of Education Officers and Principals and Deputy Principals of other Government schools [which are not National Schools]. Officers serving in the `Special Cadre’ within Class III hold posts such as those of Education Officers and Assistant Directors of Education.

Next, as specified in Clause 18 of “P2”, **appointments to Class I** of the Sri Lanka Educational Administrative Service are solely from the ranks of serving officers in Class II of the same Service. Similarly, as stated in Clause 16 of “P2”, **Appointments to Class II** of the Sri Lanka Educational Administrative Service are also solely from the ranks of serving officers in Class III of the same Service or from other posts deemed parallel by the Education Service Committee of the Public Service Commission on the recommendation of the Secretary to the Ministry of Education.

However, as set out in “P2”, **appointments to Class III** of the Sri Lanka Educational Administrative Service - which is the *entry* Grade to the Service - are made in the following manner: firstly, the number of vacancies in Class III are to be determined upon the number of vacancies which exist on 01st January and 01st June of a year, in the aforesaid Cadre of 1783. Thereafter, these vacancies are to be filled in the following three ways - *ie:*

(i) 25% of the vacancies are to be filled based on the results of an **Open Competitive Examination**. Any citizen of Sri Lanka who is between the

ages of 22 years and 26 years and possesses the specified qualifications, is eligible to sit for that Open Competitive Examination;

(ii) 30% of the vacancies are to be filled by **promotions on merit**, of officers who have served for a minimum period of three years in Grade I of the Sri Lanka Principals Service;

(iii) The remaining 45% of the vacancies are to be filled based on the results of a **Limited Competitive Examination**. As stated in "P2", only *"A Government Teacher, Teachers of Assisted Schools and Pirivenas"* who are between the ages of 25 years and 45 years and possess specified qualifications, are eligible to sit for that Limited Competitive Examination.

It is evident from the descriptions of the three Education Services set out above, that: public officers who are serving in the Sri Lanka Teachers' Service *or* who have ascended from the Sri Lanka Teachers' Service to the Sri Lanka Principals Service, would, in most cases, hope for a career path in which they will eventually enter the Sri Lanka Educational Administrative Service, which encompasses more senior positions. The "Sri Lanka Educational Administrative Service" will, from now on, be referred to as "the SLEAS" in this judgment.

It is also evident that, in terms of the scheme specified in the Service Minute marked "P2": (a) officers who have ascended from the Sri Lanka Teachers' Service to the Sri Lanka Principals Service could enter Class III of the SLEAS either by way of merit based promotions from the Sri Lanka Principals Service to the SLEAS [*ie:* under category (ii) described earlier]; *or* by sitting for a Limited Competitive Examination for admission to the SLEAS based on the results of that Examination [*ie:* under category (iii) described earlier]; *and* (b) officers who serve in the Sri Lanka Teachers' Service could enter Class III of the SLEA by succeeding at the aforesaid Limited Competitive Examination for admission to the SLEAS.

It may be mentioned here, for the purpose of completeness, that, in addition to these three Services, the Ministry of Education also has the Sri Lanka Teacher Educators Service in which public officers who teach teachers, serve. That Service has nothing to do with the present application.

It is in the background described above that, the petitioners serve as public officers in the Sri Lanka Teachers' Service or the Sri Lanka Principals Service. As set out in the document filed with their petition marked "P1", they have all served for long periods of time, ranging from six years at the least to as long as 28 years, in one or both of these Services. They serve in Government schools located in six Provinces.

The petitioners filed this application on 04th July 2012 against the 1st Respondent, who was the Secretary to the Ministry of Education at that time, the 2nd to 10th Respondents who were the Chairman and members of the Public Service Commission at that time, the 11th to 70th Respondents who were the Hon. Prime

Minister and members of the Cabinet of Ministers at that time and the 71st Respondent, who is the Hon. Attorney General. Where necessary, the successors of the 2nd to 70th Respondents have been substituted.

The petitioners' complaint to this Court is, in essence, that the respondents are about to act in an arbitrary, capricious and unreasonable manner and deprive the petitioners of their right to be considered for recruitment to Class III of the SLEAS and, thereby, violate the petitioners' Fundamental Rights guaranteed by Article 12(1) of the Constitution.

As set out in their petition, the petitioners state that a Notice marked "P3" was published in the Government Gazette, dated 31st December 2010, calling for applications for recruitment to **Class III** of the SLEAS. The petitioners point out that, the Notice does *not* state the *number* of vacancies in Class III of the SLEAS, which are to be filled by means of the process set out in "P3".

The petitioners go on to state that, pursuant to the Notice marked "P3", a **Limited Competitive Examination** was held on 04th June 2011 for the purpose of recruitment to Class III of the SLEAS under category (iii) described above. All the petitioners sat for this Limited Competitive Examination. The results of this Limited Competitive Examination were published on 29th February 2012. A List titled *"LIST OF NAMES SENT TO THE MINISTRY OF EDUCATION THROUGH PUBLIC SERVICE COMMISSION"* was published, listing the candidates whose names had been sent to the Ministry of Education because they had successfully passed that Examination and were eligible to be considered for appointment to Class III of the SLEAS. This List has been marked "P5" and names a total of 402 candidates under both the `General Cadre' and the `Special Cadre' of Class III of the SLEAS. However, since, as permitted by "P3", several candidates have applied to be selected for vacancies in the `General Cadre' *and also* for vacancies in two fields [or subjects] in the `Special Cadre', the names of some candidates figure more than once in the List marked "P5". For example, the candidate named H.M.P.Herath Menike features twice - *ie:* at the top of the List of Candidates under the `General Cadre' and also at the top of List of Candidates under the `Special Cadre' in the subject of `Mathematics'. The petitioners state that, when these duplicate listings are discounted, the List marked "P5" contains the names of 309 candidates whose names have been sent to the Ministry of Education for the purpose of being considered for appointment to Class III of the SLEAS, based on the results of the Limited Competitive Examination. The names of the 25 petitioners are on this List marked "P5".

The petitioners state that, they have learnt that several candidates whose names are in the List marked "P5" have been called for interviews. "P2" specifies that such interviews are held only for the purpose of verifying the basic qualifications of a candidate who has succeeded at a Limited Competitive Examination. However, none of the petitioners have been called for an interview. The petitioners state that, having passed the Limited Competitive Examination and being included in the List marked

"P5", they had a reasonable expectation that they too would be called to attend similar interviews and be appointed to Class III of the SLEAS upon verification of their basic qualifications.

Having set out the aforesaid factual background, the petitioners move on to their main complaint, which is that, there is a move to implement a proposal [made by the Ministry of Education] to appoint a large number of persons who had been previously carrying out *"acting duties"* in SLEAS Class III Posts, to substantive and permanent posts within Class III of the SLEAS, in a manner which is *outside* the process set out in the Service Minute marked "P2" and the Notice marked "P3". The petitioners complain that such an exercise will contravene the scheme of recruitment set out in the Service Minute marked "P3" and will be arbitrary and irrational.

When estimating the number of these persons they claim are about to be appointed in the aforesaid manner, the petitioners have produced two newspaper reports marked "P7(a)" and "P7(b)". The first report alleges that 642 persons who had not gone before the selection process set out in the Notice marked "P3" were about to be irregularly admitted to Class III of the SLEAS by means of a Cabinet Memorandum submitted by the then Minister of Education.

The petitioners aver that, in the aforesaid background, they reasonably apprehend that, as at December 2010, there had been approximately 1200 vacancies in Class III of the SLEAS *but* that, only 410 of the persons who had qualified for appointment to Class III through the process set out in the Notice marked "P3" [*ie:* in all three of the aforesaid categories (i), (ii) and (iii)], were to be appointed through that process. They allege that, the correct number of vacancies in Class III had been concealed when publishing the Notice marked "P3" for the purpose of facilitating the aforesaid proposal.

In these circumstances, the petitioners plead that, when there are 1200 vacancies in Class III of the SLEAS, the failure to call the petitioners [who have successfully sat for the Limited Competitive Examination and whose names are included in the List marked "P5" which contains only 309 names] for interviews to verify their basic qualifications and, thereafter, appoint the petitioners to Class III of the SLEAS, is arbitrary, capricious and *ultra vires* the powers of the respondents and amounts to an infringement of the petitioners' fundamental rights guaranteed by Article 12(1) of the Constitution. Next, the petitioners plead that, any act by the respondents to appoint persons to Class III of the SLEAS by means of a process which is *outside* the scheme of recruitment set out in the Service Minute marked "P2", will be arbitrary, capricious and *ultra vires* the powers of the respondents and amount to an infringement of the petitioners' rights under Article 12(1). Finally, the petitioners plead that, the respondents' failure to disclose the number of vacancies which existed in Class III of the SLEAS as part of an attempt to *"reserve"* a large number of such vacancies in order to facilitate the aforesaid proposal, is also a violation of the petitioners' rights guaranteed by Article 12(1).

When the petitioners' application was taken up before this Court on 26th July 2012, learned Deputy Solicitor General informed Court that there were **410 vacancies** in Class III of the SLEAS and that they would all be filled on the basis of the results of the Open Competitive Examination [25% of these vacancies which number 103], on promotions on merit [30% of these vacancies which number 122] and on the basis of the results of the Limited Competitive Examination [45% of these vacancies which number 185]. Learned Deputy Solicitor General also informed Court that, *"no position would be filled up out of the minute of the Sri Lanka Administrative Service (P2)"*. There appears to have been a slight error in the recording of that assurance by the use of the words *"out of"* instead of *"outside of".* The assurance was, undoubtedly, to the effect that, no positions in the SLEAS would be filled outside the provisions of the Service Minute marked "P2".

The petitioners filed a Further Affidavit dated 17th February 2013, which appears to have been permitted by this Court. In this further affidavit, the petitioners state that, the position taken by the respondents that there were only 410 vacancies in Class III of the SLEAS, is arrived at *after* taking into account the group of persons who were, in terms of the aforesaid proposal mooted by the Ministry of Education, to be appointed to Class III of the SLEAS *outside* the scheme of recruitment set out in the Service Minute marked "P2". Thus, in their further affidavit, the petitioners complained that, *"….. a large number of vacancies for class III of the SLEAS had been unlawfully reserved for various people, by not counting the vacant positions where certain persons had been appointed on a covering-up basis. Therefore, when the Gazette* [*sic* - should read *"Notice"*] *marked "P3" was released, all the vacancies were not counted by the authorities for a collateral purpose."*.

On 07th August 2013, learned Deputy Solicitor General obtained permission from Court to file an affidavit in response to the aforesaid allegations made in the petitioners' further affidavit. In pursuance of that application, the 1st respondent [the then Secretary to the Ministry of Education] has filed an affidavit dated 16th September 2013, setting out his position in response to the petitioners' further affidavit.

In his affidavit the 1st respondent, has denied the contents of the petitioners' further affidavit dated 17th February 2013 and the documents annexed thereto. The 1st respondent has produced documents marked "1R1" to "1R9".

In paragraph [6] (a) of his affidavit, the 1st respondent first says that, the Ministry of Education submitted a proposal to the Cabinet of Ministers to give *"supernumerary appointments"* in Class III of the SLEAS to officers who had been performing *"covering up duties"* in SLEAS posts. However, the 1st respondent has omitted to produce a copy of this proposal. At this point, it is relevant to observe that, the use of the words *"supernumerary appointments"* by the 1st respondent suggests that, the proposal was that these officers should be granted appointments which were not substantive posts within the permanent cadre of Class III of the SLEAS but were *outside* the permanent cadre of Class III of the SLEAS - *vide:* the definition of the

word *"Supernumerary"* in the Shorter Oxford Dictionary [5th ed.] to mean *"in excess of the usual proper or prescribed number;"* and also as *"Beyond the necessary number"*.

However, paragraph [6] (b) of the affidavit makes it clear that, when this proposal was submitted, the Cabinet of Ministers was of the view that any vacancies should be filled though the process set out in the Service Minute marked "P2" and directed that the Public Service Commission be consulted.

Thereafter, as referred to in paragraphs [6] (c) to (e), the letters marked "1R1" to "1R5" were exchanged between the Ministry of Education and the Public Service Commission. When these letters are sorted into chronological order, the following facts are established: (i) By the letter dated 22nd September 2012 marked "1R1", the Ministry of Education recommended that the officers who had been performing *"cover up duties"* be *"absorbed"* into Class III of the SLEAS by appointing them on a supernumerary basis; (ii) the Public Service Commission replied by its letter dated 06th November 2012 marked "1R3", stating that, the officers who had been performing *"cover up duties"* could be *"absorbed"* into Class III of the SLEAS on a supernumerary basis; (iii) the Ministry of Education then sent its letter dated 08th January 2013 marked "1R2" inquiring whether that should done by appointing these officers to substantive posts in Class III of the SLEAS as and when vacancies arose in those posts *or* by appointing these officers to those posts on a supernumerary basis and paying them only their salaries and not granting the other benefits of the substantive posts; (iv) the Public Service Commission replied by its letter dated 12th February 2013 marked "1R4" directing that, the Ministry of Education should act in in terms of the guideline issued previously by the Minister of Public Administration, Home Affairs and Plantation Industries and set out in a Note to the Cabinet dated 10th September 1998 marked "1R6" - *ie:* that any *"absorption"* of the officers who had been performing *"cover up duties"* into Class III of the SLEAS should only be through the process of competitive examinations and interviews faced by all those who sought to be appointed to Class III of the SLEAS.

In this connection, it is useful to set out the relevant part of "1R6" because the rationale and the directive set out therein are directly relevant to the present application which is before us [underlining and punctuation has been added, for clarity]:

''අධි සේවක පදනම මත පත්වීම් දීමේදී නිර්වචන දෙකක් ක්‍රියාත්මකයි.

1. <u>ස්ථිර තනතුරුවල ඇබෑර්තු ඇති වන විට එම ඇබෑර්තු අධි සේවක පදනම මත සිටින නිලධාරීන්ගෙන් පිරවීම</u> - මේ අනුව උසස්වීම් බලාපොරොත්තු වන අයගේ උසස්වීම් ඇහිරේ. ඒ අනුව සේවයේ උදාසීනත්වය ඇති වේ.

2. <u>අධි සේවක පදනම මත පත්වීම් ලබා තනතුරු ආදී වෙනත් වරප්‍රසාද නොලබමින් වැටුප පමණක් ලබා ගැනීම</u> - ස්ථිර තනතුරක් දැරීමට නම් නියමිත උසස්වීම් පටිපාටියේ විධිවිධාන අනුව උසස්වීම් ලබාගෙන උපලේඛනගත තනතුරු වලට පත්වීම. උදා: වශයෙන් තරහ විභාගයට පෙනී සිට සමත්වීම හෝ කුසලතා මත උසස්වීම් ලබා ගැනීම.

රාජ්‍ය සේවයේ උසස්වීම් පිළිබඳව විවිධ ශ්‍රේෂ්ඨාධිකරණ නඩු පැවරීම නිසා අධි සේවක පදනම මත උසස්වීම් ලැබූ අයට ඉහත 2 යටතේ වූ ක්‍රමය සමස්ථයක් වශයෙන් අනුගමනය කරනු ලැබේ.

එමඟින් උසස්වීම් බලාපොරොත්තු වන එම සේවයේ අනිකුත් නිලධාරීන් සහ මෙම කණ්ඩායම් අතර තරඟ විභාග හා සම්මුඛ පරීක්ෂණවලට පෙනී සිට උසස්වීම් සමඟ උපලේඛනගත තනතුරුද ලබා ගැනීම.

යෝජිත කණ්ඩායම 2 විකල්පය මත පත්කිරීම වඩාත් සුදුසු ක්‍රමය වන්නේ දැනට සේවයේ සිටින අයගේ විරුද්ධත්වය එමඟින් සීමා වන බැවිනි."

It is seen from "1R6" that, the then Minister of Public Administration, Home Affairs and Plantation Industries has considered the following two possible methods by which officers who are serving in supernumerary positions could be appointed to substantive and permanent posts in a Service: (i) by directly appointing them to substantive and permanent posts in the Service as and when vacancies arose in the permanent cadre of that Service [Item 1 of "1R6"]; or (ii) by requiring them to seek entry into the permanent cadre of the Service under and in terms of the regular scheme of promotion applicable to that Service [Item 2 of "1R6"]. Thereafter, the then Minister has observed that adopting the method set out in Item 1 blights the promotion prospects of other persons who are in the Service and causes `apathy' or `indifference' [*vide:* Carter's Sinhalese-English Dictionary (1924)] in the Service. Therefore, the Minister has observed that, where officers who had been serving in supernumerary positions sought to be appointed to substantive and permanent posts in a Service, they should do so in conformity the regular scheme of promotion applicable to that Service.

Thus, the Public Service Commission has given clear instructions to the Ministry of Education [by "1R4"] to act in terms of the direction set out in "1R6" - *ie:* to follow a procedure whereby the officers who had been serving in supernumerary positions are required to seek entry into Class III of the SLEAS by way of competitive examinations and interviews in conformity with the regular scheme of promotion applicable to that Service - *ie:* the scheme set out in "P2".

However, paragraph [6] (f) and (g) show that, despite this direction, the Ministry of Education later submitted the Note dated 20th March 2013 marked "1R5" to the Cabinet of Ministers recommending that, those officers who had been performing *"covering up duties"* be *"absorbed"* into the SLEAS *"on a supernumerary basis"* after holding interviews – "අධි සේවක පදනම මත ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවයට අන්තර්ග්‍රහණය කිරීමට අමාත්‍ය මණ්ඩලයේ අනුමැතිය අපේක්ෂා කරමි.".

The 1st respondent takes the position that this recommendation was a `policy decision' to be taken by the Cabinet of Ministers in the exercise of its powers under the Constitution. Nevertheless, in paragraph [6] (h), the 1st respondent categorically states that *no* final decision has been taken with regard to the aforesaid recommendation.

Finally, in paragraphs [7] (a) and (b) of his affidavit, the 1st respondent states that: (i) the approved cadre of Class III of the SLEAS is 1783; (ii) the officers who held "*covering up appointments"* in the SLEAS had been *"taken into account"* when the Ministry of Education determined the number of vacancies in the approved cadre of Class III of the SLEAS prior to publishing the notice marked "P3"; and (iii) on this basis, 1373 posts in Class III of the SLEAS were *"occupied"*, leaving only 410 vacancies in Class III [1783 - 1373 = 410].

The petitioners supported their application on 26th November 2013. This Court granted the petitioners leave to proceed under Article 12(1) of the Constitution.

On 26th June 2014, learned Deputy Solicitor General informed Court that the 1st respondent is relying on his aforesaid affidavit dated 16th September 2013 and that he does not wish to file any further affidavits. Therefore, the 1st respondent's position in response to both the petition and the petitioners' further affidavit, must be taken to be set out in the 1st respondent's affidavit dated 16th September 2013.

Thereafter, 142 persons who stated that they had been *"functioning"*, for many years, as Assistant Directors of Educations and were to be *"absorbed"* into Class III of the SLEAS by the Ministry of Education, sought to intervene and be added as Respondents to this application. On 28th October 2016, this Court permitted the addition of these persons as Intervenient Petitioners-Added Respondents. They will be referred to as the "intervenient petitioners".

Several of these intervenient petitioners have filed an affidavit dated 06th November 2015. In their affidavit, the intervenient petitioners stated that: (i) they are all senior officers in the Sri Lanka Teachers' Service and Sri Lanka Principals Service and possess professional and academic qualifications; (ii) all of them are *"presently performing covering up duties in the posts of Assistant Directors of Education, in the SLEAS"*; (iii) the fact that, the Limited Competitive Examination for admission to Class III of the SLEAS was not held for eight years, the retirements which took place during this period, the more than three-fold increase of Zonal Education Offices during this period and the shortage of officers to serve in the Northern and Eastern parts of the country during the war, resulted in the SLEAS facing difficulties in carrying out its activities; (iv) in order to resolve these difficulties, senior officers in the Sri Lanka Teachers' Service and Sri Lanka Principals Service [including the intervenient petitioners] were appointed to perform *"cover up duties"* as Assistant Directors in the SLEAS, after going through an interview process; (v) all the officers who were so appointed to perform *"cover up duties"* [including the intervenient-petitioners] were senior teachers or principals who possessed professional and academic qualifications and had played a significant role in developing education at a zonal and national level; (vi) the removal of these officers from the posts they are now *"functioning"* in, will prejudice the education system; (vii) public funds have been invested in the training of these officers; (viii) several provincial authorities and ministers recommended that these officers be appointed to substantive and permanent posts in the SLEAS; (ix) the intervenient petitioners say that, in view of

these circumstances, a proposal was formulated to *"absorb"* all these officers [including the intervenient petitioners] who had been performing duties on a *"covering up basis"*, into the SLEAS *"on a supernumerary basis"* in recognition of their long-standing services to the SLEAS and *"thereby ensuring that the cadre of the SLEAS will not be affected in any manner."*.

The intervenient petitioners go on to state that: (i) a Cabinet Memorandum recommending a proposal on these lines was submitted in 2009. Thereafter, another Cabinet Memorandum dated 26th March 2012 and marked "R7" was submitted by the Minister of Education recommending that officers who had served for three years or more in a *"covering up position"* and who fulfilled the criteria for appointment to Class III of the SLEAS at the date of such *"covering up"* appointment and also satisfied some other specified criteria, be *"absorbed"* into Class III of the SLEAS on a *"supernumerary basis"*; (ii) the intervenient petitioners claim that the Cabinet of Ministers approved this proposal and requested the Public Service Commission to *"determine the feasibility of implementing the said proposal"*; (iii) the intervenient petitioners refer to the aforesaid letter marked "1R3" and say that, on that basis, they *"understand"* that the Public Service has deemed the proposal to be feasible and recommended its implementation; (iv) in line with that thinking, the Ministry of Education prepared a *"LIST OF THE PERFORMING A.D.E'S TO BE ABSORBED TO THE SLEAS-2012"* which was marked "R8" and which includes almost all the intervenient petitioners. The intervenient petitioners unequivocally state that, the officers named in the list were *"to be absorbed into the SLEAS, and thereby granted* ***substantive appointments*** *in the post of Assistant Director of Education."* [emphasis added by me].

The intervenient petitioners plead that: (i) this is the fourth instance that officers serving *"covering up duties"* have been absorbed in the SLEAS; (ii) the provisions of the Service Minute marked "P2" permit the *"absorption"* of such officers into Class III of the SLEAS; (iii) in any event, the Cabinet of Ministers has the power to authorise the *"absorption"* of the intervenient petitioners into Class III of the SLEAS by way of a policy decision; (iv) a decision made by the Cabinet of Ministers to exercise that authority, is an example of a policy decision taken for the *"greater public good"* since it seeks to appoint officers who have been *"functioning on a covering up basis"* in supernumerary positions for long periods of time and enables the effective utilization of public funds; and (v) the proposed *"absorption"* of these officers into Class III of the SLEAS will be done on objective criteria.

Finally, the intervenient petitioners refer to a previous Fundamental Rights Application No. SC FR 657/2012 filed in this Court and marked a copy of the petition and order in that application as "R11" and "R12". The petitioners suggest that the said application related to a post similar to the *"covering up"* posts held by the intervenient petitioners and claim that, in Application No. SC FR 657/2012, this Court took cognizance of the long service of that petitioner in the post of Assistant Director of Education and granted him relief. That claim does not have any merit since the Order marked "R12" clearly states that the petitioner in that application was only

granted, by consent, the facility of continuing in his *"covering up"* post. The Court did not permit his *"absorption"* into the permanent cadre. The intervenient petitioners also refer to another Fundamental Rights Application No. SC FR 116/2013 where they say, a group of petitioners who are similarly circumstanced with the petitioners in the present application, made an application marked "R13" to this Court on lines similar to the present application and were not granted leave to proceed by the Order marked "R14". Needless to say, that Order marked "R14", which only states *"Application is dismissed (See the signed Order for details)"* does not impact on our duty to fully consider and decide the present application.

In order to determine this application, it is **firstly** necessary to examine whether the Public Service Commission and the Ministry of Education are required to make appointments to Class III of the SLEAS *only* in terms of and within the scheme set out in the Service Minute marked "P2" *or* whether appointments to Class III can be properly made through some other method of selection and entrance to Class III.

In this regard, it was seen from the earlier description of the contents of the Service Minute marked "P2" that, "P2" provides for recruitment to Class III of the SLEAS by the three fold modes of the Open Competitive Examination, Promotion on Merit and the Limited Competitive Examination. "P2" makes detailed and comprehensive provisions in respect of these three modes of recruitment to Class III. There is no provision made in "P2" for recruitment *outside* the scheme set out in "P2" [other than in the limited circumstances envisaged by Clause 27(a) of "P2" which are referred to later in this judgment].

It will now be useful to consider the import of a Service Minute such as "P2". In this regard, it is hardly necessary to emphasize that, the efficiency and integrity of the public administration system of a country is dependent on the quality of the officers who serve that system. Therefore, it is important to ensure that the recruitment of such officers is made in the best possible manner. A key to achieving that objective is to ensure that recruitment to the Public Service of a country is effected according to published procedures which incorporate proper selection criteria and due and fair process. As Professor Chapman of the University of Manchester [Profession of Government 1960 1st ed at p.74.] observes, this requirement for standardization and formalization of recruitment procedures is brought about by the need to minimize the ill effects of patronage, favouritism and resulting inefficiency and because *"efficiency could only be obtained by prescribing some fairly objective tests of merit before appointment."*. These considerations are reflected in the recommendation made, as far back as in 1875, by the aptly named Playfair Commission that, recruitments to the Civil Service of England be made by way of open competition. Thus, as stated in Halsbury's Laws of England [5th ed. Vol. 20 para. 290] which deals with the appointment of civil servants, the Civil Service Commission of England [which is the equivalent of our Public Service Commission] *"must publish a set of principles to be applied for the purpose of the requirement that selection must be on merit on the basis of open and fair competition"* and, thereafter, when appointing civil servants, the *"Civil Service management authorities must comply with the recruitment*

principles" set out in these publications. These principles apply with equal force to our Public Service, which was founded on the model of the of the Civil Service of England when the Ceylon Civil Service was established in 1833, following the recommendations of the Colebrooke-Cameron Commission.

In fact, these principles are clearly incorporated in Chapter II of the Establishments Code which governs *"RECRUITMENT PROCEDURE AND APPOINTMENT"* of public officers to the Public Service. Thus, section 2 of Chapter II of the Establishments Code is titled *"Scheme of Recruitment"* and section 2:1 therein states *"For every post in the Public Service or, where such a post belongs to a Grade or Service, for every such Grade or Service, there should be a Scheme of Recruitment which specifies the salary scale of post, the qualifications required, age limits and other relevant particulars, drawn up by the Department concerned and approved in accordance with Section 2:2 to 2:5."*. On the same lines, section 1 of Chapter II is titled *"General"* and section 1:6 therein states *"Every appointment must be made in terms of the Scheme of Recruitment approved in terms of sections 2:2 to 2:5."*. Next, section 6:1:5 in Chapter II reiterates that, an appointment must be *"in accordance with the approved Scheme of Recruitment.".* In this regard, it should also be mentioned that section 2:1:3 makes it clear that, *"A Scheme of Recruitment may be embodied in a Minute governing a Service, e.g. the Minute on the Sri Lanka Administrative Service, which will be issued under the authority of the Cabinet of Ministers."*.

This Court has consistently recognised that the provisions of the Establishments Code should be complied with and given effect to. That approach stems from early decisions such as PERERA vs. JAYAWICKREME [1985 1 SLR 285] where Wanasundera J [at p.328] described the Establishments Code as the *"basic enactment"* governing the matters set out therein and as an *"authoritative enactment issued by the Cabinet of Ministers"* which has *"been designed to apply to all classes and categories of Public officers"* falling under Article 55 of the Constitution. His Lordship went on to state with regard to the Establishments Code [at p.335], *"It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code. These procedures are therefore mandatory and cannot be superseded or disregarded without due legal authority."* Wanasundera J went to say with regard to the Establishments Code [at p. 338], *"This Code constitutes the norm and embodies the necessary safeguards to protect the rights of public officers. It constitutes the state of the law on this matter and is and should be applicable, without exception, to all public officers of the class or category to which the petitioner belongs. Any departure in a particular case from this basic norm, which is of general application, would be a deprivation of the protection given by the law and must be regarded as unequal treatment and a violation of Article 12(1) of the Constitution."* In a similar vein and a few years later, Kulatunga J observed in PERERA vs. RANATUNGA [1993 1 SLR 39 at p.54-55] that the Establishments Code has been formulated in

pursuance of the duty cast on the Cabinet of Ministers to provide for and determine all matters of policy relating to the appointment, transfer, dismissal and disciplinary control of public officers and that, accordingly, the Establishments Code is in the nature of *" ….. a constitutional recognition of the concept of the Rule of law, in particular, that government should be conducted within the framework of recognized rules and principles and that, in general, decisions should be predictable and the citizen should know where he is which in turn restricts arbitrary action or discrimination. The relevant provisions of the Establishments Code are in conformity with this concept and through Article 55 (4) are made complementary to Article 12."*.

Next, it is self-evident that, the Service Minute marked "P2" is a Scheme of Recruitment, as contemplated by section 2:1 and section 2:1:3 of the Establishments Code. Further, as set out earlier, the Establishments Code stipulates that, all appointments to Class III of the SLEAS must and can only be made in terms of and within the scheme set out in the Service Minute marked "P2".

In the light of what I have set out, it is very clear that the Public Service Commission and the Ministry of Education are bound to make appointments to Class III of the SLEAS only in terms of and within the scheme set out in the Service Minute marked "P2", which has been issued by the Public Service Commission. Appointments made in violation of the scheme set out in "P2" are liable to be struck down by this Court if they are shown to be discriminatory or arbitrary or otherwise in violation of Article 12 (1) of the Constitution.

Thus, in JAYAWICKREMA vs. LAKSHMAN [1998 2 SLR 235] which dealt with a comparable situation where this Court considered whether the Post Graduate Institute of Medicine was bound to act within the terms of the regulations it had made, Fernando J observed [at p.249], *"It is true that regulations can be amended. But even the authority which made the regulations is bound by them, unless and until they are duly amended; and disregarding its own regulations is not a method by which the authority can amend them."*. In DE SILVA vs. PERIS [SC FR 219/98 SCM 22nd July 1999], which was a case where, in contrast, the Post Graduate Institute of Medicine followed its own regulations and the petitioner complained that doing so caused injustice to her, Amerasinghe J cited Fernando J's aforesaid statement with approval. His Lordship went on to say *"Perhaps, as the Board of Study has recommended and resolved, the criteria ought to be amended; that is something the Board may do. However, for the time being, the Board is governed by the rules and regulations as they are. I am of the view that the Board of the PGIM was not acting mala fide, but was applying the prescribed criteria as it was entitled to do and indeed obliged to do."*. The principle referred to by Fernando J and Amerasinghe J applies here.

Secondly, it is necessary to examine whether the aforesaid proposal made by the Ministry of Education to *"absorb*" officers who have been performing *"cover up duties"* as Assistant Directors of Education, into the permanent cadre of Class III of the SLEAS, is violative of the scheme set out in the Service Minute marked "P2".

In this regard, as set out earlier, the 1st respondent has repeatedly said that the Ministry of Education wished to *"absorb"* these officers into Class III of the SLEAS. In fact, the final proposal made by the Ministry of Education to the Cabinet of Ministers and set out in the Note marked "1R5" recommends that, those officers who had been performing *"covering up duties"* be *"absorbed"* [අන්තර්ග්‍රහණය කිරීමට] into the SLEAS *"on a supernumerary basis"*.

The word *"absorb"* is defined in the Shorter Oxford Dictionary [5th ed.] to mean *"include or take (a thing) in so that it no longer has separate existence; incorporate."*. Thus, when an officer is *"absorbed"* into a Service, he would become an integral part of that service, be placed on par with other officers of the same Class within that Service and be entitled to the same rights and have the same duties as other officers of the same Class within that Service. This would, in the normal course, mean and require that such an officer is appointed to a *substantive post* in that Service. The deliberate and repeated use of the word *"absorb"* by the 1st respondent points to the conclusion that, the Ministry of Education intended, by this process of *"absorption"*, to appoint these officers to **substantive posts** in Class III of the SLEAS.

This conclusion is confirmed by the fact that, while the Establishments Code contemplates that officers will usually hold "substantive appointments" to posts within each Service on a permanent basis, it also provides for officers who will hold posts temporarily or for a short term on the basis of a "substitute appointment" [where the holder of the substantive post is temporarily absent] or a "casual appointment" [as a stop-gap measure for a short period] or a "temporary appointment" [to hold a temporary post] or an "acting appointment" [as a temporary measure only and until a substantive appointment is made] - *vide:* section 1 and section 2 of Chapter IV, section 13 of Chapter II and section 1 of Chapter II of the Establishments Code. Quite obviously, an officer who is *"absorbed"* into Class III of the SLEAS in terms of the aforesaid proposal made by the Ministry of Education would not hold a "substitute appointment" or a "casual appointment" or a "temporary appointment" or an "acting appointment" since his appointment will be a permanent one and not be temporary or for a short period of time or pending a substantive appointment. Therefore, his appointment upon *"absorption'"* could only be to hold a "substantive appointment" in Class III of the SLEAS, as contemplated by the Establishments Code.

In any event, the fact that, the *"absorption"* which the 1st respondent refers to is, in reality, the appointment of those officers to substantive and permanent posts is revealed by the intervenient petitioners' specific averments in paragraphs [31] and [50] of their affidavit that, the officers named in the list marked "R8" were *"to be absorbed into the SLEAS, and thereby granted* ***substantive appointments*** *in the post of Assistant Director of Education."* and *"We further state that our absorption and the absorption of all other officers similarly circumstances, is merely the granting of* ***permanency*** *to us and other similarly placed officers in the very posts we have been performing covering up duties ….."*. [emphasis added by me].

Perhaps in the light of this difficulty, both the 1st respondent and the intervenient petitioners have claimed that, officers who are to be *"absorbed"* into Class III of the SLEAS in terms of the aforesaid proposal, will hold those posts *"on a supernumerary basis"*. However, that claim does not appear to have a logical basis because an appointment on a supernumerary basis would be an appointment which is *outside* the permanent cadre of Class III of the SLEAS - *vide:* the definition of the word *"Supernumerary"* cited earlier - and could not be an appointment, upon *"absorption"*, to a substantive and permanent post within that cadre. In other words, an officer who is *"absorbed"* into Class III of the SLEAS in terms of the proposal made by the Ministry of Education and [as concluded earlier] will hold a substantive and permanent post in Class III, cannot then be regarded as holding that post on a supernumerary basis. It seems to me that, the 1st respondent's claim that these officers will be *"absorbed"* into Class III but will yet be holding those posts *"on a supernumerary basis"*, is a *non sequitur*.

The intervenient petitioners have also submitted that, their proposed *"absorption"* into Class III *"on a supernumerary basis"* will only grant them *"permanency"* but not affect cadre vacancies or affect the petitioners. That submission overlooks the fact that, the proposed *"absorption"* of the intervenient petitioners into Class III will result in them occupying substantive posts in Class III on a permanent basis. That will fill the cadre vacancies relating to those posts and will deny those posts to the petitioners and any other person who seek those posts through the entry method specified in the Service Minute marked "P2". The Service Minute marked "P2" makes it clear that, there are only a limited number of posts, each with specified designations, in Class III. Therefore, the proposed so-called *"absorption"*, of the intervenient petitioners into Class III will directly affect cadre vacancies and prejudice the petitioners.

It seems to me that the words *"on a supernumerary basis"* have been used by the respondents in an attempt to cloud the fact that the so-called *"absorption"* of these officers resulted in these officers being granted substantive and permanent posts in Class III of the SLEAS.

To sum up, the contents of the Service Minute marked "P2" have been described earlier and it is very clear that, "P2" makes no provision for entrance into Class III of the SLEAS through a door which stands outside the three pathways of the Open Competitive Examination, Promotions on Merit and the Limited Competitive Examination, which were described earlier. It is equally evident that, the proposal made by the Ministry of Education to *"absorb"* officers who have been performing *"cover up duties"* into Class III of the SLEAS, is a proposal to grant them substantive and permanent posts in Class III by a method which is *outside* the three pathways specified in "P2" and is violative of the scheme set out in "P2".

The **third** question to be examined has two aspects. First, whether the number of vacancies for appointment to Class III of the SLEAS through the process commenced by the Notice marked "P3" and under and in terms of the Service Minute

marked “P2” was calculated to be 410 *after* taking into account the vacancies that would be filled as a result of implementing the aforesaid proposal made by the Ministry of Education to *“absorb*” officers who have been performing *“cover up duties”*, into the permanent cadre of Class III of the SLEAS. Second, whether such a method of calculating vacancies contravenes the scheme of recruitment set out in “P2”.

The answer to the first aspect of this question is found in the averments made in paragraphs [7] (a), (b), (c) and (d) of the 1st respondent’s affidavit. These averments point clearly to the fact that, the total number of officers who have been performing *“cover up duties”* as Assistant Directors of Education *“had been taken into account in determining the number of vacancies of the approved cadre.”* when calculating that *“1373 positions had been occupied as at 01.06.2010”* in a cadre of 1783. It is on that basis that the Ministry of Education has arrived at the number of 410 vacancies which it intended to fill through the process commenced by the Notice marked “P3” which was published under and in terms of the Service Minute marked “P2” [1783 - 1373 = 410].

In other words, the Ministry of Education proposed to first *“absorb”* the aforesaid officers into substantive posts in Class III of the SLEAS and, *thereafter*, fill the 410 vacancies which still remained, through the process commenced by the Notice marked “P3” and under and in terms of the Service Minute marked “P2”.

This conclusion is supported by the List marked “R8” produced by the intervenient petitioners which shows that, in 2012, the Ministry of Education intended to *“absorb”* 624 officers [including all but six of the intervenient petitioners] who had been performing the duties of Assistant Directors of Education, into Class III of the SLEAS. This makes it clear that, the 410 vacancies which the Ministry of Education intended to fill through the process commenced by the Notice marked “P3” and under and in terms of the Service Minute marked “P2”, were the balance vacancies which would remain in Class III *after* making provision for the aforesaid 624 officers listed in “R8’ to be *“absorbed”* into Class III.

With regard to second aspect of the question, since the Service Minute marked “P2” limits the modes of entry to Class III of the SLEAS to the three pathways described earlier, it is clear that the aforesaid manner in which the Ministry of Education has purported to calculate the number of vacancies for appointment to Class III of the SLEAS, contravenes the scheme set out in “P2”.

It also follows that, the actual and correct number of vacancies which existed in Class III of the SLEAS at the relevant time was: the aggregate of the 624 officers whom the Ministry of Education wished to *“absorb”* into Class III as per the List marked “R8” *plus* the 410 vacancies which the 1st respondent says remained after the proposed *“absorption”* of those officers - *ie:* a minimum of 1034 vacancies [624 +

410 = 1034]. Thus, the figure of 410 vacancies claimed by the 1st respondent is a gross underestimate.

Further, it is seen that, perhaps because they were aware that the method of calculation they intended to adopt was wrong, the respondents chose to omit from the Notice marked "P3", the number of vacancies which were to be filled through that process. This conduct on the part of the respondents is regrettable, especially since high officials of the State are expected to exert every effort to make the process of recruitment to the Public Service as transparent as possible. As Fernando J stated in in JAYAWARDENA vs. WIJAYATILAKE [2001 1 SLR 132 at p.143] *"Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability in administration; and this means - in relation to appointments to, and removal from, offices involving powers, functions and duties which are public in nature - that the process of making a decision should not be shrouded in secrecy, and that there should be no obscurity as to what the decision is and who is responsible for making it."*

Fourthly, it remains to consider the 1st respondent's and intervenient petitioners' position that, even if the aforesaid proposal [to *"absorb*" officers who have been performing *"cover up duties"* into Class III of the SLEAS] and the manner of calculation of vacancies are both violative of the scheme set out in the Service Minute marked "P2", the Public Service Commission and the Ministry of Education are, nevertheless, entitled to implement the aforesaid proposal on the basis that they are giving effect to a *`policy decision'* taken by the Cabinet of Ministers.

However, this submission made by the respondents and the intervenient petitioners fails to get off the ground for the simple reason that neither the respondents nor the intervenient petitioners have produced a decision by the Cabinet of Ministers to the aforesaid effect. In fact, the 1st respondent himself acknowledges that the Cabinet of Ministers has not taken a decision with regard to the proposal made by the Ministry of Education – *vide:* paragraph [6] (h) of the 1st respondent's affidavit which states *"however, no final decision has been taken as yet with regard to making such appointments."*.

Further, the Cabinet Memorandum dated 26th March 2012 and marked "R7" produced by the intervenient petitioners shows that, an earlier proposal on similar lines submitted by the Ministry of Education on 22nd March 2011, had been rejected by the Cabinet of Ministers because the proposal was in conflict with the Service Minute marked "P2". – "ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවයේ තනතුරුවල රාජකාරී ආවරණය කරන නිලධාරීන් වෙනුවෙන් ඉදිරිපත් වූ 2011.03.22 අමාත්‍ය මණ්ඩල සංදේශ අංක 2011/ED/E/28 සංදේශය සඳහා වූ අමප /11/0675/530/024 හා 2011 අප්‍රේල් 06 අමාත්‍ය මණ්ඩල තීරණය වූයේ ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවා ව්‍යවස්ථාවේ විධිවිධාන වලට පටහැනිවන බවට නිරීක්ෂණය කර ඇති බැවින් උක්ත සංදේශ යෝජනාව, නිර්දේශ නොකිරීම සඳහා වූ අනු කාරක සභා නිර්දේශය අනුමත කිරීමය.''. The Cabinet Memorandum dated 26th March 2012 marked "R7" by the intervenient petitioners and the Note to the Cabinet of Ministers dated

20th March 2013 marked "1R5" by the 1st respondent are further bites at the same cherry by the Ministry of Education. There is *no* evidence that, on either of these two renewed attempts, the Cabinet of Ministers decided to approve the same proposal it had rejected earlier.

Therefore, the aforesaid question of whether the Public Service Commission and the Ministry of Education are entitled to implement the aforesaid proposal and act *outsid*e the scheme set out in the Service Minute marked "P2", on the basis of giving effect to a *`policy decision'* taken by the Cabinet of Ministers, does not arise for consideration.

Before parting with this issue, it is relevant to state that, at times material to this application, the powers vested in the Cabinet of Ministers by Article 55 (1) of the Constitution to provide for and determine policy relating to the appointment and promotion of public officers, authorise the Cabinet of Ministers to direct that a Service Minute be amended or scrapped altogether and replaced with another or to direct that a specific procedure be adopted to meet the needs of specific circumstances, which are outside the compass of a Service Minute or are not met by the provisions of a Service Minute. In HETTIARACHCHI vs. SENEVIRATNE [1994 3 SLR 290], Fernando J, in a very brief judgment, expressed the view that the Cabinet of Ministers is not necessarily bound to act in terms of Service Minutes such as "P2".

But, I would think that, in the absence of a published directive issued by the Cabinet of Ministers to adopt a special procedure and follow specified guidelines which are required by reasons of policy and are based on objective and rational criteria, the Cabinet of Ministers would be expected to act in terms of the existing Service Minute marked "P2" other than in instances where a *lacuna* in "P2" is detected that and the Cabinet of Ministers acts specifically for the purposes of addressing that *lacuna - ie:* acts in line with paragraph 30 of "P2" which states *"Any matter not provided for in this Minute will be determined by the Cabinet of Ministers."*. It seems that, any other approach would leave public officers and those who aspire to become public officers mired in uncertainty and insecurity with regard to their prospects of entering the Public Service and their terms of employment and prospects of promotion in the Public Service. The ill effects of such a situation are obviously damaging and far reaching.

In this regard, it is relevant to cite Fernando J's observation in BANDARA vs. PREMACHANDRA 1994 1 SLR 301 at p. 312] that, *"The subjection of Article 55 (1) to the equality provision of Article 12 mandates fairness and excludes arbitrariness. Powers of appointment and dismissal are conferred by the Constitution on various authorities in the public interest, and not for private benefit, 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."* In any event, Article 4 (d) of the Constitution requires the Cabinet of Ministers, when exercising its executive powers, to respect, secure and advance fundamental rights declared by the Constitution and to not abridge, restrict or deny these fundamental

rights in any manner, except to the extent provided for by the Constitution itself. Therefore, as held by this Court time and again, an exercise of executive powers in a manner which violates fundamental rights guaranteed by the Constitution, is liable to be struck down.

Finally, a reference should be made to Clause 27 (a) of "P2" which states *"The posts enumerated in Class I, in Class II and in Class III of the Schedule to the Minute will normally be held by officers in the Services. The Cabinet however reserves the right to appoint any Public Officers to any of the posts enumerated in the schedule."*, The petitioners have correctly submitted that Clause 27(a), in itself, cannot be regarded as a *carte blanche* given to the Cabinet of Ministers to disregard the scheme of recruitment set out in "P2" altogether and make large scale recruitments to the SLEAS outside the terms of "P2". Instead, it is plain to see that, Clause 27(a) contemplates a discretionary power given to the Cabinet of Ministers to appoint a public officer from another Service to a post in the SLEAS in special circumstances - for instance, where a suitably qualified officer is not available within the SLEAS. Any other interpretation of Clause 27(a) will defeat the purpose of the detailed and comprehensive scheme of recruitment set out in "P2".

To conclude: I hold that, the Public Service Commission and the Ministry of Education are permitted to make appointments to Class III of the SLEAS only in terms of and within the scheme of recruitment set out in the Service Minute marked "P2". Next, I hold that, the 1st to 10th and 1A, 1B and 2A to 10A respondents [*ie:* the Secretary, Ministry of Education and his successors and the Public Service Commission and their successors] have attempted to improperly bypass and, thereby, contravene the scheme set out in the Service Minute marked "P2" and grant substantative appointments in Class III of the SLEAS to a large number of officers [including the intervenient petitioners] who had been holding *"acting appointments"* or *"cover up"* appointments as Assistant Directors of Education. I further hold that, the said respondents have adopted an erroneous and unjustifiable method of calculating the number of vacancies in Class III to be filled through the process commenced by the Notice marked "P3" and in terms of the Service Minute marked "P2". The said respondents have also wrongfully suppressed the correct number of vacancies. Finally, I hold that, despite the petitioners' names being included in the List marked "P5" as persons who were eligible to be admitted to Class III of the SLEAS following the results of the Limited Competitive Examination and despite, as stated earlier, the correct number of vacancies in Class III being a minimum of 1034, the said respondents have wrongfully failed to call the petitioners for interviews to verify whether they have the basic qualifications for appointment to Class III of the SLEAS and to, thereafter, appoint the petitioners to Class III if they were found to have the basic qualifications.

I hold that the aforesaid actions and omissions of the 1st to 10th and 1A, 1B and 2A to 10A respondents are unreasonable, arbitrary and capricious and have resulted in the petitioners being treated unequally with the intervenient petitioners whom the Ministry of Education intended to appoint to Class III of the SLEAS. Thereby, the said respondents have violated and are about to violate the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

As mentioned earlier, learned Deputy Solicitor General informed this Court, on 26th July 2012, that no positions in the SLEAS would be filled outside the provisions of the Service Minute marked "P2". Therefore, it can be assumed that, the proposal mooted by the Ministry of Education to *"absorb"* a large number of officers [including the intervenient petitioners] who had been holding *"acting appointments"* or *"cover up"* appointments, into Class III of the SLEAS, has not, so far, been implemented. In view of the determinations made earlier, I direct that the aforesaid proposal not be proceeded with and that none of these officers be absorbed or be appointed to Class III of the SLEAS other than under and in terms of the scheme of recruitment set out in the Service Minute marked "P2" or such other Service Minute or Scheme of Recruitment as may be in force at the relevant time.

Further, the respondents are directed to forthwith call the petitioners [who are presently in service in the Sri Lanka Teachers' Service or Sri Lanka Principals Service] for interviews to verify whether the petitioners have the basic qualifications for appointment to Class III of the SLEAS and, to forthwith appoint the petitioners to Class III of the SLEAS if they are found to have such basic qualifications. Any such appointments should be with effect from the last date on which a person whose name was included in the List marked "P5" was appointed to Class III of the SLEAS following the interviews held in terms of the Notice marked "P3" for some candidates named in the List marked "P5" [in this regard, it is not in dispute that some of the persons named in "P5" were interviewed and were appointed to Class III of the SLEAS in or about 2012 or 2013]. In view of this order, there is no necessity to consider awarding any compensation to the petitioners.

Finally, the petitioners have not prayed for an Order declaring that the intervenient petitioners and other officers who have been functioning on an *"acting"* or *"cover up"* basis in posts which are allocated to Class III of the SLEAS, are not entitled to continue to function in such posts. In any event, the intervenient petitioners have functioned in those posts for long periods of time and, it would appear, they have discharged their duties satisfactorily. Therefore, it is necessary to state, for purposes of clarity, that the orders made earlier in this judgment have no effect on the intervenient petitioners [who are presently in service] continuing in the *"acting appointments"* or *"cover up"* appointments they have been functioning in. Their *status quo* will remain unchanged until their dates of retirement or earlier termination, so long as the Ministry of Education and the Public Service Commission consider it

suitable to continue that *status quo*. However, if these officers wish to obtain substantive appointments in Class III of the SLEAS, they can do so only in terms of the Service Minute marked “P2” or such other Service Minute or Scheme of Recruitment as may be in force at the relevant time.

The petitioners are entitled to recover the costs of this application from the State.

Judge of the Supreme Court

S.Eva Wanasundera, PC J.
I agree

Judge of the Supreme Court

L.T.B.Dehidenya J.
I agree

Judge of the Supreme Court

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

In the matter of an application in terms of Article 17 and Article 126 read with Articles 35 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 351/2018

Rajavarothiam Sampanthan

176, Customs Road,

Trincomalee

Petitioner

Vs.

1. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
2. Mahinda Deshapriya
   Chairman
3. N J Abeysekera PC
   Member
4. Prof. Rathnajeevan Hoole
   Member
   All of Election Commission,
   Election Secretariat
   Sarana Mawataha, Rajagiriya

Respondents

AND

1. Prof. Gamini Lakshman Pieris
   No.37, Kirula Place,
   Colombo 5.

2. Udaya Prabath Gammanpilla
   65/14G, Wickramasinghe Mawatha,
   Kumaragewatta Road, Pelwatta,
   Battaramulla

3. Wellawattage Jagath Sisira Sena de Silva
   No.174/10, Uthuwankanda Road,
   Thalawathugoda
4. Mallika Arachchige Channa Sudath Jayasumana.

   21/1A,Upananda Road, Attidiya.

5. Premanath Chaminda Dolawatta

   No.50, Ihala Bomiriy, Kaduwela.

Added Respondents

Before : Nalin Perera Chief Justice
B.P. Aluvihare PC J
Sisira J de Abrew J
Priyantha Jayawardene PC J
Prasanna Jayawardene PC J
V.K. Malalgoda PC J
Murdu Fernando PC J

Counsel : K. Kanag Iswaran PC with M.A. Sumanthiran PC, Niran Ankettal E Tegal, J Arulanandhan, JC Thambiah, Niranjan Arulpragasam for the Petitioner
Jayantha Jayasuriya PC, Attorney General with
Dappula de Livera Solicitor General, Sanjay Rajarathnam PC,ASG Nerin Pulle DSG for the Attorney General's Department.
Hejaaz Hizbullah for the 4th Respondent.
Sanjeewa Jayawardena PCfor the 1st Added Respondent

Manohara de Silva PC for the 2nd Added Respondent
Ali Sabri PC for the 3rd Added Respondent
Gamini Marapana PC for the 4thAdded Respondent
Canishka Vitharana for the 5th Added Respondent
Chrishmal Warnasuriya, Samantha Ratwatte PC, Shavinda Fernando
Kushan de Alwis PC, Darshan Weerasekara, K Deekiriwewa
Gomin Dayasiri and V.K. Choksy Canishka Witharana
for several Intervenient Petitioners

Argued on : 4th,5th,6th, and 7th December 2018

Decided on : 13.12.2018

Sisira J de Abrew

Learned counsel for parties mentioned above made submissions. In addition to the submissions made by counsel for parties referred to above, the following counsel made submissions.

Thilak Marapana PC in SC FR 352/2018 for the Petitioner.

Viran Corea in 353/2018 for the Petitioner.

Dr. Jayampathi Wickramaratne PC in 354/2018 for the Petitioner.

M.A. Sumanthiran PC in 355/2018 for the Petitioner.

J.C. Waliamuna PC in 356/2018 for the Petitioner.

Geoffrey Alagaratnam PC in 358/2018 for the Petitioner.

Suren Fernando in 359/2018 for the Petitioner.

Ikram Mohamad PC in 360/2018 for the Petitioner.

Hejaaz Hisbullah in 361/2018 for the Petitioner.

His Excellency the President of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the President of the Republic) has, by a Proclamation published in Gazette No.2096/70 dated 09.11.2018 dissolved Parliament with effect from midnight on 09.11.2018. The petitioner who is a Member of Parliament whilst challenging the said Proclamation inter alia seeks the following reliefs from this court.

1. To declare that the Proclamation dissolving Parliament infringes his fundamental rights guaranteed by Article 12(1) of the Constitution.
2. To make order declaring that the said Proclamation dissolving Parliament is null and void ab initio and of no force or effect in law.
3. To quash the said Proclamation dissolving Parliament.
4. To quash the decisions and or directions contained in paragraphs (a),(b),(c) and (d) of the said Proclamation.

This court by its order dated 13.11.2018, granted leave to proceed for alleged violation of Article 12 (1) of the Constitution.

The learned Attorney General whilst submitting the following grounds contended that the Supreme Court is precluded from exercising the jurisdiction in respect of the alleged violation of the Petitioner's fundamental rights and from granting the reliefs sought by the Petitioner.

1. A specific mechanism is provided in Article 38(2) of the Constitution for the Supreme Court to exercise jurisdiction over allegation of intentional violations of the Constitution, misconduct or abuse of power by the President of the Republic.
2. The dissolution of Parliament by the President of the Republic does not constitute Executive or Administrative action falling within the purview of Article 126 of the Constitution.

I now advert to the above contentions.

When Article 38 (2) of the Constitution is examined, it is clear that the mechanism provided in Article 38 (2) of the Constitution is only available to the Members of Parliament. This mechanism is not available to the other citizens of the country. In fact there are several petitions filed in this court seeking to quash the Proclamation dissolving Parliament. The said petitioners are not Members of Parliament. For the above reasons, I reject the above contention advanced by the learned Attorney General. I now advert to the 2nd contention advanced by the learned Attorney General. He contended that the dissolution of Parliament by the President of the Republic does not constitute Executive or Administrative action falling within the purview of Article 126 of the Constitution. The general power given to the President of the Republic is contained in Article 33(2)(c) of the Constitution. The same power is contained in Article 70 of the Constitution with a procedure governing the exercise of the said power. Article 33 is found in Chapter VII of the Constitution. The Chapter VII of the Constitution deals with 'Executive' and the President of the Republic'. Therefore it can be safely concluded that the power of the President of the Republic to dissolve Parliament is an executive action of the President of the Republic. This view is supported by the judicial decision in the case of In Re The Nineteenth Amendment to the Constitution [2002] 3 SLR 85 (a judgment by seven Judges of this court) wherein His Lordship S.N.Silva CJ at page 103 and 104 held as follows:

> "We have stated clearly, on the basis of a comprehensive process of reasoning, that **the dissolution of Parliament is a component of the executive power of the People, attributed to the President**, to be exercised in trust for the People and that it cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of Article 70 (1) of the Constitution." (emphasis added).

At this stage I would like to consider Article 4 (b) of the Constitution which reads as follows:

Article 4(b) of the Constitution reads as follows.

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

(a) omitted

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People ;

(c) omitted

(d) omitted

(e) omitted"

Therefore it can be contended that official acts of the President of the Republic are executive actions. This view is supported by the passage in page 29 of the Book titled 'Fundamental Rights and the Constitution' by R.K.W. Goonesekere, wherein the learned Author states thus: "Official acts of the President are executive actions…. ." The contention that official acts of the President of the Republic are executive actions is also supported by the judicial decision in the case of Karunathilake and Another Vs Dayananda Dissanayke Commissioner of Elections and Others [1999] 1SLR 157. In the said case the following facts were observed.

The period of office of the Central, Uva, North-Central, Western and Sabaragamuwa Provincial Councils came to an end in June, 1998. The Commissioner of Elections (the 1st respondent) fixed the nomination period in terms of section 10 of the Provincial Councils Elections Act, No. 2 of 1988. After the receipt of nominations which concluded on 15.07.1998 each returning officer fixed 28.8.98 as the date of the poll by a notice under section 22 (1) of the Act. The issue of postal ballot papers in terms of section 24 of the Act read with Regulation 10 of the second schedule to the Act was fixed for 4.8.98. But by telegram dated 3.8.98, the respective returning officers suspended the postal voting without adducing any reason therefore. The very next day on 4.8.98 the President issued a Proclamation under section 2 of the Public Security Ordinance (PSO) bringing the provisions of Part If of the Ordinance into operation throughout Sri Lanka and made an Emergency Regulation under section 5 which had the legal effect of cancelling the date of the poll. Thereafter, the 1st respondent took no steps to fix a fresh date for the poll in terms of

section 22 (6) of the Act, even after 28.8.98. In the meantime the term of office of the North-Western Provincial Council came to an end and the date of the poll for that Council was fixed for 25.1.99.

His Lordship GPS de Silva CJ held as follows.

The making of the Proclamation and the Regulation as welt as the conduct of the respondents in relation to the five elections, clearly constitute "executive action' and the court would ordinarily have jurisdiction under Article 126 of the Constitution.

When I consider all the above matters, I hold that the power of the President of the Republic to dissolve Parliament is an executive action. I therefore reject the contention of the learned Attorney General that is to say that the dissolution of Parliament by the President of the Republic does not constitute Executive or Administrative action falling within the purview of Article 126 of the Constitution.

Can any person challenge the actions performed by the President of the Republic in his official capacity in the Supreme Court? This question must be considered since the Petitioner challenges the actions performed by the President of the Republic to dissolve Parliament. In this connection I would like to consider Article 35 of the Constitution. Article 35(1) reads as follows:

> *"While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity.*
>
> *Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make and application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President in his official capacity.*
>
> *Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33(2)(g)."*

According to Article 35(1) of the Constitution, the President of the Republic while holding office enjoys immunity from suit. But does it mean that the Supreme Court cannot examine the legality of actions performed by the President of the Republic? I now advert to this question. In terms of the 2nd proviso to Article 35(1) of the Constitution, the Supreme Court has no jurisdiction to pronounce upon the exercise of the powers of the President of the Republic performed under Article 33(2)(g) of the Constitution. This Article deals with the power of the President of the Republic to declare war and peace. The words *'anything done or omitted to be done by the President in his official capacity'* in the 1st proviso to Article 35(1) of the Constitution should be stressed. Thus when Article 35 of the Constitution is considered, it is clear that except the acts done by the President of the Republic in the exercise of his powers conferred by Article 33(2)(g) of the Constitution, the other acts of the President of the Republic are not immune from suit. It has to be stated here that that the President of the Republic is a creature by the Constitution. This view is supported by Article 30 of the Constitution which reads as follows:

> "30(1) - *There shall be a President of the Republic of Sri Lanka, who is the head of the State, the head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces.*
>
> (2)- *The President of the Republic shall be elected by the People and shall hold office for a term of five years."*

It is the duty of the President of the Republic to respect and uphold the Constitution. This view is supported by Article 33(1) of the Constitution which reads as follows.

33.(1) It shall be the duty of the President to -

(a) ensure that the Constitution is respected and upheld;

(b) promote national reconciliation and integration;

(c) ensure and facilitate the proper functioning of the Constitutional Council and the institutions referred to in Chapter VIIA; and
(d) on the advice of the Election Commission, ensure the creation of proper conditions for the conduct of free and fair elections and referenda.

The President of the Republic in terms of Article 32 of the Constitution must take an oath stating that he would uphold and defend the Constitution. Therefore it is seen that the President of the Republic is subject to the Constitution. In Mallikaarchchi Vs Shivapasupathi, Attorney General [1985] 1 SLR 74 wherein Sharvananda CJ at page 78 held thus: "the President is not above the law."

I have earlier held that the acts of the President of the Republic except the acts done in the exercise of his powers conferred by Article 33(2)(g) of the Constitution are not immune from suit. In this connection, I would like to consider the judicial decision in Karunatilleke and Another Vs Dayananda Dissanayake Commissioner of Elections and Others (supra) wherein this Court at page 177 held as follows:

> "I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit .."

For the above reasons I hold that this court has the power to examine legality of the impugned acts or omissions by the President of the Republic except the acts done by him in the exercise of powers conferred to him by Article 33(2)(g) of the Constitution.

For the above reasons, I hold that this court has jurisdiction to inquire into the legality and correctness of the Proclamation issued by the President of the

Republic dated 09.11.2018 published in Government Gazette No.2096/70 dated 09.11.2018 dissolving Parliament. I further hold that acts of the President of the Republic in issuing the said Proclamation and the said Proclamation are subject to the judicial review of this court and do not come under immunity stated in Article 35 of the Constitution.

Learned President's Counsel for the 1st added Respondent Mr. Sanjeewa Jayawardena drawing our attention to both Sinhala and English versions of Article 62 of the Constitution, contended that the President of the Republic under Article 62(2) of the Constitution has the power to dissolve Parliament at any time. I now advert to this contention. If this contention is accepted as correct, the moment the notice of resolution discussed in Article 38(2) of the Constitution is handed over to the Hon. Speaker of Parliament, the President of the Republic can dissolve Parliament. If it happens, no resolution discussed in in Article 38(2) of the Constitution can be passed by Parliament. Thus if the above contention is accepted as correct, Article 38(2) of the Constitution would be rendered nugatory. Sinhala version of Article 62(2) of the Constitution contains three sentences. But the English version of the said Article contains one sentence. The second sentence of the Sinhala version of the said Article is to the following effect. "However Parliament can be dissolved before the expiry of its fixed term." According to Article 62(2) of the Constitution, fixed term of Parliament is a period of five years. Article 62(2) of the Constitution deals with the dissolution of Parliament at the end of term of five years from the date appointed for its first meeting. It is an automatic dissolution. Since it is an automatic dissolution, there is no necessity for the President of the Republic to issue a Proclamation. Article 62(2) of the Constitution (English version) reads as follows:

"Unless Parliament is sooner dissolved, every Parliament shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said period of five years shall operate as dissolution of Parliament."

This Article discusses a dissolution called "sooner dissolution of Parliament". What is "sooner dissolution of Parliament"? It is discussed in Proviso to Article 70(1) of the Constitution. Article 70(1) of the Constitution reads as follows:

"The President may by Proclamation, summon, prorogue and dissolve Parliament:

Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour."

According to Article 70(1) of the Constitution, there are only two ways in which Parliament can be sooner dissolved. They are as follows:

1. At the expiration of a period of not less than four years and six months from the date appointed for its first meeting.
2. When the Parliament by a resolution passed by not less than two-thirds of the whole number of Members (including those not present) requests the President of the Republic to dissolve Parliament.

These are the two ways in which Parliament can be sooner dissolved. Thus it is seen that sooner dissolution of Parliament discussed in Article 62(2) of the Constitution is the dissolution that is discussed in Article 70(1) of the Constitution. For the above reasons, I hold that the President of the Republic has no power to dissolve parliament under and in terms of Article 62(2) of the Constitution.

Learned President's Counsel for the 1st Added Respondent Mr.Sanjeewa Jayawardena drawing our attention to Article 70(5)(b) of the Constitution further contended that the President of the Republic has the power to dissolve Parliament under Article 62(2) of the Constitution. Article 70(5)(b) of the Constitution reads as follows.

> *"Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62, the President shall forthwith by Proclamation fix a date or dates for the election of Members of Parliament and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation."*

As I pointed out earlier, the dissolution of Parliament discussed in Article 62(2) of the Constitution is an automatic dissolution unless Parliament is sooner dissolved. I have earlier held that sooner dissolution of Parliament discussed in Article 62(2) of the Constitution is the dissolution that is discussed in Article 70(1) of the Constitution. Further the Proclamation discussed in Article 70(5)(b) of the Constitution is not a Proclamation dissolving Parliament. It is a Proclamation fixing a date for the election of Members of Parliament and summoning the new Parliament to meet. This Proclamation will be issued upon the automatic dissolution of Parliament. Considering all the above matters, I hold that Article 62(2) or 70(5)(b) of the Constitution does not give power to the President of the Republic to dissolve Parliament. For the above reasons, I reject the contention of learned President's Counsel for the 1st Added Respondent.

Can it be contended that President of the Republic, acting under Article 70(5)(a) of the Constitution, can dissolve Parliament? Does this Article confer any power to the President of the Republic to dissolve Parliament? Article 70(5)(a) of the Constitution reads as follows.

"A Proclamation dissolving Parliament shall fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation."

This Article does not give any power to the President of the Republic to dissolve Parliament. This Article states that certain particulars that should be stated, in the proclamation dissolving Parliament. They are:

1. Fixing a date or dates for the election of Members of Parliament.
2. Summoning the new Parliament to meet on a date not later than three months after the date of such Proclamation.

For the above reasons, I hold that Article 70(5)(a) of the Constitution does not confer any power to the President of the Republic to dissolve Parliament and that the President of the Republic cannot acting under 70(5)(a) of the Constitution dissolve Parliament.

It was contended on behalf of the Respondents that the President of the Republic, in terms of Article 33(2)(c) of the Constitution, could dissolve Parliament. However it was contended on behalf of the Petitioner that the President of the Republic without fulfilling the requirements stated in Article 70(1) of the Constitution, could not dissolve Parliament in the exercise of the powers conferred to him by Article 33(2)(c) of the Constitution. Can the President of the Republic acting under Article 33(2)(c) of the Constitution dissolve Parliament without fulfilling the requirements stated in Article 70(1) of the Constitution? This is one of the important questions that must be decided in this case. Article 33(2)(c) of the Constitution reads as follows.

"In addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law, the President shall have the power –

(a) to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament;
(b) to preside at ceremonial sittings of Parliament;
(c) to summon, prorogue and dissolve Parliament;
(d) to receive and recognize, and to appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents;
(e) to appoint as President's Counsel, attorneys-at-law who have reached eminence in the profession and have maintained high standards of conduct and professional rectitude. Every President's Counsel appointed under this paragraph shall be entitled to all such privileges as were hitherto enjoyed by Queen's Counsel;
(f) to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other judges of the Supreme Court, the President of the Court of Appeal and other judges of the Court of Appeal, and such grants and dispositions of lands and other immovable property vested in the Republic as the President is by law required or empowered to do, and to use the Public Seal for sealing all things whatsoever that shall pass that Seal;
(g) to declare war and peace; and
(h) to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do."

For the purpose of clarity I will reproduce below the Article 70(1) of the Constitution.

"The President may by Proclamation, summon, prorogue and dissolve Parliament:

Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President

to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour."

The 1st sentence of Article 70(1) of the Constitution which reads as follows *'the President may by Proclamation, summon, prorogue and dissolve Parliament'* should be stressed. When this sentence is considered, it is seen that the power given to the President of the Republic to dissolve Parliament by Article 33(2)(c) of the Constitution is reproduced in Article 70(1) of the Constitution. When Article 70(1) of the Constitution states that '*provided that the President shall not dissolve Parliament ....'* he (the President of the Republic) cannot and is not empowered to dissolve Parliament without the requirements set out in Article 70(1) being satisfied. What are those requirements?

1. There must be an expiration of a period of four years and six months of Parliament from the date appointed for its first meeting.
2. Parliament by a resolution passed by not less than two thirds of the whole number of Members (including those not present) must request the President of the Republic to dissolve Parliament. This requirement becomes necessary only when the President of the Republic intends to dissolve Parliament before expiration of a period of four years and six months of Parliament from the date appointed for its first meeting

Therefore I hold that in terms of Article 70(1) of the Constitution, the President of the Republic cannot, until the expiration of a period of four years and six months of Parliament from the date appointed for its first meeting, dissolve Parliament at his own will. In other words the President of the Republic cannot, at his own will, dissolve Parliament during the period of four years and six months of Parliament from the date appointed for its first meeting. If the President of the Republic wants to dissolve the Parliament during the said period of four years and six months,

there must be a resolution passed by two third majority of the Members of Parliament (including those not present) requesting the President of the Republic to dissolve Parliament. However the President of the Republic, at his own will, can dissolve Parliament under Article 70(1) of the Constitution after expiration of a period of four years and six months of Parliament from the date appointed for its first meeting. Article 33(2)(c) of the Constitution only confers power to the President of the Republic to dissolve Parliament. The same power is contained in Article 70(1) of the Constitution. The requirements which should be fulfilled in exercising the said power are found in Article 70(1) of the Constitution. The dissolution of Parliament by the President of the Republic should always be by a Proclamation. This is clear when one examines Article 70(1) of the Constitution. Article 33(2)(c) of the Constitution does not discuss about a Proclamation. For the above reasons, I hold that the President of the Republic cannot, under Article 33(2)(c) of the Constitution, dissolve Parliament without one of the requirements stated in Article 70(1) of the Constitution being fulfilled. In the present Case, the date appointed for first meeting of Parliament was on 01.09.2015. This is evident by Government Gazette No.1929/13 dated 26.08.2015 marked P2. Thus, the period of four years and six months of Parliament from the date appointed for its first meeting would end on 28.02.2020. The President of the Republic has dissolved Parliament with effect from mid-night on 09.11.2018. Thus President of the Republic has dissolved Parliament before the expiration of 4½ years from the date appointed for its first meeting. Parliament by a resolution passed by two third Members of Parliament (including those not present) has not requested the President of the Republic to dissolve Parliament. Considering all the above matters, I hold that the Proclamation issued by the President of the Republic dated 09.11.2018 published in Government Gazette No. 2096/70 dated 09.11.2018

dissolving Parliament, is contrary to Article 70(1) of the Constitution; is therefore null and void ab initio; and of no force or effect in Law.

I would like to consider another question. Can the President of the Republic dissolve Parliament whilst a prorogation of Parliament is in force? To answer this question Article 70(3) of the Constitution should be considered. Article 70(3) of the Constitution reads as follows.

> *"A Proclamation proroguing Parliament shall fix a date for the next session, not being more than two months after the date of the Proclamation:*
>
> *Provided that at any time while Parliament stands prorogued the President may by Proclamation –*
>
> *(i) summon Parliament for an earlier date, not being less than three days from the date of such Proclamation,*
>
> *or*
>
> *(ii) subject to the provisions of this Article, dissolve Parliament."*

According to this Article if the President of the Republic wants to dissolve Parliament whilst the prorogation of Parliament is in force, it has to be done subject to the provisions of Article 70 of the Constitution. Thus, if the President of the Republic wants to dissolve Parliament whilst the prorogation of Parliament is in force, one of the following conditions should be satisfied.

1. On the day of the dissolution, Parliament must have completed a period of four years and six months from the date appointed for its first meeting.
2. Parliament by a resolution passed by not less than two-third of the whole number of Members (including those not present) should request the President of the Republic to dissolve Parliament.

I will now examine whether there was a prorogation of Parliament when it was dissolved on 9.11.2018 and if that is so, whether any of the above conditions had been

satisfied. Parliament was prorogued with effect from 27.10.2018 until 16.11.2018. This is evident by Proclamation issued by the President of the Republic dated 27.10.2018 published in Government Gazette No.2094/45 dated 27.10.2018 marked P6. Later by Proclamation issued by the President of the Republic dated 4.11.2018 published in Gazette No.2095/50 dated 4.11.2018 marked P7 summoned Parliament to meet on 14.11.2018. However, the President of the Republic dissolved Parliament on 9.11.2018. Thus the dissolution of Parliament has taken place whilst the prorogation of Parliament was in force.

In the present case, the date appointed for 1st meeting of Parliament was on 1.9.2015. Thus period of 4 ½ years of Parliament from the date appointed for 1st meeting of Parliament would end on 28.2.2020. Thus the 1st requirement stated above has not been satisfied when Parliament was dissolved on 9.11.2018. Parliament, by a resolution passed by not less than two-third of the whole number of Members (including those not present), has not requested the President of the Republic to dissolve Parliament. Thus the 2nd requirement stated above too has not been satisfied when Parliament was dissolved on 9.11.2018. Therefore, it is clear that the 1st or 2nd requirement stated above has not been satisfied when Parliament was dissolved on 9.11.2018. For the above reasons, I hold that the dissolution of Parliament by Proclamation issued by the President of the Republic on 9.11.2018 published in Government Gazette No.2096/70 dated 9.11.2018 was against the Article 70(1) and 70(3) of the Constitution and is therefore null and void ab initio; and of no force or effect in law.

For the above reasons I hold that the Proclamation issued by the President of the Republic on 9.11.2018 published in Government Gazette No.2096/70 dated 9.11.2018 dissolving Parliament has violated fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution. I have earlier held that the Proclamation issued by the President of the Republic dated 09.11.2018 published in Government

Gazette No.2096/70 dated 09.11.2018 dissolving Parliament, is contrary to Article 70(1) and 70(3) of the Constitution; is therefore null and void ab initio; and of no force or effect in Law.

For the aforementioned reasons, I make order quashing the Proclamation issued by the President of the Republic dated 09.11.2018 published in Government Gazette No.2096/70 dated 09.11.2018 dissolving Parliament and declaring the said Proclamation null and void ab initio and of no force or effect in law.

I have read the draft judgment of His Lordship the Chief Justice. For the aforementioned reasons, I agree with the conclusion reached by His Lordship.

The judgment delivered in this case and aforementioned orders will apply to SC FR 352/2018, SC FR 353/2018, SC FR 354/2018, SC FR 355/2018, SC FR 356/2018, SC FR 358/2018, SC FR 359/2018, SC FR 360/2018, and SC FR 361/2018.

Judge of the Supreme Court

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

SC FR Application No. 351/ 2018

SC FR Application No. 352/ 2018

SC FR Application No. 353/ 2018

SC FR Application No. 354/ 2018

SC FR Application No. 355/ 2018

SC FR Application No. 356/ 2018

SC FR Application No. 358/ 2018

SC FR Application No. 359/ 2018

SC FR Application No. 360/ 2018

SC FR Application No. 361/ 2018

In the matter of an Application under and in terms of Articles 17, 35 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

PETITIONERS

Rajavarothiam Sampanthan,
No176, Customs Road,
Trincomalee.
Petitioner (SC FR 351/ 2018)

1. Kabir Hashim,
   156 Lake Drive,
   Colombo 8

2. Akila Viraj Kariyawasam,
   306 (D2) Bauddhaloka Mawatha,
   Colombo 7

Petitioners (SC FR 352/ 2018)

1. Centre for Policy Alternatives (Guarantee) Limited
   No. 6/5, Layards Road
   Colombo 00500

2. Dr. Paikiasothy Saravanamuttu
   No. 3, Ascot Avenue
   Colombo 00500

Petitioners (SC FR 353/ 2018)

Lal Wijenayake
Secretary,
United Left Front,
1003, 1/1 Sri Jayewardenepura Mawatha
Rajagiriya
Petitioner (SC FR 354/ 2018)

Gabadagamage Champika Jayangani Perera, Attorney-at-Law, 60 Anderson Road, Kalubowila, Dehiwela.
Petitioner (SC FR 355/ 2018)

1. Anura Kumara Dissayanake,
   No, 464/20, Pannipitiya Road, Pelwatta, Battaramulla.

2. Bimal Ratnayake,
   No.1, 2nd Lane Jambugasmulla Mawatha, Nugegoda

3. Vijitha Herath,
   No. 154, Yakkala Road, Gampaha

4. Dr. Nalinda Jayatissa,
   No. 41, Hospital Road, Homagama.

5. Sunil Hadunetti,
   No. 4, Yeheyya Road,
   Izadeen Town, Matara

6. Nihal Galapaththi,
   No. 208/2, Muthumala Mawatha, Pallikudawa, Thangalle.

Petitioners (SC FR 356/ 2018)

Manoharan Ganesan, MP,
No. 24, Sri Maha Vihara Road,
Pamankada, Dehiwala.
Petitioner (SC FR 358/ 2018)

1. Hon. Rishad Bathiudeen, MP,
   Leader,

2. Hon. Ameer Ali, MP,
   Chairman,

3. Hon. Abdullah Mahroof MP
   National Organizer,

4. Hon. Ishak Rahuman, MP,
   Deputy Leader,

All of All Ceylon Makkal Congress
7th Floor, 296, Galle Road, Colombo 6.
Petitioners (SC FR 359/ 2018)

1. Rauff Hakeem,
   Leader-Sri Lanka Muslim Congress,
   Dharussalam,
   51, Vaxhaul Lane,
   Colombo 2.

2. Seyed Ali Zahir Moulana,
   Dharussalam
   51, Vaxhaul Lane,
   Colombo 2.

3. Faizal Casim,
   Dharussalam,
   51, Vaxhaul Lane,
   Colombo 2.

4. H. M. M. Harees,
   Dharussalam,
   51, Vaxhaul Lane,
   Colombo 2.

5. M. I. M. Mansoor,
   Dharussalam,
   51, Vaxhaul Lane,
   Colombo 2.

6. M. S. Thowfeek,
   Dharussalam,
   51, Vaxhaul Lane,
   Colombo 2.

7. A. L. M. Nazeer,
   Dharussalam,
   51, Vaxhaul Lane,
   Colombo 2.

Petitioners (SC FR 360/ 2018)

Professor S Ratnajeevan H Hoole
Member of the Election Commission
Elections Secretariat
P O Box 02
Sarana Mawatha, Rajagiriya 10107

and

88, Chemmany Road,
Nallur, Jaffna.

Petitioner (SC FR 361/ 2018)

Vs.

RESPONDENTS

1. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.
   Respondent in all cases

2. Mahinda Deshapriya,
   Chairman

3. N.J Abeysekara PC
   Member

4. Prof. Ratnajeevan Hoole,
   Member

   2nd to 4th of:

   The Election Commission,
   Election Secretariat,
   Sarana Mawatha, Rajagiriya.
   Respondents in all cases except in SC FR 352/2018 and 354/2018

   AND

   Honourable Karu Jayasuriya,
   Speaker of Parliament,
   Parliament of Sri Lanka,
   Sri Jayewardenepura Kotte.
   5th Respondent in SC FR 353/ 2018 and in 355/2018

   AND

   Commissioner General of Elections,

Election Commission,
Election Secretariat, Sarana Mawatha,
Rajagiriya

Dhammika Dassanayake,
Secretary General of Parliament,
Parliament of Sri Lanka, Sri Jayawardenapura,
Kotte
5th and 7th Respondents in SC FR 356/ 2018

AND

M. A. P. C Perera,
Commissioner General of Elections,
Elections Secretariat,
PO Box 02,
Sarana Mawatha,
Rajagiriya, 10107

Udaya Seneviratne,
Secretary to the President,
Presidential Secretariat,
Colombo 01.
4th and 5th Respondents SC FR 361/ 2018

AND

1. Prof. Gamini Lakshman Pieris
   No.37, Kirula Place,
   Colombo 5

2. Udaya Prabath Gammanpila,
   65/14G, Wickramasinghe Mawatha,
   Kumaragewatte Road, Pelawatte, Battaramulla

3. Wellawattage Jagath Sisira Sena de Silva
   No.174/10, Uthuwankande Road,
   Thalawathugoda

4. Mallika Arachchige Channa Sudath Jayasumana
   21/1A, Upananda Road,
   Attidiya

5. Premnath Chaminda Dolawatte
   No.50 Ihala Bomiriya,
   Kaduwela
   1st to the 5th Added-Respondents in SC FR 351/2018

BEFORE

H.N.J PERERA, CJ.
BUWANEKA ALUWIHARE, PC. J.
SISIRA J. DE ABREW, J.
PRIYANTHA JAYAWARDENA, PC. J.
PRASANNA JAYAWARDENA, PC. J.
VIJITH. K. MALALGODA, PC. J.
MURDU N. B. FERNANDO, PC. J.

COUNSEL

K. Kang-Isvaran, PC with M. A Sumanthiran, PC., Viran Corea, Ermiza Tegal, Niran Anketell, Junaita Arulnantham and J. Crosette Thambiah instructed by Mohan Balendra for the Petitioner in SC FR 351/ 2018

Sanjeewa Jayawardena PC, with Rukshan Senadheera for the 1st Added Respondent in SC FR 351/ 2018

Manohara de Silva PC, with Samantha Rathwatte PC, with Canishka Witharana and Boopathy Kahathuduwa for the 2nd Added-Respondent in SC FR 351/ 2018

M.U.M. Ali Sabry PC, with Ruwantha Cooray, Naamiq

Nafath, Ramzi Bacha and Hassan Hameed instructed by Athula de Silva for the 3rd Added-Respondent in SC FR 351/ 2018

Gamini Marapana PC, with Palitha Kumarasinghe PC, and Kushan D'Alwis PC, Ganesh Dharmawardana, Navin Marapana, Kaushalya Molligoda and Uchitha Wickremasinghe instructed by Sanath Wijewardana for the 4th Added-Respondent in SC FR 351/2018

Canishka Witharana with Chandana Botheju, Thissa Yapa, H. M. Thilakarathna instructed by Nilantha Wijesinghe for the 5th Added- Respondent in SC FR 351/ 2018

Thilak Marapana PC, with Ronald Perera PC, and Suren Fernando instructed by Vidanapathirana Associates for the Petitioners in SC FR 352/ 2018

Viran Corea with Bhavani Fonseka, Khyati Wickremenayake, and Inshira Faliq instructed by R.M Balendra for the Petitioners in SC FR 353/ 2018

Dr. Jayampathi Wickremarathne with Kanchana Yatunwala instructed by Vidanapathirana Associates for the Petitioner in SC FR 354/ 2018

A.Sumanthiran PC, with Niran Anketell instructed by M. Balendran for the Petitioner in SC FR 355/ 2018

J.C. Weliamuna PC, with Shantha Jayawardena, Pasindu Silva

and Thilini Vidanagamage for the Petitioners in SC FR 356/ 2018

Geoffrey Alagarathnam PC, with Lasantha Gamsinghe for the Petitioner in SC FR 358/ 2018

Suren Fernando with Shiloma David for the Petitioners in SC FR 359/ 2018

Ikram Mohomaed PC, with Thisath Wijaygunawardena PC, Nizam Karipper PC, A. M. A. Faaiz , M. S. A. Wadood , Roshaan Hettiaarachchi , Tamya Marjan , Milhan Ikram Mohomad, Nadeeka Galhena and Mariam Saadi Wadood for the Petitioners in SC FR 360/ 2018

Hejaaz Hizbullah with Muneer Thoufeek, M. Jegadeeswaran, Shifam Mahroof and M. Siddeque for the Petitioner in SC FR 361/ 2018

Jayantha Jayasuriya PC, Attorney General with Dappula de Livera PC, Solicitor General, Sanjay Rajaratnam, PC, Senior Additional Solicitor General, Indika Demuni de Silva, PC, Additional Solicitor General, Farzana Jameel PC, Additional Solicitor General, Nerin Pulle, Deputy Solicitor General, Shaheeda Barrie, Senior State Counsel, Kanishka de Silva Balapatabendi State Counsel and Manohara Jayasinghe State Counsel for the Attorney General and the 1st Respondent.

ARGUED ON 04th, 5th, 6th and 7th of December 2018

WRITTEN SUBMISSIONS

By the Petitioner on 30th November 2018.

By the 1st Respondent on 30th November 2018.

By the 1st Added Respondent on 30th November 2018 and 10th December 2018.

By the 2nd Added Respondent on 30th November 2018.

By the 3rd Added Respondent on 30th November 2018.

By the 4th Added Respondent on 30th November 2018 and 10th December 2018.

By the 5th Added Respondent on 30th November 2018.

DECIDED ON 13th December 2018

H.N.J. Perera CJ,

On Friday, 09th November 2018, His Excellency, the President issued a Proclamation which was published in the Extraordinary Gazette No. 2096/70 dated 09th November 2018.

This Proclamation states:

"A PROCLAMATION BY HIS EXCELLENCY THE PRESIDENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

KNOW YE that by virtue of the powers vested in me by paragraph (5) of Article 70 of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with paragraph (2) (c), of Article 33 of the Constitution of the Democratic Socialist Republic of Sri Lanka and paragraph (2) of Article 62 of the Constitution of the Democratic Socialist Republic of Sri Lanka and in pursuance of the provisions of section 10 of the Parliamentary Elections Act, No. 01 of 1981, I Maithripala Sirisena, President of the Democratic Socialist Republic of Sri Lanka, do by this proclamation-

(a) Dissolve Parliament from midnight today and summon the new Parliament to meet on the Seventeenth day of January, Two Thousand and Nineteen;

(b) Fix, Fifth day of January Two Thousand and Nineteen as the date for Election of the Members of Parliament;

(c) Specify the period beginning on the Nineteenth day of November Two Thousand and Eighteen and ending at Twelve Noon on the Twenty Sixth day of November, Two Thousand and Eighteen as the nomination period, during which nomination papers shall be received by the Returning Officers; and

(d) Specify each place mentioned in Column II of the Schedule hereto as the place of nomination for candidates seeking election in the electoral district mentioned in the corresponding entry in Column I of that Schedule.

Given at Colombo on this Ninth day of November, in the year Two Thousand and Eighteen.

By order of His Excellency,

UDAYA R. SENEVIRATNE,
Secretary to the President.

SCHEDULE

Column I *Electoral District*	*Column II* *Place of Nomination*
No. 1 - Colombo	*Office of the District Secretary, Colombo*
No. 2 - Gampaha	*Office of the District Secretary, Gampaha*
No. 3 - ……..”	

On Monday, 12th November 2018, the Petitioner in SC FR 351/2018 filed this petition praying for a Declaration that the aforesaid Proclamation infringes the Petitioner's fundamental rights contained in Article 12 (1) of the Constitution; an Order quashing the aforesaid Proclamation, an Order declaring the Proclamation null, void *ab initio* and of no force or effect in Law, an Order quashing the decisions and/or directions contained in paragraphs (a), (b), (c) and (d) of the Proclamation and other related reliefs including interim reliefs suspending the operation of the Proclamation marked "P1". The aforesaid Proclamation was filed with the petition in SC/FR 351/2018 marked "P1".

The Petitioner is a citizen of the Republic, a Member of the Eighth Parliament of Sri Lanka and the Leader of the Opposition in the Eighth Parliament.

The Hon. Attorney General is named as the 1st Respondent to the petition. The Petitioner pleads that the Hon. Attorney General has been made a Respondent in terms of the first proviso to Article 35 (1) of the Constitution because *"[…] the executive and administrative act impugned in these proceedings was done by the President in his official capacity"* and also in his capacity as the Hon. Attorney General as required, *inter alia*, by Article 134 (1) read with Articles 17 and 126 of the Constitution.

The 2nd to 4th Respondents to the petition are the Chairman and Members of the Elections Commission.

It would be best to commence by setting out the nature of the Petitioner's case.

The essence of the Petitioner's case is succinctly pleaded in paragraphs [7] to [12] of the petition. In order to ensure accuracy, I will set out below where necessary the Petitioner's own words [quoted *verbatim* in italics and within inverted commas] in these paragraphs of the petition.

The Petitioner contends that the dissolution of Parliament sought to be effected by the Proclamation marked "P1" is *"ex facie unlawful and in violation of the Constitution and nothing flows from the same"* because:

(i) "*The President is expressly prohibited by the Constitution from dissolving Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting"* and *"the date appointed for the first meeting of the Eighth Parliament of Sri Lanka was 1st September 2015."* as established by the Gazette Notification dated 26th August 2015 marked "P2".

In this regard, it should be mentioned here that the Petitioner is basing this contention upon Article 70 (1) of the Constitution which states

> *"The President may by Proclamation, summon, prorogue and dissolve Parliament:*
>
> *Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour."*.

It should also be stated that a perusal of "P2" and "P1" shows that while "P2" establishes that the first meeting of the Eighth Parliament was on 01st September 2015, the Proclamation marked "P1" was issued on 09th November 2018 - *i. e:* only three years and two months and eight days after the first meeting of the Eighth Parliament.

Thus, the period of four and half years specified in the proviso to Article 70 (1) had not passed when the Proclamation marked "P1" was issued;

(ii) *"The only exception provided by the Constitution to the above prohibition is where Parliament requests the President to dissolve Parliament by a resolution passed by not less than two-thirds of the whole number of Members (including those not present) voting in its favour."* and *"no such resolution has been passed by Parliament requesting the President to dissolve Parliament."*.

In this regard, it is undisputed among the parties to this application that, up to this date, there has been no resolution passed by a two third majority of Parliament requesting His Excellency, the President to dissolve Parliament. The Court can also take judicial notice of the fact that, up to this date, no such resolution has been passed;

(iii) "Thus and otherwise, the Petitioner states that the purported dissolution of Parliament dated 9th November 2018 was inter alia:

a. In violation of the express prohibition contained in the Constitution contained in the proviso to Article 70 (1);
b. An unconstitutional attack on Parliament;
c. Ultra vires the powers of the President;
d. Unlawful;
e. An assault on the legislative power of the People;
f. A violation of the sovereignty of the People;
g. A violation of the rights of the Petitioner and each and every Member of Parliament;
h. Arbitrary, irrational, capricious, vexatious and unreasonable;
i. Action that offends and is in breach of the principles of reasonableness and legitimate expectation and is motivated by improper objectives; and
j. Null and void and of no force or effect in law.";

Thereafter and with regard to the Petitioner's right to invoke the fundamental rights jurisdiction of this court, the Petitioner pleads in paragraphs [13] to [17] of the petition that the impugned actions of His Excellency, the President constitute executive or administrative action within the meaning of Article 17 read with Article 126 of the Constitution and were done by His Excellency, the President *"in his official capacity"*. The Petitioner goes on to plead that the said impugned actions of *"purporting to dissolve Parliament as contained in "P1" amounts to an infringement of the rights of the Petitioner recognized under and in terms of Article 12 (1) of the Constitution."* In this connection, the Petitioner states that the Petitioner and every member of Parliament were entitled by law to complete their respective terms in Parliament according to law and have been unlawfully denied that opportunity by the impugned actions of His Excellency, the President and further, that the said denial violates the rights of all their electors [of the Petitioner and every other member of Parliament] who are citizens of the Republic and are entitled to representation in Parliament according to the law.

In paragraph [18] of the petition, the Petitioner has averred that "*the issuance of "P1" was motivated by improper objectives inasmuch as the following demonstrates that the ulterior motive behind a sequential pattern of acts described below was to secure control of the purported newly appointed Prime Minister over the reins of the government."."* It is unnecessary to recount here the alleged *"sequential pattern of acts"* which the Petitioner has described in sub-clauses (a) to (n) of paragraph [18]. It will suffice to say that the Petitioner's contention is that the events of 26th October 2018 and thereafter which are manifested by the Gazette Notifications marked "P3" to "P9" [these events are in the public domain and need not be described here] and the fact that Parliament, which had been prorogued on 27th October 2018, was due to meet again on 14th November 2018 in a climate where there was uncertainty with regard to who then had the majority in Parliament, led to the dissolution of Parliament set out in the Proclamation marked "P1" issued on 09th November 2018.

In paragraphs [20] to [23] and [25] to [26] of the petition, the Petitioner states that "P1" has been issued *"with improper objectives not sanctioned by law"* and that the impugned actions *"have gravely endangered the role of Parliament, representative democracy and the rule of law"* and have created what the Petitioner describes as *"a constitutional crisis"*. The Petitioner states that *"Parliament being one of the organs of government must be protected from unconstitutional assaults by the executive on its independence, stature and role."*. The Petitioner pleads that he has made his application invoking the jurisdiction of this Court *"in the interests of safeguarding these cherished principles"* and *"in the interests of restoring the democratic process, the rule of law and constitutional governance."*

In paragraph [24] of the petition, the Petitioner states *"a General Election - however desirable as a matter of political expediency even to the Petitioner and his party - cannot be called and held except in terms of the law."*. In paragraph [29] of the petition, the Petitioner states that the Proclamation marked "P1" would *"cast a pall of unprecedented illegitimacy over all incidental actions thereto, including the purported election of a new Parliament. This illegitimacy would shake the basic democratic structure on which Sri Lankan society is built."*.

On 12th November 2018 nine other broadly similar applications were filed. They were: (i) SC FR 352/2018 filed by Kabir Hashim and Akila Viraj Kariyawasam naming the Hon. Attorney General as the Respondent in his aforesaid dual capacity; (ii) SC FR 353/2018 filed by the Centre for Policy Alternatives [Guarantee] Ltd and Dr. Paikiasothy Saravanamuttu naming as Respondents the same four Respondents as in the present petition [*ie:* SC FR 351/2018] and also Hon. Karu Jayasuriya, Speaker of Parliament as

the fifth Respondent; (iii) SC FR 354/2018 filed by Lal Wijenayake, Secretary, United Left Front naming the Hon. Attorney General as the Respondent in his aforesaid dual capacity; (iv) SC FR 355/2018 filed by G.C.J. Perera naming as Respondents the same four Respondents as in the present petition [*ie:* SC FR 351/2018] and also Hon. Karu Jayasuriya, Speaker of Parliament as the fifth Respondent; (v) SC FR 356/2018 filed by Anura Kumara Dissanayake, Bimal Rathnayake, Vijitha Herath, Dr. Nalinda Jayatissa, Sunil Handunetti, and Nihal Galappaththi naming the same four Respondents as in the present petition [*ie:* SC FR 351/2018] and also the Commissioner General of Elections and Dhammika Dasanayake, Secretary General of Parliament as two more Respondents; (vi) SC FR 358/2018 filed by Manoharan Ganesan naming the same four Respondents as in the present petition [*ie:* SC FR 351/2018]; (vii) SC FR 359/2018 filed by Rishad Bathiudeen Ameer Ali, Abdullah Mahroof and Ishak Rahuman naming the same four Respondents as in the present petition [*ie:* SC FR 351/2018]; (viii) SC FR 360/2018 filed by Rauf Hakeem, Seyed Ali Zahir Moulana, Faizal Cassim, H.M.M. Harees, M.I.M. Mansoor, M.S. Thowfeek and A.L.M. Nazeer naming the same four Respondents as in the present petition [*ie:* SC FR 351/2018]; and (ix) SC FR 361/2018 filed by Professor S. Ratnajeevan H. Hoole, Member of the Elections Commission naming the Hon. Attorney General as the Respondent in his aforesaid dual capacity, Mr. Mahinda Deshapriya, Chairman and member of the Elections Commission, Mr. N.J. Abeyasekera, PC member of the Elections Commission, M.A.P.C. Perera, Commissioner General of Elections and Udaya Seneviratne, Secretary to the President as the Respondents to the petition.

The Petitioners in SC FR 353/2018, SC FR SC 355/2018, FR 356/2018, SC FR 358/2018 and SC FR 361/2018 prayed for an interim order restraining the aforesaid 2nd, 3rd, 4th - namely, the Chairman and members of the Elections Commission - from acting in terms of the Proclamation marked "P1". That was in addition to praying for an interim order staying the operation of the Proclamation marked "P1".

The Petitioners in SC FR 353/2018, SC FR 355/2018 and SC FR 356/2018 plead that the impugned actions of His Excellency, the President referred to above violate the Petitioners' rights guaranteed by Article 14 (1) (a) of the Constitution in addition to violating the Petitioners' rights guaranteed by Article 12 (1) of the Constitution. The Petitioners in SC FR 358/2018 pleads that the impugned actions of His Excellency, the President referred to above violate the Petitioners' rights guaranteed by Articles 14 (1) (a), 14 (1) (b) and 14 (1) (c) of the Constitution in addition to violating their rights guaranteed by Article 12 (1) of the Constitution. The Petitioner in SC FR 361/2018 pleads that the impugned actions of His Excellency, the President referred to above violate the Petitioner's rights guaranteed by Article 10 of the Constitution in addition to

violating his rights guaranteed by Article 12 (1) of the Constitution. As stated later on, this Court has only granted leave to proceed under Article 12 (1) of the Constitution. Therefore, the alleged violation of rights guaranteed by Articles 10 and 14 (1) (a), 14 (1) (b) and 14 (1) (c) need not be considered.

The Petitioners in SC FR 352/2018, SC FR 354/2018 and SF FR 358/2018 allege that the actions of His Excellency, the President on 26th October 2018 [*ie:* the actions referred to in "P3", "P4" and "P5" relating to the removal and appointment of Prime Ministers and/or the dissolution of the Cabinet of Ministers] are in violation of the applicable provisions of the Constitution and/or are *ultra vires* the Constitution and/or are extra-constitutional. The merits of those allegations are outside the scope of the present application which relates only to the validity of the Proclamation marked "P1". Therefore, they need not be considered.

When the aforesaid nine applications were taken up by Court on 12th November 2018, the Hon. Attorney General who is named as a Respondent in all the applications in his aforesaid dual capacity, appeared. Applications dated 12th November 2018 seeking to intervene and be added as parties were filed by the aforesaid five Added Respondents - namely, Prof. Gamini Lakshman Pieris, Udaya Prabhath Gammanpila, Dr. W.J.S.S. De Silva, M.A.C.S. Jayasumana and P.C. Dolawatta.

The gravity and urgency of the matters in issue in these applications made it incumbent on the Court to hear the parties before Court without delay and decide the limited question of whether the Petitioners should be granted leave to proceed in the first instance and, if so, whether the issue of any interim reliefs were essential also in the first instance. Therefore, the Court ordered that these applications be supported on 12th November 2018. Accordingly, these applications were supported on 12th November 2018 before the Bench which had been listed to hear cases in Court 502 on that day in the usual course of listing of cases done the previous week.

On 12th and 13th November 2018, the Court heard submissions made by Mr. Kanag-Isvaran, PC representing the Petitioner in this application [SC FR 351/2018], Mr. Tilak Marapana, PC representing the Petitioners in SC FR 352/2018, Mr. Viran Corea representing the Petitioners in SC FR 353/2018, Dr. Jayampathy Wickramaratne, PC representing the Petitioner in SC FR 354/2018, Mr. M.A. Sumanthiran, PC representing the Petitioner in SC FR 355/2018, Mr. J.C.Weliamuna, PC representing the petitioners in SC FR 356/2018, Mr. G.J.T. Alagaratnam, PC representing the Petitioners in SC FR 358/2018, Mr. Suren Fernando representing the Petitioners in SC FR 359/2018, Mr. Ikram Mohamed, PC representing the Petitioners in SC FR 359/2018 and Mr. Hejaz

Hisbullah representing the Petitioner in SC FR 361/2018. Thereafter, the Court heard submissions made by Mr. Jayantha Jayasuriya, PC, Attorney-General and by Mr. Sanjeeva Jayawardena, PC, Mr. Manohara De Silva, PC, Mr. Ali Sabry, PC, Mr. Gamini Marapana, PC and Mr. Canishka Vitharana representing the aforesaid five Intervenient-Petitioners.

Having considered these submissions, the Court made Order on 13th November 2018 allowing the applications for intervention made by the aforesaid five intervenient-Petitioners. Thus, they are now the 1st to 5th Added Respondents named in the Caption.

On 13th November 2018, having considered the submissions made on behalf of all the parties before us, the Court made Order granting the Petitioners in all nine applications leave to proceed under Article 12 (1) of the Constitution. In the circumstances of these cases, the Court also considered it necessary to issue Interim Orders in all nine applications staying the operation of the Gazette Extraordinary No. 2096/70 dated 09th November 2018 [which is marked "P1" with the petition in the present application no. SC FR 351/2018] until 07th December 2018. Further, the Court issued Interim Orders in SC FR 353/2018, SC FR 355/2018, SC FR 356/2018, SC FR 358/2018 and SC FR 361/2018 restraining the Chairman and members of the Elections Commission [who are the aforesaid 2nd, 3rd and 4th Respondents in the present application no. SC FR 351/2018] and/or their servants, subordinates and agents from acting in terms of the said Gazette Extraordinary No. 2096/70 dated 09th November 2018, until 07th December 2018.

In view of the need to hear and determine these applications without delay, the Court directed the added Respondents to file their statements of objections on or before 19th November 2018, the Petitioners to file their counter affidavits, if any, on or before 26th November 2018 and all parties to file their Written Submissions on or before 30th November 2018. The hearing of all these applications was fixed for 04th, 05th and 06th December 2018.

In terms of the aforesaid Order, the Hon. Attorney General and the five added Respondents have filed their statements of objections [by way of affidavits], the Petitioners have filed their counter affidavits and all these parties have filed their written submissions before 30th November 2018.

A bench comprising the aforesaid seven Judges was nominated to hear and determine these nine applications.

The 1st added Respondent has tendered his affidavit dated 19th November 2018 in reply to the petitions. In their affidavits in reply to the petition in the present case [SC FR

351/2018], the 3rd, 4th and 5th added Respondents make similar averments to those made by the 1st added Respondent. Therefore, it will suffice to set out the positions taken by the 1st added Respondent in his affidavit. In the interest of accuracy, I will reproduce those averments *verbatim* where necessary [quoted *verbatim* in italics and within inverted commas]. Where the 3rd, 4th or 5th added Respondents have made averments which have not been made by the 1st added Respondent, those averments will be referred to separately.

Firstly, the 1st added Respondent has pleaded, by way of *"preliminary objections"* that:

(i) the Petitioner has misrepresented material facts; (ii) the Petitioner's application is misconceived in Law; and (iii) "*His Excellency, the President has acted lawfully and within the powers conferred upon him in terms of Article 33 (2), Article 62 (2) and Article 70 (3) Proviso (ii) of the Constitution and, therefore, there has been no infringement of any Fundamental Right of the Petitioner, hence the Application of the Petitioner should be dismissed in limine."*

The 1st added Respondent has also pleaded, by way of a further *"preliminary objection"* that *"what is before Court is not a Supreme Court special determination in order to determine upon constitutionality, but is a fundamental rights application"* and, accordingly, the jurisdiction vested in this Court when dealing with these applications is *"to make just and equitable orders that have to be viewed in the corrected perspective in law.".* However, the 3rd, 4th and 5th Respondents have not taken up this position in their affidavits.

These *"preliminary objections"* averred by the 1st added Respondent address the merits of the dispute before Court and, therefore, will be considered when the Court is examining the merits of the cases of the Petitioners, the Respondents and the added Respondents.

Thereafter, in paragraph [9] of his affidavit, the 1st added Respondent recounts events which have occurred since the conducting of the long delayed Local Government elections in February 2018, the critical challenges faced by the economy and the events which have occurred on and after 26th October 2018 including the events which occurred in Parliament on and after 14th November 2018. Having done so, the 1st added Respondent pleaded that, *"in these compelling, unprecedented and critical circumstances, H.E. the President of the Republic, in the due exercise of the powers conferred on him by the Constitution, dissolved Parliament as a prelude to resorting to taking the matter before the People at a General Election."*. In paragraph [22] of his

affidavit, the 1st added Respondent has stated that *"as at the date of dissolution of Parliament as contained in the relevant Gazette, the highly complex situation and the very volatile circumstances that created their own extreme exigencies, warranted H.E the President in resorting to the said dissolution of Parliament."*.

While acknowledging in paragraph [10] of his affidavit that *"a General Election cannot be called and held except in terms of the Law"*, the 1st added Respondent states that *"in this instance the dissolution of Parliament and the calling of elections is lawful."*

In paragraph [15] of his affidavit, the 1st added Respondent sets out the basis on which he seeks to support his aforesaid assertion that the issue of the Proclamation marked "P1" is lawful:

" *(a) The provisions inter alia of Articles 62 (2), 33 (2) (c), 70 (3) Proviso (ii) and*

70 (5) and Articles 3 and 4 of the Constitution and the doctrine of separation of powers, render the said dissolution per se legitimate and valid in law;

(b) The proviso to Article 70 (1) does not impose any form of fetter whatsoever on the President's substantive power to dissolve Parliament referable to Articles 33 (2) (c) and 62 (2), inasmuch as the restriction inserted in the said proviso only applies to a situation where the legislature itself exercises its power, in a limited situation, to invite the President to dissolve Parliament, prior to the effluxion of a period of four years and six months;

(c) Article 70 (3) Proviso contains the specific words `at any time while the Parliament stands prorogued' and that those words cannot in law be treated as redundant or surplusage;

(d) That in any event, even in such a situation and even when such an invitation is received, the President exercise the ultimate discretion with regard to dissolution or non-dissolution;

(e) Furthermore, the structure and arrangement of the Constitution and its relevant Articles and Chapters, support the aforesaid;

(f) The particular juxtaposition of the aforesaid Article, is, as will be elucidated

during the course of the oral hearing, also be of significant importance;

(g) If the Petitioner's contention is substantiated in Law, it would mean that Your Lordships would have to ignore the clear and unambiguous language in Articles 33 and 62 and insert words into the provisos of Articles 70, which is not permitted in Law;

(h) Furthermore, the words 'In addition to', is most telling, as will be elucidated in detail at the hearing."

In paragraph [16] of his affidavit, the 1st added Respondent avers that the Petitioner's application *"Is incompatible with the larger right of the people to exercise their franchise even prior to the expiration of the formal term of parliament."*.

In paragraph [18] of his affidavit, the 1st added Respondent has also stated that, under and in terms of Articles 33 (2) (c), 62 (2) and the Proviso to Article 70 (3), the President has the power to dissolve Parliament while Parliament stands prorogued.

In paragraph [19] of his affidavit, the 1st added Respondent states that accepting the interpretation given by the Petitioner to the Articles of the Constitution which deal with the power of the President to dissolve Parliament would require this Court to *"completely ignore several established Rules of Interpretation of Statutes and that to do so would be contrary to the Law and the Constitution which Your Lordships are also called upon to respect and uphold, in order to protect, vindicate and enforce the right of the people."*.

The 1st added Respondent also pleads in paragraph [17] of his affidavit that *"in any event and without prejudice to the aforesaid, the practical consequences of a declaration which is adverse to the said dissolution endangers practical consequences and results of very serious proportions and in the ultimate equation the jurisdiction of Your Lordships' Court under Articles 17 and 126 is discretionary. In any event, Your Lordships will not accept the postponement of an election as being Just and Equitable."* In this regard, the 1st Respondent goes to plead in paragraph [21] of his affidavit that *"the premature dissolution of Parliament as opposed to any purported extension of the term of office of Parliament does not result in the violation of the franchise or of suffrage and instead in fact promotes the right of Franchise of the People and the right of self-determination of the People and of the Constituency as a whole and advances the expression of the supreme will of the People as a collective body, in a Constitutional context."*. In

paragraph [23] of his affidavit, the 1st added Respondent contends that the grant of the reliefs prayed for in the petition will infringe the right to franchise of the 1st added Respondent and all citizens of Sri Lanka which is enshrined in Articles 3 and 4 of the Constitution.

Finally, in paragraph [20] if his petition the 1st added Respondent has averred that *"the fundamental checks and balances between the Legislature and the Executive, including inter alia the power of the Legislature to impeach the President and the power of the President to dissolve Parliament cannot be eroded into without adversely impacting the inalienable Sovereignty and Franchise of the People and consequently, the preservation by Article 33 (2) (c) of the power of the President to dissolve Parliament subject to Article 35 and as a prelude to a General Election enabling the People who are supreme and the repository of inalienable Sovereignty to exercise their right of Franchise should be upheld by Your Lordships' Court."*.

In addition, the 3rd added Respondent has contended in paragraphs [15] to [24] of his affidavit that: (i) the reliefs sought by the Petitioner are contrary to Article 3 read with Article 4 of the Constitution and, if granted, will suppress the will of the people; (ii) the people are the source of all power and *"When there is a never ending conflict and unclear definition of each of their powers the safest bet is to go to the source of the power which is the `people'*; (iii) granting the reliefs sought by the Petitioner will amount to a direct contravention of previous determinations by this Court that a renunciation or reduction or restriction of executive power by way of an amendment to the Constitution could be effected only with the approval of the people at a referendum; and (iv) *"the said issue never arose in the present 19th Amendment as Article 33 (2) (c) retained the power of the President to dissolve Parliament. However, there was no such Article in the previous 19th Amendment empowering the President to dissolve Parliament."*.

The 5th added Respondent has contended in paragraphs [17], [20] and [21] of his affidavit that: (i) the President is under a constitutional duty to uphold sovereignty of the People by ensuring that the Government and the State function without any difficulties or failure and that *"In the circumstances the President shall have power to exercise executive powers entrusted in him by the people to dissolve the Parliament on permissible provisions in the constitution in order to preserve the State and the Government."*; (ii) fundamental rights are subject to the limitations specified in Article 15 (7) of the Constitution and *"wherefore the decision of the President taken in terms of the Constitution in the interest of national security, public order cannot be challenged by the*

Petitioner. Further Your Lordships have jurisdiction to consider the circumstances which led to dissolution of parliament in determining this matter on fair and equitable basis, which may also enter into the political sovereign."; and (iii) *"constitutional provisions should always receive a fair, liberal and progressive interpretation so that its true objective might be promoted ..... constitutions are to be interpreted to in a manner so as to resolve the present difficulties addressing the conditions prevailing in contemporary society. Constitutions do not expect to perform impossibilities."*.

The 5th added Respondent has made several statements in paragraphs [18] and [19] of his affidavit with regard to the effect of the Order of this Court staying the Proclamation marked "P1" on the proceedings in Parliament on 14th November 2018 and thereafter. He also refers to the effect of the events which have occurred on or after 14th November 2018. These matters have no bearing on the issue before this Court in these applications.

The 2nd added Respondent has, in his affidavit dated 19th November 2018, taken a somewhat different approach to the aforesaid positions stated by the 1st, 3rd, 4th and 5th added Respondents.

The 2nd added Respondent raises the following *"Preliminary Objections"*: (i) Members of Parliament are necessary parties to the Petitioner's application and the failure to add all Members of Parliament is fatal to the maintainability of the application; (ii) the Petitioner's application is misconceived in law inasmuch as the Petitioner has not established a violation of a fundamental right, and (iii) in any event, the Proclamation marked "P1" is not subject to judicial review and, further, *"the basis on which His Excellency the president formed an opinion to dissolve parliament is a political decision which your lordship's court has no jurisdiction to inquire into"*; and (iii) the alleged violation has a specific remedy provided by the Constitution because *"where the president's act is unconstitutional, a specific remedy is provided in Article 38 (2) (a) (i) and therefore, the Petitioner ought to have if at all resorted to that remedy. In any event it is my position that the president's act is constitutional and has not violated the law in any manner."*.

In paragraph [10] of his affidavit, the 2nd added Respondent succinctly sets out the basis on which he seeks to support his aforesaid assertion that the issue of the Proclamation marked "P1" is lawful [reproduced *verbatim* to ensure accuracy]:

" (a) If the interpretation put forward by the Petitioner that parliament cannot be

dissolved until four years and six months from the date of appointment is adopted such shall lead to unworkable and disastrous consequences particularly in a situation where no party represented in parliament has a majority.

(b) *Article 33 (2) (c) was introduced this new sub article to the constitution by the 19th Amendment and that there would have not been any reason to introduce this new provision, for the reason the legislature intended that sub Article to be a standalone section, giving the power to president to dissolve parliament in exceptional situations warranting such dissolution.*

(c) *The power set out in Article 33 are powers enumerated `in addition' to any other Article in the constitution. Therefore, the president has the power to dissolve parliament without the approval of the parliament notwithstanding Article 70.*

(d) *The sovereign power of the republic is vested in the people and therefore any attempt to seek a mandate from the people cannot be construed to mean unconstitutional as the constitution itself and all organs of government derives its power from the people."*.

Thereafter, in paragraphs [11] to [14] of his affidavit, the 2nd added Respondent has stated that there were seven Parliamentary Elections held during the period from 1989 to 2015 and that one party or alliance secured a clear majority in Parliament only at the Parliamentary Elections held in 1989 and 2010. The 2nd added Respondent pleads that, in this background, *"it is the prerogative of the president to dissolve parliament if he is satisfied that no party will be able to form a government."* and that *"the decision of the president to dissolve the parliament was correctly made in as much, the President had sufficient grounds to come to a conclusion that no party in the parliament commands a majority."* and that, in the present circumstances, *"no party in the parliament is able to form a government and as a result parliament could have come to stand still unless it was dissolved."*. The 2nd added Respondent has filed a further affidavit dated 03rd December 2018 tendering additional documents. In that second affidavit, he states that, to the best of his knowledge, *"up to date no resolution was moved in parliament to establish that Hon. Ranil Wickramasinghe or any other member of parliament commands the confidence of the parliament nor has Hon. Ranil Wickramasinghe or any member of parliament submitted any material to his excellency the president to establish that any member of*

parliament that such member commands the confidence of parliament. Therefore, I state that the decision to dissolve parliament was made by the president as he had no other alternative and therefore correct in law.".

Mr. Udaya Ranjith Seneviratne has filed an affidavit dated 19th November 2018 in the present case – *i.e:* SC FR 351/2018. He has done so in his capacity as the Secretary to His Excellency, the President since he is not named as a Respondent in his personal capacity.

He states, by way of *"preliminary objections"* that this Court has no jurisdiction to hear and determine the Petitioner's application, that the Petitioner's application is misconceived in law, that the Petitioner has failed to cite all necessary and affected parties and that the Petitioner's application is not in conformity with the Supreme Court Rules, 1990.

In paragraph [12] of his affidavit, the Secretary to His Excellency, the President states *"I admit that the first proviso to Article 35 (1) of the Constitution recognizes the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President in his official capacity."*.

In paragraph [16] of his affidavit, the Secretary to His Excellency, the President states *"I state that Parliament may be summoned, prorogued and dissolved inter alia in terms of Article 33 (2) (c), Article 70 (1), Article 70 (2), Article 70 (5), Article 70 (6), Article 70 (7), proviso to Article 70 (1) and proviso (ii) to Article 70 (3) of the Constitution."*.

In paragraphs [18], [22] and [27] of his affidavit, the Secretary to His Excellency, the President states that *"His Excellency the President has acted at all times in accordance with the provisions of the Constitution"* and *"His Excellency the President has always acted according to the law and in terms of the Constitution"* and *"That, at all times material to this Application, His Excellency the President has acted in terms of the powers, duties and functions reposed in the President under the Constitution and all applicable laws and written laws, in issuing the Proclamation marked P1;"* and *"That His Excellency the President has acted bona fide in the best interest of the country and its People with a view to protect and enhance the inalienable sovereignty and in accordance with the Constitution and the law;"* and *"That His Excellency the President has not violated the Constitution and in particular the Fundamental Rights of the Petitioner by issuing the Proclamation marked "P1";"* and *"That His Excellency the President has at all times acted in order to ensure that the Constitution is respected and upheld and that*

the Fundamental Rights, including the franchise of the People have been respected, secured and advanced;"

The Secretary to His Excellency, the President has also averred *"That His Excellency the President has on 11th November, 2018 by an Address to the Nation disclosed the reasons which necessitated the dissolution of Parliament by the Proclamation marked P1. I annex hereto marked **1R1** a transcript of the said Address to the Nation."*.

The Petitioners' applications were all taken up for hearing on 4th December 2018 - application nos. SC FR 351/2018, SC FR 352/2018, SC FR 353/2018, SC FR 354/2018, SC FR 355/2018, SC FR 356/2018, SC FR 358/2018, SC FR 359/2018, SC FR 360/2018, and SC FR 361/2018 since the questions in issue in all these applications were much the same. Accordingly, we heard submissions made on behalf of Petitioners in these ten applications by Mr. Kanag-Iswaran, PC, Mr. Tilak Marapana, PC, Mr. Viran Corea, Dr. Jayampathy Wickramaratne, PC, Mr. M.A. Sumanthiran, PC, Mr. J.C. Weliamuna, PC, Mr. Suren Fernando, Mr. G.J.T. Alagaratnam, PC, Mr. Ikram Mohamed, PC, and Mr. Hejaz Hizbullah, respectively.

Thereafter, submissions were made by Mr. Jayantha Jayasuriya PC, the Hon. Attorney General appeared in his official capacity. Mr. Sanjeeva Jayawardena, PC, Mr. Manohara De Silva, PC, Mr. M.U.M. Ali Sabry, PC, Mr. Gamini Marapana, PC, and Mr. Canishka Vitharana who appeared respectively for the 1st to 5th added Respondents.

When hearings commenced on 04th December 2018, several learned counsel appearing for intervenient Petitioners who had filed applications seeking to be added as Respondent but had not been added as Respondents since their applications were not before the Court on 12th November 2018, sought permission to, nevertheless, make submissions. In view of the importance of the issue before the Court, these requests were permitted on an exceptional basis, in terms of Article 134 (3) of the Constitution. Accordingly, we heard submissions made by Mr. Gomin Dayasiri, Mr. Samantha Ratwatte PC, Mr. V.K. Choksy, Mr. Chrishmal Warnasuriya, Mr. K. Deekiriwewa, and Mr. Darshan Weerasekera.

All counsel made exhaustive submissions before us, stretching over 4 days. The Petitioners in all 10 applications, the Attorney General and the added Respondents have submitted written submissions on 30th November 2018, and some of them have submitted further written submissions after the cases were taken up for hearing. Mr. Samantha

Ratwatte PC, Mr. V.K. Choksy and Mr. Chrishmal Warnasuriya, have also filed written submissions. I have endeavoured to carefully consider both oral and written submissions made by all counsel when examining the issues before us.

Having set out the cases of the parties before us in some detail, I proceed to consider and determine the issues before us in these applications.

Jurisdiction

When, on 12th and 13th November 2018, the Petitioner's application in the present case [*i.e:* SC FR 351/2018] and the other eight applications were supported by counsel for the Petitioners and were opposed by the Attorney General and counsel for the five added Respondents in the course of submissions spanning two days, neither the Attorney General nor counsel for the added Respondents disputed the jurisdiction of the Supreme Court to hear and determine any of the issues that arise in these applications challenging the validity of the Proclamation marked "P1".

However, when Mr. Udaya Ranjith Seneviratne, in his capacity as the Secretary to His Excellency, the President filed his affidavit dated 19th November 2018 he has pleaded that this Court has no jurisdiction to hear and determine these applications but did not explain the basis on which he makes that claim. The 2nd added Respondent has also pleaded in his affidavit dated 19th November 2018 that the Proclamation marked "P1" is not subject to judicial review and, in this connection, has stated that the basis on which His Excellency, the President formed his opinion that Parliament should be dissolved is a *"political decision"* which this Court has no jurisdiction to inquire into. Further, the 2nd added Respondent has stated that the Petitioner cannot invoke the fundamental rights jurisdiction of the Supreme Court since the Petitioner, as a Member of Parliament, had the specific remedy provided by Article 38 (2) (a) (i) of the Constitution of giving the Hon. Speaker notice of resolution moving for the removal of His Excellency, the President from office under the provisions of Article 38 (2) (a) (i) of the Constitution.

It is to be noted that none of the other added Respondents – *i.e:* the 1st, 3rd, 4th and 5th Respondents - have, in their affidavits, disputed the jurisdiction of the Supreme Court to hear and determine these applications. In fact, in their affidavits the 1st and 5th Respondents expressly state that the power vested in the President by Article 33 (2) (c) of the Constitution is *"subject to Article 35"* of the Constitution while the 3rd and 4th added

Respondents expressly state that the power vested in the President by Article 33 (2) (c) of the Constitution is *"subject to Article 35 Proviso I"* of the Constitution

Further, in their written submissions tendered on 30th November 2018 before the hearing was taken up on 04th December 2018 — Mr. Sanjeeva Jayawardena, PC on behalf of the 1st added Respondent, Mr. Manohara De Silva, PC on behalf of the 2nd added Respondent, Mr. Ali Sabry, PC on behalf of the 3rd added Respondent, Mr. Gamini Marapana, PC on behalf of the 4th added Respondent and Mr. Canishka Witharana on behalf of the 5th added Respondent do not dispute the jurisdiction of the Supreme Court to hear and determine these applications.

However, the written submissions tendered on behalf of the Attorney General urge that the Supreme Court is precluded from exercising its fundamental rights jurisdiction in respect of these applications. That contention is made on the following two fold basis:

(a) A submission that the Petitioners in all nine applications rely on their claim that His Excellency, the President intentionally and/or wilfully and/or unlawfully violated the Constitution and/or committed an abuse of the powers of his office and that, therefore, the only remedy available to the Petitioners is under the specific mechanism provided by Article 38 (2) of the Constitution;

(b) A submission that the dissolution of Parliament does not constitute *"executive or administrative action"* falling within the purview of Article 126 of the Constitution.

At the hearing which commenced on 04th December 2018, the Hon. Attorney General made exhaustive submissions in support of these two preliminary objections. Learned Counsel for the five added Respondents stated that they associate themselves with the aforesaid two preliminary objections raised by the Attorney General but did not press these issues.
The submission set out in (a) above will be considered first.

In this regard, the Hon. Attorney General submits that since, as specified by Article 118 (b) of the Constitution, the Supreme Court can exercise its jurisdiction for the protection of fundamental rights under and in terms of Article 126 of the Constitution only subject to the provisions of the Constitution, the Supreme Court is precluded or fettered from exercising that fundamental rights jurisdiction in the present applications because Article

38 (2) of the Constitution provides a *"specific mechanism"* or *"a specific procedure or mechanism"* setting out the manner in which the Supreme Court can exercise jurisdiction with regard to the Petitioners' complaints of alleged intentional violation of the Constitution and/or alleged abuse of the powers of his office by His Excellency, the President. It is submitted that, therefore, the Petitioners' complaints are *"not justiciable"* under Article 126.

Article 38 (2) of the Constitution deals with the procedure to be followed where any Member of Parliament wishes to move for the removal of the President then in office or—as is more usually said in common parlance—wishes to move for the impeachment of the President then in office. The gist of Article 38 (2) is that:

(i) any Member of Parliament may give the Hon. Speaker written notice of a resolution alleging that the President then in office is incapable of discharging the functions of his office by reason of physical or mental infirmity because the President then in office is guilty of intentional violation of the Constitution and/or misconduct or corruption involving the abuse of the powers of his office and/or three other grounds and seeking an inquiry and report thereon by the Supreme Court;

(ii) the Hon. Speaker is permitted to entertain such notice of a resolution only if it has been signed by not less than two thirds of the Members of Parliament or unless it is signed by not less than one half of the Members of Parliament and the Hon. Speaker is satisfied that the allegations merit inquiry and report by the Supreme Court;

(iii) in instances where the Hon. Speaker entertains such notice of such a resolution, he is bound to refer the resolution to the Supreme Court for inquiry and report and the Supreme Court shall, after due inquiry, make a report of its determination to Parliament together with the reasons therefor;

(iv) in cases where the Supreme Court has reported to Parliament that the allegations made in the resolution have been established, the Parliament may by a resolution passed by not less than two thirds of the Members of Parliament [including those not present] voting in its favour, remove the President from office.

The Hon. Attorney General submits that the procedure referred to in Article 38 (2) for the Supreme Court constitutes a *"specific mode"* prescribed by the Constitution for the Supreme Court to exercise jurisdiction in respect of the Petitioners' complaints that His Excellency, the President has intentionally violated the Constitution and/or is guilty of the abuse of the powers of his office. It has been submitted that, therefore, the Supreme Court cannot disregard this *"specific provision"* referred to in Article 38 (2) and exercise its jurisdiction for the protection of fundamental rights under Article 118 (b) of the Constitution in the Petitioners' applications.

This submission fails on several counts.

Firstly, the submission is logically flawed in the case of these particular applications. To put in another way, the submission is a glaring *non sequitur* in the specific circumstances of these applications. The simple reason for that observation is that these applications challenge a dissolution of Parliament and a Member of a Parliament which is dissolved by the President without notice and literally overnight, cannot have recourse to Article 38 (2) because, at the time the applications are filed, no Parliament would exist in which a motion for impeachment can be brought.

Secondly, Article 38 (2) of the Constitution need even be considered only where proceedings for the impeachment of His Excellency, the President have commenced and the Hon. Speaker has referred a resolution to the Supreme Court for inquiry and report or, at the least, when such proceedings are impending. However, no such circumstances have arisen. In fact, there is absolutely no suggestion before us that the Petitioner [or any of the Petitioners in the other applications] has any intention of giving notice of a resolution under Article 38 (2) for the impeachment of His Excellency, the President. The complaint in these applications that the impugned act of His Excellency, the President has allegedly violated the Constitution and/or abused the powers of his office and, thereby, violated the fundamental rights of the Petitioners does not mean that the Petitioner [or any of the other Petitioners] intends to take the extreme step of attempting to impeach His Excellency, the President. Thus, the submission made on behalf of the Hon. Attorney General is founded on hypothesis and is without factual basis or merit.

Thirdly, the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction of the Supreme Court is a cornerstone of the sovereignty of the people which is the *Grundnorm* of our Constitution. Thus, Article 4 (d) declares *"the fundamental rights which are by the Constitution declared and recognized shall be*

respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and extent hereinafter provided.".

It has been emphasised time and again by this Court that it is a foremost duty of the Supreme Court to protect, give full meaning to and enforce the fundamental rights which are listed in Chapter III of the Constitution. Thus, Sharvananda CJ observed in **MUTUWEERAN vs. THE STATE** [5 Sri Skantha's Law Reports 126 at p. 130]; *"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."*. In the same vein, Ranasinghe J stated in **EDIRISURIYA vs. NAVARATNAM** [1985 1 SLR 100 at p. 106] that, *"A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations."*.

In honouring this duty, the Supreme Court is giving tangible and effective life and meaning to the sovereignty of the people. The single and only instance specified in the Constitution where the exercise of these fundamental rights may be restricted is in circumstances falling within the ambit of Article 15 of the Constitution. The present applications do not fall with the ambit of Article 15 in the absence of any laws which have been passed prescribing restricting the operation of Article 12 (1) in the interests of national security, public order or any other of the specific grounds referred to in Article 15 (7) of the Constitution. Further, it hardly needs to be said that, the mere fact the procedure described in Article 38 (2) of the Constitution provides for the Supreme Court to inquire into a resolution and report to Parliament, cannot deprive this Court of its jurisdiction under Article 118 (b) read with Article 126 for the protection of fundamental rights. In the absence of a specific and express provision in the Constitution which strips the Supreme Court of jurisdiction under Article 118 (b) read with Article 126 and Article 17 for the protection of fundamental rights, the provisions of Article 118 (b) read with Article 126 and Article 17 will prevail. Therefore, this Court has the jurisdiction and, in fact, a solemn duty to hear and determine these applications according to the law.

Fourthly, the procedure specified in Article 38 (2) refers solely to the exercise of the power of the Legislature. It has to be understood that the role of the Supreme Court under Article 38 (2) is limited to inquiring into the allegation or allegations contained in a resolution which has been referred to the Court by the Hon. Speaker and making a report thereon to Parliament. The Supreme Court is, essentially, performing a fact-finding

function upon the direction of Parliament. It is Parliament which determines what is to be done with the report submitted by the Supreme Court to Parliament. Thus, the limited fact-finding role of the Supreme Court under Article 38 (2) cannot be equated with the exercise of judicial power by the Supreme Court in the protection of fundamental rights. In any event, the hypothetical possibility that the Supreme Court *may* be called upon to perform a limited fact-finding role *if* a motion under Article 38 (2) is referred to the Supreme Court by the Hon. Speaker cannot, by any stretch of imagination, deprive the Supreme Court of its jurisdiction under Article 118 (b) read with Article 126 for the protection of fundamental rights in the "here and now".

Fifthly, it is patently clear that these applications are solely by way of personal applications which are restricted to an invocation of the jurisdiction of this Court for the protection of the Petitioners' fundamental rights. This is also manifested by the reliefs prayed for by the Petitioners which are limited to declarations that the Proclamation marked "P1" violate their fundamental rights under Article 12 (1) and/or Article 14 (1) (a) of the Constitution and Orders quashing "P1" and related interim reliefs. The Petitioners do *not* pray for a declaration that His Excellency, the President has intentionally violated the Constitution or committed an abuse of the powers of his office. Thus, the Petitioners' applications before us cannot be logically connected with the entirely different nature of proceedings under and in terms of Article 38 (2) which set in motion the power of the legislature to impeach a President who is then in office and, in the exercise of that power of the Legislature, provide for the Legislature to request the Supreme Court to inquire into and report on the allegation or allegations contained in a resolution.

Sixthly, the mere fact that Article 38 (2) provides for any Member of Parliament to give the Hon. Speaker notice of a resolution under Article 38 (2) does not mean that those Petitioners who are Members of Parliament will be entitled to or be able to have the Supreme Court inquire into and report on the merits of the resolution. The success or failure of the efforts of any Member of Parliament to have such a resolution inquired into and reported on by the Supreme Court is dependent entirely upon the resolution being supported by a minimum of one half of the Members of Parliament. Further, even in instances where a Member of Parliament gives notice of a resolution in terms of the procedure specified in Article 38 (2) of the Constitution for the impeachment of a President then in office and the Supreme Court does inquire into and furnish a report, the passing of that resolution is again dependent on not less than two thirds of the Members of Parliament [including those not present] voting in its favour in the exercise of the

legislative power of Parliament. Therefore, the mere existence of the procedure described in Article 38 (2) cannot deprive those Petitioners who are Members of Parliament of the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction of the Supreme Court. To emphasise the point, the fundamental rights jurisdiction of the Supreme Court can be immediately invoked by any Member of Parliament in his capacity as a citizen of Sri Lanka and he can obtain a determination by this Court. His right to do so is not dependent on cobbling together the required majority of Members of Parliament. Thus, there is no valid comparison between the procedure specified in Article 38 (2) of the Constitution for the impeachment of a President then in office and the inalienable right of a Member of Parliament, as a citizen of Sri Lanka, to invoke the jurisdiction of this Court for the protection of fundamental rights.

The submissions made on behalf of the Hon. Attorney General have also referred to the decision in **MALLIKARACHCHI vs. SHIVA PASUPATHI** [1985 1 SLR 74]. However, that decision is founded on the absolute immunity which was enjoyed by the President by operation of Article 35 (1) of the Constitution prior to the 19th Amendment to the Constitution. The position is very different now with the introduction of the first proviso to Article 35 (1) by the 19th Amendment to the Constitution which states *"Provided that nothing in this paragraph shall read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity."*. In fact, in paragraph [12] of his affidavit, the Secretary to His Excellency, the President has stated *"I admit that the first proviso to Article 35 (1) of the Constitution recognizes the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President in his official capacity."*. Thus, the decision in MALLIKARACHCHI vs. SHIVA PASUPATHI is of little relevance today. Further, it is seen that although it has been submitted on behalf of the Hon. Attorney General that *"The judgment also opines that Article 38 also acts as an effective check on the President's powers under the 1978 Constitution"*, a perusal of the judgment shows that Sharvananda CJ only referred to the provisions of Article 38 and commented [at p.78] *"It will thus be seen that the President is not above the law."* That *obiter* comment cannot be taken as authority for the submission Article 38 strips this Court of its jurisdiction for the protection of the Petitioners' fundamental rights. In any event, even when the Constitution afforded full immunity to the President, his actions have been reviewed on the basis that *"immunity shields only the doer and not the act"* (**KARUNATHILAKA vs. DAYANANDA DISSANAYAKE** [1991 1 SLR 157]) Thus, immunity, even in its former absolute

capacity, would only have shielded the person of President from punitive consequences and not the acts that stem from the Office of the executive.

It should also be mentioned that, in any event, the aforesaid submission made by the Hon. Attorney General cannot even be made in the case of the Petitioners in SC FR 353/2018, SC FR 354/2018, SC FR 355/2018 and SC FR 361/2018 who were and/or are not Members of the Eighth Parliament and, therefore, have no opportunity of bringing a motion for the impeachment of the President. The contention that these Petitioners must be deemed to have an opportunity to bring a motion for the impeachment of the President through their elected Members of Parliament is divorced from reality and is without merit.

Finally, it has to be observed that the acceptance of the submission made by the Hon. Attorney General will render the first proviso to Article 35 (1) meaningless for the most part. That is because the President has an array of duties, powers and functions under the Constitution and many of the acts done or omitted to be done by the President in his official capacity will relate to his duties, powers and functions under the Constitution. Thus, if the submission made on behalf of the Hon. Attorney General is carried to its logical end, the result will be the emasculation of the first proviso to Article 35 (1). That cannot be permitted by this Court which must honour its constitutional duty under Article 4 (d) and vigorously protect the totality of its jurisdiction for the protection of fundamental rights conferred by Article 118 (b) read with Article 126 of the Constitution.

For the aforesaid reasons, the submission made by the Hon. Attorney General and set out in (a) above – *i.e:* that the only remedy available to the Petitioner is under the mechanism provided by Article 38 (2) of the Constitution—is rejected.

The submission set out in (b) above will be considered next.

In this regard, it has been submitted on behalf of the Attorney General that the dissolution of Parliament by the President does not constitute *"executive or administrative action"* falling within the purview of Article 126 of the Constitution and, therefore, is covered by the immunity granted by Article 35 (1) of the Constitution.

Article 35 (1) of the 1978 Constitution stipulated that during the period when a President holds office, no proceedings can be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him in his official or private capacity. Thus, prior to the 19th Amendment, Article 35 (1) conferred a blanket immunity

upon a President [so long as he holds office] from being sued in respect of any act or omission done by him in his official capacity *qua* President or in his private capacity.

However, as is well known, the proviso to Article 35 (1) introduced by the 19th Amendment to the Constitution introduced a very significant change. It states *"Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity."*.

Thus, the proviso to Article 35 (1) entitles any person who complains that an act or omission by the President in his official capacity has violated a fundamental right of that person to institute a fundamental rights application under and in terms of Article 126 of the Constitution against the Hon. Attorney General and seek a determination by the Supreme Court with regard to his complaint. In other words, the proviso to Article 35 (1) makes acts or omissions by the President in his official capacity justiciable within the limited sphere of an invocation of the jurisdiction for the protection of fundamental rights conferred on the Supreme Court by Article 118 (b) read with Article 126 of the Constitution and subject to the stipulation that the Hon. Attorney General [and not the President] is to be made the Respondent to the fundamental rights application filed by that person. It hardly needs to be said that the Hon. Attorney General is to be named as the Respondent in the place of the President and as his representative.

Since the proviso to Article 35 (1) grants the right to challenge acts or omission by the President *"in his official capacity"* only by way of the specific procedure of making a fundamental rights application under Article 126 of the Constitution, it follows that *"executive or administrative action"* by the President *"in his official capacity"* may be challenged in terms of the proviso to Article 35 (1). That is because Article 126 (1) stipulates *"The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by* ***executive or administrative action*** *of any fundamental right or language right declared and recognised by Chapter III or Chapter IV."* [emphasis added]

As mentioned earlier, it has been submitted on behalf of the Hon. Attorney General that the issue by His Excellency, the President of the Proclamation marked "P1" stating that Parliament is dissolved does not constitute *"executive or administrative action"* and, therefore, cannot be made the subject of an application made under Article 126 of the Constitution in terms of the proviso to Article 35 (1) of the Constitution.

The Court must now examine the merits of that submission.

In this regard, the Hon. Attorney General submits that Article 30 (1) of the Constitution describes the President as being the Head of State, the Head of the Executive and of the Government and the Commander-in-Chief of the Armed Forces. He goes on to seek to draw a distinction between acts done by the President as the Head of State and as the Commander-in-Chief of the Armed Forces on the one hand and acts done by the President as the Head of the Executive and of the Government on the other hand.

The Hon. Attorney General then submits that only acts done by the President as the Head of the Executive and of the Government can be regarded as acts done in the exercise of *"general executive powers of governmental nature"* which constitute *"executive or administrative action"* subject to review under Article 126. He seeks to differentiate acts done by the President as the Head of State and as the Commander-in-Chief of the Armed Forces and categorise such acts as those done in the exercise of the *"plenary powers of the Head of State"* and *not* done in the exercise of *"general executive powers of governmental nature"*. On that basis, the Hon. Attorney General contends that acts done by the President as the Head of State and as the Commander-in-Chief of the Armed Forces are done in the exercise of the *"plenary powers of the Head of State"* and, therefore, do not constitute *"executive or administrative action"* which is justiciable under Article 126.

The Hon. Attorney General goes on to submit that acts done by the President under the powers listed in Article 33 (2) of the Constitution [including the power of dissolving Parliament under Article 33 (2) (c)] are all acts done in the exercise of *"plenary executive powers"* of the President held by him as part of the *"plenary powers of the Head of State"* and are not *"*acts done by the President in the exercise of his *"general executive powers of governmental nature"*. On that basis, the Hon. Attorney General submits that the President's power of dissolving Parliament under Article 33 (2) (c) does not constitute *"executive or administrative action"* which is justiciable under Article 126.

In support of his contention that there exists a "special type" of executive power of the President which is in the nature of *"plenary executive powers"* exercised by the President in the capacity of the Head of State and not in the capacity of the Head of the Executive and Government, the Hon. Attorney General cites a passage from the **SC Reference 2/2003** where five judges of this Court headed by His Lordship, S.N. Silva CJ stated;

"That in terms of the several Articles of the Constitution analysed in this opinion and upon interpreting its content in the context of the Constitution taken as a whole, the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka. The Minister appointed in respect of the subject of defence has to function within the purview of the plenary power thus vested and reposed in the President […] The plenary executive power and the defence of Sri Lanka vested and reposed in the President includes the control of the Forces, the Army, the Navy and Air Force of which the President is the Commander-in-Chief as provided in Article 30 (1) of the Constitution.".

The Hon. Attorney General has expressly submitted that the *"plenary executive power"* referred to by the Court in SC Reference 2/2003 is comparable to the *"plenary power of the Sovereign or in our context the Head of State"*. It appears the Hon. Attorney General seeks to equate the term *"plenary executive power"* used by the Court in SC Reference 2/2003 to a royal prerogative power which is subject to no restriction. Royal prerogative power is described in the Shorter Oxford Dictionary [5th ed at p.2331] as *"The special right or privilege exercised by a monarch or head of State over all other people, which overrides the law and is in theory subject to no restriction"*.

The word "plenary" comes from the Latin *"plenus"* which means "full". The Shorter Oxford Dictionary [5th ed. at p.2243] defines *"plenary"* as meaning *"Complete, entire, perfect, not deficient in any element or respect, absolute, unqualified"*. Black's Law Dictionary [9th ed. at p. 1273] defines *"plenary"* as meaning *"Full; complete; entire"*. Webster's New International Dictionary of the English Language [2nd ed. at p.1889] defines *"plenary"* as meaning *"Full; entire; complete; absolute; perfect; unqualified; as, a plenary license, authority."*

Thus, the words *"plenary power"* simply mean "full power" or "complete power" and should not be taken to and cannot be taken to mean a species of inherent unrestricted omnipotent power held by a Head of State which is akin to royal prerogative power. In this regard, it must be remembered that the President, who is the Head of State under the Constitution, is but a creature of the Constitution. His powers are only those which are specifically vested in him by the Constitution and the law. Equally, the exercise of these powers by the President are circumscribed by the provisions of the Constitution and the law. Thus, in **SUGATHAPALA MENDIS vs. CHANDRIKA KUMARATUNGA** [2008 2 SLR 339 at p. 374] Tilakawardane J stated, *"Furthermore, being a creature of the Constitution, the President's powers in effecting action of the Government or of state officers is also necessarily limited to effecting action by them that accords with*

the Constitution." At p 373, she held that, *"...no single position or office created by the Constitution has unlimited power and the Constitution itself circumscribes the scope and ambit of even the power vested with any President who sits as the head of this country."*.

Thus, the suggestion inherent in the submission made on behalf of the Hon. Attorney General that the President, in his capacity as the Head of State, has a species of inherent unrestricted omnipotent power which is akin to royal prerogative power held by a monarch, has to be emphatically rejected. Since 1972, this country has known no monarch and this Court must reject any submission that carries with it a suggestion to the contrary. It is apt to refer to the decision in **VISUVALINGAM vs. LIYANAGE** [1983 1 SLR 203 at p.222] where Samarakoon CJ emphatically rejected the proposition advanced by Deputy Solicitor General that the President of Sri Lanka has *"inherited the mantle of a Monarch"*.

In any event, a perusal of the opinion expressed by this Court in SC Reference 2/2003 shows that the term *"plenary executive power"* was used in the context of the aforesaid meaning of the word *"plenary"* as a reference to the fact that "complete" executive power including the defence of Sri Lanka and the control of the three Forces was vested in the President by the Constitution. In SC Reference 2/2003, this Court did not suggest that the executive power of the defence of Sri Lanka and the control of the three Forces vested in the President or, for that matter, the executive powers of the Head of State vested in the President by Article 30 (1) of the Constitution are in any way superior to or different from the executive powers of the Head of the Executive and of the Government vested in the President by other Articles of the Constitution. This is reflected in the later judgment of His Lordship, S.N. Silva CJ in **SINGARASA vs. THE AG** [2013 1 SLR 245] where the learned Chief Justice observed [at p.255] that our Constitution *"is a departure from the monarchical form of government such as the UK based on plenary power and omnipotence"* and [at p.256] *"There could be no plenary executive power that pertain to the Crown as in the U.K. and the executive power of the President is derived from the People laid down as in Article 4(b)"*. Later on, His Lordship stated [at p. 260] *"The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic Article 3 cited above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the People."*

Before leaving this subject, it is necessary to mention here that the statement made in the written submissions tendered on behalf of the Attorney General that this court has previously referred to an *"an exercise of 'prerogative power'"* and that therefore *"even*

in the context of a Republican Constitution prerogative powers continue to maintain its vitality" is incorrect. A perusal of the judgment of Amerasinghe J in **MAITHRIPALA SENANAYAKE vs. MAHINDASOMA** [1998 2 SLR 333] shows that His Lordship used the term 'prerogative power' only when summing up the submissions made on behalf of the appellants and Respondents and when referring to the views of the academics Philips and Jackson [Constitutional and Administrative Law – 7th Ed. at p. 662] and when referring to the concept of the royal prerogative which prevailed in England [at p. 341, 342, 360 and 369]. His Lordship Justice Amerasinghe did not recognise the existence of any prerogative power which existed in the President under our Constitution.

In view of the principle set out above, this Court cannot accept the submission made on behalf of the Hon. Attorney General that there are some powers which are vested in the President which are not limited by the provisions of the Constitution and which are, therefore, not subject to review in appropriate circumstances.

Next it is necessary to examine whether the act of dissolution of Parliament by the President amounts to "executive or administrative action" within the meaning of Article 126 of the Constitution.

The Constitution does not define or describe what is meant by the term *"executive or administrative action"*. It appears to assume that the words are adequately descriptive and speak for themselves. As far as I am aware, this Court has, advisedly, not ventured an attempt at defining the term. Instead, the question of whether an act or omission can be regarded as constituting *"executive or administrative action"* must be decided on the nature of the powers that are exercised, the nature of the act and the facts of each case.

In **PERERA vs. UNIVERSITY GRANTS COMMISSION** [1978-79-80 1 SLR 128 at p. 137-138] Sharvananda J as he then was, observed, *"The expression 'executive or administrative action' embraces executive action of the state or its agencies or instrumentalities exercising Governmental functions. It refers to the exertion of state power in all its forms."*

To determine whether the act of dissolving Parliament falls within the ambit of executive or administrative action it is necessary to examine whether the power and nature of the act were executive or administrative. In this regard, it is to be noted that CHAPTER VII of the Constitution which is titled *"THE EXECUTIVE - The President of the Republic"* is where the office of President is described, the manner of election and term of office of the President is specified, the duties and powers of the President are listed, the

accountability of the President to Parliament is stipulated, the immunity of the President from suit is formulated and several other provisions relevant to the office of President are set out. This shows that the office of the President and the powers he holds are of an executive character. That conclusion is solidified by Article 4 (b) of the Constitution which specifies that the President exercises the executive power of the people. This fact has been recognised in several decisions of this Court.

Therefore, it would appear that the exercise of the power of dissolution of Parliament which is listed as one of the powers of the President in Article 33 which is within CHAPTER VII titled *"THE EXECUTIVE The President of the Republic"*, is one manner in which the President exercises executive power. That, in turn, would suggest that the dissolution of Parliament by the President is an executive act which falls within the definition of *"executive or administrative action"*.

In **PARAMESWARY JAYATHEVAN vs. ATTORNEY GENERAL** [1992 2 SLR 356 at p. 360] Kulathunga J observed, with Ramanathan J, Perera J and Wijetunga J agreeing, that acts done by public officers *"under colour of office in the exercise or the purported exercise of government functions"* are ordinarily regarded as constituting *"executive or administrative action"*. In the present case, the issue by His Excellency, the President of the Proclamation marked "P1" was undoubtedly done *"under colour of office"* of the President and, further, done by the President *"in the exercise or the purported exercise of government functions"* if one were to use the words of Kulathunga J.

This analysis is fortified by the comments of Fernando J in **FAIZ vs. AG** [1995 1 SLR 372, at p 381], where referring to the term "executive or administrative" used in the Constitution, His Lordship stated *"That phrase does not seek to draw a distinction between the acts of "high" officials (as being "executive"), and other officials (as being "administrative"). "Executive" is appropriate in a Constitution, and sufficient, to include the (official) acts of all public officers, high and low, and to exclude acts which are plainly legislative or judicial (and of course purely private acts not done under colour of office). The need for including "administrative" is because there are residual acts which do not fit neatly into this three-fold classification…Thus "administrative" is intended to enlarge the category of acts within the scope of Article 126; it serves to emphasise that what is excluded from Article 126 are only acts which are legislative or judicial…"*

In **THENUWARA vs. SPEAKER OF PARLIAMENT** [SC FR 665/2012 decided 24th March 2014] Marsoof J, with Ekanayake J, Hettige J, Wanasundera J and Marasinghe J agreeing, approved and followed the views expressed by Fernando J in FAIZ vs. AG and held that the impugned act of the Speaker of Parliament appointing a Parliamentary Select Committee amounted to an executive or administrative act within the meaning of Article 126 of the Constitution. Describing the impugned act of the Speaker, Marsoof J observed [at p 09-10], *"This was an integral part of a sui generis function of Parliament which did not fit easily into the legislative executive or judicial spheres of government and bore a unique complexion in that, while being more disciplinary in nature, it could not be exercised by Parliament alone and had to be performed in concurrence with the President of Sri Lanka, as contemplated by Article 107(2) and (3) of the Constitution .... I am inclined to the view that the impugned act of the Speaker of the House of Parliament to appoint a Parliamentary Select Committee was indeed 'executive or administrative action' within the meaning of Article 126 of the Constitution."*

Applying the rationale expounded by this Court in the several decisions referred to earlier, I see no reason why the powers vested in the President under Article 33(2) of the constitution should be regarded as anything other than executive action by the President. While the president may when exercising those powers be doing so *qua* Head of State in a historical sense, any such flavour of acting as Head of State does not detract from the core feature that the President is exercising executive powers.

This conclusion is fortified by the specific exemption from this Court's jurisdiction of the President's power to declare War and Peace under Article 33 (2) (g) of the Constitution. The maxim *expressio unius est exclusio alterius* enunciates the principle of interpretation that the specific mention of only one item in a list implies the exclusion of other items. Referring to this maxim, Maxwell [12th ed at p. 293] states *"By the rule usually known in the form of this Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class…"* Similarly, Bindra [7th ed. at p 147] states, *"The express mention of one thing implies the exclusion of another. This maxim is the product of logic and common sense."* Bindra states [10th ed. at p. 1281] *"In construing a provision of the constitution, resort may be had to the well-recognised rule of construction contained in the maxim 'expressio unius est exclusio alterius', and the expression of one thing in the Constitution may necessarily involve the exclusion of other things not expressed [Exp Yalladingham 1 Wall 243 (US); Brosnan v Maryland 12 Wheat 419 (US)]. An exception of any particular case presupposes that all those which are not included in such exception are embraced within the terms of a general grant or prohibition. The rule is likewise well-established that where no exception is made in*

terms, none will be made by mere implication or construction [Rhode Island v Massachussets 12 Pet 657 (US)].".

It appears to me that this is an appropriate instance in which the maxim should be applied to raise the inference that the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution denotes that all the other powers of the President which are listed in Article 33 (2) are, subject to review by way of an application under Article 126 in appropriate circumstances which demand the Court's review of those powers.

No doubt some of the powers vested in the President by Article 33 (2) may not, in practice, be reviewable by an application under Article 126 depending on the facts before court. For example, it is hard to think of instances where the performance by the President of a purely ceremonial function [as under Article 33 (2) (b)] would be amenable to review by this Court. On the other hand, it is conceivable that several of the other executive powers vested in the president by Article 33 (2) (c) [other than under Article 33 (2) (g) which is expressly excluded] could be, in appropriate circumstances, subject to challenge under a fundamental rights application under Article 126.

In this connection, it is relevant to mention here the decision in **EDWARD SILVA vs. BANDARANYAKE** [1997 1 SLR 92 at p. 95] where Fernando J, referring to the President's power of appointing Judges of the Supreme Court stated *"The learned Attorney-General submitted that the President in exercising the power conferred by Article 107 had a "sole discretion". I agree with this view. This means that the eventual act of appointment is performed by the President and concludes the process of selection. It also means that the power is neither untrammelled nor unrestrained, and ought to be exercised within limits, for, as the learned Attorney-General said, the power is discretionary and not absolute. This is obvious. If, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed: because it is the will of the People, which that provision manifests, that such a person cannot hold that office. Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude."*

It should also be mentioned that in **SINGARASA vs. AG** (*supra*) S.N. Silva CJ held that the accession by the then President to the Optional Protocol to the International Covenant on Civil and Political Rights was in excess of the power of the President as contained in the then Article 33 (f) of the Constitution [which is on the same lines as Article 33 (2) (h) of the Constitution after the 19th Amendment] and did not bind the Republic *qua* State and has no legal effect within the State. Although that was a decision where the Supreme Court was hearing an Application for Special Leave to Appeal from a judgment of the Court of Appeal, the principle laid down by the Court that an act of the President in the exercise of his powers under Article 33 (2) (h) is subject to review by the Court fortifies the conclusion reached above that all the powers listed in Article 33 (2) [except the power to declare War and Peace listed in Article 33 (2) (g)] are subject to review under Article 126 in appropriate circumstances.

In this connection, Chief Justice Silva stated [at p 261], *"On the other hand where the President enters into a treaty or accedes to a Covenant the content of which is `inconsistent with the provisions of the Constitution or written law' it would be a transgression of the limitation in Article 33 (f) cited above and ultra vires. Such act of the President would not bind the Republic qua state. This conclusion is drawn not merely in reference to the dualist theory referred to above but in reference to the exercise of governmental power and the limitations thereto in the context of Sovereignty as laid down in Article 3, 4 and 33(f) of the Constitution."* His Lordship continued (at p. 263-264), *"Therefore the accession to the Optional Protocol in 1997 by the then President and Declaration made under Article 1, is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic."*

For the aforesaid reasons, the submission made on behalf of the Attorney General and set out in (b) above – *i.e:* the dissolution of Parliament does not constitute *"executive or Administrative action"* falling within the purview of Article 126 of the Constitution – is rejected.

Next it is necessary to consider the submission of Mr. Manohara de Silva PC appearing for the 2nd added Respondent. He submitted that when Article 3 is read with Article 4 of the Constitution, the Courts through which the judicial power of the people is exercised by Parliament, must ensure that the people in whom sovereignty is vested are given the ability to fully and meaningfully exercise the power of franchise, which is an integral component of sovereignty. He further submitted that Article 105 of the Constitution

places a duty on the Supreme Court to protect, vindicate and enforce the rights of the people which include the right of franchise. He submitted that therefore, this Court cannot impugn the Proclamation marked "P1" since it gives the people the right to exercise their franchise. He further submitted that since the sovereignty of the people is exercised by Parliament through the Court, this Court cannot make any order which prevents the people from exercising their will through the exercise of their franchise.

However, the guiding rule is that this Court is obliged to act to uphold the Rule of Law. Mr. de Silva's submission overlooks the fundamental premise that any exercise of franchise, must be at an election which is duly and lawfully held and which satisfies the Rule of Law. A departure from that rule will result in the negation of the requirement of the Rule of Law that an election must be lawfully called and be lawfully held and, thereby, adversely affect the results of an ensuing election. The basic principle is that nothing valid can result from an illegality. Therefore, I am of the view that the Court has ample jurisdiction and in fact a duty to examine whether "P1" was issued in accordance with the provisions of the Constitution.

The 2nd added Respondent submitted that the Proclamation marked "P1" is not subject to judicial review and, further, *"the basis on which His Excellency, the President formed an opinion to dissolve Parliament is a political decision which your lordship's court has no jurisdiction to inquire into"*.

However, this submission too is countered by the aforesaid rule that while His Excellency's decision to issue "P1" may have been a political decision, the power to dissolve Parliament is specified in the Constitution, and, therefore, this Court has both the power and the duty to examine whether the issue of "P1" was in accordance with the Constitution.

In his affidavit the 2nd added Respondent has also submitted that these applications cannot be maintained because of the failure to include all Members of Parliament, who are necessary parties. Mr. Manohara de Silva, PC did not make a submission to such effect before us. In any event, it appears to me that the Petitioner is not required to list the other Members of Parliament as Respondents.

Finally, although the 1st to 4th added Respondents have stated in their affidavits by way of *"preliminary objections"* that the Petitioner has misrepresented material facts and that

Petitioners' application is misconceived in Law, none of the learned counsel appearing for these added Respondents made submissions to such effect before us.

For the aforesaid reasons, the preliminary objections are overruled and I hold that this court has the jurisdiction to hear the merits of the case.

The provisions of the Constitution relating to dissolution

All counsel have agreed that, in essence, there are three provisions of the Constitution which have to be considered when deciding the applications before us. They are Article 33 (2), Article 62 (2) and Article 70. The Petitioners contend that Article 48 (1) and Article 48 (2) also support their cases. The Hon. Attorney General and the added Respondents disagree with that contention.

I set out below Article 33 (2) (c), Article 62 and Article 70. In the case of Article 70, only Articles 70 (1) to 70 (5) are set out below. Since the wording of these three Articles in the Sinhala language is in issue, the Articles as they appear in the Sinhala language are also set out so that reference can be made to the Articles as expressed in the two languages, where required.

Article 33 (2) appears under Chapter VII titled *"THE EXECUTIVE - The President of the Republic"* and states:

"33 (2) In addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law, the President shall have the power -

(a) to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament;

(b) to preside at ceremonial sittings of Parliament;

(c) to summon, prorogue and dissolve Parliament; ....."

....."

"(2) ආණ්ඩුක්‍රම ව්‍යවස්ථාවෙන් හෝ වෙනත් ලිඛිත නීතියකින් හෝ ප්‍රකාශිතවම ජනාධිපතිවරයා වෙත පවරා හෝ නියම කර ඇත්තා වූ බලතලවලට සහ කාර්යයන්ට අමතරව, ජනාධිපතිවරයාට -

(අ) පාර්ලිමේන්තුවේ එක් එක් සැසිවාරය ආරම්භයේ, පාර්ලිමේන්තුවේ දී ආණ්ඩුවේ ප්‍රතිපත්ති ප්‍රකාශය කිරීමට බලය ඇත්තේය;

(ආ) පාර්ලිමේන්තුවේ මංගල රැස්වීම්වල මුලසුන දැරීමට බලය ඇත්තේය;

(ඇ) පාර්ලිමේන්තුව කැඳවීමට, වාර අවසන් කිරීමට සහ විසුරුවා හැරීමට බලය ඇත්තේය. ....."

Article 62 appears under Chapter X which is titled *"THE LEGISLATURE - Parliament"* and states:

"62. (1) There shall be a Parliament which shall consist of two hundred and twenty -five Members elected in accordance with the provisions of the Constitution.

(2) Unless Parliament is sooner dissolved, every Parliament shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said period of five years shall operate as a dissolution of Parliament."

"62 (1) ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ විධිවිධානවලට අනුකූලව තෝරා පත් කර ගනු ලබන මන්ත්‍රීවරයන් දෙසිය විසිපස් දෙනකුගෙන් සමන්විත පාර්ලිමේන්තුවක් වන්නේය.

(2) සෑම පාර්ලිමේන්තුවක්ම පළමුවරට රැස්වීමට නියමිත දින පටන් පස් අවුරුද්දකට නොවැඩි කාලයක් පවත්නේය .එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේ ය .එකී

පස් අවුරුදු කාලය ඉකුත්ව ගිය විට ම පාර්ලිමේන්තුව විසිර ගියාක් සේ සලකෙන්නේ ය."

Article 70 which is in Chapter XI titled *"THE LEGISLATURE - Powers and Procedures"* reads as follows:

"70. (1) The President may by Proclamation, summon, prorogue and dissolve Parliament: Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour.

(2) Parliament shall be summoned to meet once at least in every year.

(3) A Proclamation proroguing Parliament shall fix a date for the next session, not being more than two months after the date of the Proclamation : Provided that at any time while Parliament stands prorogued the President may by Proclamation -

(i) summon Parliament for an earlier date, not being less than three days from the date of such Proclamation, or

(ii) subject to the provisions of this Article, dissolve Parliament.

(4) All matters which, having been duly brought before Parliament, have not been disposed of at the time of the prorogation of Parliament, may be proceeded with during the next session.

(5) (a) A Proclamation dissolving Parliament shall fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation.

(b) Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62, the President shall forthwith by Proclamation fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation. ....”

“70 (1) ජනාධිපතිවරයා විසින් ප්‍රකාශයක් මගින් පාර්ලිමේන්තුව කැඳවීම,

පාර්ලිමේන්තුවේ වාරාවසාන කිරීම සහ පාර්ලිමේන්තුව විසුරුවා හැරීම කල හැක්කේය:

එසේ වුවද, පාර්ලිමේන්තුව විසින් එහි නොපැමිණි මන්ත්‍රීවරුන් ද ඇතුලුව මුළු මන්ත්‍රීවරයන්ගේ සංඛ්‍යාවෙන් තුනෙන් දෙකකට නොඅඩු සංඛ්‍යාවකගේ යෝජනා සම්මතයක් මගින් පාර්ලිමේන්තුව විසුරුවා හරින ලෙස ජනාධිපතිවරයාගෙන් ඉල්ලීමක් කරනු ලබන්නේ නම් මිස, පාර්ලිමේන්තුවේ ප්‍රථම රැස්වීම සඳහා නියම කරගනු ලැබූ දිනයෙන් අවුරුදු හතරක් සහ මාස හයක කාලයක් අවසන් වන තෙක් ජනාධිපතිවරයා විසින් පාර්ලිමේන්තුව විසුරුවා හැරීම නොකල යුත්තේ ය".

(2) පාර්ලිමේන්තුව සෑම වසරකට වරක්වත් කැඳවිය යුත්තේය.

(3) පාර්ලිමේන්තුවේ වාරය අවසන් කරන්නා වූ ප්‍රකාශනයෙන් ඊළඟ වාරය පටන් ගැනීම සඳහා දිනයක් නියම කළ යුත්තේ ය .ඒ දිනය ප්‍රකාශනයේ දින සිට මාස දෙකක් නොඉක්මවන දිනයක් විය යුත්තේ ය:

එසේ වුව ද, පාර්ලිමේන්තුවේ වාරයක් අවසන් කොට ඇති කවර හෝ අවස්ථාවක -

(i) ප්‍රකාශනයක් මගින්, ඒ ප්‍රකාශනයේ දින සිට තුන් දවසකට 'කලින් දිනයක්' නොවිය යුතු නියමිත කලින් දිනයක රැස්වන ලෙස පාර්ලිමේන්තුව කැඳවීමට; හෝ

(ii) මේ ව්යවස්ථාවේ විධිවිධානවලට යටත්ව, ප්රකාශනයක් මගින් පාර්ලිමේන්තුව විසුරුවා හැරීමට; හෝ

ජනාධිපතිවරයාට බලය ඇත්තේය.

(4) යථා පරිදි පාර්ලිමේන්තුව ඉදිරියට ගෙන එනු ලැබ, පාර්ලිමේන්තුවේ වාරය අවසාන කරන අවස්ථාව වන විට කටයුතු නිම කරනු ලැබ නොමැති යම් කාරණා ඇත්තේ ද, ඒ සියලු කාරණා පිළිබඳව පාර්ලිමේන්තුවේ ඊළඟ සභා වාරයේ දී ඉතිරි පියවර ගැනීමට පාර්ලිමේන්තුවට බලය ඇත්තේ ය.

(5) (අ) පාර්ලිමේන්තුව විසුරුවා හරින ප්රකාශනයෙහි, අභිනව

පාර්ලිමේන්තුවට මන්ත්රීවරයන් තෝරාපත් කර ගන්නා දිනය හෝ දින නියම කොට තිබිය යුත්තේ ය . එසේ ම, එකී ප්රකාශනය නිකුත් කළ දින සිට මාස තුනක් ගත වන්නට පෙර දිනයකට අභිනව පාර්ලිමේන්තුවේ පළමුවන රැස්වීම ඒ ප්රකාශනයෙන් ම කැඳවිය යුත්තේ ය.

(ආ) 62 වන ව්යවස්ථාවේ (2) වැනි අනු ව්යවස්ථාවේ විධිවිධාන

ප්රකාර පාර්ලිමේන්තුව විසුරුවා හරිනු ලැබූ විට ජනාධිපතිවරයා විසින් පාර්ලිමේන්තු මන්ත්රීවරයන් තේරීම සඳහා ප්රකාශනයක් මගින් නොපමාව දිනයක් හෝ දින නියම කොට අභිනව පාර්ලිමේන්තුව, ඒ ප්රකාශනයේ දින සිට තුන් මාසයකට පසු දිනයක් නොවන දිනයක රැස්වන ලෙස කැඳවිය යුත්තේ ය .

Before moving on to set out the differing positions of the parties on how these Articles should be understood and construed, it is necessary to set out Articles 48(1) and Article 48 (2) since the Petitioners seek to also rely on Articles 48(1) and (2) in support of their arguments. These Articles read as follows:

“48. (1) On the Prime Minister ceasing to hold office by death, resignation or

otherwise, except during the period intervening between the dissolution of Parliament and the conclusion of the General Election, the Cabinet of Ministers shall, unless the President has in the exercise of his powers under Article 70, dissolved Parliament, stand dissolved and the President shall appoint a Prime Minister, Ministers of the Cabinet of Ministers, Ministers who are not members of the Cabinet of Ministers and Deputy Ministers in terms of Articles 42, 43, 44 and 45: Provided that if after the Prime Minister so ceases to hold office, Parliament is dissolved, the Cabinet of Ministers shall continue to function with the other Ministers of the Cabinet as its members, until the conclusion of the General Election. The President may appoint one such Minister to exercise, perform and discharge the powers, duties and functions of the Prime Minister, and the provisions of Article 47 shall, mutatis mutandis, apply.

(2) If Parliament rejects the Statement of Government Policy or the Appropriation Bill or passes a vote of no-confidence in the Government, the Cabinet of Ministers shall stand dissolved, and the President shall, unless he has in the exercise of his powers under Article 70, dissolved Parliament, appoint a Prime Minister, Ministers of the Cabinet of Ministers, Ministers who are not members of the Cabinet of Ministers and Deputy Ministers in terms of Articles 42, 43, 44 and 45."

"48 (1) පාර්ලිමේන්තුව විසුරුවා හරිනු ලැබීමත් මහා මැතිවරණය අවසාන වීමත් අතර කාලය තුළ හැර, ධුරයෙන් ඉවත් කරනු ලැබීමෙන් හෝ ඉල්ලා අස්වීමෙන් හෝ අන්යාකාරයකින් හෝ අග්රාමාත්යවරයා ධුරය දැරීම නතර වූ විට, 70 වන වියවස්ථාව යටතේ ස්වකීය බලතල ක්රියාත්මක කරමින් ජනාධිපතිවරයා විසින් පාර්ලිමේන්තුව විසුරුවා හැර ඇතොත් මිස, අමාත්ය මණ්ඩලය විසිරෙන්නේය .එසේ වූ විට ජනාධිපතිවරයා විසින් 42 වන, 43 වන, 44 වන, සහ 45 වන වියවස්ථා අනුව අග්රාමාත්යවරයකු ද, අමාත්ය මණ්ඩලයේ අමාත්යවරුන් ද, අමාත්ය මණ්ඩලයේ සාමාජිකයන් නොවන අමාත්යවරුන් ද, නියෝජ්ය අමාත්යවරුන් ද පත් කළ යුත්තේය:

එසේ වුව ද, ඉහත කී පරිදි අග්රාමාත්යවරයා ධුරය දැරීම නතර වීමෙන් පසුව පාර්ලිමේන්තුව විසුරුවා හරිනු ලැබුවහොත්,

අමාත්ය මණ්ඩලය, අමාත්ය මණ්ඩලයේ අනෙකුත් අමාත්යවරුන්ගෙන් සමන්විතව මහා මැතිවරණය අවසාන වන තෙක් ක්රියා කළ යුත්තේ ය .තව ද අග්රාමාත්යවරයාගේ බලතල, කාර්ය සහ කර්තව්ය ක්රියාත්මක කිරීම සඳහා සහ ඉටු කිරීම සඳහා ජනාධිපතිවරයා විසින් එකී අමාත්යවරයන් අතුරෙන් යම් අමාත්යවරයකු පත් කරනු ලැබිය හැක්කේ ය .තවද 47 වන වියවස්ථාවේ විධිවිධාන අවශ්ය වෙනස් කිරීම් සහිතව මේ සම්බන්ධයෙන් අදාළ වන්නේ ය.

(2) පාර්ලිමේන්තුව විසින් ආණ්ඩුවේ ප්රතිපත්ති ප්රකාශය හෝ විසර්ජන පනත් කෙටුම්පත හෝ ප්රතික්ෂේප කළ හොත් එවිට ද ආණ්ඩුව කෙරෙහි විශ්වාස භංග යෝජනාවක් සම්මත කළ හොත් එවිට ද අමාත්ය මණ්ඩලය විසිරෙන්නේ ය .එසේ වූ විට 70 වන වියවස්ථාව යටතේ ස්වකීය බලතල ක්රියාත්මක කරමින් ජනාධිපතිවරයා විසින් පාර්ලිමේන්තුව විසුරුවා හරිනු ලැබුවහොත් මිස, ජනාධිපතිවරයා විසින් 42 වන, 43 වන, 44 වන සහ 45 වන වියවස්ථා අනුව අග්රාමාත්යවරයෙක්ද, අමාත්ය මණ්ඩලයේ අමාත්යවරුන් ද, අමාත්ය මණ්ඩලයේ සාමාජිකයන් නොවන අමාත්යවරුන් ද, නියෝජ්ය අමාත්යවරුන් ද පත් කළ යුත්තේ ය .

The Petitioners' submissions

The parties are all agreed that the Articles of the Constitution which are relevant to the question before us are Articles 33 (2) (c), Article 62 and Article 70.

The Petitioners submit that these Articles mean and should be read and understood in the following way:

(a) Article 33 (2) (c) only recognises the existence of a power of the President to summon, prorogue and dissolve Parliament and states that power is vested in the President. The Petitioners submit that this power vested in the President by Article 33 (2) (c) is nothing but a

"*nude power"* which cannot be exercised other than in terms of and within the confines of Article 70;

(b) The only manner in which the President can exercise that power to summon, prorogue and dissolve Parliament is set out and limited by the provisions of Article 70. The Petitioners submit that the President can exercise the power to dissolve Parliament only subject to and in compliance with the provisions of Article 70;

(c) Article 62 (1) specifies that Parliament shall consist of 225 members while Article 62 (2) specifies that a duly elected Parliament shall continue for five years from the date appointed for its first meeting and no longer, and shall stand dissolved at the end of that five year period.

The Petitioners submit that Article 62 (2) does not confer any power upon the President to dissolve Parliament. They submit that the words *"unless sooner dissolved"* ["එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේ ය."] in Article 62 (2) only recognise the possibility that Parliament may be dissolved before the expiry of the five years in situations where the President has issued a Proclamation under and in terms of and subject to the restrictions specified in Article 70 (1) and in compliance with Article 70 (1).

Thus, the Petitioners' position is that while Article 33 (2) (c) only recognises and vests in the President the power to dissolve Parliament, the only manner in which the President may exercise that power is specified and limited by the provisions of Article 70.

The Petitioners go on to submit that the overarching provision specifying the manner and method of the exercise of the President's power to dissolve Parliament and controlling that power is Article 70 and, in particular, Article 70 (1) which specifies that the only way the President may dissolve Parliament is by the issue of a Proclamation and the Proviso to Article 70 (1) which stipulates that no such Proclamation can be issued until the expiration of four and a half years from the date of the first meeting of that Parliament unless not less than two thirds of the Members

of Parliament (including those not voting) have by a resolution requested the President to dissolve Parliament, and the President is of the view that such request should be acceded to.

The Petitioners submit that there is no difference in the meaning of Article 62 (2) in the English language and the same Article in the Sinhala language. They submit that Article 62 (2) in the English language is couched in one long sentence while Article 62 (2) in the Sinhala language says the exact same thing as Article 62 (2) in the English language but in three separate sentences.

They submit that the words *"Unless sooner dissolved"* and "එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේ ය." in Article 62 (2) are in the passive sense and do not vest any power in the President to dissolve Parliament.

The Petitioners draw attention to the fact that Article 62 (2) makes no mention of the President. In this connection, the Petitioners submit that Article 62 (2) is placed in Chapter X of the Constitution which is titled *"THE LEGISLATURE - Parliament"* and point out that the only reference to the President in that Chapter is in Article 65 which deals with the President's power to appoint and remove the Secretary General of Parliament. The Petitioners' position is that Article 62 (2) does not confer any power upon the President to dissolve Parliament.

The Petitioners submit that the fact that Parliament can only be dissolved under the provisions of Article 70 is reflected and recognised in Article 48(1) and Article 48 (2) since these Articles which refer to the dissolution of Parliament by the President *"in the exercise of his powers under Article 70*" and to no other provision in the Constitution under which the President could have dissolved Parliament.

The submissions of the Hon. Attorney General, the Added Respondents and the Intervenient Petitioners

The Hon. Attorney General and the added Respondents submit that Articles 33 (2) (c), Article 62 and Article 70 should be read and understood in the following way:

(a) Article 33 (2) (c) has been specifically included by the 19th

Amendment as a new power vested in the President to summon prorogue and dissolve Parliament at his discretion and which can be exercised independent of the restraints set out in Article 70(1). They highlight that Article 33 (2) of the 1978 Constitution prior to the 19th Amendment had no provision referring to the President's power to summon, prorogue and dissolve Parliament.

They submit that Article 33 (2) (c) formulates and recognises a *sui generis* and overarching *"executive-driven"* dissolution of Parliament by the President which is independent of the power of dissolution referred to in Article 70 (1) and is not subject to the limits and restraints specified by Article 70 (1);

(b) Article 70 (1) only applies to a *"legislature driven"* dissolution of Parliament in which the President may, at the request of Parliament made by a resolution passed by not less than two thirds of the Members of Parliament, dissolve Parliament during the first four and a half years of its life time and, dissolve Parliament at his discretion and without a request from Parliament at any time after the expiry of that period of four and a half years;

(c) Article 62 (2) read with Article 33 (2) (c) vests in the President an independent and separate power to dissolve Parliament at any time under provisions of Article 33 (2) (c) without being circumscribed by Article 70 (1).

In this regard, the written submissions tendered on behalf of the Hon. Attorney General state *"However, with the introduction of the Nineteenth Amendment to the Constitution on the 15th of May 2015, the President's power to dissolve Parliament was, for the first time, recognised under **TWO** distinct and separate Articles in the Constitution.*

*The **first** is Article 33 (2) (c), which is an 'Executive driven dissolution process'. The **second** is Article 70 (1), which is the "Legislative driven dissolution process.'"*

It has been submitted that the fact that Article 33 (2) (c) is a new provision introduced under the 19th Amendment cannot be ignored and that the power vested in the President under this Article is *"[…] a sui generis, additional and overarching power, conferred on*

the President, independent of the power of dissolution of the President referred to in Article 70(1) of the Constitution."

Further, it has been submitted that the fact that Article 33 (2) states that the powers vested in the President thereby are *"in addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law"* ["අමතරව"] lends force to the contention that the power vested in the President by Article 33 (2) (c) is unrestrained by and *"goes beyond"* the restrictions in Article 70 (1).

It has been submitted that, if the framers of the 19th Amendment had intended to make the powers set out in Article 33 (2) (c) subject to Article 70 (1), they would have stipulated that Article 33 (2) (c) is *"subject to the provisions of Article 70"* or is *"subject to the other provisions of the Constitution"* It has been submitted that, *"Therefore, in the absence of any such restrictive language, Article 33 (2) (c) of the Constitution must be read as a distinct and separate provision conferring power on the President to dissolve Parliament at any time."*

With regard to Article 70 (1), the written submissions tendered on behalf of the Hon. Attorney General state that *"…the proviso to Article 70 (1) of the Constitution was never intended to apply to the President's power under Article 33 (2) (c)",* and that such proviso, *"...cannot now be 'read into' Article 33 (2) (c) in the guise of constitutional interpretation. Such an attempt will render the Chapeau of Article 33 (2) (c) meaningless and redundant."*

It has been submitted that Article 70 (1) refers only to a *"legislature driven process"* where the Legislature requests the President to dissolve Parliament, and where the President *"may"* exercise his powers and dissolve Parliament when such a request is made. Thus, it was submitted that Article 70 (1) gives the President a discretion to either accede to a request by Legislature or not, and that therefore, the proviso operates only as a fetter on Parliament with regard to the manner in which Parliament may request a dissolution, but that it remains at the President's discretion whether to accept or deny such request.

It was further submitted that in any event, the proviso in Article 70 (1) must be construed as being limited in its operation to Article 70 and cannot apply to the separate power of dissolution conferred on the President by Article 33 (2) (c).

With regard to Article 62 (2), it was submitted by the Hon. Attorney General that this Article reinforces the submission that the President has the power to dissolve Parliament at any time under Article 33 (2) (c) prior to the expiry of the five year term referred to in Article 62 (2). In this connection, it has been submitted that,

> *"It is observed that Article 62(2) of the Constitution contains 3 limbs:*
>
> a. *The Term of Parliament will be limited to five years.*
>
> b. *Parliament however can be dissolved prior to the expiry of its Term.*
>
> c. *Upon expiry of its five-year Term, Parliament shall be deemed to have been dissolved.*
>
> *It must be noted that limb (b) above does not make any reference to Article 70(1) of the Constitution.* ***This limb therefore categorically recognises that Parliament can be dissolved at anytime prior to its five year term.***
>
> *Furthermore, there is no restriction recognised under Article 62 (2) of the Constitution on the exercise of the President's power to dissolve Parliament at any time during Parliament's five-year term.*
>
> *Accordingly, it is respectfully submitted that Article 62 (2) of the Constitution reinforces the interpretation advanced in these proceedings, that the President has the power to dissolve Parliament at any time during its five-year term in terms of Article 33 (2) (c) of the Constitution."*

With regard to Article 48 (1) and Article 48 (2), it was submitted that the reference in these two Articles to the President *"in the exercise of his powers under Article 70"* does not preclude the President from exercising his powers under Article 33 (2) (c) to dissolve Parliament.

Mr. Sanjeeva Jayawardena, PC, appearing for the 1st added Respondent, took up a somewhat different position and submitted that the *"substantive power of dissolution"* of Parliament is vested in the President by Article 62 (2) and that the reference to the President's power to dissolve in Article 33 (2) (c) is in the *"enumeration of presidential*

powers". He described Article 62 (2) as a *"stand alone power"* which is set out and recognised in the words *"Unless parliament is sooner dissolved…"* ["එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේ ය."]

He submitted that the manner in which this *"stand alone power"* may be exercised is set out and manifested in Article 70 (5) (a) and Article 70 (5) (b) which read: *"70 (5) (a) A Proclamation dissolving Parliament shall fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation; 70 (5) (b) Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62, the President shall forthwith by Proclamation fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation;"*

Mr. Jayawardena contended that, Article 70 (b) recognises that the President has the power vested in the President by Article 62 (2) read with Article 33 (2) (c) to dissolve Parliament before its five year term expires and that when the President exercises that power, Article 70 (5) (b) requires him to fix the dates for the election of Members to Parliament and to summon the new Parliament to meet within three months of such Proclamation.

Mr. Manohara de Silva, PC, appearing for the 2nd added Respondent, submitted that Article 33 (2) (c) was inserted by the 19th Amendment as a *"solution to the problem"* created by the introduction of Article 70 (1). He submitted that this was done to cater for situations such as, for instance, where an Appropriation Bill is defeated or where the exigencies of the circumstances make it necessary for the President to dissolve Parliament prior to the expiry of the four and a half year period referred to in the proviso to Article 70 (1). He submitted that Article 33 (2) (c) was deliberately introduced by the 19th Amendment because the earlier safeguards set out in provisos (b) and (d) of Article 70 (1) were removed by the 19th Amendment. Mr. de Silva demonstrated that since 1989, only two of the Parliaments elected by the people have had a single party or alliance with a majority. He submitted that in the context of this history of "hung parliaments", the President must have the opportunity to dissolve Parliament where a deadlock or a harmful situation transpires. He went on to contend that, in view of this necessity, Article 33 (2) (c) was introduced by the 19th Amendment to give the President the overarching and unrestricted power to dissolve Parliament whenever he thought it necessary to do so. Mr. De Silva also submitted that Article 62 (2) is an *"unequivocal and unambiguous"*

statement in the Constitution that the President has unqualified power to dissolve Parliament before the expiry of five years.

Mr. Ali Sabry, PC, appearing for the 3rd added Respondent, submitted that the Court must harmoniously construe and interpret the provisions of Articles 70, 62 (2) and 33 (2) (c) when determining the power vested in the President to dissolve Parliament. He submitted that Article 62 (2) is the empowering provision giving the President power to dissolve Parliament; that Article 70 (1) sets out the procedure for doing so; and that Article 33 (2) (c) identifies a separate power given to the President. He too categorised the provisions of 70 (1) as referring to a *"legislature driven process"*. Mr. Sabry also submitted that Article 33 (2) (c) was inserted by the 19th Amendment to the Constitution to cater for the removal of the safeguards which existed in the former Article 70 (as it existed prior to the 19th Amendment).

Mr. Gamini Marapana, PC appearing for the 4th added Respondent submitted that Articles 33 (2) (c) and 62 (2) confer on the President a power to dissolve Parliament which is not subject to Article 70 (1) or any other provision. In support of this contention, he submitted that, if it had been intended that Article 33 (2) (c) should be subject to Article 70 (1), either Articles 33 (2) (c) and Article 62 (2) should have expressly stated that they were *"subject to Article 70 (1)"* or Article 70 (1) should have contained the words *"notwithstanding the provisions in Articles 33 (2) (c) and Article 62 (2)".*

He went on to submit that the proviso to Article 70 (3) states that *"at any time while Parliament stands prorogued the President may by proclamation ... (ii) subject to the provisions of this Article, dissolve Parliament."* He contended that the use of the words *"at any time"* are important and operative words of the proviso to Article 70 (3) and must be given meaning. He submitted that the words *"at any time"* in the proviso to Article 70 (3) make it clear that the power of dissolving Parliament during a prorogation of Parliament may be exercised by the President at any time, without being subject to the restriction of the period of four and a half years referred to in the second paragraph of Article 70 (1). He argued that any other interpretation would render the words *"at any time"* in the proviso to Article 70 (3) redundant and superfluous and would thus contravene established rules of interpretation.

Mr. Canishka Vitharana who appeared for the 5th added Respondent submitted that Article 33 (2) (c), Article 62 (2) and Article 70 (5) create a "triangle" which comprehensively sets out an unfettered power vested in the President to dissolve

Parliament. He submitted that there is a different triangle constituted by Articles 33 (2) (c), Article 62 (2) and Article 70(1) by which the President also has the power to dissolve Parliament at Parliament's request within the first four and a half years of its term. He submitted that Article 62 (2) is posited *"in the middle"* of both triangles. Mr. Vitharana submitted that, in this instance, the President has acted within and in terms of the first triangle described above when he issued "P1".

Mr. Vitharana went on to submit that where there is a clash between the President and the Legislature and the President wishes to dissolve Parliament, the Constitution provides that the President's *"will must prevail"* and that, thereby, the President is placed in a position of *"supremacy" vis-à-vis* the Legislature with regard to the dissolution of Parliament.

The submissions made by the several learned counsel who appeared for the intervenient Petitioners accord with what has been submitted on behalf of the Hon. Attorney General and by learned counsel appearing for the added Respondents. In addition, Mr. Samantha Ratwatte, PC submitted that, since Article 3 of the Constitution declares that the sovereignty of the People includes the right to exercise the franchise and Article 83 of the Constitution stipulates that Article 3 is an *"entrenched"* provision of the Constitution, the construction of any Article of the Constitution to have the effect of restricting the exercise of the right of franchise, would be a violation of the sovereignty of the people and be offensive to the Constitution. Mr. Choksy submitted that the Constitution dictates that the President holds a pre-eminent position *vis-a-vis* the Legislature and that the President's will must prevail over the Legislature. Mr. Warnasuriya submitted that Article 33A of the Constitution imposes a duty on the President to dissolve Parliament in circumstances where it is apparent that Parliament has *"failed"*. Mr. Deekiriwewa described Article 62 (2) as an "*emergency door"* which empowered the President to dissolve Parliament when there *"is a crisis"*. Mr. Weerasekera submitted that the Petitioner in the present application [SC FR 351/2018] is not entitled to invoke the fundamental rights jurisdiction of this Court because the Petitioner is not differently circumstanced from other Members of Parliament.

Decision

The decision in this case rests on the correct manner in which Article 33 (2) (c), Article 62 and Article 70 of the Constitution are to be read, understood and applied. The

Petitioners complain that the Proclamation marked "P1" has been issued *ultra vires* and in contravention of the powers and procedures set out in these Articles and that, therefore, their fundamental rights guaranteed by Article 12 (1) of the Constitution have been violated.

The essence of the task before us is to examine these Articles and determine whether or not the Proclamation marked "P1" has been issued in terms of and in compliance with the powers and procedures set out in these Articles.

When doing so, we must keep in mind established and accepted principles of law which apply when a Court construes or interprets a Constitution. Learned counsel appearing for all the parties before us have inundated the Court with a plethora of decisions of the Courts and statements of the law by renowned and recognised writers on constitutional law. It will be appropriate to mention at this point some of those principles which we consider should be kept in mind when we determine these applications.

The first rule is that words in a statute must be given their ordinary meaning. As Maxwell on the Interpretation of Statues states [12th ed. at p. 28-29] *"The rule of construction is to 'intend the Legislature to have meant what they actually expressed'. The object of all interpretation is to discover the intention of Parliament, 'but the intention of Parliament must be deduced from the language used', for 'it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.' Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise… Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to 'leave the remedy (if one be resolved upon) to others."*

In the same vein, Bindra [7th Ed. at pp.1337-1338] states, *"The consequences of a particular construction, if the text be explicit, can have no impact on the construction of a constitutional provision [Kesavananda Bharati v State of Kerala]. If the language employed is plain and unambiguous, the same must be given effect to irrespective of the consequences that may arise. Consequences may well be considered in fixing the scope and ambit of a power, where the text of the statute creating the power is unclear and*

ambiguous [Kesavananda Bharati v State of Kerala (1973) 4 SCC 225, p 690 Per Palekar J]."

Further, as Bindra observes [12th ed. at p. 205] at *"The legislature is a proverbial good writer in its own field, no matter that august body is subject to periodic criticism. It is not competent for the court to proceed on the assumption that the legislature knows not what it says, or that it has made a mistake. We cannot assume a mistake in an Act of Parliament. If we think so, we should render many Acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of the Act may have made a mistake. If so, the remedy is for the legislature to amend it. The legislature is presumed not to have made a mistake even if there is some defect in the language used by the legislature, it is not for the court to add to or amend the language or by construction make up deficiencies which are left in the Act."*.

These principles have been followed by this Court. Thus, Amerasinghe J stated, in **SOMAWATHIE vs. WEERASINGHE** [1990 2 SLR 121 at p. 124], *"How should the words of this provision of the Constitution be construed? It should be construed according to the intent of the makers of the Constitution. Where, as in the Article before us, the words are in themselves precise and unambiguous and there is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense."*

The next principle of interpretation which should be mentioned is that, where there is more than one provision in a statute which deal with the same subject and differing constructions of the provisions are advanced, the Court must seek to interpret and apply the several provisions harmoniously and read the statute as a whole. That rule of harmonious interpretation crystallises the good sense that all the provisions of a statute must be taken into account and be made to work together and cohesively to enable the statute to achieve its purpose.

As Sripavan J, as he then was, stated in **HERATH vs. MORGAN ENGINEERING (PVT) LTD** [2013 1 SLR 222 at p. 229], *"Whether it is the Constitution or the Act, the Courts must adopt a construction that will ensure the smooth and harmonious working of the Constitution or the Act as the case may be, considering the cause which induced the legislature in enacting it."*

In **CHIEF JUSTICE OF ANDHRA PRADESH vs. LVA DIXITULA** [AIR 1979 SC 193], the Supreme Court of India stated that, *"Where two alternative constructions are possible, the court must chose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions, or undermines or tends to defeat or destroy the basis scheme and purpose of the enactment. These canons of construction apply to our Constitution with greater force [....]"*

In the often cited Canadian case of **DUBOIS vs. R** [(1985) 2 SCR 350 at 356] Justice Lamer stated *"Our Constitutional Charter must be construed as a system where every component contributes to the meaning as a whole and the whole gives meaning to its parts. [...] The court must interpret each section of the Charter in relation to the other."*

In this regard, it is pertinent to reproduce here the guidelines formulated by Dhavan J in **MOINUDDIN vs. STATE OF UTTAR PRADESH** [AIR 1960 All 484, p 491] with regard to the approach to be adopted by a Court which is faced with alternate constructions of a statutory provision. The learned judge stated, "*The choice between two alternative constructions should be made in accordance with well recognized canons of interpretation:*

Firstly, if two constructions are possible the Court must adopt the one which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory.

Secondly, constitutional provisions are not to be interpreted and applied, by narrow technicalities but as embodying the working principles for practical Government.

Thirdly, the provisions of a Constitution are not to be regarded as mathematical formulae and that their significance is not formal but vital. Hence practical considerations rather than formal logic must govern the interpretation of those parts of the Constitution which are obscure.

Fourthly, in a choice between two alternative constructions, the one which avoids a result unjust or injurious to the nation should be preferred.

Fifthly, before making its choice between two alternate meanings, the Court must read the Constitution as a whole, take into consideration its different parts and try to harmonise them.

Sixthly, above all Court should proceed on the assumption that no conflict or repugnancy between different parts was intended by the framers of the Constitution."

In such situations, the Court must take into account all the words in a statute and ensure that no provision is made redundant or superfluous. In this regard, Bindra states that [12th ed. at p.208-209] *"The Legislature is deemed not to waste its words or to say anything in vain. The presumption is always against superfluity in a statute […] A construction which would render the provision nugatory ought to be avoided. No word should be regarded as superfluous unless it is not possible to give a proper interpretation to the enactment, or the meaning given is absurd or inequitable […] No part of a provision of a statute can be ignored by just saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby. Law should be interpreted so as not to make any word redundant, if it is possible to interpret it so as to utilise the meanings of all words used in the legislation."*.

Further, as Bindra states [10th ed. at p. 1269], *"One section of an Act cannot be held ultra vires of another section of the Act. In a contingency of this kind, the only course open to court is to put a harmonious interpretation thereupon [Mahavir Prasad v State of Rajasthan AIR 1966 Raj 256, p 258, per Dave CJ]."*, and (at p. 1271), *"It is a well-settled principle of interpretation that all parts of the Constitution should be read together and harmoniously. [VR Sheerama Rao v Telugudesam AIR 1983 AP 96 – Andhra Pradesh High Court]"*.

The general rules of statutory construction apply to constitutional interpretation. Bindra [10th ed., at pp. 1263-1264) states *"The Constitution being essentially in the nature of a statute, the general rules governing the construction of statues in the main apply to the constructions of the Constitution as well. The fundamental rule of interpretation is the same, whether it is the provisions of the Constitution or an Act of Parliament, namely, that the court will have to ascertain the intention gathered from the words in the Constitution or the Act as the case maybe. And where two constructions are possible, that one should be adopted which would ensure a smooth and harmonious working of the Constitution and eschew that which would lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory [Chandra*

Mohan Lal v State of Uttar Pradesh AIR 1966 SC 1987; Shakuntala S Tiwari v Hemchand M Singhania AIR 1987 SC 1823].".

However, when interpreting provisions in a Constitution, a Court must approach its' task keeping in mind that the document before the Court is the foundation, charter of governance and guiding light of the nation. The Court is duty bound to carry out that task in a manner which correctly understands and interprets the provisions of the Constitution so as to uphold the Rule of Law and constitutional certainty. The Court must remain alive to the need to understand and apply the Constitution in accordance with the intention of its makers and also take into account social, economic and cultural developments which have taken place since the framing of the Constitution.

Thus, Bindra [10th ed. at p. 1262] states, *"A Constitution is a documentation of the founding faiths of a nation and the fundamental directions for their fulfilment. So much so, an organic, not pedantic, approach to interpretation, must guide the judicial process. The healing art of harmonious construction, not the tempting game of hairsplitting promotes the rhythm of the law [Fatehchand Himatlal v State of Maharashtra (1977) Mah LJ 205, (1977) MP LJ 201(SC) per Krishna Iyer J]."* Bindra goes on to state [at p.1261], *"Accustomed as we have been in our day-to-day administration of justice to the interpretation of numerous statutes, we are apt to lose sight of the fact that the Constitution is unlike most statutes that we come across, has to be judged from somewhat different standards. The constitution is the very framework of the body policy: its life and soul; it is the fountainhead of all its authority, the main spring of all its strength and power. The executive, the legislature and the judiciary are all its creation, and derive their sustenance from it. It is unlike other statutes, which can be at any time altered, modified or repealed. Therefore, the language of the constitution should be interpreted as if it were a living organism capable of growth and development if interpreted in the broad and liberal spirit, and not in a narrow and pedantic sense."*

Dealing with the interpretation of a Constitution, Bindra emphasizes [at p. 1284], *"A democratic Constitution cannot be interpreted in a narrow and pedantic (in the sense of strictly literal) sense. Constitutional provision is to be interpreted in the light of basic structure of the Constitution [Shriram Industrial Enterprises Ltd, Meerut v Union of India (1995) 2 LBESR 822 (All)]. It lays down basic norms of community life, which on judicial interpretation, find their true reflection in every aspect of individual and collective human life. Therefore any constitutional interpretation which subverts the free social order is anti-constitutional [Prof Manubhai D Shah v Life Insurance Corpn (1981) 22 Guj LR 206]. It is the basic and cardinal principle of interpretation of a democratic Constitution that it is to be interpreted to foster, develop and enrich democratic*

institutions. To interpret a democratic Constitution so as to squeeze the democratic institutions off their life is to deny the people or a section thereof the full benefit of the institutions which they have established for their benefit [Prof Manubhai D Shah v Life Insurance Corpn (1981) 22 Guj LR 206].

Bindra also reminds us that the task of interpreting a Constitution should not be in an overly technical manner and states [10th ed. at p.1261-1262] *"The Constitution is written to be understood by the voters; its words and phrases are used in their normal and ordinary sense as distinguished from technical meaning. The simplest and most obvious interpretation of a Constitution; if in itself sensible, is the most likely to be that meant by the people in its adoption [Green v United States 2 L Ed 2d 672, p 703, 356 US 165]. There is no war between Constitution and common sense [Mapp v Ohio 6 L Ed 1081, p 1091, per Clark J]."*

On the same lines, Bindra observes [10th ed. at p. 1274] *"A constitutional provision will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon. It is the duty of the court to determine in what particular meaning or particular shade of meaning the words or expression was used by the constitution-makers, and in discharging the duty, the court will take into account the context in which it occurs the object for which it was used, its collocation, the general congruity with the concept or object it was intended to articulate and a host of other considerations. Above all, the court will avoid repugnancy with accepted norms of justice and reason [HH Maharajadhiraja Madhav Rao Jivaji Rao v Union of India (1971) 1 SCC 85]."*.

Next, it is to be kept in mind that the task of interpreting a statute must be done within the framework and wording of the statute and in keeping with the meaning and intent of the provisions in the statute. A Court is not entitled to twist or stretch or obfuscate the plain and clear meaning and effect of the words in a statute to arrive at a conclusion which attracts the Court.

In **SOMAWATHIE vs. WEERASINGHE** [*supra*, at p.128], Amerasinghe J stated, *"[…] we have to interpret the Constitution on the same principles of interpretation as apply to ordinary law and that we have no right to stretch or twist the language in the interest of any political, social or constitutional theory The principle that in interpreting a Constitution, a construction beneficial to the exercise of legislative or administrative power should be adopted, may not be of any great help when the statutory provisions that fall to be considered relate to the constitutional guarantees of the freedom and civil rights of individual citizens against abuse of governmental power. We must assume that*

there was a sufficient and indeed a grave need for the enactment of the Chapter on fundamental rights as part of the Constitution. The question before us is not as to the expediency, still less as to the wisdom of these provisions, but is one of law depending on the construction of the relevant articles of the Constitution. It is no doubt a legitimate, and in the case of a Constitution, a cogent argument, that the framers could not have meant to enact a measure leading to manifestly unjust or injurious results to the nation and that any admissible construction which avoids such results ought to be preferred. Having regard to the precise and comprehensive provisions of chap. III of the Constitution, we are not in the happy position of a learned Judge of the United States, who is said to have observed that there was no limit to the power of judicial legislation under the "due process" clause of the 5th and 14th Amendments, except the sky. I consider it to be both legally and constitutionally unsound, even though the invitation has been extended to us by learned counsel, to eviscerate the Constitution by our own conceptions of social, political or economic Justice".

A guiding principle when a Court interprets the Constitution is that the Court must adopt an approach which enforces the Rule of Law, which is one of the fundamental principles upon which our Constitution is built.

Thus, in **WIJEYARATNE vs. WARNAPALA** [SC FR 305/2008 decided on 22nd September 2009 at p.5] Sripavan J, as he then was, stated *"It has been firmly stated in several judgments of this Court that the "Rule of Law" is the basis of our Constitution. (Vide Vishvalingam vs. Liyanage (1983) 1SLR 236; Premachandra vs. Jayawickrema (1994) 2SLR 90. `If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective' – Bhagwati J in Gupta and Others vs. Union of India, (1982) AIR (SC) 197*."

In **PREMACHANDRA vs. MAJOR MONTAGUE JAYAWICKREMA** [1994 2 SLR 90, at p. 102] this Court stated "*When considering whether the exercise of a statutory power or discretion, especially one conferred by our Constitution, is subject to review by the judiciary, certain fundamental principles can never be overlooked. The first is that our Constitution and system of government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent Judiciary."*

In **VASUDEVA NANAYAKKARA vs. CHOKSY** [2008 1 SLR 134 at p 180-181]. S.N. Silva CJ held, that, "…*the Rule of Law is the basis of our Constitution as affirmatively laid down in the decision of this Court in Visuvalingam v Liyanage and Premachandra v Jayawickrema and consistently followed in several subsequent decisions. The Rule of Law "postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative or wide discretionary authority on the art of the Government" (vide: Law of the Constitution by A. Dicey - page 202)."*

A related principle is that our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power.

As Fernando J emphasised in **DE SILVA vs. ATUKORALE** [1993 1 SLR 283 at p. 296-297], *"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon the lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order, that it may use them for the public good."*

On similar lines. Eva Wanasundera, PC J stated in **PREMALAL PERERA vs. TISSA KARALIYADDA** [SC FR No. 891/2009 decided on 31st March 2016 at p.5], *"The said authorities have specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that discretions are conferred on public functionaries in trust for the public, to be used for the good of the public, and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."*.

In **SUGATHAPALA MENDIS vs. CHANDRIKA KUMARATUNGA** (*supra*) Tilakawardane J held [at p 380] with regard to the powers of the President *"That the President, like all other members of the citizenry, is subject to the Rule of Law, and consequently subject to the jurisdiction of the courts, is made crystal clear by a plain reading of the Constitution, a point conclusively established in Karunathilaka v Dissanayake by Justice Fernando…"* . Her Ladyship stated [at p. 373] *"...no single*

position or office created by the Constitution has unlimited power and the Constitution itself circumscribes the scope and ambit of even the power vested with any President who sits as the head of this country."

In the Determination by this Court **IN RE THE NINETEENTH AMENDMENT TO THE CONSTITUTION**, [SC SD 04/2015 at p.6-7] Sripavan CJ held `*Article 42 states "The President shall be responsible to Parliament for the due exercise, performance and discharge of powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.' Thus the President's responsibility to Parliament for the exercise of Executive power is established. Because the Constitution must be read as a whole, Article 4(b) must also be read in light of Article 42.* ***Clearly the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.***"

It has also been frequently recognised by this Court, that our Constitution enshrines the doctrine of separation of powers. In this regard, S. N. Silva CJ held, **IN RE THE NINETEENTH AMENDMENT TO THE CONSTITUTION** [2002 3 SLR 85 at p. 98] *"…This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another.*"

In **JATHIKA SEVAKA SANGAMAYA vs. SRI LANKA HADABIMA AUTHORITY** [SC Appeal 13/2015 decided on 16th December 2015] Priyantha Jayawardena, PC J, stated, "*The doctrine of separation of powers is based on the concept that concentration of the powers of Government in one body will lead to erosion of political freedom and liberty and abuse of power. Therefore, powers of Government are kept separated to prevent the erosion of political freedom and liberty and abuse of power. This will lead to controlling of one another. There are three distinct functions involved in a Government of a State, namely legislative, the executive and the judicial functions. Those three branches of Government are composed of different powers and function as three separate organs of Government. Those three organs are constitutionally of equal status and also independent from one another. One organ should not control or interfere with the powers and functions of another branch of Government and should not be in a position to dominate the others and each branch operates as a check on the others. This is accomplished through a system of "checks and balances", where each branch is given certain powers so as to check and balance the other branches… The doctrine of separation of powers is enshrined in Article 4 read with Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka."*

It is necessary to state here that our Law does not provide for a Court to review or question the validity of a statute which has been enacted by the Legislature. Thus, in **GAMAGE vs. PERERA** [2006 3 Sri L.R. 354 at p.359] Shirani Bandaranayake CJ stated: *"Article 80(3) of the Constitution refers to a Bill becoming law and reads as follows: "Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no Court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever". The aforesaid Article thus had clearly stated that in terms of that Article, the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Reference was made to the provisions in Article 80(3) of the Constitution and its applicability by Sharvananda, J. in Re the Thirteenth Amendment to the Constitution and had expressed his Lordship's views in the following terms: `Such a law cannot be challenged on any ground whatsoever even if it conflicts with the provisions of the Constitution, even if it is not competent for Parliament to enact it by a simple majority or two third majority.*"

Finally, I wish to set out here two more principles which must guide us in deciding this application.

Firstly, this Court has a sacred duty to uphold the integrity and supremacy of the Constitution. Thus, in **PREMACHANDRA vs. MAJOR MONTAGUE JAYAWICKREMA** [*supra*, at p. 111] the Court declared *"In Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary".*

Secondly, this Court must be mindful of the guidelines brought to our attention by the Hon. Attorney General when he concluded his submissions before us by citing the words of the Supreme Court of the United States of America in **BAKER vs. CARR** [369 U.S. 186 1962] which declared *"The Court's authority - possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."*

Having set out the aforesaid principles which are relevant when determining the applications before us, I must now examine the nature, meaning and effect of Articles 33 (2) (c), 62 (2) and 70.

To start with, a reading of Article 33 in its entirety sheds light on how Article 33 (2) (c) is to be understood.

First, Article 33 (1) lists the principal constitutional duties of the President. It is significant to note that the first and foremost of those duties cast upon the President is the duty to *"ensure that the Constitution is respected and upheld."*.

Thereafter, Article 33 (2) states that *"In addition to the powers, duties and functions expressly conferred on or imposed on the President by the Constitution or other written law, the President shall have the power -"* to do any of the eight types of acts listed in Article 33 (2) (a) to (h). The President's power *"to summon, prorogue and dissolve Parliament"* is one of those eight types of power and is listed in Article 33 (2) (c).

It is significant that, although Article 33 (2) (c) states that the President has the power to summon, dissolve and prorogue Parliament, Article 33 (2) (c) does not state how that power is to be exercised or state the manner in which the President is entitled to exercise that power.

In the absence of any words in Article 33 (2) (c) which describe the manner in which the President is entitled to exercise the power of summoning, proroguing and dissolving Parliament, the Court must look at the other provisions of the Constitution for guidance to ascertain how the power referred to in Article 33 (2) (c) may be lawfully exercised by the President. The principle that the Court should do so is illustrated in Bindra's statement [10th ed. at p.48] that *"In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision [Dounes v Bidwell 182 US 244]. The subject, the context, and the intention of the body inserting a word in the federal Constitution are all to be considered in determining its construction. [M'Culloch v Maryland 4 Wheat 316 (US)]."*.

When that is done, it is seen that the only provision in the Constitution which sets out the manner in which Parliament may be summoned, prorogued or dissolved by the President is Article 70.

A perusal of Article 70 shows that it is structured in a manner which comprehensively and in detail sets out the manner and circumstances in which the President may summon,

dissolve and prorogue Parliament. To start with, the first paragraph of Article 70 (1) specifies that a summoning, prorogation or dissolution of Parliament by the President is to be by effected by a Proclamation issued by the President.

Thereafter, the second paragraph of Article 70 (1) [which starts with the words *"Provided that ..."* and has been described as a *"proviso"* by the Hon. Attorney General and the added Respondents and, in contrast, described as an *"exception"* by Mr. Alagaratnam who appears for the Petitioners in SC FR 358/2018] stipulates restrictions on the President's power to dissolve Parliament.

Next, Articles 70 (2), (3), (5), (6) and (7) specify requirements placed on the President's power of summoning Parliament and the instances where the President is mandatorily required to summon Parliament within specified time frames.

Finally, Article 70 (3) delineates the limits and requirements placed on the President's power to prorogue Parliament.

Thus, the only provision in the Constitution which states the instrument by which the President can exercise his power of summoning, proroguing and dissolving Parliament is the first paragraph of Article 70 (1) which stipulates that the President is to issue a Proclamation to such effect. That was the position under the Ceylon (Constitution) Order in Council, 1946 in which Article 15 (1) stated that the Governor may *"by Proclamation summon, prorogue, or dissolve Parliament"* and also under the 1972 Republican Constitution in which Articles 41 (1), Article 41 (2) and Article 41 (6) read with Article 21 (b) make it clear that the President can exercise his power of summoning, proroguing and dissolving Parliament only by issuing a Proclamation. Article 70 (1) of the 1978 Republican Constitution continued in the same vein and stated that the power of the President to summon, prorogue and dissolve Parliament is to be exercised by the President issuing a Proclamation. Accordingly, the conclusion must be that Article 70 (1) in the present Constitution [as amended by the 19th Amendment] follows that long constitutional history and makes it clear that the President can exercise his power of summoning, proroguing and dissolving Parliament only by issuing a Proclamation to such effect.

Thereafter, a comprehensive and detailed specification of the parameters, limits and circumstances in which the President may issue a Proclamation summoning, proroguing

and dissolving Parliament are set out in clear and specific language in the second paragraph of Article 70 (1) and in Articles 70 (2) to Article 70 (7).

Thus, it is evident that while Article 33 (2) (c) is by way of a general provision in which the President's power of summoning, proroguing and dissolving Parliament is enumerated in Article 33 (2) along with seven other powers vested in the President, the specific and detailed provisions of Articles 70 (1) to Article 70 (7) comprehensively specify the manner and method by which the President may lawfully exercise his power of summoning, proroguing and dissolving Parliament.

Referring to situations such as in the present case where a statute contains both a general provision and a specific provision dealing with the same subject, Bindra [12th ed. at p 732] states *"Where there is in the same statute a specific provision and also a general provision that, in its most comprehensive sense, would include matters embraced in the former, the particular provision must be operative and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision [Mulji Tribhovan Sevak v Dakore Municipality AIR 1922 Bom 247; Harnam Singh v State of Punjab AIR 1960 Punj 186, p 191]. When there are two sections in a statute, one dealing specially with any particular subject which is also included in some of the provisions of another section, which is couched in general terms, the provisions of this latter section should not affect the provisions of the former section unless there is specific provision to the contrary in the statute itself. Where there are two articles (limitation) which may possibly govern a case, one more general and the other more particular and specific, the latter article ought to be adopted [Magundappa v Javali AIR 1965 Mys 237, p 238 per Tukol J; Manichvasagam v Muthuveeraswami AIR 1963 Mad 362, p 364 per Ram Chandra CJ]."*

In these circumstances, the inescapable inference is that the detailed provisions set out in Article 70 with regard to the manner and method of the exercise of the President's power of summoning, proroguing and dissolving Parliament and the restrictions and limits placed on that power must be read together with and are inextricably linked to the power referred to in Article 33 (2) (c) of the Constitution.

The resulting conclusion must be that the President's power of summoning, proroguing and dissolving Parliament referred to in Article 33 (2) (c) of the Constitution can only be exercised under and in terms of the scheme set out in Article 70 and is circumscribed and

limited by the provisions of Article 70 and can be exercised only within and in conformity with the provisions of Article 70.

This conclusion is fortified by the wording of Article 48 (1) and (2) which refer to the President dissolving parliament acting *"in the exercise of his powers under Article 70."* and contemplate no possibility of the President having dissolved Parliament without reference to Article 70.

Accepting the Respondent's contention that the power of issuing a Proclamation summoning, proroguing or dissolving Parliament under Article 33 (2) (c) and ignoring the provisions of Article 70, will render the entirety of Article 70 redundant and superfluous and thereby offend the rule that statutory interpretation must ensure that no provision of the Constitution is ill-treated in that manner.

The added Respondents have also submitted that following the introduction of the second paragraph of Article 70 (1) by the 19th Amendment and the deletion of the powers vested in the President under Article 70 (1) of the 1978 Constitution to dissolve Parliament on the rejection of a statement of Government Policy following the completion of the first Session of Parliament or following the rejection of two consecutive Appropriation Bills [Article 70 (1) (b) and Article 70 (1) (d) of the 1978 Constitution], the framers of the 19th Amendment realized that it was inadvisable to render the President unable to dissolve Parliament for four and half years even in such situations where it was evident that Parliament was dysfunctional. They contend that Article 33 (2) (c) was intentionally inserted by the 19th Amendment as a new provision to preserve with the President a power to dissolve Parliament at any time and at his sole discretion irrespective of the confines of Article 70 (1).

We see nothing on the face of Article 33 (2) (c) or in the Determination of this Court **IN RE THE 19TH AMENDMENT [2015]** [SC SD 04/2015] which supports that view. That submission is hypothetical and cannot be accepted.

In any event, following the 19th Amendment, Article 70 (1) and Article 33 (2) (c) must be read and understood as they now appear in the Constitution. The Court cannot dispute or review these provisions. The Court is expressly prohibited from doing so by Article 80(3) which states that *"Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any*

ground whatsoever." That restriction was clearly declared by this Court in **GAMAGE vs. PERERA** *(supra)* which was cited earlier.

Accordingly, the submission made on behalf of the Hon. Attorney General and by the added Respondents that Article 33 (2) (c) confers a *sui generis*, independent, overarching and unfettered power upon the President to dissolve Parliament at his sole discretion and without reference to Article 70 has to be rejected.

It must also be stressed that, as set out earlier when identifying the relevant principles of the law and statutory interpretation, this Court has, time and again, stressed that our law does not permit vesting unfettered discretion upon any public authority whether it be the President or any officer of the State. The suggestion that Article 33 (2) (c) vests in the President an unfettered discretion to summon, prorogue and dissolve Parliament at his sole wish and without reference to the clear and specific provisions of Article 70 is anathema to that fundamental rule and therefore must be rejected. As this Court has emphasized on several occasions, the President is subject to the Constitution and the law, and must act within the terms of the Constitution and the law. As this Court has also stated on several occasions, the guiding principle must be the furtherance and maintenance of the Rule of Law. The submission made on behalf of the Hon. Attorney General and the added Respondents runs counter to that principle and must be rejected.

Further, accepting the contention advanced by the Hon. Attorney General and the added Respondents that Article 33 (2) (c) vests an unfettered power upon the President to dissolve Parliament whenever he may wish to do so, will result in an absurd and untenable situation where any President, whomsoever he may be, will have the absolute power to dissolve Parliament whenever he may wish to - even in order to prevent his impeachment or because the composition of a newly elected Parliament is not to his liking.

No doubt, a duly elected President is not likely to act in such a manner. But, that expectation, however confident it may be, does not detract from the duty placed upon the Court to remain alive to the danger inherent in accepting the aforesaid contention. The principles of interpretation referred to above make it clear that such an interpretation should not be accepted unless the express words in the Constitution dictate so. As explained earlier, that is not the case.

It should also be mentioned that accepting the contention advanced by the Hon. Attorney General and the added Respondents will vest an unfettered power upon the President to dissolve Parliament whenever he may wish to do so and *sans* any restrictions. That will result in empowering a President to place the very continuation of any Parliament subject to his sole power and, thereby, place a President in a position of supreme power over the Parliament. That would then negate the effectiveness of Article 33A which stipulates that the President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and written law. Such a development will be inimical to the principle enunciated by this Court that all three organs of Government have an equal status and must be able to continue to be able to maintain effective checks and balance on each other.

The submission made by the Hon. Attorney General and the added Respondents who all sought to categorise the power of dissolution of Parliament created and recognised by Article 33 (2) (c) read together with and subject to Article 70 (1) as a solely "*legislative driven dissolution"* and postulated the existence of a separate and independent "*executive driven dissolution"* based solely on Article 33 (2) (c) has to be rejected for the same reasons set out above. This submission is without substance since any dissolution of Parliament [other than upon the expiry of the Parliament's full term of five years] has to be by way of a Proclamation made by the President and is, therefore, *"executive driven"* to use the words of the Hon. Attorney General and added Respondents. In this connection it is also relevant to note that Article 70 (1) confers upon the President a discretion with regard to whether or not to dissolve Parliament either at the request of Parliament before the expiry of four and half years from the date of that Parliament's first sitting or without the intervention of Parliament after the expiry of that period of four and a half years. Thus, in any foreseeable situation, the dissolution of Parliament before the end of its term of five years is ultimately the act of the Executive. The only instance where Parliament can be dissolved without an act of the President exercising his powers subject to the limitations under Article 70 (1) is upon the expiry of the Parliament's term of five years specified in Article 62 (2).

The Hon. Attorney General and the added Respondents have stressed on the words at the start of Article 32 which state "*In addition to"* [*"*අමතරව"]. They contend that these words denote that the power given to the President by Article 33 (2) (c) to summon, prorogue and dissolve Parliament is additional to, and independent of Article 70.

Firstly, the submission that Article 33 (2) (c) confers an overarching power which is independent of Article 70 (1) because of the words "*In addition to"* [*"*අමතරව"] at the commencement of Article 33 (2) cannot be accepted due to the reasoning set out earlier.

Further, this Court is obliged to accord a plain and ordinary meaning to the words in Article 33 (2). Accordingly, it is plain to see that Article 33 (2) sets out the fact that the powers listed in Article 33 (2) (a) to (h) are in addition to the powers, duties, and functions conferred or imposed on or assigned to the President by the other provisions of the Constittion including Article 70.

In this connection it is also important to note that Article 70 (1) in the original 1978 Constitution prior to the 19th Amendment stated "The President may, from time to time, by Proclamation summon, prorogue and dissolve Parliament." After the 19th Amendment, Article 70 (1) reads "The President may, by Proclamation summon prorogue." The words "from time to time" which appeared in the original 1978 Constitution have been removed from Article 70 (1). It is seen that Article 70 (1) only uses the word "may" and refers to the President's ability to issue a Proclamation which summons, prorogues or dissolves Parliament. Article 70 (1) does not expressly state that the President has the power to do so. It is apparent that the 19th Amendment to the Constitution has regularised this omission by expressly stating in Article 33 (2) (c) that the President has this power. It is clear that Article 33 (2) (c) is only a recognition of President's power to summon, prorogue and dissolve Parliament under and in terms of Article 70.

Next it is necessary to consider the meaning and effect of Article 62 (2). Article 62 (1) specifies that Parliament shall consist of 225 members. Thereafter, Article 62 (2) states in English "*Unless Parliament is sooner dissolved, every Parliament shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said period of five years shall operate as a dissolution of Parliament*" and in Sinhala "සෑම පාර්ලිමේන්තුවක්ම පළමුවරට රැස්වීමට නියමිත දින පටන් පස් අවුරුද්දකට නොවැඩි කාලයක් පවත්නේය. එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේ ය. එකී පස් අවුරුදු කාලය ඉකුත්ව ගිය විට ම පාර්ලිමේන්තුව විසිර ගියාක් සේ සලකෙන්නේ ය."

The Petitioners' contend that Article 62 (2) states in both Sinhala and English the following three positions:

I. State that Parliament shall continue for five years from the date appointed for its first meeting;

II. Recognize that Parliament may be sooner dissolved by the President – i.e: dissolved by the President before that period of five years;

III. State that the expiry of the period of five years will operate as an automatic dissolution by the effluxion of time without the intervention of the President or any other party.

They go on to submit that the "sooner" dissolution referred to in Article 62 (2) is clearly a reference to the fact that Parliament may be dissolved sooner than five years by a Proclamation issued by the President under and in terms of Article 70 (1).

On the contrary, the added Respondents contend that Article 62 (2) in Sinhala is significantly different from Article 62 (2) in English and that the Article 62 (2) in Sinhala states the following positions:

(a) State that Parliament shall continue for five years from the date appointed for its first meeting;

(b) State that Parliament may be dissolved by the President at any time prior to expiration of that five year periof because the words "එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේය" vests a power in the President to dissolve Parliament at any time, which is independent of Article 70 (1);

(c) State that the expiry of the period of five years will operate as an automatic dissolution by the effluxion of time without the intervention of the President or any other party.

The added Respondents go on to state that this meaning and understanding of Article 62 (2) is reflected and manifested in Article 70 (5) (b) which states in English, "*Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62, the President shall forthwith by Proclamation fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than*

three months after the date of such Proclamation" and in Sinhala "62 වන ව්‍යවස්ථාවේ (2) වැනි අනු ව්‍යවස්ථාවේ විධිවිධාන ප්‍රකාර පාර්ලිමේන්තුව විසුරුවා හරිනු ලැබූ විට ජනාධිපතිවරයා විසින් පාර්ලිමේන්තු මන්ත්‍රීවරයන් තේරීම සඳහා ප්‍රකාශනයක් මගින් නොපමාව දිනයක් හෝ දින නියම කොට අභිනව පාර්ලිමේන්තුව, ඒ ප්‍රකාශනයේ දින සිට තුන් මාසයකට පසු දිනයක් නොවන දිනයක රැස්වන ලෙස කැඳවිය යුත්තේ ය."

The contention of the added Respondents is that Article 62 (2) read with Article 70 (5) (b) in Sinhala has the effect of granting the President an unrestricted power to dissolve Parliament outside the confines of Article 70 (1).

Upon a careful examination of the language in Articles 62 (2) and 70 (5) (b) in both languages, it is clear that the added Respondents' submission has no merit or substance. I see no appreciable difference between the text in Sinhala and English in Article 62 (2) which both postulate the positions set out by the Petitioner in (I), (II) and (III) listed above.

The words, "unless sooner dissolved" in English is nothing more than a recognition of the fact that Parliament may be dissolved sooner than five years. The words "එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේය" in Sinhala say the very same thing.

Further, it has to be noted that neither the phrase "unless sooner dissolved" in English or the phrase "එහෙත් නියමිත කාල සීමාව ඉකුත්වීමට පෙර පාර්ලිමේන්තුව විසුරුවා හරිය හැක්කේය" in Sinhala give any idea as to who may effect that dissolution or the manner in which that dissolution may be effected. Even if one were to assume that since Article 33 (2) (c) states that the President has the power to dissolve Parliment and, therefore, any reference in Article 62 (2) to the dissolution of Parliament must be taken to mean a dissolution effected by the President, the inescapable fact is that Article 62 (2) does not state the method and manner of the exercise of such a power.

In these circumstances and for the reasons set out earlier, the conclusion must be that the "sooner" dissolution of Parliament referred to in Article 62 (2) is nothing but a recognition of the possibility that the President could have dissolved Parliament under the provisions of Article 70 (1) prior to expiry of the term of five years. Thus, the added

Respondents' contention that Article 62 (2) vests an independent and additonal method of dissolving Parliament free from the restricitons of Article 70 (1), must be rejected.It is necessary to state here that Article 70 (5) (a) stipulates that:

"*A Proclamation dissolving Parliament shall fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation."*

Thus, it is *ex facie* clear that Article 70 (5) (a) refers to a Proclamation under Article 70 (1) before the expiry of the Parliament's full term of five years. Thereafter, Article 70 (5) (b) states "*Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62, the President shall forthwith by Proclamation fix a date or dates for the election of Members of Parliament, and shall summon the new Parliament to meet on a date not later than three months after the date of such Proclamation*." It is equally clear that Article 70 (5) (b) only refers to a dissolution of Parliament by effluxion of time as specified by Article 62 (2) upon the expiry of Parliament's full term of five years - *i.e*: an automatic dissolution of Parliament at the end of five years without any intervention by the President. In this connection, since it has been previously concluded that Parliament can be dissolved by the President only by the issue of a Proclamation, the absence of a reference to "a Proclamation dissolving Parliament" in Article 70 (5) (b) is significant and leads to the irresistible inference that the words "Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62," in Article 70 (5) (b) only refer to and mean an automatic dissolution of Parliament at the end of five years without any intervention by the President as mentioned in Article 62 (2). It is for that reason that Article 70 (5) (b) does not refer to an issue of a Proclamation dissolving Parliament and only refers to the fixing of dates of the General Election and summoning of the new Parliament – *i.e*: after the previous Parliament, has automatically dissolved at the end of its five year term.

We have carefully read Article 70 (5) (b) in Sinhala which states "62 වන ව්‍යවස්ථාවේ (2) වැනි අනු ව්‍යවස්ථාවේ විධිවිධාන ප්‍රකාර පාර්ලිමේන්තුව විසුරුවා හරිනු ලැබූ විට ජනාධිපතිවරයා විසින් පාර්ලිමේන්තු මන්ත්‍රීවරයන් තේරීම සඳහා ප්‍රකාශනයක් මගින් නොපමාව දිනයක් හෝ දින නියම කොට අභිනව පාර්ලිමේන්තුව, ඒ ප්‍රකාශනයේ දින සිට තුන් මාසයකට පසු දිනයක් නොවන දිනයක රැස්වන ලෙස කැඳවිය යුත්තේ ය." The added Respondents submitted that the words "විසුරුවා හරිනු ලැබූ විට" in Article 62 (2) in Sinhala are significantly

different from the words "*Upon the dissolution of Parliament by virtue of the provisions of paragraph (2) of Article 62*," in English. We fail to see a real difference in the meaning of the phrase in English and the phrase in Sinhala. Article 70 (5) (b) in both languages only stipulates what should be done by the President after Parliament is dissolved by operation of Article 62 (2) at the end of five years – *i.e*: stipulate that the President must issue a Proclamation fixing the date of elections and summoning Parliament. Rather than vesting a 'power' in the President to dissolve Parliament, the said provision imposes 'an obligation' on the President to forthwith fix dates for elections and for the newly elected Parliament to meet when a Parliament stands dissolved upon the completion of its term. We see nothing in these words in Sinhala which suggest a different meaning from the words in English in Article 70 (5) (b).

The added Respondents' attempts to make out non-existent differences in the meaning of the words in Articles 62 (2) and 70 (5) in Sinhala and English have no substance and are a strained effort to twist or stretch the meaning of words which are readily understood to be the same when the plain and ordinary meaning of these words in both languages are accorded to them.

We must bear in mind Amerasinghe J's admonition in **SOMAWATHIE vs. WEERASINGHE** [*supra*, at p.128], that, *"[…] we have to interpret the Constitution on the same principles of interpretation as apply to ordinary law and that we have no right to stretch or twist the language in the interest of any political, social or constitutional theory."* Indeed, it appears to me that acting upon the tenuous interpretation sought to be placed on Article 62 (2) and 70 (5) (b) by the added Respondents who seek to rely upon non-existent differences in the language used in the Sinhala and English texts would disregard that wise counsel. Adopting the interpretation suggested by the added Respondents would require this Court to engage in the forbidden but *"tempting game of hairsplitting"* referred to by Krishna Iyer J and cited earlier. As the Indian Supreme Court stated in **HH MAHARAHADHIRAJA MADHAV RAO JIVAJI RAO vs. UNION OF INDIA** [1971 1 SCC 85], *"A constitutional provision will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon."*

Thus, the conclusion must be that Article 62 (2) does not vest any separate or independent power in the President to dissolve Parliament outside the mechanism specified in Article 70 (1).

To now turn to Article 70 (1), as I stated earlier, this Article comprehensively sets out the manner and method in which the President can summon, prorogue and dissolve Parliament. The question before us is the President's power of dissolution of Parliament.

The second paragraph of Article 70 (1) states, "*Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour.*".

Thus, this Article stipulates in no uncertain terms that the President shall not dissolve Parliament during the first four and a half years from the date of its first meeting unless the President has been requested to do so by a resolution passed by not less than two thirds of the members of Parliament.

The second paragraph of Article 70 (1) makes it clear that, even upon receipt of such a request during the first four and a half years of the term of Parliament, the President has the discretion to decide whether or not he is to comply with such a request made by Parliament – *i.e:* the President is entitled to decide whether to dissolve Parliament or refrain from doing so, notwithstanding the request by Parliament.

The second paragraph of Article 70 (1) makes it also clear that, after the expiry of four and a half years of the term of Parliament, the President may dissolve Parliament at his discretion, irrespective of the wishes of the Members of Parliament.

Thus, the second paragraph of Article 70 (1) makes it crystal clear that the power of the President to dissolve Parliament by Proclamation is subject to and limited by the aforesaid two conditions.

Therefore, since as concluded earlier, Article 33 (2) (c) must be read with and is inextricably linked to Article 70, the power of the President to dissolve Parliament which is referred to in Article 33 (2) (c) is subject to and limited by the aforesaid two conditions stipulated in second paragraph of Article 70 (1).

The added Respondents have contended that the second paragraph of Article 70 (1) is a *"proviso"* which applies only to Article 70 (1) and cannot have any application to Article 33 (2) (c) or 62 (2). Mr. Alagaratnam PC, appearing for the Petitioner in SC FR 358/2018

has contended that the second paragraph of Article 70 (1) is not a *"proviso"* and is an *"exception"* which is of general application to all related Articles of the Constitution.

However, there is no necessity to examine such intricacies for the simple reason that all parties agree that the second paragraph of Article 70 (1) must, at the minimum, apply to Article 70 (1). As stated earlier, the first paragraph of Article 70 (1) makes it clear that any dissolution of Parliament by the President must be by way of a Proclamation issued by the President. It follows that, since the second paragraph of Article 70 (1) undisputedly applies to the first paragraph of Article 70 (1), any Proclamation issued by the President dissolving Parliament can be issued only subject to the limitations specified in the second paragraph of Article 70 (1). Consequently, any dissolution of Parliament referred to in Article 33 (2) (c) and Article 62 (2) can only be effected by way of a Proclamation issued under Article 70 (1) which, in turn, can be issued only subject to the limitations specified in the second paragraph of Article 70 (1).

Next, we must consider the proviso to Article 70 (3) which states that "*Provided that at any time while Parliament stands prorogued the President may by Proclamation - (i) summon Parliament for an earlier date, not being less than three days from the date of such Proclamation, or (ii) subject to the provisions of this Article, dissolve Parliament."*

Article 70 (3) states that the President may, subject to the provisions of *"this Article"*, issue a Proclamation dissolving Parliament even during a time when Parliament stands prorogued. The stipulation in Article 70 (3) that the issue of a Proclamation dissolving Parliament must be subject to the provisions of *"this Article"* must be read to mean a reference to the entirety of Article 70. That would necessarily include the entirety of Article 70 (1) and, in particular, the second paragraph of Article 70 (1).

The added Respondents have contended that the first line of the proviso to Article 70 (3), which start with the words *"Provided that at any time..,"* denotes that the time period of four and a half years specified in the second paragraph of Article 70 (1) does not apply to instances where the President dissolves Parliament at a time during which Parliament has been prorogued. In support of this argument, the added Respondents have submitted that the words *"at any time"* in the proviso to Article 70 (3) make it clear that the power of dissolving Parliament during a prorogation of Parliament may be exercised by the President at any time, without being subject to the restriction of the period of four and a half years referred to in the second paragraph of Article 70 (1). They argue that any other interpretation would render the words *"at any time"* in the proviso to Article 70 (3)

redundant and superfluous and would, thereby, contravene established rules of interpretation.

However, a careful reading of Article 70 (3) read with Article 70 (1) makes it evident that when a plain and ordinary meaning is accorded to 70 (3), this Article simply states that:

(i) The President is entitled to dissolve Parliament by the issue of a Proclamation at any time while Parliament is prorogued;

(ii) However, this must be done subject to the provisions of the entirety of Article 70, including, in particular, Article 70 (1).

We cannot see any reason or justification for adopting a less direct and simple way of understanding Article 70 (3) and its proviso. The plain and ordinary meaning of the words *"Provided that at any time while Parliament stands prorogued"* the President may issue a Proclamation dissolving Parliament coupled with the stipulation that such a Proclamation can only be issued subject to the provisions of Article 70 should only be understood simply by what those words state and have been identified in (i) and (ii) above.

Adopting the approach suggested by the added Respondents to interpret the plain and ordinary meaning of Article 70 (3) would once again disregard the wise counsel offered by Bhagwati J and Amerasinghe J. in the decisions cited earlier.

Accordingly, based on the analysis of the nature, effect and meaning of Articles 33 (2) (c), 62 (2) and 70 set out above, it is concluded that:

1. The enumeration of the President's powers in Article 33 (2) include and specify the power vested in the President to summon, prorogue and dissolve Parliament;

2. The President may exercise that power only within the terms of the Constitution and by acting in accordance with the procedure specified in Article 70 and subject to the limitations specified in Article 70;

3. Any dissolution of Parliament by the President can only be effected by way of a Proclamation issued under and in terms of the first paragraph of Article 70 (1);

4. By operation of the second paragraph of Article 70 (1), the President cannot dissolve Parliament during the first four and a half years of its term unless he has been requested to do so by a resolution passed by not less than two thirds of the Members of Parliament [including those not present]. Even upon receipt of such a resolution, the President retains the discretion to decide whether or not he should act upon such a request;

5. After the expiry of four and a half years of Parliament's term, the President is entitled, at his own discretion, to dissolve Parliament by issue of a Proclamation;

6. Upon the expiry of five years from the date of its first meeting, Parliament will dissolve `automatically' and without any intervention of the President by operation of Article 62 (2);

7. Upon such dissolution at the end of the five year term, the President must act under Article 70 (5) (b) and forthwith issue a Proclamation fixing a date for the General Election and summoning the new Parliament to meet within three months of that Proclamation.

To my mind, the reasoning and conclusions set out above gives effect to the first principle of statutory interpretation that the words of a statute must be given their plain and ordinary meaning and that the clear and unequivocal language of a statute must be enforced. The rule that provisions in the Constitution must be harmoniously read and applied so that the scheme of the Constitution can be made effective without rendering any provision superfluous or redundant, is complied with. Further, the reasoning and conclusions set out above ensures that the words in the relevant provisions are not strained or twisted in an attempt to reach a conclusion which is not justified by the provisions themselves. To my mind, the effect of this interpretation also accords with the duty cast on this Court to read and give effect to the provisions in the Constitution so as to uphold democracy, the Rule of Law and the separation of powers and ensure that no unqualified and unfettered powers are vested in any public authority.

As stated earlier in this judgment, it is an undisputed fact that the Proclamation marked "P1" has been issued before the expiry of the period of four and a half years from the date the Eighth Parliament had its first meeting. It is also undisputed that no resolution has been passed by Parliament requesting that Parliament be dissolved.

Therefore, on an application of the reasoning and conclusions set out above, I am compelled to hold that the Proclamation marked "P1" has been issued in contravention of the provisions of Article 70 (1) of the Constitution and is, therefore, null and void.

The submission made by some of the added Respondents that, irrespective of whether or not the provisions of the Constitution allow the issue of the Proclamation, the exigencies of the prevailing circumstances require that an election be held and, therefore, the Petitioners are not entitled to maintain this application, must be emphatically rejected. The Constitution governs the nation. Disregarding the Constitution will cast our country into great peril and mortal danger. The Court has a duty to uphold and enforce the Constitution. It is apt to reiterate and emphasise this Court's declaration in **PREMACHANDRA vs. MAJOR MONTAGUE JAYAWICKREMA** [*supra*, at p. 112] that, *"In Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary".*

It has been said by some of the added Respondents that refusing the Petitioners' applications will enable a General Election to be held in pursuance of the Proclamation marked "P1" and, therefore, justified because it will give effect to the franchise of the people. That submission is not correct. Giving effect to the franchise of the people is not achieved by the Court permitting a General Election held consequent to a dissolution of Parliament which has been effected contrary to the provision of the Constitution. Such a General Election will be unlawfully held and its result will be open to question. A General Election will be valid only if it is lawfully held. Thus, a General Election held consequent to a dissolution of Parliament which has been done contrary to the provisions of the Constitution will not be a true exercise of the franchise of the people.

Some of the added Respondents have submitted that the prevailing circumstances require that a General Election be held and that the Court should permit a General Election to be held. The Court cannot be motivated by those considerations which are inevitably tinged with political considerations and other issues outside the scope of the task before us, which is determining the constitutional validity of the Proclamation marked "P1". In any event, it appears to me that, there is ample provision in the second paragraph of Article 70 (1) for Parliament, which is under a duty to act in accordance with the will of people, to take steps to have a lawful General Election where it considers it necessary to do so.

The final point the Court must address is the submission made with regard to the basis of relief. Counsel for one of the intervenient Petitioners submitted that the Petitioners are

not entitled to the relief claimed as they have failed to demonstrate a positive act of 'unequal treatment' among those who are equally circumstanced in the present instance. However, our jurisprudence under Article 12 (1) has evolved since the doctrine of 'classification.'

"[…] notwithstanding the Full bench decision in Elmore Perera's case, the Supreme Court has abandoned the classification theory in granting relief for infringement of right to equality. Relief is now freely granted in respect of arbitrary, and mala fide executive action in the exercise of the Court's jurisdiction under Article 126 of the Constitution". (***Hon. Justice Kulatunga PC., "Right to Equality-National Application of Human Rights" [1999] BALJ, Vol. VIII, Part I, page 8***)

Article 12 (1), which perhaps has the most dynamic jurisprudence in our Constitutional law, offers all persons protections against arbitrary and mala fide exercise of power and guarantees natural justice and legitimate expectations. *Vide*. **CHANDRASENA vs. KULATUNGA AND OTHERS** [1996 2 SLR 327], **PREMAWATHIE vs. FOWZIE AND OTHERS** [1998 2 SLR 373], **PINNAWALA vs. SRI LANKA INSURANCE CORPORATION AND OTHERS** [1997 3 SLR 85], **SANGADASA SILVA vs. ANURUDDHA RATWATTE AND OTHERS** [1998 1 SLR 350], **KARUNADASA vs. UNIQUE GEM STONES LTD AND OTHERS** [1997 1 SLR 256], **KAVIRATHNE AND OTHERS vs. PUSHPAKUMARA AND OTHERS** [SC FR 29/2012 SC Minutes 25.06.2012]

The Supreme Court has even extended the jurisprudence under Article 12 (1) to encompass the protection of Rule of Law. In **JAYANETTI vs. LAND REFORM COMMISSION** [1984 2 SLR 172] His Lordship Justice Wanasundera said that; "*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.*" In **SHANMUGAM SIVARAJAH vs. OIC, TERRORIST INVESTIGATION DIVISION AND OTHERS**, [SC FR 15/2010, SC Minutes 27. 07. 2017], the Supreme Court endorsed the new doctrine that Rule of Law forms a part of Article 12 (1). The decision quotes with approval Justice Bhagawathie's observation in The Manager,

Government Branch Press Vs Beliappa AIR1979 SC 429, that :- "*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.*"

Thus, I am unable to agree with the submission that Article 12 (1) of the Constitution recognizes 'classification' as the only basis for relief. In a Constitutional democracy where three organs of the State exercise their power in trust of the People, it is a misnomer to equate 'Equal protection' with 'reasonable classification'. It would clothe with immunity a vast majority of executive and administrative acts that are otherwise reviewable under the jurisdiction of Article 126. More pertinently, if this Court were to deny relief merely on the basis that the Petitioners have failed to establish 'unequal treatment', we would in fact be inviting the State to 'equally violate the law.' It is blasphemous and would strike at the very heart of Article 4 (d) which mandates every organ of the State to "*respect, secure and advance the fundamental rights recognized by the Constitution*". Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people.

The Proclamation marked "P1" has been issued outside legal limits and has resulted in a violation of Petitioner's rights both in his capacity as a parliamentarian legitimately elected to represent the People and in the capacity of a citizen who is entitled to be protected from any arbitrary exercise of power.

For the reasons set out above, I hold that the Petitioners' rights guaranteed under Article 12 (1) of the Constitution have been violated by the issue of the Proclamation filed with the petition in SC FR 351/2018 marked "P1" and make order quashing the said Proclamation and declaring the said Proclamation marked "P1" null, void *ab initio* and without force or effect in law.

This judgment and the aforesaid orders will apply to applications in nos. SC FR 351/2018. SC FR No. 352/2018, SC FR No. 353/2018, SC FR No. 354/2018, SC FR No. 355/2018, SC FR No. 356/2018, SC FR No. 358/2018, SC FR No. 359/2018, SC FR No. 360/2018, and SC FR No. 361/2018 in which the same issues as those in this application are before this Court.

I place on record our deep appreciation of the assistance given by the Hon. Attorney General and all learned Counsel for the Petitioners, Added-Respondents and Intervenient Petitioners.

Chief Justice

Buwaneka Aluwihare, PC, J
I agree

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

Vijith K. Malalgoda, PC, J
I agree

Judge of the Supreme Court

Murdu Fernando, 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 26 of the Constitution read together with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 356/2016

R.P.Karunarathna Bandara
No. 31, Nika Wewa Handiya,
Nochchiyagama.

PETITIONER

V.

1.P.B.Disanayaka
Governor of the North Central Province
Governor's Office, Anuradhapura.

2.S.G.M.C.K.Seniviratne
Chairman

3.H.M.K.Herath
Member

4.H.M.H.B.Ratnayaka
Member

Provincial Public Service Commission of
North Central Province,
Kachcheri Building, Anuradhapura.

5.Peshala Jayarathna
Chief Minister of North Central Province
Provincial Council Administrative Building
Harischandra Mawatha, Anuradhapura.

6.E.M.N.W.Ekanayaka
The Provincial Education Director,
Provincial Department of Education,
Anuradhapura.

7.D.M.Kumiduni Ariyawansa
Zonal Education Director
Anuradhapura Zonal Education Office
Anuradhapura.

8.W.T.A Manel
Secretary of the Ministry of Education
Of the North Central Province,
Provincial Council Administrative
Building,
Harischandra Mawatha, Anuradhapura.

9.N.M.N.R.B.Nwarathna
Senior Assistant Secretary of the
Ministry of Education of the North
Central Province, Provincial Council
Administrative Building,

Harischandra Mawatha, Anuradhapura.

10.K.A.Thilakarathna

Chief Secretary of the North Central

Province, Chief Secretary's Office,

Anuradhapura.

11.S.M.Kusumthilak

Principal,

Nivaththaka Chethiya Maha Vidyalaya

Anuradhapura.

12.Hon.Attorney General,

Attorney General's Department,

Colombo 12.

BEFORE:-S.E.WANASUNDERA,PC, J.

SISIRA J DE ABREW, J.

H.N.J.PERERA, J.

COUNSEL:- Shantha Jayawardena with Chamara Nanayakkarawasam and

Dinusha de Silva for the Petitioner

N.Wigneshwaren, S.S.C for the Respondents

ARGUED ON:- 19.01.2018

DECIDED ON:- 28.06.2018

H.N.J.PERERA, J.

The Petitioner filed the instant application challenging his transfer from the post of Principal by the 8th Respondent from Nivaththaka Chethiya Maha Vidyalaya, Anuradhapura on 13th September 2016.

This Court granted leave to proceed with the application under Article 12(1) of the Constitution.

The Petitioner states that he has served as a teacher and Principal in schools in rural areas of the country over a period of 23 years and while the Petitioner was serving as the Principal of the Nivaththaka Chethiya Maha Vidyalaya on 6th September 2016 the Petitioner was informed over the telephone by the Secretary to the School Development Committee that the 5th Respondent Chief Minister will be attending the school on 9th September at 9.30 a.m for a ceremony to lay foundation stone in order to commence the work relating to the proposed new school building. The petitioner was given only two days notice to arrange all required preparations for the laying of the foundation stone by the 5th Respondent. The Petitioner further states that on the same day evening he met the 7th and 8th Respondents and got detail instructions from them as to how the program should run at the opening ceremony. The Petitioner also was informed that the 5th Respondent was to address the gathering, following the laying out of the foundation and the tea party, therefore took steps to inform the parents of the Grade 8 students through the sectional head and the class teachers.

The Petitioner further states that they were expecting the 5th Respondent and the guests to reach the school by 9.30 am, however without any advance notice the 5th Respondent and his team arrived at the school at about 9.00 a.m. According to the Petitioner there was not much of a crowd assembled at that time but he proceeded to welcome the 5th Respondent and following the laying down of the foundation stone and the tea party, the 5th Respondent addressed the school children and parents at the School main hall. It is the Petitioner's position that the 5th Respondent made quite cynical comments when addressing the gathering alleging that there are school Principals who do not know as to how the bundle of beetle leaves should be handed to a guest and alleged that the Petitioner failed to get enough number of parents for the said meeting.

It is the position of the Petitioner that he realized that in the heat of the events he has handed over the bundle of beetle leaves inadvertently the wrong way around to the 5th Respondent and when the 5th Respondent was leaving the school after the said ceremony pointed a finger at him and accused the Petitioner as a 'boru karaya.'

The Petitioner allege that on the same day evening he was informed by the 6th Respondent, that the 8th Respondent requested the Petitioner to come to the Chief Ministry of the North Central Province and when he met the 8th Respondent he informed the Petitioner that the Petitioner would be transferred to a different

school with immediate effect on the orders given by the 5th Respondent. The Petitioner states that he came to know from the 8th Respondent that the reason for the said transfer is the unhappiness of the 5th Respondent with regard to the events that took place in the school at the said ceremony. The petitioner further states that he met the 5th Respondent on or about 13.09.2016 and apologized for any inadvertent mistake at the said ceremony held on 09.09.2016. However, the 5th Respondent was hostile towards the Petitioner and reiterated that the Petitioner would be transferred and thereafter, on the same day he was informed by the 8th Respondent that he has been transferred to Rabavewa Maha Vidyaly in Anuradhapura.

It is the Petitioner's position that as he did not receive a letter of transfer he continued to work at the said school and on 14.09.2016, the 11th Respondent who was the Principal serving at Rabavewa Maha Vidyalaya, Anuradhapura came to his school in order to assume duties as the Principal of the said school and the Petitioner informed him that he has not yet received the transfer letter and the same day evening he has received a telephone call from the 5th Respondent to his mobile phone and that the 5th Respondent has threatened him that he should vacate the school with immediate effect and if not he will be subject to various difficulties including inquiries and even the dismissal from the service. The Petitioner claims that he recorded the said conversation using his mobile phone.

The Petitioner states that on the following day too he reported to work as usual and around 10 a.m the Petitioner was summoned by the 7th Respondent to the Zonal Education Director's Office and he was handed over a letter dated 13.09.2016 (P13) issued by the 8th Respondent transferring him on exigencies of service to Rambewa Maha Vidyalaya, Anuradhapura. Thereafter, upon receipt of the said letter of transfer the Petitioner went to the Chief Ministry of the North Central Province to submit an appeal. Thereafter the 7th Respondent summoned the Petitioner to the school and directed the Petitioner to hand over duties to the new Principal. At the school there were two officers from the Ministry of Education of the North Central Province and they handed over the Petitioner another letter of transfer dated 15.09.2016 issued by the 9th Respondent (P14) cancelling the aforesaid transfer of the Petitioner as the Principal of Rabavewa Maha Vidyalaya, Anuradhapura and attaching the Petitioner to the zonal Education Office of Anuradhapura on exigencies of service. The Petitioner states that on 15.09.2016 he assumed duties at the said zonal Education Office of Anuradhapura. However, he was not allocated with any function.

It is the Petitioner's position that he being an officer of Sri Lanka Principal's Service there is no duty or function that he can discharge at the Zone Education Office. The Petitioner claims that he was a Principal serving at a school coming under the purview of the North Central Provincial Council and that in case of Provincial Public Service, the powers relating to appointment, transfer, dismissal and disciplinary control is vested in the Governor. The Governor may delegate such powers to the Provincial Public Service Commission and the said Provincial Public Service Commission may delegate its powers to the chief Secretary or any officer of the Provincial Public service. (Sec 32 of the Provincial Councils Act No.42 of 1987)

It is contended on behalf of the Petitioner that therefore, the Chief Minister or the Minister in charge of the subject of Education of the Provincial Council has no power in respect of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service. The Petitioner concedes that the 8th Respondent has been delegated by the Provincial Public Service Commission with the powers pertaining to transfer.

The Petitioner contends that the 8th Respondent has to exercise her discretion/power independently and objectively and if the 8th Respondent surrenders and abdicates her discretion to some other person and acts under the dictates of such person, the exercise of discretion is ultra vires. The Petitioner claims that the 8th Respondent has surrendered and abdicated her discretion to the 5th Respondent and has acted on the dictation of the 5th Respondent and therefore the said transfer of the Petitioner is ultra vires. The Petitioner further claims that the Petitioner had been transferred simply because the 5th Respondent wanted the Petitioner to be transferred. The Petitioner contends that this is clearly visible from the documents marked R7 and P19. The letter addressed to the Human Rights Commission by the 8th Respondent (P19) clearly establishes that the 8th Respondent has acted on the advice of the 5th Respondent to transfer the Petitioner. The Petitioner claims that the 8th Respondent has misconstrued that transferring Principals is a policy matter that the Minister can decide and therefore she is bound to implement such an order. The Petitioner claims that it is manifestly clear that the purported administrative reason behind the transfer is that the Petitioner has failed to please the Chief Minister. In P19, the 8th Respondent has stated that the Chief Minister was unhappy because the participation of parents at the ceremony was poor. The Petitioner states that securing attendance of parents for a ceremony is not within the scope of duties of the Petitioner and what the Petitioner can do is to inform the parents and the participation of parents is not within the control of

the Petitioner. The Petitioner further claims that there was no exigency of service warranting the transfer of the Petitioner. Instead, transfer of the Petitioner is a punishment imposed upon the Petitioner due to the animosity of the 5th Respondent towards the Petitioner. Therefore the Petitioner states that the transfer of the Petitioner is arbitrary, irrational, unreasonable and malicious and is in violation of Article 12(1) and 14(1)(g) of the Constitution. The Petitioner complains that the Petitioner's fundamental rights guaranteed under Articles 12(1) and 14(1)(g) have been violated by the 5th and 8th Respondents and to grant reliefs prayed for in the Petition.

There is no dispute that the power to transfer officers of the category to which the Petitioner belongs had been delegated to the 8th Respondent by the Provincial Public Services Commission. It is the Petitioner's case that the 8th Respondent has implemented an 'order' of the 5th Respondent to transfer the petitioner, that the 8th Respondent has surrendered and abdicated her discretion to the 5th Respondent and acted on the dictation of the 5th Respondent, and therefore the transfer is ultra vires and void.

The 5th Respondent in his affidavit dated 4.9.2017 has stated that he along with other officials arrived at the school premises on the said day of the ceremony at around 9 a.m and found the Petitioner not ready and there was unnecessary delay and this was due to the inefficiency of the Petitioner which is indicative of his inability to manage a school of this nature, especially during an important development phase. The 5th Respondent has further stated that he expressed his concerns to the 8th Respondent about the inability of the Petitioner to carry out the important development work at the said school. Thus it is clearly seen that the 5th Respondent was not happy about the way the Petitioner conducted himself on the said date and thought that he is not fit enough to run a school where important development activities to be taken place. This clearly support the Petitioner's version that certain incidents did take place on this particular date and that the 5th Respondent was unhappy about them and complained so to the 8th Respondent.

The document R7 annexed to the affidavit submitted by the 8th Respondent and the document marked P19 clearly establish that the 8th Respondent has acted on the advice of the 5th Respondent to transfer the Petitioner. R7 clearly shows that the 5th Respondent has advised the 8th Respondent and the 7th Respondent to appoint an efficient Principal to the said school immediately. P19 very clearly establish the allegation made by the Petitioner that the 8th Respondent verily

believed that the Minister can make policy decisions and that she and the other officers are expected to implement and carry out such decisions.

This clearly establishes the fact that there was no other complaint against the Petitioner and that the 8th respondent transferred the Petitioner immediately to another school on the verbal advice given by the 5th Respondent. As contended by the Petitioner there was no exigency of service on the given date to transfer the Petitioner to a different school. The 5th Respondent has thought the Petitioner is not a fit person to be the Principal in a school where development work is to be carried out. The 5th Respondent was not happy about the way the Petitioner had carried out the day's program and had conveyed so, to the 8th Respondent. There is no doubt from the material placed before this court that the 8th Respondent has very clearly acted to satisfy the 5th Respondent and to transfer the Petitioner immediately to another school.

There is no evidence to show that the Petitioner was an inefficient Principal. Up to the date of the incident there has been no such complaints being made by any party. But the evidence indicate that the Petitioner was not a good organizer of functions, or public events. Taking into consideration all the events that took place on the said day in which the ceremony was held, one cannot state that the decision taken by the 8th Respondent to transfer the Petitioner immediately to another school is reasonable or justifiable. The 8th Respondent has very clearly acted to please the 5th Respondent and has taken a hasty decision to transfer the Petitioner to another school to satisfy the 5th Respondent, which is wrong. This clearly establishes the fact that the 8th Respondent had very clearly surrendered and abdicated her discretion to the 5th Respondent. This clearly establishes the fact that the 8th Respondent has failed to exercise her discretion independently and objectively as contended by the Petitioner.

The 8th Respondent in paragraph 15 of her affidavit dated 4th September 2017 has stated that the Petitioner, as the Principal of the school, was unable to carry out his responsibilities effectively especially in the context of the development and construction work planned. The 8th Respondent further states that the 5th Respondent expressed serious concerns to her about the ability of the Petitioner to carry out the important development work at the said school and she was of the opinion that the retention of the Petitioner as the Principal was not suitable and after consulting the 6th Respondent took steps to transfer the 11th Respondent who was the Principal of another school as the Principal of the said school.

The 8th Respondent in her affidavit has further stated that on this day when the 5th Respondent, along with other Officials including her arrived at the school, the Petitioner was not ready and there was unnecessary delay and that the Petitioner handed over the betel leaves incorrectly to the 5th respondent and found that there were no parents present inside the hall during the ceremony. The 8th Respondent also claims that she came to know from the school children who were present that their parents were not informed to attend the said program. In paragraph 21 of her affidavit the 8th Respondent has clearly stated that the removal and transfer of the Petitioner and the decision to transfer him is purely on the ground of his unsuitability to carry out operations favourable to the proposed development program and that it was a decision made for the purpose of ensuring the development of the school in order to raise the standard of education and facilities therein.

There is no doubt that the reason for the transfer of the Petitioner out from the said school was the dissatisfaction of the 5th respondent as to how the Petitioner conducted himself on this particular day and nothing more. The 8th Respondent has not stated anything else or given any other reason for the said transfer of the Petitioner from the said school. There is no allegation what so ever being made against the Petitioner that he was incompetent to be the Principal of the said school prior to the day this incident took place. The Petitioner had continued to be the Principal of the said school and there had been no complaints from anybody not even from the parents about his conduct or suitability to be the Principal of the said school prior to the date on which the Minister visited to lay the foundation stone to a new building. There were no complaints about the abilities and capabilities of the Petitioner to function as the Principal of the said school what so ever. And from the affidavit of the 5th and the 8th Respondent s it is very clearly seen that the 5th Respondent was not happy about the way the Petitioner handled the matters on the day of the program and thought that the Petitioner was incapable of carrying out responsibilities of the said development work and that they should have another efficient person from another school instead.

It is to be noted that this was an additional responsibility which had been cast on the Petitioner as the Principal of the said school. It is submitted that it is justifiable for the 5th Respondent to raise serious concerns about the suitability of the Petitioner to continue as Principal, given the heavy administrative burden occasioned by the development project. It is further submitted that the 5th Respondent had openly expressed his dismay not only in respect of the Petitioner's

organizational capacity but by his lack of knowledge with regard to Sri Lankan traditions. For these reasons the 8th Respondent has come to the conclusion that the retention of the Petitioner at the present station was not suitable for administrative reasons.

On a perusal of the objections filed by the 8th Respondent it is clearly seen that the 8th Respondent was clearly influenced by the concerns raised by the 5th Respondent on this particular day as to the suitability of the Petitioner to continue as the Principal in the said school. The said incidents had taken place on the day the foundation stone was laid for a new building in the said school premises. And there is no doubt that the main construction work would take some time to begin. What prompted the 8th Respondent to transfer the Petitioner immediately the following day? There is no doubt that the 8th Respondent had clearly acted very quickly to please the 5th Respondent.

The Petitioner is a person who had an outstanding carrier as an excellent school Principal. His service has been identified and appreciated by the Ministry of Education on several occasions. In 2015 he received the 'Guru Prathibha Prabha Award', awarded by the Ministry of Education for his performance.

The material before this court clearly establishes that the transfer of the Petitioner was neither a normal annual transfer nor on account of the exigencies of service. There is no material to justify the said transfer of the Petitioner immediately out of the said school where he intrinsically functioned as the Principal.

According to the Petitioner on the same day at about 3.30 p.m when the Petitioner was informed by the 6th Respondent, that the 8th Respondent requested the Petitioner to come to the Chief Ministry of the North Central Province, he went to the Chief Ministry and met the 8th Respondent who informed the Petitioner that he would be transferred to a different school with immediate effect on the orders given by the 5th Respondent. The reason given by the 8th Respondent for the alleged transfer is the unhappiness of the 5th Respondent with regard to the events transpired at said school in the morning. Thereafter, on or about 13.09.2016 the Petitioner met the 5th Respondent and apologized for any inadvertent mistake at the said ceremony held on 09.09.2016. However the 5th Respondent was hostile towards the Petitioner and reiterated that the Petitioner would be transferred.

It is conceded that the 8th Respondent has been delegated by the Provincial Public Service Commission with the powers pertaining to transfer. The 8th Respondent

exercises her delegated power which has been delegated by the Provincial Public Service Commission. The 8th Respondent has to exercise her discretion independently and objectively. In the instant case there is material to show that the 8th Respondent has surrendered and abdicated her discretion to the 5th Respondent and had acted under the dictates of the 5th Respondent. The 8th Respondent is prohibited from acting under the dictates of the 5th Respondent.

'An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else.' (vide: Chapter 10 of 'Administrative Law' Wade and Forsyth, 10th Edition, page 259)

See also page 269:- 'The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and resulting decision is ultra vires and void.'

It is clearly seen that the 5th Respondent was highly dissatisfied the way how the Petitioner handled matters at the said ceremony which was held on 09.09.2016. The 5th Respondent has accordingly expressed his dissatisfaction to the 8th Respondent and had expressed his fear about the capabilities of the Petitioner to handled matters pertaining to the construction of the new building at the said school premises. No doubt that the 8th Respondent should have taken cognizance of the said fact and taken steps to remedy the situation. But instead of exercising her powers independently and objectively, the 8th Respondent had proceeded immediately to transfer the Petitioner from the said school to please the 5th Respondent which is wrong. In my opinion this was a duty which the 8th Respondent herself had to perform. In exercising that discretion the 8th Respondent could not abdicate her judgment in favour of anyone else however powerful that person may be. In Administrative Law if the person who has the power exercises his or her power wrongly, then such act or decision is ultra vires.

No doubt that the Petitioner is vested with some responsibilities when a new construction is to be carried out in the said school premises. The Petitioner will have to look into the safety of the school children, see that the studies of the school children are not disrupted or disturbed by the said activities, and provide all assistance for the authorities to carry out the said development activities without hindrance. No doubt the said construction work would be handled under the supervision of a separate branch of the Ministry of Education. This Court cannot

agree with the contentions of the 5th and the 8th Respondents that the Petitioner was not suitable to continue as the Principal of the said school for administrative reasons. In my view the sudden transfer of the Petitioner to another school was unreasonable. As held in Range Bandara V Gen.Anuruddha Ratwatte and Another [1997] 3 Sri .L. R.360, the summary transfer of the petitioner was a misuse of discretion. The decision to transfer was arbitrary, capricious and unreasonable and violative of the Petitioner's rights under Article 12(1).

Article 12 of the Constitution refers to the right to equality and Article 12(1) specifically states that,

"All persons are equal before the law and are entitled to the equal protection of the law"

"The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It forbids actions, which deny equality and thereby becomes discriminative. The hall mark of the concept of equality is to ensure that fairness is meted out."- Bandaranayake, J. :- Karunathilaka & another V. Jayalath de Silva and others [2003] 1 Sri.L.R 35 at page 41,42.

The 8th Respondent in paragraph 18 of her affidavit dated 04.09.2017, has stated that the Petitioner was requested to relinquish duties to the 11th Respondent, and as the Petitioner expressed the view that he was unwilling to be transferred to Rambewa Maha Vidyalaya and since the parents of that school too were not comfortable with the Petitioner being made Principal, the Petitioner was transferred to the Zonal Education Office, Anuradhapura.

The Petitioner in paragraph 25 of his Petition dated 10.10.2017 states that when he went to the school to hand over duties to the new Principal on 15.10.2016 two officers from the Ministry of Education of the North Central Province was waiting for him at the school. They handed over the Petitioner another letter of transfer dated 15.09.2016 issued by the 9th Respondent cancelling the earlier transfer of the Petitioner as the Principal of Rabavewa Maha Vidyalaya, Anuradhapura and attaching the Petitioner to the Zonal Education Office of Anuradhapura. The Petitioner complains that he assumed duties at the Zonal Education Office of Anuradhapura on 15.09.2016 and he was not allocated with any function. It is the Petitioner's position that he being an Officer of Sri Lanka Principal's Service there is no duty or function that he can discharge at the Zonal Education Office. The material before this Court very clearly establish that the Petitioner not only have

been transferred out from school but also had been without a good cause deprived from functioning as a school Principal until now.

I accordingly hold that the Petitioner has been successful in establishing that his fundamental rights guaranteed in terms of Articles 12(1) of the Constitution has been violated by the actions of the 8th Respondent. For the foregoing reasons I hold that the 8th Respondent had violated the Petitioners fundamental rights guaranteed under Articles 12(1) of the Constitution. Further I declare the two transfer orders marked P14 and P15 null and void.

Accordingly I direct the Respondents to appoint the Petitioner as the Principal of the Nivaththaka Chethiya Maha Vidyalaya, Anuradhapura, within two months from today. I direct the 8th Respondent to personally pay a sum or Rs 250,000/= as compensation to the Petitioner. The State shall also pay Rs 250,000/= as compensation and Rs 50,000/= as costs to the Petitioner. All payments to be made within two months from today.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

SISIRA J .DE ABREW, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Talpe Merenchige Eeasha Nanayakkara,
   No.139/7A, Akuregoda Road,
   Pelawatta, Battaramulla.

Petitioner

SC FR Application 365/2012

Vs,

1. Sathya Hettige, Chairman

1A. Darmasena Dissanayaka, Chairman

2. Kanthi Wijetunga Member

2A. A. Salam Abdul Waid, Member

3. S.C. Mannapperuma, Member

3A. D. Shirantha Wijayatilaka, Member

4. Ananda Seneviratne, Member

4A. Prathap Ramanujam, Member

5. N.H. Pathirana, Member

5A. V. Jegarasasingam, Member

6. S. Thillai Nadarajah, Member

6A. Santi Nihal Seneviratne, Member

7. Sunil S. Sirisena, Member

7A. S. Ranugge, Member

8. A. Mohamed Nahiya Member

8A. D.L. Mendis, Member

9. I.M. Zoysa GUnsekara, Member

9A. Sarath Jayathilaka, Member

10. T.M.L.C. Senaratne, Secretary

1st to 10th Respondents all of:
The Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05

11. M.I.M. Rafeek,
Secretary to the Ministry of Tourism and Sports, No. 09, Pilip Gunawardena Mawatha, Colombo 07

Also:

The Acting Director General of the Department of Wildlife Conservation, No. 811/A, Jayanthipura Road, Battaramulla.

11A. R.M. D.B. Meegasmulla,
Secretary,
Ministry of Sustainable Development and Wildlife,
9th Floor, Sethsiripaya (Old Building),
Battaramullla.

11B. Dr. Sumith Pilapitiya,
Director General of Wildlife Conservation,
No. 811/A, Jayanthipura Road,
Battaramulla.

12. The Secretary,
The Ministry of Public Administration,
Independence Square, Colombo 07.

13. Director Establishments,
The Ministry of Public Administration,
Independence Square, Colombo 07.

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

Respondents

Before: Sisira J.De. Abrew J

Vijith K. Malalgoda PC J

Murdu N.B. Fernando PC J

Counsel: Faiz Musthapha PC with Shantha Jayawardena and Chamara Nanayakkarawasam for the Petitioners

S. Barre SSC, for the Attorney General

Argued on: 22.06.2018

Judgment on: 06.09.2018

Vijith K. Malalgoda PC J

Petitioners in the fundamental rights applications SC/FR/364/2012 and SC/FR/365/2012 have come before the Supreme Court alleging violations under Article 12 (1) of the Constitution. Since the grievance complained by both the Petitioners, and the relief claimed are similar in nature, all parties to SC/FR/364/2012 agreed to abide by the decision in SC/FR/365/2012.

The Petitioner in SC/FR/365/2012 being a Bachelor of Science Degree holder (in Botany, Zoology and Chemistry) from the University of Peradeniya in 1983 had responded to an

advertisement published in the "Daily News", newspaper (P-3) of 08.12.1984 by the Project Coordinator of Mahaweli Environment Project of the Ministry of State and applied to the post of "Training Officer" in the said project. Consequent to an interview process the Petitioner was selected to the above post, "Training Officer" of the Mahaweli Environment Project.

According to P-5, the letter of appointment, the said post in the Mahaweli Environment Project under the Department of Wildlife Conservation, was permanent but non-pensionable post, subject to a trial period of three years with effect from the date of appointment, i.e. 15.02.1985.

As submitted by the Petitioner, few other graduates were also appointed to the following positions at the same project during this period.

a) Ecologist (2 posts)

b) Park Planner

c) Rural Sociologist

d) Training Officer (2 posts including the Petitioner)

The Mahaweli Environment Project was a project commenced in the year 1982, funded by USAID and the Petitioner being an employee of the said project was offered two months training in the United States of America on Park Management. The said project came to an end on 30th September 1991 and prior to that, the then Minister of Lands Irrigation and Mahaweli Development, under whose purview the said project and the Department of Wildlife Conservation was placed at the time, submitted a Cabinet memorandum dated 14.05.1991, seeking approval of the Cabinet of Ministers to absorb all the categories of employees recruited for the Mahaweli Environment Project in to the Department of Wildlife Conservation (P-6).

The Cabinet of Ministers, who met on 12.06.1991, had made the following order with regard to the said Cabinet Paper.

> "A memorandum by the Minister of Lands, Irrigation and Mahaweli Development dated 14.05.1991 on Absorption of staff of the Mahaweli Environment Project in to the Department of Wildlife Conservation was considered and the proposal in the memorandum were approved"

With the said Cabinet Approval, the Ministry of Lands, Irrigation and Mahaweli Development had taken prompt steps to absorb the employees of the Mahaweli Environment Project including the Petitioner to the Department of Wildlife Conservation. Accordingly the Petitioner was issued with a letter of appointment dated 18.09.1991 absorbing her to the post of Assistant Director in the Department of Wildlife Conservation (P-8).

The said appointment of the Petitioner as well as the appointments of few others including the Petitioner in FR/ Application 364/2014 was challenged before the Supreme Court in FR/ Application 148/1991.

Their lordships of the Supreme Court by their order dated 23.02.1994 held that the appointment of the 2nd to the 7th Respondents to the six new posts of Assistant Director in the Department of Wildlife Conservation is in violation of the provisions enshrined in Article 12 of the Constitution, and the appointments of the 2nd to the 7th Respondents as Assistant Directors in the Department of Wildlife Conservation were accordingly set aside.

Subsequent to the above decision by the Supreme Court, by letter dated 11.01.1995 the 11th Respondent had informed the Petitioner of removing her from the post of Assistant Director.

However by letter dated 17.02.1995 Secretary to the Ministry of Public Administration, Parliamentary Affairs' and Plantation informed the 11th Respondent, that the 3 officers referred to in the said letter (including the Petitioners in 164 and 165 /2014) be permitted to remain in the same positions they held prior to their absorption as Assistant Director, but for the Department to take appropriate steps to change the scheme of recruitment in order to absorb them in to the cadre, as other officers in the project were absorbed in to the Department (P-15).

As revealed before us the Petitioner was issued with a letter of appointment from the Mahaweli Environment Project when she was first recruited as the Training Officer on 30th January 1985 (P-5). When the Cabinet of Ministers approved the absorption of the employees of the said project, the Petitioner was once again issued with a letter of appointment, appointing her to the Post of Assistant Director of the Department of the Wildlife Conservation (P-8), which was quashed by the Supreme Court by the order dated 23. 02.1994.

By letter dated 22.02.1995 the 11th Respondent had informed the Petitioner of the decision to retain the Petitioner on the same conditions referred to in the letter dated 30th January 1985 as approved by the Secretary to the Ministry of the Public Administration, Home Affairs' and Plantations (P-16) but the said letter cannot be considered as a letter of appointment issued to the Petitioner. As referred to above in this judgment, the Secretary to the Ministry of the Public Administration, Home Affairs' and Plantations by his letter 17.02.1995 had further instructed the 11th Respondent take steps to absorb the Petitioner to the Department of Wildlife Conservation as approved by the Cabinet decision, by amending the scheme of recruitment of the Department Cadre.

As revealed before us, the main grievance of the Petitioner complained before this court has arisen as a result of the 11th Respondent's failure to implement the said order within a reasonable time. According to the Petitioner, in spite of several letters sent to various authorities, no steps were taken by the 11th Respondent to issue a letter of appointment to the Petitioner until the Petitioner went before the Court of Appeal in a Writ Application seeking the said relief in June 2007. When the said Writ Application was pending before the Court of Appeal, the Secretary to the Public Service Commission (the 10th Respondent) by his letter dated 19th June 2012 absorbed the Petitioner to the post of Education and Training Officer of the Department of Wildlife Conservation with effect from 05. 04. 1996.

Since the Petitioner could not proceed with the Writ Application thereafter, she withdrew the said application but decided to file the present application before the Supreme Court alleging violation under Article 12 (1) of the Constitution for the reason that,

a) By the said letter of appointment issued on 19th June 2012 the Petitioner was once again absorbed in to the post she was first recruited in the year 1985.
b) Even though the said absorption was to effect from 1996, the promotional aspect of the said post has not been taken in to consideration, when the said letter of appointment was issued.
c) The Petitioner was placed on a further period of 3 years on probation by the said letter.
d) By the year 2000 the Petitioner was receiving a salary higher than of an Assistant Director in the Department of Wildlife Conservation and therefore the salary entitlement of the Petitioner would be reduced by the new letter of appointment.

This would result the Petitioner,

i. To be placed on a lower salary scale

ii. Return the salary already drawn (or recover by the state)

iii. To be kept at a lower scale for the purpose of the Pension

iv. As a result the Petitioner would draw a lessor pension after serving almost 33 years to the state

When considering the material already discussed above, it appears that there is a long delay in issuing letter of appointment to the Petitioner or in other words the Petitioner had worked in the Department of Wildlife Conservation for nearly 17 years without a letter of appointment being issued to her.

As revealed from P-15, the Secretary to the Ministry of the Public Administration, Home Affairs' and Plantations has given specific instructions to the 11th Respondent,

i. To permit the Petitioner to remain in the same position referred to in her first letter of appointment dated 30.01.1985.

ii. To take steps to absorb the Petitioner to the permanent cadre of the Department of wildlife Conservation as did with the other staff of the project, by giving effect to the Cabinet decision and amending the scheme of recruitment

But, the said instruction had not been carried out for 17 years, until the matter was raised before the Court of Appeal by the Petitioner. Even though the Respondents failed to give any proper answer for the above delay, some observations were made to the effect that, the interference by the Petitioner at various levels, too had caused a delay in resolving this issue.

But, I cannot agree with the above submission of the Respondents since it is the legitimate expectation of the Petitioner to receive a letter of appointment for a specific post and to look at the promotional aspects based on the position offered by the said letter of appointment. When considering P-15, it appears to me that, even the Secretary to the Ministry of the Public Administration, Home Affairs' and Plantations, had shared the same view when he was writing the said letter by directing the 11th Respondent to take steps to amend the scheme of Recruitment when taking steps to absorb the Petitioner.

The Respondents have failed to submit any material, to establish any steps taken by the 11th Respondent to implement the said directive given in P-15 and as revealed before us, by P-25 a decision has been taken to appoint the Petitioner to the same post she was first recruited in 1985, without amending the scheme of recruitment with effect from a date in 1996 subject to another 3 years' probation period.

As further observed by me, in P-15 a clear reference had been made to the requirement of giving effect to the Cabinet decision, and as referred by me in this judgment, the Cabinet of Ministers by its decision dated 12.06.1991, had approved the memorandum dated 14.05.1991 on absorption of staff of the Mahaweli Environment Project in to the Department of Wildlife Conservation, had given the Petitioner a legitimate expectation of appointing her to a permanent post in the said Department. When considering the Cabinet decision referred to above and the contents in letter P-15, I observe that, by failing to implement the said Cabinet decision and the direction given in P-15 the 11th Respondent had clearly infringed the equal protection guaranteed under the Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

I further observe that the 10th Respondent too had acted in violation of the rights guaranteed under article 12 (1) of Constitution when he issued the letter of appointment on 19.06.2012 after 17 years, for the absorption of the Petitioner to the same post the Petitioner was first appointed in the year 1985 without considering any amendments to the scheme of recruitment in the cadre of the Department of Wildlife Conservation.

Even though I have declared that the above Respondents have infringed the Petitioners fundamental rights guaranteed under article 12 (1) of the Constitution, I am not inclined to grant any relief as prayed by the Petitioner in paragraph (c) (d) (e) (f) or (g) to the prayer to the Petition in the absence of any provisions in the scheme of recruitment of the Department of Wildlife Conservation with regard to the post of Assistant Director and/or Deputy Director.

However when considering the grievances complained by the Petitioner I make order directing the Respondents including the 10th, 11th, 12th and 13th Respondents to,

a) Allow the Petitioner to draw the same salary as she was drawing as at 2012 with earned increments and/or any other salary increments to which the Petitioner entitled thereafter, based on the salary she drew as at 19th June 2012 by any other Government/Public Administration circular
b) Allow the Petitioner to retire based on the last salary she drew according to (a) above
c) Petitioners pension rights to be considered on the last drawn salary referred to in (b) above
d) The probation period referred to in the letter of appointment dated 19th June 2012 should be considered not from the above date but form 05.04.1996

I further make order, directing the state to pay a sum of Rs. 2 million as compensation to the Petitioner and a further sum of Rs. 200,000/- as cost for this case.

As agreed by all parties the Petitioner to the Fundamental Rights Application 364/12 is also entitled to the above relief, which is granted to the petitioner in the present application.

Application allowed.

Judge of the Supreme Court

Sisira J.De. Abrew J

I agree,

Judge of the Supreme Court

Murdu N.B. Fernando PC J

I agree,

Judge of the Supreme Court

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Kalu Arachchige Amila Duminda, No. 300, Yatiyana Watta Road, Yatiyana.
2. Muditha Mihipala Kumarage, Ukwatta, Thotahoda, Akmeemana.
3. Vindana Lasantha Jayakody, No. 213/4, Thalawathugoda Road, Mirihana, Kotte.
4. D.C.Gayan Sarinda, No. 443/A, Lake Road, Akuregoda, Thalangama South, Battaramulla.
5. Rathnayake Mudiyanselage Sanka Dipsara Weerakoon, No. 147, Kumbukwewa, Maho.

SC FR Application No. 389/2012

6. Kamburugamuwe Loku Arachchige Chameera Sanjeewa, No. 220/2, Enderamulla, Wattala.
6. Gannoruwa Palagama Gedera Nayana Yasamali Dewasurendra, 'Yasamali', Ridigama, Kurunegala.
7. Don Kannangara Koralage Meadini Diana Kannangara, Polkotuwa, Ovitiyagala, Horana.
8. Nupe Hewage Thushanthim, No. 158/1A/1, Rajasinghe Mawatha, Ihala Imbulgoda, Imbulgoda.
9. Harshani Shamila Samarasingha, ' Jeewana', Uda Aparekka, Aparekka, Matara.

10. Balakumary Fernando (Kumaravelu),
    No. 82, College Street, Colombo 13.
11. Wattage Chamini Lasanthika Perera,
    No. 35/3, Bodhu Pedesa Road,
    Nunggamugoda, Kelaniya.
12. Samarakkody Dasanayakage Chamila
    Nilakshi Kumari, Kikolaya, Polgahawela.

Petitioners

Vs

1. Secretary, Ministry of Public
   Administration and Home Affairs,
   Independent Square, Colombo 7.

   And 42 others

Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.,**
H. N. J. PERERA J. &
PRASANNA JAYAWARDENA PCJ.

COUNSEL : Saliya Pieris PC with Thanuka Nandasiri for the Petitioners
Shantha Jayawardena with Chamara Nanayakkarawasam for the 29th to 43rd Respondents
Ms. Indika Demuni de Silva PC, ASG, for the 1A, 2nd to 4th, 14th, 15 A to 27 J and 28th Respondents.

ARGUED ON : 15.02.2018.

DECIDED ON : 21.03.2018.

S. EVA WANASUNDERA PCJ.

The Petitioners in this Application were holding the post of Data Entry Operators/ Coding Clerks attached to the Department of Census and Statistics. They complain that their fundamental rights enshrined in Article 12(1) of the Constitution have been violated by the Respondents having failed to approve the Service Minute marked as P5 with the Petition.

I would like to put down the factual position of this matter, as I understand from the documents filed by both parties before this Court as contained in the Petition and the Objections of all parties, as follows:-

The Petitioners have filed the Petition dated 03.07.2012 against the 1st to 28th Respondents. On 30.08.2012, at the instance of the counsel for the Petitioners this Court had issued an **interim order** directing that " no appointments should be made on the results of the examination which was to be held on 14.09.2012 to select persons for the post of Statistical Officer – Grade II." However, when the examination was held as scheduled on 14.09.2012, the **29th to 43rd** Respondents being candidates who sat for the said examination and passed the same, **were aggrieved by the said interim order** granted by this Court and as such, sought to intervene into this Application and it was allowed.

The Petitioners were recruited on casual basis between the year 2000 and 2005 to the Department of Census and Statistics, for the purpose of conducting pre and post tasks for the population and housing census held in the year 2001. The entry qualification was to possess six passes at the G.C.E. 'O' Level Examination of which four should be credit passes obtained at not more than two sittings. They were named as Data Entry Operator/Coding Clerks. Later on, while they continued to work, they had made representations from time to time continuously, to be absorbed into the permanent cadre of the Department of Census and Statistics. By a decision of the Cabinet of Ministers dated 01.08.2005,

about 300 persons including the Petitioners were appointed to the post of **Data Entry Operator/Coding Clerks on a permanent basis.**

The 29th to 43rd Respondents were recruited under the Unemployed Graduate Training Scheme – 2004 and they were appointed to the Department of Census and Statistics as trainees. Later on , they were appointed to the newly created post of Statistical Assistant with effect from 01.11.2005 based on a policy decision of the cabinet of ministers.

The Petitioners are 13 in number and none of them except the 1st Petitioner, were graduates when the said Unemployed Graduate Training Scheme was implemented by the Government in the year 2004. Anyway, the Petitioners **were not recruited for training** at the Department of Census and Statistics under the said **2004 Unemployed Graduate Training Scheme.** The Petitioners were taken in as Data Entry Operators/Coding Clerks in the year 2001.

Moreover, by the time the unemployed graduates were appointed as Statistical Assistants, the Petitioners and the like were already working in the permanent cadre of the Department of Census and Statistics and confirmed in their posts after completing three years of probation and passing of two Efficiency Bar Examinations.

By the year 2006, the Department of Census and Statistics was requested by the Public Service Commission by Public Service Circular No. 06/2006 to restructure and re-categorize all posts and to update the relevant Schemes of Recruitment so as to fall in line with the provisions of the said Circular and the Guidelines issued by the Public Service Commission. This Circular was dated 25.04.2006. Thereafter, the Secretary to the Ministry of Finance and Planning had a discussion with Officers of the Department of Census and Statistics and other Trade Unions and it was decided to formulate new Schemes of Recruitment **for all posts** having regard to Public Administration Circular No. 06/2006.

As a result, **a draft Scheme** of Recruitment for the post of **Statistical Assistant** was **formulated** making provision therein for Data Entry Operators/Coding Clerks to apply for the same.

However, in view of the steps that were being taken by the Government, in the year 2008, to establish the **Sri Lanka Information and Communication Technology Service**, the aforementioned scheme of recruitment for the post of Statistical Assistant was **abandoned.**

Thereafter the Cabinet of Ministers took a policy decision to establish the Sri Lanka Information and Communication Technology Service and the relevant Service Minute was duly published in the Government Gazette No. 1631/20 dated 09.09.2009. It is filed by the Respondents marked 3R2 with the Affidavit of Objections by the 3rd Respondent, Director General of the Department of Census and Statistics. This Service Minute **provided for the absorption** of inter alia **Data Entry Operators/Coding Clerks** who possessed the required qualifications.

In the year 2010, the Petitioners along with many other Data Entry Operators/Coding Clerks **expressly consented to be absorbed** into the said **Sri Lanka Information and Communication Technology Service.** Their application forms to the Director General Combined Services of the Ministry of Public Administration have been marked as 3R3A to 3R3M which are the applications of all the 13 Petitioners. **All of them were absorbed** in the year 2013, **with effect from 01.07.2009.** Therefore, it can be concluded that " all the Petitioners belong to the Sri Lanka Information and Communication Technology Service from 01.07.2009." They cannot be taken as workers in the permanent cadre of the Department of Census and Statistics from 01.07.2009. They are governed by the said Service Minute and no other and they are subject to transfer to other Departments or Ministries.

I find that, the Data Entry Operators/Coding Clerks were **not any more belonging to the Department of Census and Statistics, with effect from 01.07.2009.**

The Department of Census and Statistics went a step further in the year 2011. They made Schemes of Recruitment for different posts and categories of workers within the Department and finalized them and submitted, according to the formal procedure, to the Ministry of Finance, Department of Management Services, Director General of Establishments, Salaries and Cadres Commission and the Public Service Commission. The Public Service Commission approved the Scheme of Recruitment for the post of **Statistical Officer** after suppressing the post of Statistical Assistant except in so far as who were already holding the said post.

The said approved scheme of recruitment to the post of Statistical Officer was marked as 3R8 dated 21.10.2011.

According to the said Scheme of Recruitment 3R8, steps were taken to fill 131 vacancies in the post of Statistical Officer Grade II under both the open and limited competitive streams. Vacancies under the 'open competitive stream' were duly advertised in the Gazette on 20.04.2012. The Petitioners also could have applied to this post under the 'open competitive stream' if they possessed the requisite qualifications including a degree from a recognized university.

The notice for recruitment under the 'limited competitive stream' was issued on 04.05.2012 inviting applications on or before 01.06.2012 from Statistical Assistants with 5 years of service in that post. Since the Petitioners were not within the Department of Census and Statistics they could not have applied under this category of 'limited competitive stream' and they had not applied anyway.

The open competitive examination for 65 vacancies out of the number of 131 vacancies to be filled, was held on 30.09.2012 and the limited competitive examination for recruitment of the rest of the vacancies was held on 15.09.2012. Even though the recruitment of 65 vacancies under the open category were duly filled after informing this court of the same, the other vacancies under **the limited category were not filled** during the last five years, **due to the interim relief granted** by this Court at the instance of the Petitioners five years ago.

The 29th to 43rd Respondents were governed by a different Scheme of Recruitment for Statistical Assistants whereas the Petitioners were governed by a Scheme of Recruitment for Data Entry Operator/Coding Clerks in the Sri Lanka Information and Communication Technology Service.

I find that the Petitioners have come to this Court by way of a Petition dated 3rd July, 2013. By this time, the Petitioners belonged to the Sri Lanka Information and Communication Technology Service and the 29th to 43rd Respondents belonged to the Statistical Assistants post in the Department of Census and Statistics. Due to the interim relief granted by this Court to be effective till the final determination of this Application, the 29th to 43rd Respondents have suffered for the last 5 years not being able to get their new posts as Statistical Officers Grade II after having served as Staistical Assistants for 5 years prior to sitting for the limited category

examination and having passed the same. Their plight seems to be quite unreasonable. On the other hand , even though the Application of the Petitioners certainly was going to affect the Statistical Assistants, the Petitioners have failed to make them parties to the Application before this Court. If they did not intervene, in fact, there would not have been any other way of placing their position before this Court.

The Petitioners' contention arises thus:
The Department of Census and Statistics decided to introduce a service minute for the Department and in a draft service minute it was proposed to " abolish the post of Statistical Assistant and the other graduates who are in the Data Entry Operators/Coding Clerks Service be absorbed as Statistical Officers of the Department." In the said draft Service Minute, it was also proposed that the employees who have been already absorbed to the Information Technology Service be absorbed as Statistical Officers disregarding the fact that they have been absorbed to the Information Technology Service. The said Draft was forwarded to the Union by a letter dated 26.01.2012 from the 3rd Respondent. The Petitioners allege that the said service minute had been prepared according to the specimen proposed by the Public Service Commission and that it was forwarded prior to being submitted for the approval of the 1st Respondent. The said Draft is marked as **P5A.**

While this matter was pending, the 3rd Respondent had decided to internally recruit employees to the Grade II Statistical Officers and the 1st Respondent had issued a letter dated 04.05.2012 inviting the applications from suitable candidates. The Petitioners complain that the said letter was not published either on the notice board in the head office or in the District Offices. They had come to know about the same when it was published in the Web Site of the Department. Then it was sought by the Petitioners that they be allowed to sit for the examination along with the Statistical Assistants for the limited category examination to be promoted to Statistical Officers. This was not allowed by the Respondents. Further to that decision, the position of the Respondents had been that establishment of a new service minute was not necessary.

The Petitioners submit that the failure to approve the Scheme of Recruitment by the Respondents, in respect of Statistical Assistants which would enable the Petitioners to be promoted to the post of Statistical Assistant initially and

thereafter obtain other promotions in the Department as suggested by P5A , is unreasonable, arbitrary, discriminatory and that it amounts to a breach of their legitimate expectation to be absorbed as Grade II Statistical Officers. They pray inter alia that the Respondents be directed to approve the draft service minute marked as P5A and that the Petitioners be absorbed as Grade II Statistical Officers.

I observe **that P5A is not a finalized Service Minute**. It is a draft sent for observations of the Unions of which the Petitioners are members. The document P5A is referred to them only to be considered as they were stakeholders. The Respondents had abandoned the proposal for such a service minute for good reasons. The main reason is that it was **found to be against the policy of the Government**. At the time P5A was sent to the Unions for observations, it had not been forwarded to the Public Service Commission for approval. It was pursuant to requests by Trade Unions and discussions which had commenced on the possibility of drafting a service minute for the Department of Census and Statistics. The Data Entry Operators/Coding Clerks had very much wanted to have them included in the said Service Minute by making provision for their promotions to the post of Statistical Officer. The Public Service Commission had informed the Secretary to the Ministry of Finance that a separated Service Minute was not required for the Department of Census and Statistics because Schemes of Recruitment had by then already been approved for all the posts in terms of Public Administration Circular No. 06/2006 which included a scheme of promotion as well.

Service Minutes to each and every Government Department cannot be separately done by the State. It would not be proper to have different service minutes each time a problem crops up to suit the members of the unions. The Public Service Commission has to approve the Service Minutes. Court is not able to direct the Public Service Commission to approve any particular Draft which suits any particular set of workers. After all , the Data Entry Operators/Coding Clerks were taken in to the Department on casual basis with the basic qualification of 6 passes with 4 credits at two sittings of the Ordinary Level Examination. Once they worked for three years they were confirmed. If they obtain a degree from a recognized university they also can be allowed to sit for the open competitive examination just like any other person and be appointed to the post of Statistical

Officer. Otherwise, if they are **within the Department** of Census and Statistics, and **had joined as**

Statistical Assistants and worked for 5 years in that post, it is only then that they can be recruited under the limited competitive stream.

The Petitioners **not being Statistical Assistants** are not allowed to enter the limited competitive stream. Then again, the Petitioners were at that time **not working within the Department**. They were in the posts of **the Sri Lanka Information and Communication Technology Service.** They were subject to promotions according to the Service Minute relating to them which was contained in the Gazette No. 1631/20 dated 09.09.2009 making provision for promotions in a three tiered promotional scheme which could take them up to Class I Grade I which falls within the Executive Grade under salary code SL 1-2006.

When the Petitioners were absorbed to the Sri Lanka Information and Communication Technology Service, they were placed on Class III Grade III and the salary scale was higher than that of the Data Entry Operators/Coding Clerks. I have taken into consideration that the Petitioners have got absorbed into this service on their own application and therefore, later on, cannot expect the Department of Census and Statistics to consider them as belonging to the limited competitive category.

Just because only a draft of a service minute (P5A) which was not permissible in law had been circulated among the stake holders, which served as a method of only calling for their observations, **such a document at the draft stage cannot be compelled to be made into a proper service minute against public policy** and cannot be taken as a promise granting any legitimate expectation.

I have already considered this Application on merits and I do not wish to look into the preliminary objection of time bar at this juncture.

This Court does not find any material to grant the reliefs prayed for by the Petitioners. I hold that there is no infringement of any fundamental rights of the Petitioners by any of the Respondents who were made parties to this Application.

This Application is dismissed. No Costs.

Judge of the Supreme Court

H.N.J.Perera
I agree.

Judge of the Supreme Court

Prasanna S.Jayawardena
I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution

Janaka Sampath Batawalage,
P.355, Niwasipura, Ekala Ja-Ela.

Petitioner

SC (FR) Application No.393/2008

Vs.

1. Inspector Prasanna Ratnayake,
   Police Station,
   Dam Street, Colombo 12.
2. Sub Inspector Seneviratne,
   Police Station,
   Dam Street, Colombo 12.
3. Sub Inspector Herath,
   Police Station,
   Dam Street, Colombo 12.
4. The Inspector General of police,
   Police Headquarters,
   Colombo 1.
5. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

Respondents

BEFORE: BUWANEKA ALUWIHARE, PC, J
PRIYANTHA JAYAWARDENA, PC, J
K.T.CHITRASIRI, J

COUNSEL: Viran Corea with Sanita de Fonseka and Subhashini Samaraarachchi for Petitioner.
Shyamal A. Collure with A.P.Jayaweera for 1st Respondent.
Nayomi Wickramasekara, SSC for 2nd to 5th Respondents.

ARGUED ON: 29.09.2016

DECIDED ON: 05.03.2018

ALUWIHARE, PC, J:

This is an application where the Petitioner has invoked the fundamental rights jurisdiction of this Court alleging that, 1st to the 3rd Respondents have violated his fundamental rights enshrined in the Constitution.

Leave to proceed in this matter was granted on the alleged infringement of Articles 13 (1) and 13 (2) against all Respondents while leave to proceed was also granted on the alleged infringement of the Petitioner's fundamental rights under Article 11 of the Constitution, against the 1st and 3rd Respondents.

According to the averments in the amended Petition, the Petitioner who had been an army officer had retired after serving 10 years, as a lieutenant. At the time relevant to the present application, the Petitioner had been working for a private entity called Dialog Telecom (Pvt) Ltd. in the capacity of Human Resource Management Coordinator. It is pertinent to note that, at the time relevant to the present application, the Petitioner was a father of two children, one being an infant of 6 months.

The Petitioner who, along with his wife had come to Pettah to make certain purchases and was proceeding towards Gunasinghapura bus terminus with the intention of going to their residence at Ja-ela. According to Petitioner, they had been keen to get back home without delay because of the infant, who had to be breast fed by his wife. At one point both had half crossed the road when a three wheeler had nearly knocked into his wife. She had been shaken by this incident, but after a few awkward movements, she finally had managed to cross the road and had joined up the Petitioner. At this juncture the1st Respondent, who had been on duty, had reprimanded the wife of the Petitioner in foul language for the manner in which she crossed the road. The Petitioner and his wife had ignored him and had proceeded towards the bus stand.

The 1st Respondent at that point had beckoned to them clapping and demanded them to approach the 1st Respondent. When they approached the 1st Respondent the Petitioner had initially introduced himself as an army officer and when the 1st Respondent demanded from him the official identity card, the Petitioner had disclosed that he had retired from service. The Petitioner alleges that the 1st Respondent continued to use foul language and held him by the collar of his T shirt and slapped him several times. Having dragged the Petitioner near a police vehicle which had been parked in the vicinity, the 1st Respondent had assaulted the Petitioner. It is alleged by the Petitioner that three other police officers had held the Petitioner and facilitated the assault. It is averred by the Petitioner that the 2nd Respondent happened to be among the three police officers referred to. The Petitioner's wife had tried to intervene, but had been chased away by the 1st Respondent. The Petitioner alleges that he was bundled into the police vehicle and was

brought to the Dam Street Police Station where both the 1st and the 3rd Respondents assaulted him. According to the Petitioner the 1st Respondent had told him that they would fabricate a charge by introducing a grenade and have him produced before the Magistrate. The Petitioner then had pleaded with the 1st Respondent to permit him to call his wife to check whether she had reached home safely. To his dismay, he was not allowed, instead had been put in the police cell and the 1st Respondent had kicked him several times.

After some time, the 1st Respondent had questioned the Petitioner about his father-in-law who happened to be a retired police officer and the Petitioner had been told that he would be released after producing him before the Judicial Medical Officer and he was further advised not to say anything to the Medical Officer.

It is the position of the Petitioner that he was traumatized by the events of that day and fearing that he will have to face a trumped-up charge, he had decided not to complain to the Judicial Medical Officer about the injuries. The JMO however, had questioned the Petitioner about the contusions and Petitioner had remained silent. The JMO had then directed the police to admit the Petitioner to the accident ward of the Colombo National Hospital. When he was taken to the accident ward he had got himself released stating that he was alright and therefore he was brought back to the police station and placed in the police cell.

The Petitioner also asserts that the attempts made by his wife and two of his associates to visit him at the Dam Street Police Station were thwarted by 3rd Respondent on the ground that no visits could be permitted after 9.00 p.m.

The Petitioner also alleges that the 1st Respondent kicked him in the chest when he refused to place his thumb impression on two envelopes produced by the 1st Respondent. Owing to his refusal, the Petitioner alleges that he was dragged out of the cell and some police officers tried forcibly to get his finger impressions on the envelopes and the 1st Respondent, enraged by his resistance, kicked the Petitioner on the head and the Petitioner had lost consciousness.

According to the Petitioner, he regained consciousness at the Colombo National Hospital. He asserted that he got himself discharged from the hospital against medical advice as the 1st Respondent had demanded that his wife have him discharged from the hospital, if the Petitioner does not wish to be placed on remand custody for an extended period.

After the Petitioner got himself discharged from the hospital, he had been brought back to the police station and he had been forced to sign a statement. He asserts that he refused to sign the statement as it carried contents which he had not stated. The 1st Respondent had told the Petitioner to place his signature with an endorsement "he does not accept what had been recorded".

The Petitioner had then been produced before the Magistrate Maligakanda on an allegation that he possessed Cannabis in the form of cigars and had been enlarged on bail. Thereafter the Petitioner had been warded at the Negombo Hospital on 30th April, 2008 and had spent a couple of days at the hospital.

The Petitioner had complained to this court that as a result of the trauma he underwent he still suffers from health issues and in addition he was unable to report for duty for three weeks. The Petitioner also complains of the mental trauma he had undergone as a result of the assault.

The Petitioner's wife Nilanga Probodhini Wanigasundera had sworn an affidavit (P2) with regard to the events that took place on the day in question. She had confirmed the Petitioner's statement as regards the course of events that led to the incident. She had also stated that when she came to the Dam Street Police Station she heard her husband's cries of distress. She had also affirmed the events averred to by the Petitioner regarding to the institution of proceedings before the Magistrate's Court and the admission of her husband to the National Hospital, Colombo.

The Petitioner's father-in-law Upali Ananda Wanigasundera, an ex-chief Inspector of Police had also sworn an affidavit in support of the Petitioner. He had averred that he was informed by his daughter Prabodhini Wanigasundera that the Petitioner had been taken into custody by the Dam Street Police. He says he spoke to the 1st Respondent over the phone and the 1st Respondent assured him that the Petitioner would be released as soon as possible and had complained that the Petitioner had abused him (the 1st Respondent).

He had visited the Dam Street Police Station around 6.00 a.m. on the 29th August,2008 with his daughter and had been informed that the Petitioner had been admitted to the General Hospital. He had visited the Petitioner at the hospital and observed that the Petitioner was handcuffed and two constables stationed at his bedside. The Petitioner

had told him that after he was produced before the Judicial Medical Officer (JMO) he was brought back to the Police Station and assaulted again and he lost consciousness at the Police Station and he was brought to the hospital.

Upali Wanigasundera had further averred that he returned to the Police Station and made inquiries from Inspector Rathnayake (the1st Respondent) about the Petitioner. The 1st Respondent had stated that he would have the Petitioner remanded and exacerbate the situation unless they get the Petitioner discharged from the hospital and the Petitioner pleaded guilty to the charges that the 1st Respondent would be filed against him.

Wanigasundera had further averred that owing to the mental trauma his daughter and his son-in-law (the Petitioner) were undergoing, for an early resolution of the matter, they got the Petitioner discharged from the hospital.

The Petitioner had then been brought back to the Police Station and subsequently produced before the Magistrate of Maligakanda.

Shanike Bhagya Udawatte, a co-employee of the Petitioner from the place where the Petitioner was employed at the time, had also sworn an affidavit in support of the Petitioner. He had arrived at the Dam Street Police Station when the Petitioner's wife had phoned him and had been informed of the Petitioner's plight. He had in his affidavit had confirmed the account in the Petitioner's wife's affidavit and had also averred that when he came to the Dam Street Police Station he saw the Petitioner lying on the floor of the police cell and the Petitioner had

informed him that he had been assaulted by the Police and was in need of medical attention. When he told the 3rd Respondent who was on duty that the Petitioner needs to be attended by a doctor, the 3rd Respondent has said that the Petitioner had already been produced before the J.M.O.

Along with the counter affidavits the Petitioner has filed copies of his medical reports. (P9 and annexures)

Consultant Judicial Medical Officer, Colombo Dr. Ajith Tennakoon by his letter dated 23.07.2008 addressed to the Human Rights Commission of Sri Lanka had informed the Commission that the Petitioner had not been subjected to a medico legal examination by a Judicial Medical Officer. The letter (annexed to P9) reveals that the Petitioner had been admitted to ward 14 of the hospital (NHSL) at 1.20 a.m. on 29.04.2008 with complaints of "fainting attacks". The doctor had attached a copy of the Bed Head Ticket (BHT) issued to the Petitioner. He had been admitted to hospital by the 3rd Respondent. The 3rd Respondent had admitted this fact in the objections filed by him. The 3rd Respondent had stated that he produced the Petitioner before Dr. Mulleriyawa, Assistant Judicial Medical Officer (AJMO) and after examining the Petitioner in the absence of the 3rd Respondent, he was directed by the doctor to take the Petitioner to Colombo National Hospital, which direction the 3rd Respondent admits he complied with. 3rd Respondent also admits that the Petitioner was admitted to the hospital.

According to the BHT the complaint of the patient is recorded as "Fainting attacks". In his notes, the house officer had recorded, that the Petitioner claimed that he was assaulted by the Police, initially at Pettah

in a Police jeep and later at the Police Station. The Petitioner also had said that he was assaulted with fists and complained of bodily pains. The BHT also carries an endorsement, presumably made by the Petitioner, which reads *"I am getting discharged on my own against medical advice".*

The Petitioner had also produced a Medico Legal Report issued by the AJMO, Negombo (P9). According to the same the Petitioner had been admitted to hospital on 01.05.2008 and had been discharged on 02.05.2008. The AJMO had recorded the history given by the patient as *"assaulted by a police officer (I.P. Prassanna Rathnayake) on 28.04.08, again assaulted around 11.00 a.m. with fists and feet. There were other police officers who assaulted him, in the same manner"*.

The AJMO had observed two contusions on the body of the Petitioner and had recorded that the two injuries as "non-grievous".

Petitioner had been charged before the Maligakanda Magistrate Court for possession of 5 cigars made of cannabis. After trial the learned Magistrate had acquitted the Petitioner on the basis that the prosecution had failed to establish beyond reasonable doubt that the Petitioner was in possession of the cannabis cigars that were produced before the court as a production.

The 1st Respondent in his statement of objections had admitted that he was on duty along with the 2nd Respondent at the location where the alleged incident took place. The 1st Respondent had averred that in view of the visit to Sri Lanka of the President of Iran, measures were taken to tighten the security in the city of Colombo and as a security

measure all vehicles and persons entering the Gunasinghapura bus terminal were subjected to search. The 1st Respondent had also stated that he observed the Petitioner trying to enter the bus terminal avoiding the stile erected to ensure that all persons who enter the terminal are checked. The 1st Respondent states that he ran towards the Petitioner and held him by hand and with difficulty he did a body search of the Petitioner and recovered five cannabis cigars. The Petitioner had claimed that he was an army officer and two army personnel who were also on duty approached the Petitioner and requested him for his identity card. The Petitioner had abused them and also had stated that he was senior in rank. The two army officers, Major Sooriyarachchi and the other officer had then left the scene.

The 1st Respondent claims that he brought the Petitioner to the Dam Street Police Station in the police vehicle. Whilst categorically denying that the Petitioner was assaulted, the 1st Respondent states that the Petitioner was taken to Colombo National Hospital as the Petitioner complained of a chest pain; and on medical advice, was warded therein.

Major Sooriyarachchi swearing an affidavit (1R2) had supported the version given by the 1st Respondent in that; he also was on duty at the Gunasinghapura bus terminus with a junior officer. Major Sooriyarachchi states in his affidavit that a civilian was conducting himself in an unruly manner, claiming that he is an Army Officer and when the Major requested for his Service Identity card, the civilian concerned abused him in foul language claiming that he is an officer senior in rank and at that stage he and the junior officer who were on duty with him left the scene.

A member of the Civil Defence Committee Indika Sanjeewa who had been assisting the police officers of the Dam Street Police Station also had sworn an affidavit (1R3). He had been on duty at the bus terminus when this incident took place and had basically affirmed to the facts referred to by the 1st Respondent, including the recovery of cannabis cigars.

According to the notes of investigations made by the 1st Respondent (1R4 (a)), the Petitioner had been stopped and searched when he tried to avoid the place where people were subjected to search. According to the notes the Petitioner had tried to break the temporary stile erected to facilitate the search. The 1st Respondent had made another note pertaining to the same incident (1R4 (b)) and in these notes the 1st Respondent had recorded as the Petitioner made an attempt to creep through the wooden stile.

The 3rd Respondent Sub-Inspector Herath in the objections filed on his behalf had averred that he has nothing to do with the arrest of the Petitioner. The position of the 3rd Respondent is that he is a resident of Kandy and having obtained official leave on 27.04.2008 he travelled to Kandy and returned on the following day which was 28th. He had reported for duty only at 20.08 hrs. (8.08 p.m.) on that day. To substantiate his position he had filed an extract from R.I.B. maintained by the Dam Street Police Station (3R2). According to the same he had reported for duty at 8.08 p.m. at the Dam Street Police Station.

The 2nd Respondent in the statement of objections filed on his behalf had denied that he assaulted the Petitioner. According to the 2nd Respondent he had been on duty on the day in question and had been

engaged in controlling the traffic at a location close to where the 1st Respondent was also on duty.

As for the arrest of the Petitioner, the 2nd Respondent had affirmed the position taken up by the 1st Respondent. 2nd Respondent had referred to the need for a heightened state of security on that day due to the visit of a head of a state and the fact that the Petitioner had been questioned by the 1st Respondent when the Petitioner was observed avoiding going through the security checkpoint.

As referred to earlier, the three medical records – Admission Note (P6), the Bed Head Ticket and the Medico Legal Report (9) indicate that the Petitioner had sustained blunt trauma which is compatible with assault. The Respondent had not denied the fact that they had to admit the Petitioner to the Colombo National Hospital in the middle of the night, the reason, however; attributed by the 1st Respondent is that the Petitioner complained of a chest pain. In the history given by the Petitioner to the medical officer on admission, it is recorded as he was assaulted by the police, initially in a Police Jeep and later at the police Station with their fists.

This appears to be a spontaneous account of events which gives credence to the Petitioner's version. These facts taken together with the assertions of the Petitioner's wife, (P2) his father-in-law (P3) Bhagya Perera Udawatte, clearly establishes that the Petitioner had been assaulted by the Police officers.

The main allegation of assault is directed against the 1st Respondent whom the Petitioner alleges, in addition to abusing him in foul

language, assaulted him, initially at Pettah, and later at the Dam Street Police Station on a number of occasions. The other allegation made by the Petitioner is that he did not have any narcotics on him at the time of his arrest and the police foisted the charge on him. The Petitioner had averred that he is a non-smoker which had been affirmed by both his wife and the father-in-law.

On the other hand, this incident had been brought about as a result of the Petitioner confronting the 1st Respondent because of his uncouth behavior towards his wife. It is highly improbable that a person carrying narcotics would willingly confront or provoke a police officer and I am of the view that the charge of possession of cannabis is a trumped up one. The Petitioner had stated that, soon after he confronted the 1st Respondent, he brandished a pistol and had told the Petitioner, he will introduce a hand grenade and produce him before the Magistrate's court.

According to Bhagya Udawatta, when he phoned the O.I.C, Dam Street, police Station upon hearing that the Petitioner had been brought to the Dam Street Police Station, the O.IC. told him that the charges were yet to be framed, which gives credence to the Petitioner's version that he was arrested for no valid reason.

I shall now consider as to whether the facts referred to above had established any infringed of the fundamental rights of the Petitioner.

This court granted leave to proceed against both the 1st and 3rd Respondents for the alleged violation of Article 11 of the Constitution.

In the case of *CHANNA PIERIS AND OTHERS* ***v.*** *ATTORNEY GENERAL AND OTHERS (1994 1 SLR page 1)* Justice Amerasinghe observed that:-

> *"In regard to violations of Article 11 (by torture, cruel, inhuman or degrading treatment or punishment), 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. 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 case of Jeganathan *v. Attorney General and Others 1982 1 SLR 294*, the Court held that, where public officers accused of violating the provisions of Article 11, the allegation must be 'strictly proved' for if proved they will carry 'serious consequences' for such officers.

I have considered the material placed before this Court by both the Petitioner and on behalf of the Respondents, in the backdrop of the decisions of this court referred to above. In the face of the cogent and credible material placed before this Court, I conclude that the Petitioner had been subjected to torture and degrading treatment.

According to the hospital admission ticket (P6) the doctor who admitted the Petitioner on the early hours of 29th April,2008 had observed

contusions on the posterior of both arms of the Petitioner, which had been confirmed by the AJMO, Negombo (P9). The history given by the Petitioner is also consistent in that, he had stated that I.P. Prassanna Rathnayake assaulted him.

I am of the view that the Petitioner had established to the required degree of proof that his fundamental rights guaranteed under Articles 11 had been violated and as such I hold that the 1st Respondent responsible for the infringement of the fundamental right of the Petitioner guaranteed under Article 11 of the Constitution.

As far as the 3rd Respondent is concerned, he had denied causing any physical harm to the Petitioner and had taken up the position that he reported for duty at the Dam Street, police station only around 8.00pm on the day in question and had produced copies of entries made by him to that effect. Although the Petitioner had made a general allegation that the 3rd Respondent also assaulted him, the Petitioner, however, when examined by AJMO Negombo had only referred to the 1st Respondent by his name as the person who assaulted him and had made no allegation against any other officer.

Further, the 3rd Respondent had not been present at the time the Petitioner was arrested or when he was placed in custody.

Thus, I hold that, as far as the 3rd Respondent is concerned, there is no material before this court to come to the conclusion that the 3rd Respondent was responsible for violation of any of the fundamental rights of the Petitioner guaranteed under the Constitution.

As far as the 2nd Respondent is concerned the violation alleged against him are under Articles 13 (1) and 13 (2).

It appears that the 2nd Respondent had also been on duty in the same vicinity where the 1st Respondent had been performing duties. In the statement of objections filed by him, the 2nd Respondent had taken up the position that it was the 1st Respondent who took action against the Petitioner and he did not get involved in the investigation pertaining to this incident. The Petitioner, in his petition has made a reference to the conduct of the 2nd Respondent and had stated that after the 1st Respondent dragged him up to the "police cab" the 1st Respondent assaulted him while three other police officers, including the 2nd Respondent, held him. From the Petitioners own assertion, it is evident that the 2nd Respondent's involvement is after he was detained by the 1st Respondent. Thus, there is no material before this court to come to the conclusion that the 2nd Respondent can be held responsible for the violation of Petitioner's fundamental rights enshrined in Articles 13 (1) and 13 (2) of the Constitution.

As referred to above, I reject the version of the police that the Petitioner was arrested for possession of Cannabis and hold that the charge had merely been foisted upon him to justify the arrest. When one considers the totality of the facts, the circumstances under which the 1st Respondent claims that he recovered Cannabis from the possession of the Petitioner is highly improbable. As such, I reject the version of the 1st Respondent in that regard.

In addition to Article 11 of the Constitution, I also hold that the arrest and subsequent detention of the Petitioner is not lawful and therefore the 1st Respondent is also responsible for the violation of Petitioner's fundamental rights guaranteed under Articles 13 (1) and 13 (2) of the Constitution.

Over the past 40 years or so, this court, has on innumerable instances had handed down judgements where it had held that police officers had acted in excess of authority in scant disregard for the fundamental rights enshrined in the Constitution. Especially, when dealing with the public, the police officers have a bounden duty to act with caution and restrain to ensure that they do nothing in derogation of the fundamental rights granted to all citizens under the Constitution. The 1st Respondent has failed in the discharge of that duty. The manner in which the 1st Respondent had acted on this occasion not only tarnishes the image of the police in the minds of the people, but certainly would have led to the erosion of the confidence the people have in the police as the law enforcement arm of the state.

In the instant case, this court cannot condone the Petitioner's own action on this occasion either. He being a former member of a security force ought to have known that there were security concerns affecting the country at the relevant time and there was a need to ensure that the safety of the public is maintained at a location such as the main public transport terminals in the capital. He does not appear to have rendered the cooperation expected of a citizen to the law enforcement. The affidavit of Major Sooriyarachchi amply reflects the boisterous manner in which the Petitioner was conducting himself on this occasion. It must also be said, however, that his conduct does not in any way justifies the conduct of the 1st Respondent and furthermore Article 11 is an absolute right and as such there is no room for derogation.

For the reasons set out in my judgement, I declare that the 1st Respondent violated the fundamental rights of the Petitioner guaranteed by Articles 11, 13 (1) and 13 (2) of the Constitution and that the 2nd and 3rd Respondents are not guilty of any transgression.

1st Respondent is directed to pay the Petitioner a sum of Rs.150, 000/- (Rupees One hundred and fifty thousand) as compensation and the State shall pay the Petitioner a sum of Rs.25, 000 as costs.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA P.C

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 Application under and in terms of Article 12 (1), 14 (1)(g), 17 and 126 of the Constitution of the Republic of Sri Lanka

SC (F/R) Application No.
402/2016

1. Laboratory Equipment Co. (Pvt) Ltd,
   No. 126/3/1,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

2. Ruwindi International Trade (Pvt) Ltd,
   No. 126/M/4,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

3. Proso Manpower Tours & Travels (Pvt) Ltd,
   No. 126/18, Ground Floor,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

4. Inter Marine C&F (Pvt) Ltd,
   No. 126/2/28,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

5. Monsell International (Pvt) Ltd,
   No. 126/19/B, Ground Floor,
   Sri Baron Jayatileka Mawatha,

YMB Building, Colombo 1.

6. Expo Cargo Links (Pvt) Ltd,
   No. 126/3/19, Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

7. Sripala Shipping (Pvt) Ltd,
   No. 126/3/2,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

8. S. Saverimuttu and Co,
   No. 126/3/3/, 3rd Floor,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

9. Demiyan Sunil Abeyratne Abeyratne & Co,
   No. 126/2/18, 2nd Floor,
   Sri Baron Jayatileka Mawatha,
   YMB Building, Colombo 1.

10. Treven Edward Weinman,
    Trust Freight Systems,
    No. 126/2/6,
    Sri Baron Jayatileka Mawatha,
    YMB Building, Colombo 1.

11. Stanley Wijesinghe,
S.W. Cargo Service,
No. 126/3/5,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

12.Mahathanthri Rathnasiri,
Rathnasiri Ruhunu Hostel,
No. 126/4,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

13.J.P.M. Fernando,
Libosree Agency,
No. 126/16,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

14.M.R. Priyantha Fernando,
Nirmala Agencies,
No. 126/B-7C,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

15.Swani Maria Pillai,
Management Accountants,
No. 126/3/23, 3rd Floor,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

16. K.N.V.K. Tennakoon,
    Eagle Freight,
    No. 126/1/10B,
    Sri Baron Jayatileka Mawatha,
    YMB Building, Colombo 1.

17. I.A.M. Sugandika Indurugalla,
    Ceylon Express International,
    No. 126/1,
    Sri Baron Jayatileka Mawatha,
    YMB Building, Colombo 1.

18. S.M. Sachchithanandam,
    V.M. Perempalam & Co.
    No. 126/1/2/, 1st Floor,
    Sri Baron Jayatileka Mawatha,
    YMB Building, Colombo 1.

19. R.P. Priya Nilaksha Perera,
    LAK SEE Photo Traders,
    No. 126/B/37 and No. 126/B/1A,
    Sri Baron Jayatileka Mawatha,
    YMB Building, Colombo 1.

20. Priyadarshani Fernando nee T.M. Nicholas,
    Priyaa Trading Company,
    No. 126/3-22,
    Sri Baron Jayatileka Mawatha,
    YMB Building, Colombo 1.

21.K.P.L. Amarasinghe,
Sasiri Associates,
No. 126/5/1,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

22.M.A.J. Laknath,
Kunchana Opticians,
No. 126/8/B,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

PETITIONERS

Vs.

1. Ceylon Electricity Board,
   No. 50, Sir Chittapalam A Gardiner Mawatha,
   Colombo 2.

2. General Manager,
   Ceylon Electricity Board,
   No. 50, Sir Chittapalam A Gardiner Mawatha,
   Colombo 2.

3. Public Utilities Commission of Sri Lanka,
   6th Floor, BOC Merchant Towers,
   St. Michael's Road,
   Colombo 3.

4. Director General,
   Public Utilities Commission of Sri Lanka,
   6th Floor, BOC Merchant Towers,
   St. Michael's Road,
   Colombo 3.

5. Colombo Young Men's Buddhist Association,
   No. 126/B/1A,
   Sir Baron Jayathilaka Mawatha,
   Colombo 1.

6. Major General Harsha Weerathunge,
   General Manager,
   Young Men's Buddhist Association,
   No. 126/B/ 1A,
   Sir Baron Jayathilaka Mawatha,
   Colombo o1.

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

Before:	Buwaneka Aluwihare PC. J Priyantha Jayawardena PC. J L.T.B. Dehideniya. J
Counsel:	Harsha Fernando with N. Noorden for the Petitioners Viraj Dayarathna SDSG with Rajitha Perera SSC for the 1st-4th and 7th Respondents Harsha Amarasekera PC with Neomal Pelpola for the 5th and 6th Respondents
Argued on:	26.02.2018
Decided on:	12.10.2018

Aluwihare PC. J.,

The Petitioners have come before this Court challenging the removal of existing electricity meters and the fixation of new meters at their respective business premises situated in Colombo Young Men's Buddhist Association—the 5th Respondent. These new meters have been installed pursuant to an arrangement arrived between the 5th and the 1st Respondent—the Ceylon Electricity Board, to provide a Bulk Electricity Supply to the said premises. Approvals and license in this regard have been granted by the 3rd Respondent—the Public Utilities Commission of Sri Lanka, and the Petitioners claim

that the totality of these events and their consequences have resulted in a violation of their Fundamental Rights under Article 12 (1) and 14(1)(g) of the Constitution.

On the day of the hearing, the learned President's Counsel for the 5th and 6th Respondents raised a preliminary objection on time bar. In what follows, I will address this preliminary objection while setting down, at the same time, the relevant facts of the case.

The Petitioners are long standing tenants of the 5th Respondent—the YMBA. Prior to 2016, the tenants have directly received their electricity from the CEB. This gave rise to a situation where the YMBA building being wired in an *ad hoc* manner over the years, jeopardizing the safety of the building. As demonstrated by the document marked "6R(3)(b)", these concerns have been shared by the Petitioners as well. Pursuant to a fire inspection that was carried out in January 2014, the 5th Respondent management decided to obtain a bulk electricity supply connection which would replace the individual connections tenants had with the CEB.

In order to obtain a bulk electricity supply, the 5th Respondent was required to obtain a certificate of exemption from the 3rd Respondent to hold a license for distribution and supply of electricity within the YMBA building. The 5th Respondent applied, went through the procedure, and was granted the said certificate of exemption in 2014. This was notified to the public in terms of section 21 (2) of the Sri Lanka Electricity Act No. 20 of 2009, by way of newspaper advertisement dated 15th August 2014 published in all three languages (marked "3R10(a)", "3R10 (b)", "3R19 (c)") and by way of a Gazette notification (marked "6R6(a)") dated 28th November 2014.

According to the 5th Respondent, between 2014 and 2015, the management of the YMBA had taken steps to inform the tenants of the plan to obtain permission from the 1st and the 3rd Respondents to distribute and supply electricity within the YMBA premises. They have produced to this Court an affidavit marked "6R3(a)" by Thantrige Thakshila Srinath Perera who was the Maintenance and Purchasing Executive of the 5th Respondent, to support their stance. Additionally, they state that after obtaining the certificate of exemption and after entering into a contract in April 2015 with

Illukkumbura Industrial Automation (Private) Ltd for the installation of the electrical distribution system, the 5th Respondent took steps to inform the tenants of the plan to remove the existing electricity meters with the CEB and replace them with the YMBA meters. The 5th Respondent has attached copies of notices convening meetings on 18th February 2016 and 3rd November 2016 and the attendance sheets of the said meetings which bear the signatures of several petitioners ("6R(4)(b), 6R4(d)"). While these documents prove that meetings took place on the said dates with the participation of tenants, I am unable to conclude as to whether the decision to install new meters was in fact discussed during these meetings. In the counter-objections, the 1st Petitioner strictly denies that they were informed of such plans at the meetings.

The removal of the meters took place on 4th July 2016. However, prior to that, the Petitioner have from time to time sent letters of complaints to the 1st and 3rd Respondents objecting to the removal of their meters. The first of these has been sent on 27th April 2016 ("P2"). Thereafter, on 12th July 2016 ("P3(A)"), 1st of September 2016 and on 9th September 2016 (marked "P8" and "P8A"), Petitioners have sent further complaints to the 3rd Respondent.

The crux of the petitioner's grievance is that the YMBA is charging a rate higher than the rate which they originally paid for when they received electricity directly from the CEB. They claim that the applicable CEB rate is the Industrial Purpose and General-Purpose Tariffs category where a charge of Rs. 18.30 is made per unit for less than 290 units and Rs. 22.85 per unit for more than 290 units. The Petitioners contend that the 5th Respondent has charged them at a higher rate, Rs. 26. 31 per unit. They *inter alia* also challenge that the monthly invoices sent to them do not indicate the monthly billing period, the units consumed by the tenants or a breakdown of the calculation.

As an extension of this argument, they contend that these undesirable consequences would not have ensued if the 1st and the 3rd Respondents did not grant a certificate of exemption to 5th Respondent to install a bulk meter supply at the premises. Therefore, they contend that the 1st and the 3rd Respondents' act of granting the certificate of exemption to the 5th Respondent has violated their fundamental rights.

In terms of section 10 read together with section 9A of the Sri Lanka Electricity Act No. 20 of 2009, the Public Utilities Commission is vested with the power to issue a Certificate of Exemption, exempting a person or a category of person from obtaining a license to distribute or supply electricity to any premises. The said Exemption is only granted to persons or category of persons who wishes to engage in community-based electricity generating project on a non-commercial basis.

In terms of section 9A of the Act, when issuing a Certificate of Exemption, the Commission must have regard to;

(a) the process adopted for generation of electricity;

(b) the quantity of electricity proposed to be generated;

(c) the number of persons among whom the electricity generated is to be distributed;

(d) the location of the plant to be used for the generation of electricity; and

(e) any other criteria that the Commission may consider appropriate,

Once approved, the Commission must publish in the Gazette, the names of any person or category of persons who have been exempted from obtaining a licence for the distribution of electricity. Furthermore, such certificate of exemption could only be issued for a specified period and must further be subject to terms and conditions which the Commission may impose.

The Petitioners challenge that the 3rd Respondent has granted a certificate of exemption in bad faith and for extraneous consideration without verifying whether the 5th Respondent has the necessary expertise to carry out the task of distributing and supplying electricity. Nevertheless, over and above the assertion that "*the Petitioners verily believe that the exemption has been granted by PUCSL for extraneous consideration and in bad faith contrary to the objectives of and provisions of the Sri*

Lanka Electricity Act No. 20 of 2009" in paragraph 24 of their Petition, the Petitioners have not adduced any evidence to sustain this claim.

In any event, based on the documentary proof produced by the 1st, 3rd and the 5th Respondents, which I have previously referred to, I have no reason to believe that the 1st and the 3rd Respondents have colluded or acted illegally to grant the 5th Respondent a certificate of exemption. The 5th Respondent applied for the said certificate as far back as in 2014. Prior to granting the said exemption, the 3rd Respondent had followed the statutory procedure to satisfy itself that the 5th Respondent has the necessary means and expertise to carry out the distribution and supply ("3R7(b)"). They reviewed the 5th Respondent's application and approved the same by way of a Commission paper marked "3R8". Gazette notification of this grant and newspaper advertisements informing the same in all three languages have been published in 2014 ("3R10(a)", "3R10 (b)", "3R19 (c)" and "6R6(a)"). Furthermore, the 3rd Respondent has specified a series of conditions and terms which the 5th Respondent must obey after obtaining the certificate of exemptions. Accordingly, it is clear that the 3rd Respondent has followed the statutory process when discharging its duties and functions under Section 9A and 10 of the Electricity Act.

Similarly, the 5th Respondent has followed the correct procedure when preferring the application under section 10 of the Electricity Act, and has exercised due diligence in liaising with entities best equipped to install the electricity meters. ("6R7(c)"). In the face of these factors, I fail to observe how the Petitioners could claim that the 3rd Respondent and 1st Respondents' conduct resulted in an alleged violation of their fundamental rights.

Even if this Court was to give the benefit of the doubt to the tenants that they may have not been aware of the shift towards the bulk supply in 2014, by their own admission, the first steps to remove the CEB meters had taken place on the 4th of July 2016. The documents marked "P2", "P3(A)", "P8" and "P8A" which are letters of complaints sent by the several petitioners to the1st and 3rd Respondents bear the dates 27th April 2016, 12th July 2016, 1st of September 2016 and on 9th September 2016.

Furthermore, the Petitioners have produced to this Court several invoices issued by the 5th Respondent for electricity consumption. I observe that the first of such bills has been issued in June 2016 and the latest is dated September 2016.

Accordingly, it is very clear that the series of events which the Petitioners are complaining of, unfolded for more than 2 years, with the most proximate event taking place in September 2016. Even if this Court were to agree with the fact that the Petitioners may have realized the magnitude of the project at a later point, they could have still invoked the jurisdiction by October 2016—which would have brought their claim within the mandatory one-month period in terms of Article 126 (2) of the Constitution.

The Supreme Court has consistently held in a number of cases involving alleged violation of fundamental rights that the time limit within which an application for relief for any fundamental right or language right violation may be filed is mandatory and must be complied with. (See **Edirisuriya Vs. Navaratnam [1985 1 SLR 100**) It has also been observed in **Illangaratne Vs. Kandy Municipal Council [1995] BALJ Vol.VI Part 1 p.11** that *"[…] it would not suffice for the petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge."*.

In a fit case, however, the Court would entertain an application made outside the time limit of one month **provided an adequate excuse for the delay could be adduced**. If the Petitioners could demonstrate that an exceptional circumstance prevented them from approaching the Court or that the lapse was not due to their fault, this Court could take cognizance of such applications notwithstanding the delay.

"*Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application were the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner*." **(Alawala v The Inspector General of Police (SC F.R. 219/2015) SC Minutes 15. 02. 2016)**

However, in the present case, the Petitioners have failed to adduce any explanation for failing to come before this Court prior to 2nd November 2016. This Court also has before itself a letter (marked "6R4(e)") which is a letter written by the 9th Petitioner in December 2016 to the 1st Respondent consenting to remove the Electric meter installed in their premises and agreeing to adhere to the instructions given by the 3rd Respondents in the reconnection of the meters. Accordingly, I do not think that the Petitioners after deciding to proceed in a particular course can, in the absence of any reasonable grounds, invoke the fundamental rights jurisdiction to alter that course to produce a result they desire.

The Petitioners' most serious grievance, as I adverted to above, is the tariff rate. They contend that the 5th Respondent is charging them a rate higher than the rate set for the "*Category G1 of the Industrial Purpose and General Purpose Tariff.*" They have complained to the 3rd Respondent of the same by way of letters marked "P6" and "P8". These complaints have been duly noted by the 3rd Respondent and it has communicated to the Petitioners that their complaint is under review (document marked "P8A").

However, contrary to their claim, the tariff rate for "Category G1 Industrial Purpose and General Purpose" is only applicable to individual tariff customers and not to those falling under the bulk electricity supply scheme. In terms of section 30 (2) of the Sri Lanka Electricity Act No. 20 of 2009, the tariff rate for bulk transmission is decided by the 3rd Respondent in accordance with a cost reflective methodology which permits the bulk supplier to recover all reasonable costs incurred in the carrying out of the activities authorized by the license.

The relevant guidelines are produced marked "3R1". These guidelines take into account *inter alia* the 'average purchase cost of electricity, average direct maintenance costs of standby generation, average direct operating cost of standby generation, average direct maintenance costs for electricity distribution system, adjustment for losses and regulatory levy.'

The Respondents state that the tariff rate for the 5th Respondent bulk meter supply was determined pursuant to data submitted by the 5th Respondent of the last three months

electricity consumption in the premises. (marked "3R2") Accordingly, the 3rd Respondent approved an interim tariff to be made applicable from June 2016 to November 2016. The 5th Respondent was permitted to charge subject to a ceiling tariff of Rs. 27. 58/kWh.

In the invoices attached by the Petitioners, I observe that, the 5th Respondent has adhered to the 3rd Respondent's conditions and has not exceeded that limit. In any event, as evinced by documents 6R9(a), 6R9(b) and 6R9(c), this rate will only be made applicable till the 5th Respondent is able to submit a final tariff charge. However, they are being prevented from determining a final tariff rate as a section of tenants have resisted the removal of their individual meters and have obtained an interim order towards this end.

On this point too, I see no compelling ground to intervene as it does not appear that the 3rd and the 5th Respondents are acting fraudulently. I do however agree with the Petitioners that the 5th Respondent's monthly invoices should include the billing period, number of units consumed by each tenant and the manner in which calculations are done pursuant to their tariff rate.

This is not merely an act of prudence but a contractual obligation as condition 19 (2) (b) and (6) of the Certificate of Exemption No. EL/EX-D/14/07 clearly require the 5th Respondent to "*publish the tariff schedule as directed by the Commission*" and to ensure that the tariff schedule shall "*contain such detail as shall be necessary to enable any consumer to make a reasonable estimate of the charges to which it would become liable for purchases of electricity*." I observe that it is only the latest invoice produced to this Court (September 2016) that carries these characteristics.

In my opinion, the Petitioners are justified in raising these concerns. I emphasize that these matters ought to be resolved by the 5th respondent once they are able to determine a final tariff rate and implement their project properly. I also urge the Respondents to consider introducing a final tariff rate that does not drastically deviate from the tariff rate for 'Category G1 Industrial Purpose and General Purpose'.

However, it must be noted that such concerns fall outside the fundamental rights jurisdiction of the Court. The Petitioners have failed to establish any derogation or failure by the 1st and the 3rd Respondents' in discharging their duties. Their grievances are strictly directed towards the 5th Respondent. This jurisdiction is not the correct platform to canvass the grievances which the Petitioners have with their landlord.

Accordingly, I am of the view that the Petitioners' application is filed out of time and is misconceived and should be dismissed *in limine*. The interim order preventing the removal of the remaining electricity meters is hereby revoked.

Application dismissed.

Judge of the Supreme Court

Justice Priyantha Jayawardena PC.

I agree

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution.

1. **MALIKA JOTHIRATHNA**
2. **R.M.N. ODARA** [a Minor]
   Both of No. 26, Halwathura,
   Willegoda Ambalangoda.

PETITIONERS

SC (FR) Application 412/2016

VS.

1. **SUMITH PARAKRAMAWANSHA**
2. **REKHA NAYANI MALLAWARACHCHI**
3. **DIYAGUBADUGE DAYARATNE**
4. **MALLIYAWADU SHIRLEY CHANDRASIRI**
5. **NILENTHI SANTHAKA THAKSALA DE SILVA**
   The former Principal, the Secretary and the Members of the Interview Board, Dharmashoka College, Ambalangoda.
6. **W.T.B. SARATH**
7. **P.D. PATHIRATHNA**
8. **K.P. RANJITH**
9. **JAGATH WALLAGE**
   The President and Members of the Appeals Board, Dharmashoka College, Ambalangoda.
10. **HASITHA WETHTHIMUNI,**
    Principal, Dharmashoka College, Ambalangoda.
11. **DIRECTOR OF NATIONAL SCHOOLS**
    Isurupaya, Battaramulla.

12. THE HON. ATTORNEY GENERAL
The Attorney General's
Department, Hulftsdorp,
Colombo 12.

PETITIONERS

BEFORE:	Priyantha Jayawardena, PC, J. H.N.J.Perera, J. Prasanna Jayawardena, PC, J.
COUNSEL:	Chrishmal Warnasuriya instructed by Ms. Indunil Wijesinghe, for the Petitioners. Rajitha Perera, SSC, for the Hon. Attorney General.
WRITTEN SUBMISSIONS FILED:	By the Petitioners, on 31st May 2018. Written Submissions were not filed by the Respondents.
ARGUED ON:	03rd May 2018.
DECIDED ON:	31st October 2018

Prasanna Jayawardena, PC, J

This Fundamental Rights Application arises from the non-admission of a child to Grade 1 of Dharmashoka College, Ambalangoda. Dharmashoka College is an old established National School with a reputation for good academic results and extra-curricular excellence. Many parents who reside in the Ambalangoda region are anxious to admit their children to Dharmashoka College, in the hope that an education at that institution will stand their children in good stead. This results in fierce competition among those parents to secure admission of their children to Grade 1 of the school each year. In HULANGAMUWA vs. SIRIWARDENA, PRINCIPAL, VISAKHA VIDYALAYA [1986 1 SLR 275 at p.281], Siva Selliah J described this competition among parents as the annual *"scramble for admission"*. More than three decades later, this competition continues unabated. If at all, it has heightened.

As is well known, Circulars issued from time to time by the Department of Education, set out in detail, the scheme of admission of five year olds to Grade 1 of government schools, the procedure to be followed when receiving, processing and deciding on applications for admission to Grade 1, and the marking schemes, criteria and standards to be applied when doing so. The Circular which applies to the present application is Circular No. 23/2013 dated 23rd May 2013 issued by the Secretary to the Ministry of Education and filed with the petition marked "P2".

On 16th November 2016, the 1st and 2nd petitioners filed the present application in this Court. The 1st petitioner is the mother of the 2nd petitioner, who was five years old at the beginning of 2015 and was, therefore, entitled to be admitted to a government school. The 1st petitioner applied to Dharmashoka College for the admission of the 2nd petitioner to Grade 1 in 2015. The application was unsuccessful. Appeals made by the 1st petitioner, which included an appeal that the 2nd petitioner be, at least, admitted in the year 2016, were to no avail. This led the petitioners to make the present application to this Court complaining that the respondents violated their fundamental rights guaranteed by Article 12 (1) of the Constitution when the respondents rejected the petitioners' application and appeals to admit the 2nd petitioner to Dharmashoka College.

The 1st to 5th respondents are the members of the Interview Board of Dharmashoka College, Ambalangoda, which considered applications for admission to Grade 1 of that school in 2015. The 6th to 9th respondents are the members of the Appeal Board which heard appeals from decisions of the Interview Board. Both Boards were appointed and required to function in terms of the Circular marked "P2". The 10th respondent is the Principal of Dharmashoka College, Ambalangoda. The 11th and 12th respondents are the Director of National Schools of the Ministry of Education and the Hon. Attorney General.

When the petitioners' application was supported on 18th January 2017, this Court granted the petitioners leave to proceed under Article 12 (1) of the Constitution.

The 11th respondent filed an affidavit dated 02nd June 2017. The 10th respondent filed an affidavit dated 12th June 2017. The petitioners filed a counter affidavit dated 18th July 2017. Thereafter, on a direction by Court, the 10th respondent submitted a further affidavit dated 26th February 2018 annexing a copy of the relevant marking scheme used by Dharmashoka College in 2015 marked "10R4"; copies of the petitioners' mark sheet, application and supporting documents submitted to Dharmashoka College in 2015 marked "10R5"; and a copy of the petitioners' appeal dated 30th December 2015 to the Appeal Board marked "10R6".

On 05th March 2018, this application was taken up for argument before a bench consisting of Justice Priyantha Jayawardena, Justice H.N.J. Perera, as the Hon. Chief Justice then was, and myself. Learned counsel appeared for the petitioners and learned Senior State Counsel appeared for the Hon. Attorney General. Though the 10th and 11th respondents had filed their affidavits objecting to the petitioners' application, no counsel appeared on behalf of these respondents. However, learned

Senior State Counsel, who appeared for the Hon. Attorney General, relied on the objections set out in the affidavits filed by these respondents.

The Circular marked “P2” and others like it recognise the commonly shared desire among parents to admit their child to Grade 1 of what they see to be the best possible government school which may be available to them. Accordingly, such Circulars endeavour to set out a scheme of admission which is just and equitable and which balances the ideal number of students per class with the available resources and the needs of the community. At the same time, “P2” and others like it seek to formulate procedures, criteria and standards which are transparent and fair and which can be applied, in an orderly manner and across the board, to all applicants. Accomplishing all this is a complex task. Nevertheless, these Circulars aim at achieving the best possible framework for admission of students to Grade 1 of all government schools each year and are, from time to time, refined and revised by the lessons learnt from the experiences of each year. In these circumstances, this Court would be reluctant to question the provisions of such Circulars unless they are manifestly inadequate, unreasonable, arbitrary or unfair.

At the same time, this Court is aware of the onerous nature of the task faced by officers who implement the provisions of such Circulars and handle and decide on admissions to Grade 1, especially in National Schools which receive a very large number of applications. Therefore, this Court has intervened in the decision making process of applications for admissions to Grade 1 only where it has been established that the provisions of the applicable Circular have been ignored, violated, misapplied or misinterpreted or there has been an abuse of process or a mistake which prejudices a child or other similar grounds.

Having set out the perspective from which I consider the present application should be viewed, I will turn to the terms of the Circular marked “P2” which are relevant to the present application.

As set out in Clause 4.1 of the Circular, the Department of Education is required to publish an annual notice calling for applications, in the prescribed format together with all supporting documents, from parents who wish to admit their child to Grade 1 of a government school at the commencement of the next year. By 30th June of each year, government schools, nationwide, receive applications submitted by parents.

The maximum number of students who may be admitted to Grade 1 of each school is specified in Clauses 3.1, 11.2 and 12 of “P2”. As set out therein, this maximum number was determined by two factors in 2015 - firstly, the number of available classes in Grade 1 of the school and secondly, a limit of forty students per class in 2015. As explained in Clause 3.1 of “P2’, the forty students per class were to be selected in the following manner: (i) the interview process described below selects thirty students for each class; (ii) the appeal process described below provides for the selection of a further three students per class; (iii) thereafter, seven more students per class were to be admitted upon recommendations made by the Ministry of Defence and *outside* the aforesaid interview and appeal process.

As set out in Clause 6.0 of "P2', the total number of students to be admitted to Grade 1 are then allocated among the following six categories of admissions, according the percentages shown in the right hand column:

Category		Percentage
I.	Children of parents who are resident proximate to the school.	50%
II.	Children of past students of the school.	25%
III.	Children with a sibling who is a present student of the school.	15%
IV.	Children of employees of institutions under the Ministry of Education which deal directly with education by state schools.	05%
V.	Children of parents who are public servants or employees of state corporations, statutory boards and state banks who have been transferred.	04%
VI.	Children who have returned from abroad with their parents.	01%

Clause 5 to 11 of "P2" sets out a careful process of selection based on marks which are to be awarded in line with schemes of marking specified in "P2" for each category of admission. The Interview Board identifies a `Provisional List' of successful applicants for each category of admission and also prepares `Waiting Lists' of applicants for each category of admission. Those on the `Waiting Lists' may be chosen for admission if applicants on the `Provisional List' later chose not to enter the school or are disqualified or removed from the `Provisional List' by the Appeal Board which hears appeals made by unsuccessful applicants. Such appeals may be on the basis that the appellant is entitled to higher marks or on the basis that an applicant on the `Provisional List' is not entitled to admission and the appellant should be admitted in that place. After the appeal process is concluded, a `Final List' of successful applicants and a `Waiting List' of applicants are prepared for each category of admission and are published on the notice board.

To now consider the present application, it is common ground that, in 2015, Dharmashoka College had six classes in Grade 1. Therefore, as set out above, 198 students were to be selected through the interview and appeal process - *ie:* 33 x 6 = 198. Thereafter, seven more students per class would be admitted on the recommendations of the Ministry of Defence.

The petitioners state that the 2nd petitioner child's father [and 1st petitioner's husband] is a past student of Dharmashoka College. In these circumstances, the petitioners' application was submitted under the "Children of past students of the school." category - *ie:* Category II in the Table set out above [hereafter referred to as the "past students category"].

Since, in terms of "P2", 25 % of the total of 198 students to be admitted on the interview/appeal process had to be under the "past students category", 49.5 students had to be selected from the applications submitted under this category - *ie:* 198 x 25% = 49.5. Naturally, in order to avoid the predicament which confronted the two rival women who claimed to be the child's mother in the Judgment of King Solomon,

the number 49.5 has to be rounded up or down to the nearest integer - *ie:* to 49 or to 50, as the case may be. In the present case, the number of students to be admitted under the "past students category" was fixed at 49 with the aforesaid number of 49.5 being rounded *down* to 49.

That decision is the *first* ground on which petitioners impugn the respondents' refusal to admit the 2nd petitioner to Dharmashoka College. The petitioners contend that the number 49.5 should have been rounded *up* to 50 admissions under the "past students category".

The petitioners' application made the `first cut' and they were summoned for an interview. On 21st December 2014, the `Provisional List' for the "past students category" marked "P5(a)" and the `Waiting List' for that category of admission marked "P5(b)", were published on the school notice board.

The 2nd petitioner child's name was not on the `Provisional List' marked "P5(a)" which named 45 applicants with the `cut off' mark being 57.35 obtained by the 45th applicant. However, the 2nd petitioner was 5th on the `Waiting List' marked "P5(b)" which named 11 applicants. The 2nd petitioner had been awarded 55.6 marks.

The petitioners appealed to the Appeal Board. This appeal dated 30th November 2014 was produced by the 10th respondent marked "10R6". It states that the petitioners are dissatisfied with the marks awarded to them but does not explain why they say so. However, in paragraph 15 of their petition to this Court, the petitioners have pleaded that the basis on which they appealed was that *"The Petitioners were convinced that a prejudice has occurred to the Petitioners in not awarding the appropriate amount of marks under Clause 6.2.IV, by not considering the achievement of the 2nd Petitioner's father emerging runner-up in the under 16 Boys 100 meter Free style even in the Senior National Swimming & Diving Championship."*.

The appeal was not successful and the 2nd petitioner's name was not on the `Final List' of the "past students category" marked "P8" naming 49 students selected for admission to Grade 1 under that category. The `cut off' mark on the `Final List' was 57.12 marks obtained by the 49th applicant named in it. However, the 2nd petitioner's name was second on the `Waiting List' of the "past students category" marked "P9". The 2nd petitioner's tally of marks remained unchanged at 55.6 marks.

The non-awarding of marks for the 2nd petitioner's father being placed runner-up at the aforesaid event and the refusal of the petitioners' appeal, is the *second* ground on which the petitioners impugn the decision not to admit the 2nd petitioner to Dharmashoka College.

The petitioners made an appeal to the Secretary to the Ministry of Education. That was also unsuccessful. They then made a complaint to the Human Rights Commission, which inquired into the complaint and made the recommendation dated 29th May 2015 marked "P10(a)" that the 2nd petitioner should be admitted to Grade 1 of Dharmashoka College. However, by its letter dated 02nd September 2015 marked "11R2"/"P10(b)", the Ministry of Education notified the Human Rights Commission

that, in terms of the provisions of the Circular marked “P2”, the 2nd petitioner could not be admitted to Grade 1 of Dharmashoka College.

The refusal by the respondents to comply with the recommendation marked “P10(a)” issued by the Human Rights Commission is the *third* ground on which the petitioners impugn the decision not to admit the 2nd petitioner to Dharmashoka College.

Lastly, the petitioners averred that in September 2016, a student named Devsara Haridhinie, who had been admitted to Grade 1 of Dharmashoka College in 2015 and was in Grade 2 in 2016, left the school, thereby creating a vacancy in Grade 2. However, the petitioners do not state under which category of admission Devsara Haridhinie had been admitted to Grade 1 in 2015.They go on to claim that the child who was placed first on the `Final Waiting List’ of the “past students category” marked “P9” was admitted to Grade 2 to fill that vacancy which arose in September 2016 and that, consequently, the 2nd petitioner moved up to first place on the `Final Waiting List’. The petitioners state that, since the 2nd petitioner is now placed first on the `Final Waiting List, they have a legitimate expectation that the 2nd petitioner would be admitted to Grade 2 of Dharmashoka College in the event any vacancy occurred in Grade 2 in 2016. However, the petitioners have not submitted any material to support their claim that the student who was placed first on the `Final Waiting List’ was admitted to Grade 2 and that the 2nd petitioner has now moved up to first place on the “Final Waiting List” marked “P9” of the “past students category”. The petitioners plead that, despite these circumstances, a student named Dasun Sandeep Senaratne, whose name was not on any `Final Waiting List’ in any category of admission, has been admitted to Grade 2 of Dharmashoka College on 21st September 2016. The petitioners state that they made further appeals asking that the 2nd petitioner be admitted to Dharmashoka College but that those appeals were also refused by the letters dated 14th October 2016 and 03rd November 2016 marked “P17” and “P18”.

The admission of Dasun Sandeep Senaratne instead of the 2nd petitioner is the *fourth* ground on which the petitioners impugn the decision not to admit the 2nd petitioner to Dharmashoka College despite their appeals in 2016.

On the basis of these averments, the petitioners plead that the respondents’ decision not to admit the 2nd petitioner to Dharmashoka College in 2015 or 2016, is discriminatory and arbitrary and violates the petitioners’ fundamental rights guaranteed by Article 12(1) of the Constitution.

The 10th respondent stated, in his affidavit, that the child named Devsara Haridhinie who left the school in 2016 had been admitted to Grade 1 in 2015 under the “Children of parents who are resident proximate to the school.” category. The 11^{1h} respondent stated that the child named Dasun Sandeep Senaratne had been admitted to Grade 2 of Dharmashoka College in 2016 consequent to an appeal which had been approved by the Secretary to the Ministry of Education on the recommendation of the Director of National Schools. He said the appeal was approved because the child had been duly admitted to Dharmashoka College in 2015 but, due to unavoidable and unexpected circumstances including ill health,

been unable to enter Grade 1 that year. In this regard, he produced the appeal, approval and letters marked "11R4", "11R5", "11R6" and "11R7".

I will now examine each of the aforesaid four grounds on which the petitioners impugn the decision not to admit the 2nd petitioner to Dharmashoka College despite their appeals in 2016.

As mentioned earlier, the petitioners' *first* claim is that the number of children admitted under the "Children of past students of the school." category should have been rounded *up* from 49.5 to 50 and not rounded down to 49.

In support of this argument, the petitioners have averred in in paragraph [21] of their petition [which is reproduced *verbatim*] that *"The Petitioners reiterate that 49.5 students were to have been admitted under the Old boys/Girls category to Dharmashoka College. However, such figure was rounded down to 49 instead. The Petitioners further states that the following categories of students also possess uneven divisions similar to the category of Old Boys/Girls, however, all other categories have benefitted with rounding off to their advantage than the Old Boys/Girls Category. For the Convenience of Your Lordships such figures are produced below including the Old Boys/Girls category for a total of 198 students;*

Category	*Percentage*	*No. of students eligible*	*No. of students admitted*
Proximity	*50%*	*99*	*99*
Old Boys/Girls	*25%*	*49.5*	*49*
Brothers/Sisters	*15%*	*29.14*	*30*
Staff members under the Ministry of Education	*05%*	*9.19*	*10*
Transferred Public Servants	*04%*	*7.92*	*8*
Returned from abroad	*01%*	*1.98*	*2*
Total	*100%*		*198"*

Thus, the petitioners' argument is that: (i) other than in the first category of *"Proximity"* [where the applicable percentage of 50% yields a number of 99 students, which is an integer or `whole number'], the applicable percentages for all the other categories of admission yielded numbers which are fractions; (ii) the *"Old Boys/Girls"* category [more correctly, the "past students category"] under which petitioners have applied is the only category in which the fraction has been rounded *down*; (iii) as set out in the aforesaid table prepared by the petitioners, the fractions have been rounded *up* in all the other categories; and (iv) this is *ex facie* discriminatory and prejudicial to applicants under the "past students category".

Thus, petitioners claim that, as set out in the above table prepared by them, the fraction of 29.14 in the *"Brothers/ Sisters"* category has been rounded up to 30; the fraction of 9.19 in the *"Staff members under the Ministry of Education"* category has been rounded up to 10; the fraction of 7.92 in the *"Transferred Public Servants"*

category has been rounded up to 8; and the fraction of 1.98 in the *"Returned from abroad"* category has been rounded up to 10.

However, the numbers calculated and stated by the petitioners in respect of the *"Brothers/ Sisters"* category and the *"Staff members under the Ministry of Education"* category are wrong. The correct numbers for these two categories are 29.7 and 9.9 respectively [15% of 198 is 29.7 and 5% of 198 is 9.9]. Thus, the aforesaid table prepared and pleaded by the petitioners is misleading.

When this error is corrected, it is seen that the rounding up of the fractions in all the categories was correct and reasonable since the elementary arithmetical rule is that fractions *higher than five* are to be rounded *up* to the nearest integer and fractions *lower than five* are to be rounded *down* to the nearest integer. Thus*:* 29.7 has been correctly rounded up to 30 in the *"Brothers/ Sisters"* category; 9.9 has been correctly rounded up to 10 in the *"Staff members under the Ministry of Education"* category; 7.92 has been correctly rounded up to 8 in the *"Transferred Public Servants"* category; and 1.98 has been correctly rounded up to 2 in the *"Returned from abroad"* category, respectively.

When, during the course of submissions, we observed that the aforesaid table prepared by the petitioners was incorrect and misleading, learned counsel for the petitioners apologised and stated that it was an inadvertent mistake. While I accept that there was no intention to mislead, I nevertheless stress that this type of mistake is unacceptable. Care must be taken by those who draft pleadings to ensure that they do not present a misleading picture to Court.

With regard to the "past students category" under which the petitioners have applied, the applicable percentage of 25% resulted in the number 49.50 [25% of 198 is exactly 49.50]. The arithmetical rule is that a fraction of .50 may be rounded up *or* down, as is suitable in the circumstances.

As mentioned earlier, the maximum number of students who could be admitted was 198 and, as explained earlier, 149 students had to be admitted under the other categories - *ie:* 99 + 30 + 10 + 8 + 2 = 149.

As a result, the maximum number of students who could be admitted under the "past students category" was 49 - *ie:* 198 - 149 = 49.

Thus, the respondents' determination that the number of students to be admitted under the "past students category" is to be fixed at 49, is arithmetically sound and is reasonable since the circumstances required that 49.5 be rounded *down* to 49 so as to ensure that the maximum number of 198 was not breached. There has been no unfair discrimination against applications under that category.

Thus, there is no merit in the first ground on which the petitioners rely.

The petitioners' *second* claim *as pleaded in their petition*, is that they were entitled to another 02 marks on account of the 2nd petitioner's father being placed runner-up in the Under 16 Boys 100 Meter Free Style Event at the Sri Lanka Schools Senior National Swimming & Diving Championships held in 1991. The petitioners contend that, had these 02 marks been awarded, their application would have received 57.6 marks [and not the 55.6 marks they were awarded] and, thereby, they would have passed the "cut off" mark of 57.12 stated in the `Final List' marked "P8", resulting in the 2nd petitioner gaining admission to Dharmashoka College.

However, as pointed out in the letter marked "11R3" written by the Director of Education [National Schools] to the Human Rights Commission, the petitioners' application had been awarded the maximum number of 08 marks which could be awarded for Competitive Events organised by the Ministry of Education in Sports or Sports related Extra-Curricular Activities. A cross-check against the marking scheme marked "10R4" used by Dharmashoka College for applications under the "past students category" in 2015, confirms that only a maximum number of 08 marks could be awarded for parents' achievements in Competitive Events organised by the Ministry of Education in the field of Extra-Curricular Activities. Thereafter, a further cross-check against the petitioners' mark sheet, application and supporting documents marked "10R5" establishes that the petitioners have been awarded this maximum number of 08 marks.

Therefore, there is no merit in the petitioners' claim as pleaded in their petition that they were entitled to another 02 marks on account of the 2nd petitioner's father being placed runner-up in that event in 1991.

Perhaps for this reason, learned counsel for the petitioners presented a different contention when this matter was argued before us, and submitted that the 2nd petitioner's father was entitled to have received Colours for swimming by reason of him being placed runner-up at the above event but that Colours were not awarded in 1991 because Dharmashoka College did not hold a Colours Awarding Ceremony that year. Learned counsel contended that this was no fault of the 2nd petitioner's father and that, therefore, the petitioners were entitled to have received 02 more marks on account of the Colours which should have been awarded to the 2nd petitioner's father. That argument had been made before the Human Rights Commission too. In his written submissions to us, learned counsel has gone further and submitted that the 2nd petitioner's father was entitled to have received "National Colours" in 1991. Learned counsel has cited clause 6.2 (III) of "P2" in support of his contention that the petitioners should have been awarded a further 02 marks.

However, in the first place, clause 6.2 (III) of "P2" only stipulates that, in the case of applications made under the "past students category", a maximum of 25 marks may be awarded for extra-curricular achievements during the school career of the parent whose child is seeking admission to the school. Clause 6.2 (III) does not give details on how marks should be allotted within that maximum of 25 marks. Instead, the specific marking scheme which details the manner in which marks may be allotted in applications made for admission to Grade 1 of Dharmashoka College under the "past

students category", is set out in section 3 of the marking scheme marked "10R4". Thus, the reliance on clause 6.2 (III) of "P2" is misplaced.

Next, there is no basis whatsoever for the claim made in the written submissions that the 2nd petitioner's father was entitled to "National Colours". It is common knowledge that "National Colours" are awarded only to sportsmen and sportswomen who represent Sri Lanka. It is fanciful to suggest that "National Colours" would be awarded to a boy who is placed runner-up in an under sixteen event in a national schools championship meet. Let alone "National Colours", being placed runner up in an under sixteen event is unlikely to entitle that boy to "Sri Lanka Schools Colours" either. In this regard, it may be mentioned that, although the receipt of "Sri Lanka Schools Colours" entitles an applicant to a maximum of 10 marks in terms of section 3 (අ) of the marking scheme marked "10R4", the petitioners have never claimed that they were entitled to any part of these 10 marks. That was probably in recognition of the fact that they had no claim to marks on account of "Sri Lanka Schools Colours".

I will now examine the initial submission made by learned counsel when this application was argued before us, which was also relied on by the petitioners before the Human Rights Commission - *ie:* the submission that the 2nd petitioner's father should have received "School Colours" in 1991. In this regard, it is seen that the award of "School Colours" attracts 02 marks in terms of section 3 (ඇ) (v) of the marking scheme marked "10R4".

However, it is clear that the petitioners' contention cannot be upheld because: (i) as explained in the letter marked "11R3" written by the Director of Education [National Schools] to the Human Rights Commission: (i) the 2nd petitioner's father was not entitled to receive School Colours in 1991 because he was `under age'. In this regard, it has to be noted that the event on which the petitioners rely, was an under sixteen event; (ii) further, as stated in the letter marked "11R2" written by the Director of Education [National Schools] to the Human Rights Commission, marks cannot be claimed or awarded on the hypothetical basis that the 2nd petitioner's father *would have* received School Colours *if a* Colours Awarding Ceremony had been held by Dharmashoka College in 1991.

It is clear to me that these explanations in "11R3" and "11R2" setting out why the petitioners are not entitled to the 02 marks they claimed, are eminently reasonable.

Accordingly, I hold there is no merit in the second ground relied on by the petitioners.

The third ground relied on by the petitioners is the refusal by the respondents to comply with the recommendation marked "P10(a)" issued by the Human Rights Commission to admit the 2nd petitioner to Dharmashoka College.

It has to be noted that the provisions of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 do not invest in the Human Rights Commission a power to make binding orders. Instead, where a dispute is not resolved by conciliation or mediation initiated by the Commission, the Commission may make *"recommendations"* to the appropriate authorities or person, or may refer a dispute to the appropriate Court. As made clear by section 15 (7) of the Act, the recipient of a recommendation made by

the Commission has a statutory duty to report back to the Commission on the action which is to be taken with regard to the implementation of that recommendation. However, there is no mandatory duty to comply with the recommendation. Instead, as stated in section 15 (8), where the Commission is of the view that the action taken by the recipient to give effect to the recommendation is inadequate, the Commission is required to report that fact to His Excellency, the President who will then place that report before Parliament.

In the present case, the Ministry of Education has responded by its letters marked "11R2" and "11R3" and explained to the Human Rights Commission why it is not possible to give effect to the Commission's recommendation marked "P10(a)". There is no material before us to suggest that the Commission found that explanation to be unacceptable or inadequate. There is certainly no suggestion that the Commission saw any reason to make a report under section 15 (8) on the ground that the explanation and response from the Ministry of Education was *"inadequate"*.

Further, a perusal of the recommendation marked "P10(a)" reveals that the Human Rights Commission has proceeded on the mistaken premise that the 2nd petitioner was placed first on the `Final Waiting List' marked "P9". The factual position is that the 2nd petitioner was placed second on the `Final Waiting List' at the time "P10(a)" was issued. Further, although "P10(a)" mentions a letter dated 21st May 2015 by which the Principal of Dharmashoka College has referred to a *"possibility"* ["හැකියාවක්"] of awarding a further 02 marks to the petitioners, that letter has not been produced to us and the petitioners have not sought from this Court a direction that the letter be produced. Therefore, we are unaware of what was said in the alleged letter. The reference in the recommendation marked "P10(a)" to the existence of a *"possibility"* of awarding further marks, does not necessarily establish an undertaking by Principal of Dharmashoka College to give those marks. In any event, the Principal is not entitled to award any marks other those permitted by the Circular marked "P2" and, in the case of applications made under the "past students category", the marking scheme marked "10R4". Further, in cases of doubt with regard to the interpretation or implementation of the Circular marked "P2", the question is to be referred to the Secretary to the Ministry in terms Clauses 18 and 11.10 of "P2". However, as learned Senior State Counsel submitted when this application was argued, neither the Secretary nor his representative were made a party to the proceedings before the Human Rights Commission. In these circumstances, I do not think that the petitioners can sustain their submission that the respondents should be held to an alleged undertaking given before the Human Rights Commission.

In support of his contention that the respondents were bound to act in terms of the recommendation marked "P10(a)" made by the Human Rights Commission, learned counsel for the petitioner has referred to UKWATTA vs. MARASINGHE [SC FR 252/2006 decided on 15th December 2010] where Ekanayake J observed [at p.6] that the Human Rights Commission had been established *"for the protection, fulfilment and promotion of the fundamental as well as other internationally recognised rights ….."*. I do not think that general observation helps the petitioners'

contention that the respondents were bound to comply with "P10(a)". Learned counsel also cited SRI LANKA TELECOM LTD vs. HUMAN RIGHTS COMMISSION OF SRI LANKA [SC Appeal 215/2012 decided on 01st March 2017] where De Abrew J stated [at p. 8-9] that a recipient of a recommendation made by the Human Rights Commission *"….. 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."* De Abrew J went on to observe that where there is a failure to comply with a recommendation made by the Commission, the remedy available to the Commission is to act in terms of section 15 (8) and report that fact to His Excellency, the President and that the recipient *"…. 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."*. Thus, SRI LANKA TELECOM LTD vs. HUMAN RIGHTS COMMISSION OF SRI LANKA does not assist the petitioners either. De Abrew J did not suggest that a recommendation made by the Human Rights Commission has a binding and compulsory effect.

For the aforesaid reasons, I hold that there is no merit in the third ground relied on by the petitioners.

The fourth and final ground averred in the petition is the claim that the child named Devsara Haridhinie had left Grade 2 of Dharmashoka College in September 2016 and that the 2nd petitioner should have been admitted but that the child named Dasun Sandeep Senaratne had been admitted instead.

However, the 10th respondent has explained that Devsara Haridhinie was admitted to Grade 1 in 2015 under the "Children of parents who are resident proximate to the school." category. Therefore, her departure from Dharmashoka College in 2016 has no relevance or bearing on the petitioners since the 2nd petitioner is on the `Final Waiting List" of the "past students category". Instead, as the 10th and 11th respondents have both stated, the 2nd petitioner may be admitted only if vacancies occur as a result of children admitted in 2015 under the "past students category", leaving Dharmashoka College. That is in line with Clause 13.2 of "P2".

With regard to the child named Dasun Sandeep Senaratne, the respondents have explained the reason for that admission in 2016 - *ie:* that this child had gained admission to Dharmashoka College in 2015 but, due to unavoidable, unexpected and exceptional circumstances including illness, had not been able to enter the school in that year.

Thus, the child named Dasun Sandeep Senaratne was differently circumstanced to the 2nd petitioner who did *not* gain admission to Grade 1 in 2015 and, further, Dasun Sandeep Senaratne was admitted on reasonable, rational and equitable criteria.

For these reasons, I am of the view that there is no merit in the fourth ground relied on by the petitioners.

In his written submissions, learned counsel for the petitioner has contended that the refusal to admit the 2nd petitioner even in 2016 was due to *"manifest discrimination by the State due to nepotism and political favouritism being extended to certain other students who sought such patronage….;"*.

However, as set out above, it is evident that the refusal of the petitioners' application for admission was correctly done and that the admission of the child named Dasun Sandeep Senaratne to Grade 2 in 2016 was based on reasonable, rational and equitable criteria. Thus, there is no warrant for this submission made on behalf of the petitioners.

Learned counsel for the petitioners has also submitted that the failure on the part of the 1st to 9th respondents to tender their affidavits, justifies this Court in arriving at a finding that the allegations made in the petition should be upheld against these respondents.

That submission is misconceived. The 10th and 11th respondents have tendered their affidavits dealing with the petitioners' case and the other respondents are entitled to rely on these affidavits. That will suffice for the purposes of this case.

The decisions such as FERNANDO vs. SAMARASEKERE [49 NLR 285] and SEES LANKA [PVT] LTD vs. BOARD OF INVESTMENT [SC HCCA LA 331/2010 decided on 28th April 2015] relied on by the petitioner, deal with pleadings under the Civil Procedure Code. The requirements applicable to pleadings under the Civil Procedure Code cannot be imported lock, stock and barrel into applications heard by this Court in the exercise of its fundamental rights jurisdiction.

Finally, in his written submissions, learned counsel has alleged *"A Pattern of mala fide "selections" by this same school."* and has cited MADDAGE DAYAL NISHANTHA vs. BANDULA GUNAWARDANE [SC FR 60/2011 decided on 20th January 2012] where this Court found that there had been an instance of manipulation and discrimination in the process of admissions to Grade 1 of this school in 2011.

However, one incident in 2011 does not constitute a *"Pattern"*. In fact, a perusal of the judgment by Tilakawardane J in that decision makes it clear that Her Ladyship confined the finding of irregularities to the facts of that particular case.

In any event, as explained earlier, in the present case, the refusal of the petitioners' application for admission to Grade 1 in 2015, was entirely correct. Thus, the petitioners' aforesaid allegation is unwarranted.

For the aforesaid reasons, I hold that the petitioners' fundamental rights under Article 12(1) have not been violated.

The petitioners have been silent on whether the 2nd petitioner entered another government school after she failed to gain admission to Dharmashoka College in 2015 or 2016. I would expect the child was admitted to a school in 2015. However, in the unlikely event she has not entered a school up to now, the 11th respondent is

directed to make arrangements to forthwith admit the 2nd petitioner to an appropriate government school, which is to be determined by the Ministry of Education.

Subject to the aforesaid direction, the petitioners' application is dismissed. The parties will bear their own costs.

Judge of the Supreme Court

H.N.J.Perera
I agree.

Chief Justice

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 in terms of Article 17 and Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 434/2016

Kamani Madhya Jinadasa

Attorney-at-Law
[for and on behalf of Citizen X, person living with the Human Immuno Virus (HIV)]

Petitioner

Vs.

1. SriLankan Airlines Limited
   Company Registration No.PB 67
   Airline Centre
   Bandaranayaka International Airport
   Katunayaka
2. Dr. Anoma Jayasinghe
   Group Medical Officer
   SriLankan Airlines Limited
   Bandaranayaka International Airport
   Katunayaka
3. Nihal Somaweera
   Secretary
   Ministry of Transport and Civil Aviation
   7th Floor, Sethsiripaya stage II
   Battaramulla.

4. Dr. Sisira Liyanage
   Director
   National STD/AIDS control
   Programme
   No.29, De Seram Place
   Colombo 10.
5. Hon. Attorney General
   Attorney General's Department
   Colombo 12

Respondents

Before : Sisira J De Abrew J
Priyantha Jayawardena PC J
Nalin Perera J

Counsel : Senany Dayaratne with T Weragoda for the Petitioner
Sahanky Parathalingam with N Parathalingam
for the 1st and 2nd Respondents
Sanjaya Rajratnam ASG for the 3rd and 5th Respondents

Argued on : 8.9.2017

Decided on : 26.2.2018

Sisira J De Abrew

This court by its order dated 20.1.2017 granted leave to proceed against the 1st and 2nd Respondents for alleged violation of Articles 12(1) and 14(1)(g) of the Constitution.

The Petitioner who is an Attorney-at-Law of the Supreme Court of Sri Lanka has presented this application to this court in terms of Rules 44(2) and

44(3) of the Supreme Court Rules 1990 for and on behalf of a HIV positive person who does not want to disclose his identity. This HIV positive person is hereinafter referred to as Citizen X.

Citizen X who was attached to Mihin Lanka Ltd made an application to join Sri Lanka Airlines Ltd (the 1st Respondent) as Mihin Lanka Ltd was going to close down its operation with effect from 30.12.2016.He was called for an interview on 27.9.2010. The Petitioner further states the following facts.

1. Citizen X who was selected by the 1st Respondent reported to the Medical Centre of the 1st Respondent and filled up a medical form.

2. On 7.10.2016 Citizen X was informed by the 1st Respondent that he had been selected as a cabin crew member of the 1st Respondent. He was also requested to take his uniform.

3. On 19.10.2016 Citizen X was requested to present himself at Nawaloka Hospital for certain medical tests including HIV tests.

4. On 26.10.2016 Citizen X was informed by the 1st Respondent that he had passed the medical test and was requested to be present at the Human Resources Department of the 1st Respondent on 28.10.2016.

5. On 28.10.2016 Citizen X signed the contract of employment and the 1st Respondent issued the staff identity card.

6. Although Citizen X signed the contract of employment on 28.10.2016, the 2nd Respondent who is the medical officer of the 1st Respondent, in the same afternoon, requested Citizen X to meet him at Hilton Hotel Colombo. The 2nd Respondent at the said meeting inquired Citizen X with

regard to his HIV situation. Citizen X then divulged his HIV situation to the 2nd Respondent.

7. On 8.11.2016 one Samudrika attached to Human Resources Department of the 1st Respondent informed Citizen X that he had failed the medical test and therefore he had not been selected for employment with the 1st Respondent.

Learned Counsel for the Petitioner contended that Citizen X was not given the employment in the 1st Respondent company as Citizen X is a person who is positive for HIV and that the said decision was wrong in terms of 'National Policy of HIV and AIDS in the World of Work in Sri Lanka' published in June 2010 by the Ministry of Labour and Labour Relations.

Learned President's Counsel for the 1st and 2nd Respondents submitted that the 1st Respondent by letter dated 28.10.2016 marked Z2, offered Citizen X a contract of employment as Ground/Flight Attendant for a period of two months commencing from 1.11.2016 to 31.12.2016 subject to terms and conditions stated in the Secondment Agreement entered into by Sri Lanka Airlines Ltd with Mihin Lanka Ltd. However it has to be noted here that the Respondents have failed to produce the Secondment Agreement along with their pleadings. Learned President's Counsel for the 1st and 2nd Respondents further submitted that when Citizen X filled up the medical form (marked Z1) at the Medical Centre of the 1st Respondent, he declared in the said medical form that he did not have any sexual transmitted disease. Learned President's Counsel for the 1st and 2nd Respondents further submitted that after the medical test of Citizen X, the 1st Respondent became aware that Citizen X was HIV positive person; that the information furnished by him in the medical form (Z1) to the effect that he

did not have sexual transmitted disease was proved to be false; and that the 1st Respondent withdrew his letter marked Z2 offering the contract of employment to Citizen X on the basis that he (Citizen X) had provided false and dishonest information. The Petitioner in his petition has stated that Citizen X did not disclose, in the medical form, the fact that he is a HIV positive person as nurses attached to the Medical Centre would read the medical form and that therefore HIV story would be published. Learned counsel for the Petitioner too submitted the above facts and contended that Citizen X was not required to disclose the said information in the medical form marked Z1.

I now advert to these contentions. The Petitioner in his Petition admits that Citizen X became aware that he is a HIV positive person in 2013. Therefore when Citizen X declared on 10.10.2016 in the medical form (Z2) that he did not have sexual transmitted disease, his declaration was false. Learned counsel for the Petitioner further contended that in terms of 'National Policy of HIV and AIDS in the World of Work in Sri Lanka'[marked as A-1(b)] it was wrong for the 1st Respondent to request Citizen X to face a medical test including HIV test since Citizen X was a HIV positive person. I now advert to this contention. How does the 1st Respondent know that Citizen X was a HIV positive person? The 1st Respondent became aware that Citizen X was a HIV positive person only in October 2016. But Citizen X was aware that he was a HIV positive person in 2013. Citizen X on 10.10.2016 declared that he did not have any sexual transmitted disease. Under these circumstances, how can the 1st Respondent be found fault with for subjecting Citizen X to a medical test including HIV test. In my view, the 1st Respondent cannot be found fault with for subjecting Citizen X to the above medical test. For the Petitioner's counsel to be successful in the above contention, the 1st Respondent should have been aware about the HIV

status of Citizen X. For the 1st Respondent to become aware of the HIV status of Citizen X, he (Citizen X) should have informed the 1st Respondent about his condition which was only known to him. When I consider the above matters, I am unable to agree with the above contention of learned counsel for the petitioner. I therefore reject the above contention.

Citizen X in 2013 knew that he was a HIV positive person but did not disclose in 2016 at least in a confidential manner that he is a HIV positive person. But when the 1st Respondent after medical test discovered that Citizen X is a HIV positive person, he wants the protection provided in 'National Policy of HIV and AIDS in the World of Work in Sri Lanka'. When I consider the above matters, I feel that Citizen X is blowing hot and cold. Such a person is not entitled to get relief from court.

When I consider all the above matters, I hold that the declaration by Citizen X in the medical form (Z1) that he does not have any sexual transmitted disease is false. Therefore Citizen X had breached the trust that an employee should keep with the employer. In my view, it is not safe to permit such a person to work as a cabin crew member. Citizen X had, in his declaration marked Z1, admitted that withholding of facts asked for in the medical form could be a cause for refusal or termination of his employment. When I consider all the above matters, I hold that the 1st Respondent cannot be found fault with when he withdrew the letter marked Z2 on the basis that Citizen X had provided false information. I further hold that the Petitioner has failed to prove the allegation that the 1st Respondent terminated the services of Citizen X or the 1st Respondent did not give him employment on the basis that he (Citizen X) was a HIV positive person.

For the aforementioned reasons, I am unable to hold that the 1st Respondent and/or the 2nd Respondent had violated the fundamental rights of Citizen X. I therefore dismiss the petition of the petitioner. Considering the facts of this case, I do not order 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 in terms of an Article 126 of the Constitution read with Articles 12(1), 12(2), 12(3) and 14(1)e of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Rev. Athuthudave Gunasiri Thero, Chairman, Sri Wijeyashrama Vihara Sanwardana Samithiya, No. 1080, Sri Jayawardenapura Mawatha, Bandaranayakapura, Rajagiriya.

2. Wanigasuriya Arachige Priyani, Secretary, Sri Wijeyashrama Vihara Sanwardena Samithiya, No. 1080, Sri Jayawardenapura Mawatha, Bandaranayakapura, Rajagiriya.

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3. Jayakody Arachilage Jayalath Premawansa, Treasurer, Sri Wijeyashrama Vihara Sanwardena Samithiya, No. 1080, Sri Jayawardenapura Mawatha, Bandaranayakapura, Rajagiriya.

PETITIONERS

Vs

1. Muthuwelu Manimuththu,
   Former Chairman, Sri Lanka Land Reclamation and Development Corporation, No. 7/2, Liberty Plaza Colombo 3.
   And : 10/A. 2/1, Ward Place, Colombo 7.

2. Karunasena Hettiarachchi,
   Chairman,Sri Lanka Land Reclamation and Development Corporation, No. 3, Welikada, Rajagiriya.
3. Valance Guneratne, Former Managing Director, Sri Lanka Land Reclamation and Development Corporation, No. 12, Vandervert Place, Colombo 12.
4. Sri Lanka Land Reclamation and Development Corporation, No. 3, Welikada, Rajagiriya.
5. Chandrapema Gamage,
   Commissioner of Buddhist Affairs, Ministry of Buddhist Affairs, No. 301, T.B.Jaya Mawatha, Colombo 10.
6. Dinesh Goonewardena, Hon. Minister of Urban Development And Sacred Area Development, Ministry of Urban Development and Sacred Area Development, 3rd Floor, Sethsiripaya, Battaramulla.
7. Depanama Sugathabandu Thero (now deceased), Sri Dharmakirthiyaramaya, Polwatte Pansala, Kollupitiya, Colombo 3.

8. Hewawasamge Padmalal Wijeratne, No. 12/1, Gregory's Road, Colombo 7.
9. Lanka Orix Leasing Company Ltd., No. 100/1, 1/1, 1st Floor, Sri Jayawardenapura Mawatha, Rajagiriya.

10. Vidyaranya Winayakarma Sabawa Head Office, Sri Dharmakirthi Rajakiya Pansala, Polwatta Pansala, Kollupitiya, Colombo 3.
11. Honourable Attorney General, Attorney General's Department, Colombo 12.

RESPONDENTS

Ven. Omare Kassapa Thero, Ilangagoda Purana Rajamaha Viharaya, Sapugoda, Kamburupitiya.

INTERVENIENT RESPONDENT

BEFORE : **S. EVA WANASUNDERA PCJ., PRIYANTHA JAYAWARDENA PCJ. & L. T. B. DEHIDENIYA J.**

COUNSEL : M.U.M. Ali Sabry, PC with Ms. Shehani Alwis for the Petitioners.
Uditha Egalahewa, PC for the 2nd and 4th Respondents.

Kuwera de Zoysa, PC with Pulasthi Rupasinghe, Ameer Maharoof and Ms. P. Kulatilake for the 9th Respondent.
Ms. M.W.Padmaraji for the 10th Respondent.
D.S.Hewapathirana for the Intervenient Respondent. (Allowed in place of the Deceased 7th Respondent)
Ms. Indika Demuni de Silva PC, ASG for 5th,6th and 11th Respondents

ARGUED ON : 19.02.2018 AND 28.02.2018.

DECIDED ON : 01. 06. 2018.

S. EVA WANASUNDERA PCJ.

The Petitioners in this Application filed their Petition dated 22.10.2008 before this Court praying for many reliefs against the 1st to 6th Respondents including that their fundamental rights under Articles 12(1), 12(2), 12(3) and 14(1)(e) have been violated.

On 29.10.2008 when the Application was supported for leave to proceed, this Court has granted leave to proceed on the alleged violation of the fundamental rights of the Petitioners under Article 12(1) and 14(1) (e) of the Constitution along **with interim relief** as prayed for in **paragraph (N**) to the prayer, issuing a **stay order** staying further proceedings of the District Court of Colombo Case No. 20286/L and 00231/08/DLM until the hearing and final determination of this Application.

During the pendency of this case, the **7th Respondent** had **departed from his life** and accordingly the **Intervenient Respondent** having made an application to

intervene in view of the death of the 7th Respondent was allowed by this Court and thus he has been brought into the case with permission of Court on 06.03.2013. On record, the 9th Respondent who had filed Objections dated 09.01.2009 and the 7th and 10th Respondents have filed their Objections together dated 27.11.2008. At the time of the hearing of this Application, the Petitioners **withdrew the payers (g) and (L)** to the Petition and then they informed court that they would proceed with the rest of the prayers. Thereafter, at the stage of hearing this matter, it was apparent from the submissions made by counsel for each party, represented in Court by counsel, **except the 9th and 10th Respondents** , that the position taken up by the Petitioners in this Application are **not contested by them**. The **2nd to 4th Respondents**, the **Intervenient Respondent and the 5th , 6th and 11th Respondent**, (the Hon. Attorney General) submitted that the **Petitioners are entitled to the reliefs** prayed for in their Petition. I observe that the **1st Respondent**, the former Chairman of SLLRDC, **the 3rd Respondent**, the former Managing Director, SLLRDC and **the 8th Respondent,** Hewawasamge Padmalal Wijeratne were **not represented** in Court by any counsel.

The Petitioners have come before this Court as citizens of this country who are professing the faith of Buddhism seeking to protect the temple property of Sri Wijeyashramaya in which they practiced their religious rights and seeking a declaration from Court, that their right to worship protected under Art. 14(1)(e) of the Constitution has been infringed. They allege that the said temple property was quite illegally, arbitrarily and unreasonably removed from them by the Respondents.

The subject matter of the case is the property depicted as **Lot 1 in Plan 1270 dated 17.07.1987** surveyed and partitioned on 16.07.1987 and prepared by J.S.E. Jayasooriya, Licensed Surveyor. This plan is marked as P1 with the Petition. The said land is of an extent of A0 R2 P20 which is equal to 100 Perches. It **is admitted by the parties** as the land which is **the subject matter** of this Application. According to the Schedule to the Petition, the said land is situated at Jayawardenapura Mawatha at Welikada in the Welikada Ward No. 3 of the Municipal Council of Sri Jayawardenapura Kotte in the Palle Pattu of Salpiti Korale in the District of Colombo and the said land is registered in volume/folio M 1639/63 at the Mount Lavinia Land Registry.

In or around the year 1954, the Sri Wijeyashrama Temple was situated on an extent of land belonging to the State, which was later vested in the Urban Development Authority and was originally taken care of by Ven. Nehinne Saddhasiri Thero as the Viharadhipathi of the temple. The said Thero had been the Viharadhipathi until his death in the year 1980. It is only thereafter that the 7th Respondent , Depanama Sugathabandu Thero had become the Viharadhipathi of the Sri Wijeyashramaya Temple.

Since the said land was required by the UDA for a public purpose, it was agreed with the Sri Lanka Land Reclamation and Development Corporation to transfer a portion of the land owned by the UDA (bounded by the Sri Jayawardenapura Mawatha, Rajagiriya which was adjoining another land of SLLRDC) to the SLLRDC in order to enable the SLLRDC to allocate a portion of land to the said temple, Sri Wijeyashramaya. Then the whole land within part of which the temple was situated including the blocks of land namely Lots 24, 25,22(part) and 23(part) in Preliminary Plan No. Co. 5534 made by the Surveyor General were **amalgamated, re-surveyed and sub-divided** by T.S.E. Wijesuriya Licensed Surveyor, on 16.07.1987 and **Plan 1270 was prepared by him on 17.07.1987**. The Surveyor had divided the land into three allotments, **namely Lots 1,2 and 3.**

Then the **UDA** transferred the said land and premises **of Lot 1 of the said Plan No. 1270** dated 17.07.1987 **to the 4th Respondent, SLLRDC, (Sri Lanka Land Reclamation and Development Corporation)** by way of a grant in terms of **Deed No. 314 dated 12th January, 1988.** This Deed is marked and pleaded as **P2** with the Petition. In this Deed, I observe that in the third covenant of the Deed in page 2 , it is mentioned thus:

" AND WHEREAS the Grantor in consideration of the said desire and approval of the Minister of Local Government, Housing and Construction, the Board of Management at its meeting held on 17th November, 1987 approved the said allocation of lands marked Lot 24 in P. Plan Co. 5534 and Lots 1B and 2B in Plan No. 1270 to the Sri Lanka Land Reclamation and Development Corporation, a body duly corporate and established under Colombo District (Low Lying Areas) Reclamation and Development Board (Amendment) Act No. 52 of 1982 and having its Registered Office at No. 302, Galle Road, Colombo 4 (hereinafter sometimes referred to as "the GRANTEE" which term or expression as herein used shall where the context so requires or admits mean and include the said Sri Lanka

Land Reclamation and Development Corporation and its successors in office and assigns) **by way of a free Grant of all that and those the lands marked** Lot 24 in the said P.Plan No. 5534 **and** Lots 1B and 2B in Plan No. 1270 fully and particularly described in the Schedule hereto **to enable the Grantee to exchange the lands with Sri Wijeyashramaya Temple** for its development purposes."

The SLLRDC had promptly allocated a portion of land in extent of 100 Perches to the Sri Wijeyashramaya according to the Plan No. 1270 as aforesaid. The Board of Directors of SLLRDC at its meeting held on 03.08.1998 had approved the allocation of land subject to obtaining the cabinet approval. Subsequently, the committee appointed by the "cabinet sub-committee on Urban Development to determine the sale of lands reclaimed by the SLLRDC" on 10.08.1988, **approved the said free grant of the said land of 100 Perches according to Plan No.1270 to the temple.**

The **SLLRDC** thereafter executed a **Deed of Declaration No. 18 dated 09.12.1988** attested by J.C.K. Goonethilake, Notary Public renouncing its right title claim and demand upon the land apportioned to the Sri Wijeyashramaya temple and **declared that the said property was granted as a free grant, as temple property in favour of Rev. Depanama Sugathabandu Thero, the Viharadhipathi at that tme of Sri Wijeyashramaya temple, his successors and the Shishyanu Shishya Paramparawa.** The said Deed and the Board decision , the relevant memorandum and the cabinet sub committee minutes are also produced before this Court , marked **as P3, P3A, P3B and P3C**. Even though this Deed 18 is titled as a Deed of Declaration it is in fact " a free grant to the temple.", in particular to the Viharadhipathi of the temple, his successors and the Shishyanu Shishya Paramparawa.

The covenant number 6 of the said **Deed 18 marked as P3** reads as follows:

" AND WHEREAS it has become expedient and necessary that there should be a declaration by the Sri Lanka Land Reclamation and Development Corporation renouncing its right title and interest to the said Lot 1 in the Schedule No. 3 hereto fully described and that **Rev. Depanama Sugathabandu, Viharadhipathi** of the Sri Wijeyashramaya temple of Bandaranayakepura (Kadurugastuduwa), Rajagiriya his **successors as Viharadhipathi of the said Sri Wijeyashramaya Temple in the Sishyanushishya Paramparawa** , are entitled to the same."

With the other covenants placed in that Deed thereafter, the land named as **Lot 1 in Schedule 3 was declared to be the property passing on to the Viharadhipathi of Sri Wijeyashramaya temple**, by the name of Rev.Depanama Sugathabandu, and his **successors in the Shishyanushishya Paramparawa** to have and to hold without any encumbrances whatsoever.

The land named as Lot 1 of Schedule No. 3 in the said Deed No. 18 is the subject matter contended in this Application , namely Lot 1 in Plan 1270 dated 17.07.1987 made by T.S.E.Wijesuriya Licensed Surveyor and Leveller of the land called Kadurugasduwa.

I find that according to these two Deeds 314 and 18 , the land in question had become temple property which passes on according to the Shishyashishyanu Paramparawa , in terms of the Buddhist Temporalities Ordinance No. 19 of 1931 as amended. This temple, Sri Wijeyashramaya had been in existence from 1954. Documents P4 and P5 show quite well that the existing temple had a letter head with the name and address as it is and that there was a Dhamma School carried out by the said temple for the neighbouring children. After the demise of the then Viharadhipathi Nehinne Sadhdhasiri Thero in the year 1980, according to the Shishyashishyanu Paramparawa, his pupil, Depanama Sugathabandu Thero had succeeded to the post of Viharadhipathi. With the passage of time, the standard of the temple had come down and no development had taken place but the Buddhists who used to come had continued to come there and worship the Bodhi Tree, the Buddha statue and do their regular worshipping at the Viharaya.

The **7th Respondent, Depanama Sugathabandu Thero seemed to have left** the Sri Wijeyashramaya temple by the year 2004 and there had been no information at that time about his whereabouts. Yet, the Petitioners and the Buddhists in the area had continued to maintain the Viharaya by performing the religious activities at the Viharaya with the younger monks who were residing there at that time.

On 03.06.2005, some unknown outsiders had reached the temple and had started to fence the property of the Sri Wijeyashramaya. It was prevented by the Petitioners and others in the area. At that time, the 1st Petitioner had held the office of 'controlling Viharadhipathi' of the temple at the request of the people who fostered the temple. On 25.07.2005 close upon 5 p.m. in the evening, the

Registrar of the District Court of Colombo had come to this temple to **execute a writ** in the District Court of Colombo case number **20286/L** and to eject the 1st Petitioner from the premises of the Wijeyashramaya temple and to demolish the Viharaya. The members of the Dayaka Sabhawa of the temple and the people of the area had got together and had **objected to such execution of writ**. The report of the fiscal is marked with the Petition **as P6**. The same fiscal Piyarathna Muthukumarana had again gone there to execute the writ once again on 05.09.2005 and had failed to do so due to a massive crowd having objected to the same.

I observe that the Buddhists in the area who had been the persons coming to the temple for worship are the people who had objected to the execution of writ at both times. The second fiscal report is marked **as P6(A)** and is before Court in which the fiscal explains how the people objected having gathered in crowds into the temple premises.

The Petitioners had perused the case record in the case No. **20286/L** and found out that the **8th Respondent, one Hewawasamge Padmalal Wijeratne** had instituted the action seeking a declaration that he is the **owner of the property in question**, i.e. the land on which the Sri Wijeyashramaya was situated, on **22.04.2004**.

It is observed by me and should be noted that **this person** who had instituted action in D.C.Colombo Case No. 20286/L as Plaintiff, is not before this Court even though he is **the 8th Respondent** in this Fundamental Rights case and is **not represented** in this Court either. He has failed to get himself represented and/or to file objections to the Application of the Petitioners.

The events which had taken place can be narrated thus: The property was declared as temple property by none other than the grantee, the SLLRDC **by P3, Deed 18**. The **7th Respondent who was the Viharadhipathi** at that time had thereafter **requested the 1st Respondent**, the then Chairman of SLLRDC to transfer the said property to **him** , in **his private capacity** as a single private person. **The 1st Respondent and the 3rd Respondent** had acted in **collusion** with the **7th Respondent**, **Depanama Sugathabandu Thero** and **had transferred** the said temple property **in favour of the 7th Respondent** by Deed No. **289** dated **11.03.2004** attested by A.C.S.N. Perera Notary Public. The Vendor was SLLRDC

and the property had been valued for **Rs. 10 million** for calculating the stamp fees.

I observe that this had taken place **17 years after** the SLLRDC had granted the property to the Viharadhipathi of Sri Wijayashramaya and the Shishyanushishya Paramparawa by **Deed No. 18**.

The very next day, i.e. on **12.03.2004**, the **7th Respondent**, Depanama Sugathabandu Thero had **transferred the property** in question, to the **8th Respondent, Hewawasamge Padmalal Wijeratne, the 8th Respondent,** by Deed No. **368** dated **12.03.2004** attested by Rasika Subasinghe Notary Public, for a big sum of money as sale price, i.e. for a sum **of Rs. 75 million**. Then and there , by Deed **369** dated **12.03.2004** attested by the same Notary Public Rasika Subasinghe, the **8th Respondent, H.P.Wijeratne** had **mortgaged** the said property to the **9th Respondent, Lanka Orix Leasing Company Ltd. and had obtained a loan of Rs. 75 million.**

Documents P7 is before Court. It is Deed 289 as aforementioned. P7A is the request made to the SLLRDC by the 7th Respondent, Depanama Sugathabandu Thero to transfer the property to **his private name**. P8 is Deed 368 and P9 is Deed 369.

At this juncture I observe that as at present, according to the submissions made by counsel in this case , the fact that the said Depanama Sugathabandu Thero , the **7th Respondent , had passed away** on 19.03.2012 is accepted by all parties before Court. The two persons who had signed on behalf of the SLLRDC as Vendors, namely **Muthuvelu Manimuttu , the former Chairman** of SLLRDC , **the 1st Respondent** and **Valence Gunaratne,** the then **Acting General Manager** of SLLRDC, the **3rd Respondent** are **not represented** by any counsel before this Court. The person who bought the land and property from the 7th Respondent and who mortgaged the property to Lanka Orix Leasing Company Ltd. , namely Hewawasamge Padmalal Wijeratne , the 8th Respondent is also not present or represented before this Court.

It is pleaded by the Petitioners that the transfer deed No. 289 had been executed after the dissolution of the Parliament in 2004 and all other allegedly wrong transactions had occurred before the General Election was held. The former

Chairman, Manimuttu and Acting General Manager Valence Gunaratne of **SLLRDC had not obtained the Board Approval or the Cabinet Approval for the said transaction before executing the transfer deed No. 289. They had signed the deed on behalf of SLLRDC.** The 9th Respondent, Lanka Orix Leasing Company Ltd. in its Statement of Objections has **not pleaded** that the SLLRDC had ever got the approval of the Board of Directors and Cabinet approval. Therefore it is a fact that the proper procedure had not been followed by the two authoritative persons before placing their signatures on Deed 289. There is **no seal of the SLLRDC** placed on that deed either. The said Deed 289 seems to be an invalid document.

The 5th Respondent , the Commissioner of Buddhist Affairs had sought the legal advice of the 11th Respondent, the Hon. Attorney General with regard to the property in question. This matter had been dealt with twice by the Attorney General. The inadequacy of documents brought to the notice of the Attorney General had resulted in an incorrect advice being given firstly and thereafter when all the documents were submitted to the Attorney General, a second advice had been given cancelling the former advice. This final advice is contained in the document **5R7** which was submitted to court with the statement of objections filed by the **5th Respondent**. **The advice contained in 5R7 is to the effect that Deed 289 is legally null and void and that by Deed 18, the property granted by the SLLRDC is 'temple property'.** Thereafter again, by a letter of advice dated 27.03.2008, marked as 5R8, the Hon. Attorney General had directed the 5th Respondent, the Commissioner of Buddhist Affairs, to firstly get a Viharadhipathi appointed to the Wijeyashramaya temple, so that action can be taken under Sec. 28 of the Buddhist Temporalities Ordinance.

It is observed that the Viharadhipathi of Sri Wijeyashramaya , Depanama Sugathabandu Thero belonged to the Sri Lanka Ramanna Nikaya and sequent to the problems arisen by his actions in transferring the land to an outsider, the Commissioner of Buddhist Affairs had written to the Chief Maha Nayaka Thero of Ramanna Nikaya , a letter dated 31.03.2008 requesting him to appoint a new Viharadhipathi to facilitate the process of taking legal action with regard to the problem, under Sec. 28 of the Buddhist Temporalities Ordinance. In that regard, Depanama Sugathabandu Thero, the **7th Respondent had addressed a letter dated 24.01.2012 to the President of the Country**, with a copy to the Chief Incumbent Maha Nayaka Thero of Sri Lanka Ramanna Nikaya, **stating that he is**

agreeable to the appointment of Omare Kassapa Thero as the new Viharadhipathi of Sri Wijeyashramaya of Rajagiriya. The **Intervenient Respondent** had brought these matters before court by his documents marked as **IP2 and IP3**.

The said 7th Respondent had been living in Sri Dharmakeerthi Royal Temple, Polwatta, Kollupitiya, Colombo 3 and he had been the Director of Vidyarannya Vinayakarma Sabhawa situated at the same address. **This Vidyarannya Vinayakarma Sabhawa is the 10th Respondent to this Application**. In fact it is only the **9th Respondent and the 10th Respondent who are opposing the Petitioners' Application filed in this Court.**

It is interesting to see **part of the contents** of **the letter IP3** which was written by the 7th Respondent to the President. In the first paragraph of that letter, he states thus:

" ඉහත කී විහාරස්ථානය පිහිටි දේපළ ශ්‍රී ලංකා ඉඩම් ගොඩකිරීම් හා සංවර්ධනය කිරීමේ සංස්ථාව විසින් 1988 දෙසැම්බර් මස 29 වැනි දින ඔප්පු අංක.18 යටතේ යථෝක්ත ශ්‍රී විජයාශ්‍රම විහාරස්ථානයේ ඒ වන විටත් විහාරාධිපති වශයෙන් කටයුතු කල පුජ්‍ය දෙපානම සුගත බන්ධු නායක ස්ථවිර වන මා හට හා මාගේ ශිෂ්‍යානුශිෂ්‍ය පරම්පරාවට පවරාදී ඇත.

එසේම ශ්‍රී ලංකා රාමඤ්ඤ මහානිකාය මගින් නිකුත් කරන ලද අංක.1365 හා 1987 ජුලි මස 26 දින දරණ සම්මුති පත්‍රය මගින්ද යථොක්ත ශ්‍රී විජයාශ්‍රම විහාරයේ විහාරාධිපති ධුරයට මා පත් කර ඇත.

ගත වූ කාලය තුල තත් විහාරස්ථානය් පැවැත්ම දියුණුව උදෙසා එක් එක් භික්ෂූන් වහන්සේලා යොදවා කොතරම් උත්සාහ කළත් ඊට සරිලන පරිසරයක් ගොඩනගා ගැනීමට නොහැකි විය. එසේම විනයාණුකූල වාතාවරණයක් සකස් කර ගැනීමට අපහසුවිය. **<u>එසේ වුවත් තත්විහාරස්ථානයේ නීත්‍යානුකූල මා සතු අයිතිය කිසිදු දිනක, කිසිදු ආකාරයකින් අන්සතු කර නැත.</u>** "

As such it is obvious that the 7th Respondent, Depanama Sugathabandu Thero had admitted to the President of this Country as late as on 24th January, 2012, i.e. about three months before his death, **that he knew and he was aware** that **Deed 18** had granted the property in question to him only as **Viharadhipathi to continue to be held by his Shishyanushishya Paramparawa** and he had sneakily hidden the fact that he had got the property transferred to him to become his private property and blatantly **had lied when he said that he had never ever transferred it to any other person.** This letter explains that even though he knew what he did and had got done illegally with the temple property, he knew the **true situation where it should have stayed**, i.e. **that the property**

was meant to be always temple property to continue from one Viharadhipathi to the next Shishyanushishya Paramparawa in accordance with the provisions of the Buddhist Temporalities Ordinance.

This **letter IP3** is proof of the 7th Respondent **having robbed the temple property** from the Sri Wijeyashramaya. However he had not been able to get the SLLRDC Chairman and the Acting Managing Director to obtain the Board approval or the Cabinet approval for the said transaction.

In this Application, the **9th and 10th Respondents challenge the validity of the Deed No. 18** which is a Deed of Declaration on the basis that the necessary rituals were not performed . Therefore, the said Respondents argue that the property remained with the 7th Respondent as property he received under the Deed No. 18. They argue that the **second Deed** by which the 7th Respondent received the property in question as a transfer from SLLRDC is **Pudgalika property** stands in his favour as a valid deed.

The 9th Respondent **argued** that the said leading financial institution Lanka Orix Leasing Company Limited is a bona fide claimant to the land in question, in terms of the judgment entered into in the District Court of Colombo case No. 20286/L. It is also argued that the Petitioners are not legally entitled to seek relief to set aside the said judgment of the District Court without ever taking part in a judicial proceeding in the appropriate judicial forum meaning the District Court . The 9th Respondent challenges that the Petitioners are in effect challenging a judicial act and not an executive or an administrative action. The next argument is that the Petitioners are trying to vindicate a claim in respect of a land by way of a fundamental rights case and that it amounts to an abuse of judicial process. It is also submitted by the 9th Respondent that the Petitioners have no locus standi as they are not entitled in law to prefer any claim in respect of temple property. It is also alleged that the Petition is time barred and the 9th Respondent also complains that in this case leave to proceed was granted when the 9th Respondent was not represented in Court. I will address these arguments in the following paragraphs.

The record of this case bears the date this application was supported in Court for leave to proceed. It was supported on the 29th October, 2008 before a bench comprising of the then Chief Justice S.N.Silva, Justice Sripavan and Justice

Ratnayake. On that day, the Hon. Attorney General and the **7th** and 10th Respondents had been **represented** in Court. It is the 7th Respondent, Sugathabandu Thero who had obtained the property in an unlawful manner and then had transferred the same to the 8th Respondent who mortgaged the same to the 9th Respondent. Therefore the predecessor in title whose title had descended to the 9th Respondent had been **present** in Court when leave to proceed was granted and after considering the submissions of the Petitioners and those Respondents who were represented only, leave to proceed under Article 12 and 14(1)e had been granted. The argument of the 9th Respondent that he was not represented and that the application is time barred cannot be gone into at this juncture and that is not an argument which could be considered at present. The 7th Respondent , his predecessor in title was represented in Court and it can be presumed that all the legal objections taken up by the 7th Respondent had been considered by Court prior to granting leave to proceed.

The 9th Respondent being such a big legal person in the business world would have gone through the volume/folios in the land registry prior to granting such a big amount as Rs.75 million to the 8th Respondent and also would have gone through the deeds registered in the land registry, **before the company decided to grant the mortgage** of the land in question. The volume / folio where the land was registered when the same was granted by the SLLRDC to the Wijeyashramaya temple as temple land by P3 deed was also the same volume/folio where the 7th Respondent's deed P7 was registered. It is Volume/ Folio M 1482/250. The company definitely knew the fact that it was temple land which was improperly obtained as pudgalika property by the 7th Respondent which he passed on to the 8th Respondent from whom the 9th Respondent got the legal hold as mortgagee. The 9th Respondent cannot claim to be a bona fide claimant to the property in question. If at all, the company whose main office is situated in the adjacent land to the land in question would have happily taken a step to grant the money to the mortgagor, the 8th Respondent who had bought the property for Rs. 75 million by Deed 368 on 12.03.2004 and on the very same day mortgaged the same for Rs. 75 million by Deed 369.

The 7th Respondent, Sugathabandu Thero got the property by Deed 289 on 11.03.2004 from the SLLRDC. The whole transaction from SLLRDC to the 7th Respondent , from the 7th Respondent to the 8th Respondent and then from the 8th Respondent to the 9th Respondent had been done **within 2 dates**. Can the 9th

Respondent be classified as a bona fide purchaser is the question. The 7th and 8th Respondent had collusively planned to get the property and transfer the same and thereafter mortgage the same within the shortest possible time period. The 9th Respondent had the knowledge of the improper actions of the 7th and the 8th Respondents and had agreed to grant the money. I find that the 9th Respondent is not a bona fide purchaser. The true value of 100 Perches of land by the side of the Jayawardenapura Mawatha, the main road in Rajagiriya would have been much more than Rs. 75 million at that time.

The Petitioners in this Application are the persons who were the resident monk at the Sri Wijayashramaya temple and the president and the Secretary of the Dayaka Sabha of the temple. They are persons who are in charge of running the temple. The property of the temple has to be safeguarded by them for the Buddhists in the area to practice their religion which is a fundamental right enshrined in the Constitution. The Petitioners are not persons who are claiming the ownership of the land in question. They represent the Buddhists who are entitled in law to practice their religion including themselves, for whom the property on which the temple is situated is very important and worthy of preserving the same which was and had been continuously known and pronounced and held by the Viharadhipathi as "temple or sanghika property". The argument of the 9th Respondent that they have no locus standi to claim the property fails because they are before court alleging that their fundamental rights have been violated especially by the 4th Respondent, the SLLRDC, having acted in collusion with the 7th and 8th Respondents to wrongfully get paper title to the property as private property whereas the property was already declared as sanghika property.

Furthermore, the 10th Respondent, the Commissioner of Buddhist Affairs who has to secure temple and sanghika property according to Sec. 26 of the Buddhist Temporalities Ordinance had been silent even after the complaints were made to him about the wrongful acts done by the 7th, 8th and 9th Respondents with regard to the property. His inaction has caused difficulties for the Buddhists in the area to practice their religion peacefully. The District Court case No. 20286/L was filed against the monk who was resident in the temple and the members of the dayaka sabha and even though it had been informed to the Commissioner of Buddhist Affairs, he did not make any effort to intervene and do the needful to secure the sanghika property. At the end of the case writ of execution to get possession was

issued by Court and the Buddhists in the area including the Petitioners had gathered in masses to prevent the 7th Respondent getting possession through the fiscal. The argument of the 9th Respondent that it is against a judicial act that the Petitioners are seeking relief from, fails. They are seeking relief against the SLLRDC and the Commissioner of Buddhist Affairs who are alleged to have infringed their fundamental rights.

The 4th Respondent SLLRDC, the 2nd Respondent who is the Chairman of the SLLRDC, the 5th Respondent who is the Commissioner of Buddhist Affairs, the 6th Respondent who is the Minister of UDA, the 10th Respondent which is the Vidyaranya Winayakarma Sabhawa , the main temple the 7th Respondent Sugathabandu Thero was belonging to and the Honourable Attorney General have made submissions written and oral, to the effect that there is a violation of fundamental rights of the Petitioners enshrined in Article 12(1) and 14(1) e and that what is prayed for by the Petitioners in their Application to this Court should be granted. They admit the wrong doing of the corrupt officers of the SLLRDC by having granted a deed of transfer of the land in question as pudgalika property to the 7th Respondent. The particular land was already declared as temple property and granted to the Sri Wijayashramaya of Rajagiriya by the SLLRDC.

Chief Justice Sharvananda in his book of **Fundamental Rights in Sri Lanka ,** commenting on the application of **Section 126 of the Constitution** stated thus:
" This clause gives **very wide discretion** to the Court in the matter of the relief to be granted. Once it is established that a fundamental right had been infringed by an executive action, it is the duty of the Supreme Court **to afford to appropriate relief. It is mandated to grant such relief as Just and Equitable in the circumstances.** The relief must be according to law and principles of **equity, justice and conscience."**

In the case of **Omare Dhammapala Thero Vs Rajapakshage Peiris and Others 2004, 1 SLR 1,** Dr. S.A.Bandaranayake J (as then she was) held that;

1. A temple could possess Sanghika property, pudgalika property and property which is neither Sanghika nor Pudgalika property but could be treated as temple property.
2. A temple is an institution sui generis which is capable in law of receiving and holding property.

3. A temple could acquire property by ordinary civil modes of acquisition without a ceremony conducted according to Vinaya.

Dr. Bandaranayake J (as she then was), in the same case had given her mind to the provisions of the Buddhist Temporalities Ordinance and stated that there is no reference to Sanghika property but Pudgalika property and temple property. She had gone through the previous case law and concluded that a temple could acquire property by civil modes of acquisition and that rituals are not required. As it is in the law of this country, **the non performance of any ritual** in any culture prevalent within the country **cannot invalidate a transfer of immovable property** done in accordance with the terms of the Notaries Ordinance. I hold that the Deed of Declaration No. 18 executed in favour of the Viharadhipathi of Sri Vijayashramaya temple remains valid at all times. The 9th Respondent's argument that the 'rituals like pouring water etc. were not done when the said Deed was executed and that makes it invalid' does not hold water. It is not a valid argument according to the law as prevalent at present with regard to temple property.

Deed 18 was not a simple Deed of Declaration. It explained the background to such execution. The covenants contained therein are quite explanatory. The Sanghika Property was given by the Sri Vijayashramaya to the UDA for development purposes on the promise that another land will be given by the SLLRDC to the temple in exchange for the Sanghika Property given to the UDA by the temple. There is no way that the Sanghika property given can be exchanged for Pudgalika property. The Deed 289 granting the same property to the 7th Respondent is ab initio null and void. Such action admittedly is illegal , unlawful and invalid per se. All sales and mortgages are null and void. **The 4th Respondent has acted in violation of the fundamental rights of the Petitioners when the 4th**

Respondent transferred the temple property without any ownership of the land in its hands to do so, after firstly, having granted the land to the Viharadhipathi of the Sri Wijayashramaya temple 17 years before such date of transfer. The said Deed 289 after all is not even a properly executed deed according to law.

I have considered all the oral and written submissions made by the 9th Respondent as well as the case law contained in the following cases quoted by the counsel on behalf of the 9th Respondent in the written submissions filed:-

1. Peter Leo Fernando Vs AG (1985) 2 SLR 341
2. Velemurugu Vs AG (1981) 1 SLR 406
3. Farook Vs Raymond and Others (1996) 1 SLR 217
4. Gamaethige Vs Siriwardena (1998) 1 SLR 384
5. Liyanage Vs Rathnasiri (2013) 1 SLR 6
6. Pemananda Thero Vs Thomas Perera 56 NLR 416
7. Amarawansa Thero Vs Panditha Galwehera Amaragnana Thero (1985) 2 SLR 275
8. Therunnanse Vs Andrayas Appu 68 NLR 286
9. Dias Vs Ratnapala Therunnanse 40 NLR 41
10. Jinaratana Thero Vs Dhammaratana Thero 57 NLR 372
11. Welakanda Dhammasiddi Vs Kamburupitiye Somaloka Thero (1990) 1 SLR 234
12. Kelegama Ananda Thero Vs Makkuddala Gnanissara Thero (1999) 2 SLR 218
13. Surasena Vs Rewatha Thero 60 NLR 182
14. Wickremasinghe Vs Unnanse 23 NLR 236
15. Rev. Werahera Wimalasara Vs Porolis Fernando 56 NLR 369
16. Wijewardena Vs Buddharakkita Thera 59 NLR 121
17. Rev. Oluwawatte Dharmakeerthi Thero Vs Rev. Kevitiyagala Jinasiri Thero (2) 79 NLR 86
18. Kampane Gunaratna Thero Vs Mawadawila Pannasena Thero (1998) 2 SLR 196 and
19. Ven. Omare Dhammapala Thero Vs Rajapakshage Pieris (2004) 1 SLR 1

I hold that all the Deeds written after the Deed of Declaration No. 18 are null and void. I declare that the Deeds Nos. **289** dated 11.03.2004 attested by A.L.S.W. Perera Notary Public, **368** dated 12.03.2004 attested by Rasika Subasinghe Notary Public and 369 dated 12.03.2004 attested by Rasika Subasinghe Notary Public are **ab initio null and void and has no force or avail in law.**

Since the said transactions as aforementioned are null and void, the District Court Cases filed under **Case numbers 20286/L and 00231/08/DLM** which were based on the footing that the said Deeds were correctly executed cannot be allowed to be proceeded with. **They are hereby dismissed**. The judgment and decree in the case No. 20286/L is hereby set aside. I make order dismissing the 5th Respondent's application in terms of Section 325 of the Civil Procedure Code in the District Court of Colombo Case No. 20286/L and discharge all the Respondents to the said Application. I make further order directing the 4th , 5th and 6th Respondents to take steps if necessary and as and when it becomes necessary in the future, to remove all encumbrances from the temple property according to law, at all times with the purpose of protecting the said **temple property** of Sri Wijayashramaya Viharaya.

According to the **document I P3** which is before this Court filed by the Intervenient Petitioner, at the time he sought intervention into the present case before the Supreme Court for which no other party before Court objected, he has been held as the Viharadhipathi of the said Wijayashramaya since his appointment has been accepted according to law as approved by the Mahanayake Thero of the Sri Lanka Ramanna Nikaya with the consent of the 7th Respondent who later had passed away on 19.03.2012 according to the death certificate filed marked as **I P4**. Therefore the Intervenient Petitioner, Ven. Omare Kassapa Thero is entitled to hold the **temple property** according to the Shishyanu Shishya Paramparawa to be carried on in the same way in the future.

I declare that the Petitioners' fundamental rights under Articles 12(1) and 14(1)e have been violated by the 1st to 6th Respondents and as such I award a nominal

sum of One Hundred Thousand from each them be paid to the Sri Wijayashrama Vihara Sanwardana Samithiya as compensation to be used for the welfare of the Viharaya in the future.

The Treasurer of the Sri Wijayashrama Vihara Sanwardana Samithiya is entitled to receive the costs of this action from the 8th and 9th Respondents.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B.Dehideniya J.
I agree.

Judge of the Supreme Court

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

In the matter of an application under Article126 of the Constitution

Mrs. R.M. Dayawathi of 20/2, 14th Milepost, Walawatte, Udawala, Teldeniya.

Petitioner

Vs.

SC Application No. 459/2017 (FR)

1. The Principal,
   Girls' High School, 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:	B. P. Aluwihare PC, J. Prasanna Jayawardena PC, J. Vijith K. Malalgoda PC, J.
COUNSEL:	Elmore Perera for the Petitioner Rajiv Goonetilake, SSC for the Attorney General
ARGUED ON:	06. 04. 2018
DECIDED ON:	05. 11. 2018

Aluwihare PC. J.,

The Petitioner has complained to this court that her 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 her daughter Aksha Arundathi to Grade 01 of Girls' High School, Kandy.

The Petitioner in her application has averred that she was born on 30. 01. 1979 and baptized as a Christian on 31. 10. 1993 in Badulla and her daughter, born on 10. 02. 2012 was baptized on 08. 07. 2012. Copies of the daughter's birth certificate and Certificate of Baptism are marked P3 and P4 respectively.

In June 2017, the Petitioner submitted a school admission application dated 10. 06. 2017 for the admission of her daughter to Grade I in Girls' High School, Kandy for the year 2018 under the quota allocated to Christian students. The Petitioner has attached along with the application, *inter alia*, a letter from Rev. M.G. Edmund J.P., Superintendent Minister, Methodist Church, Kandy and a Grama Niladhari certificate confirming the Residence and character. These documents are attached P7 and P8 respectively.

Thereafter, by letter dated 24.07. 2017, the 1st Respondent informed the Petitioner to be present for an interview on 07. 09. 2017 at 2 pm and to bring the originals and photocopies of all documents submitted.

When they duly presented themselves for the interview, the 1st Respondent has asked the Petitioner for the Deed of her residence. Upon informing that the Petitioner does not have the deed as they are not the owners of the property, the 1st Respondent has promptly asked them to leave.

Thereafter, the Petitioner together with aforesaid Rev. M.G. Edumund have appealed to the 1st Respondent drawing her attention to clause 3.2 of the **Instructions** issued by the Ministry of Education **regarding the admission of Children to Grade one in Government Schools for the year 2018**' (marked P5). Clause 3.2 of the said document specifies that "*in filling vacancies in schools vested to the 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 the categories.*"

Pursuant to the said appeal, the 1st Respondent informed the Petitioner to be present before the Appeals Board on 14. 11. 2017. At the Appeal hearing too, the Petitioner was asked to produce the deed to their residence and the Petitioner informed the Board that they do not have a deed as their place of residence is owned by the husband's unmarried brother. In its place, they produced additional documents confirming their residence namely the Grama Niladhari Certificate and provided proof that their names have been registered in the Electoral register. The Appeal Board at the end of the hearing awarded them a total of 20 marks (marked P13) and informed that the final list will be posted on 10. 12. 2017. However, the Petitioners state that their daughter's name was not included in the list.

The Petitioner claims that the non-admission of her daughter to Grade 01 of High School Kandy is violative of Article 12 as the 1st Respondent failed to give regard to clause 3.2 of the P5 which states that due consideration should be given to *the proportion of children belonging to different religions at the time of vesting the school to the government.* She further states that, at the time of vesting to the Government, Girls' High School Kandy had 968 students from which 373 students were Christians. Accordingly, the admission

for Year 2018 has to maintain a proportion of 38.53% of Christian students which would amount to 75 students. She alleges that since the required quota has not been achieved for the Year 2018, her daughter should be admitted to the school as of right on the basis of her religion.

The 1st Respondent in her objections has expressed doubts about the religion of the Applicant on the premise that the Grama Niladhari certificate bears an alteration in relation to the Petitioner's religion and that the Certificate of Baptism bears 2017 as the year of issuance. She further claims that in terms of the **Circular no. 22/2017** (marked R1), applicants who apply under the proximity/vicinity category must establish their residence by resorting to the specific documents specified therein and that anyone who is unable to support the claim of residence in this manner is liable to have the application rejected. She also states that, in any event, the School has met the respective quota for the year 2018 and that the Petitioner's daughter, notwithstanding the failure to prove the residence, cannot be admitted.

For the present purposes, it is important to first determine the percentage which the school must maintain under clause 4.2 of the **Circular No. 22/2017** and clause 3.2 of the **Instructions regarding the admission of Children to Grade one in Government Schools for the year 2018** [hereinafter "Instructions"]—which is the identical English reproduction of the aforesaid clause 4.2. In order to ascertain the proportions of students, I refer to the document marked P14 –submitted by the Petitioner, and relied on by the Respondent—which is a report of the proceedings of the Methodist Church Synod held in 1961. According to this report, in 1961, there had been 968 students learning at Girls' High School of which 373 students belonged to the Christian faith. These 373 students were further sub-categorized into Methodists and students belonging to other denominations. Thus, at the point of vesting, Girls' High School, Kandy housed 81 Methodist students from a total of 968. This reflects an approximate percentage of 8.36 which the school has maintained under clause 4.2 of the Circular No. 22/2017 over the years.

The 1st Respondent has brought to the attention of this Court the numbers relevant for the year 2018. The total number of vacancies for Grade I, 2018 were 190 out of which

25 seats had to be reserved for children of those in the armed forced who served in operational areas. This left 165 seats to be allocated among the different categories of admission. According to the 1st Respondent, 50% of the said 165 was allocated to the proximity category, which amounts to 83 seats. It is from the said 50% that a further 8.36% had to be reserved for Methodist children—which constituted 7 seats. The 1st Respondent has informed this Court that already 12 Methodist students have been admitted.

The Petitioner argues that clause 3.2 of the Instructions, which is identical to clause 4.2 of the Circular no. 22/2017, permits "*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 applicants will all be admitted and the remaining vacancies shall then (and only then) be proportionately divided among other religions***" [emphasis added by the Petitioner]

However contrary to what is claimed by the Petitioner, clause 3.2 imposes no such mandatory requirement on the school administrators to admit all applicants based on their religion to fill the vacancies. It only stipulates that;

> "*In filling vacancies in schools vested to the 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 the 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 applicants will all be admitted and the remaining vacancies shall then (and only then) be proportionately divided among other religions*"

The Petitioner's argument proceeds on the basic premise that for the purposes of clause 3.2, the School must allocate the vacancies taking *Christianity* as the only basis and not its different denominations. However, as stated, the School has allocated seats giving due recognition to this distinction. This distinction is also reflected in P14—the document relied on by the Petitioner. For the year 2018, the 1st Respondent has already admitted 12 students although the allocated number of seats were only 7. As to how the 1st Respondent admitted 5 students in excess of the quota reserved for the proximity category has not been explained by the 1st Respondent. Nevertheless, that alone cannot compel this Court to make a finding that the school has proceeded on the basis of Christianity and not on the denominations. The excess of 5 seats could also have been the result of residual seats being proportionately divided among the categories due to lack of applicants in some other category. Since there is no evidence nor any allegation disputing that the 1st Respondent has adopted an inaccurate classification, I am of the view that the School' allocation of seats to Methodist students for 2018 is correct. Consequently, this means that the Girls' High School, Kandy, by admitting 12 Methodist students under the proximity category (for reasons undisclosed and unchallenged) has already exceeded the quota for that category for the relevant year.

Also implicit in the Petitioner's argument is the contention that, even if a Methodist applicant (or an applicant belonging to other faith) fails to meet the criteria for admission, they must be admitted solely on the basis of their religion if there are vacancies remaining in a particular quota. The learned Counsel for the Petitioner has cited **SC FR 335/2016** where it was held that "*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*".

However, it is important to note that in the said case, the issue pertaining to proof of residence was resolved in favor of the Petitioner. Furthermore, the Respondent in that case had admitted only 1 child under the proximity category. In view of the said factual matrix, it cannot be said that the said judgment confers on an applicant the right to gain admission to a school solely based on the religion, irrespective of their ineligibility. That

would amount to a surreptitious by-passing of the procedure. At the very least, there must be evidence on the record to show that the applicant fulfills the bare minimum qualifications for the admission.

The Circular no. 22/2017 proceeds taking certain predetermined categories of applicants as its basis. These categories are clearly spelled out in the circular along with the respective qualifications. A candidate must prefer his or her application under one of these categories to gain admission. If religion was to be the sole criteria for eligibility, the circular could have made it a separate category. The fact that it isn't, means that religion must be viewed within the framework of the overarching eligibility criteria. The religious quota is a special factor for consideration—and not a separate tier of admission. It does not make eligible an otherwise ineligible applicant. This is the reason for proportionately dividing remaining slots apportioned to a religion among other categories—to facilitate the intake of eligible candidates in other categories.

Thus, the issue we must in fact determine is whether the Petitioner in the present instance has established their proof of residence and the fact of Baptism.

Although the 1st Respondent disputes the certificate of Baptism, I am not inclined to believe that the certificate is not genuine and by extension that the Petitioner's daughter is not a Christian. The Respondent has not disputed the fact that it was issued in 2017, and for the particular purpose of preferring the School admission application. The Petitioner has also produced letters and interventions made by Rev. M.G. Edmund J.P., Superintendent Minister, Methodist Church, Kandy on behalf of the Petitioners in relation to the school admission. In those circumstances, I see no reason to disbelieve that the Petitioner's daughter was baptized as a Christian.

However, by their own admission, the Petitioners are not the owners of the residence. In terms of the circular therefore, they would be not be entitled to receive most amount of marks given to different types of documents through which an applicant is called to prove residence. These marks are given based on the strength of proof—the highest being given to a title deed and the lowest being given to other documents such as the National Identity Card, Water Bills, Birth certificates etc. This last category is not exhaustive and I would

state that, where the circumstances so warrant, they could include a Grama Niladhari certificate.

As correctly contended by the counsel for Petitioner, the lack of a title deed does not empower the 1st Respondent to outright reject the Petitioner's application at the interview. A rejection could only take place if the applicant has not produced an iota of evidence supporting their claim. In the present case, the Petitioner has presented a Grama Niladhari certificate to support their claim for residence. Albeit very low, that document was entitled to receive a set mark on par with Telephone bills and other similar documents. In those circumstances, the 1st Respondent was wrong to reject their application simply because the Petitioner did not have a title deed.

Nevertheless, I observe that due consideration was given to these factors at the appeal stage. The Appeal Board has awarded the Petitioner 02 marks under the heading "පදිංචිය තහවුරු කරන අතිරේක ලේඛන", indicating that the Grama Niladhari certificate was admitted as a valid document supporting the claim of residence. This establishes that the Petitioner resides within the Administrative district of Kandy.

Thus, there is evidence to support that the Petitioner's daughter fulfils the bare minimum qualifications for admission. The next question is therefore to see whether there is room to accommodate the Petitioner's daughter's application. As admitted by both parties, the Petitioner's application has only succeeded in obtaining 20 marks. No doubt, this would place their application at a clear disadvantage. However, by virtue of clause 4.2 of Circular No. 22/2017, this disadvantage could be overcome if there are seats remaining in the Methodist quota. Even if there are seats remaining, preference must undoubtedly be given to those who have obtained higher marks in the same proximate *cum* religious category. It is subject to these considerations, could the 1st Respondent consider the admission of the Petitioner's daughter.

However, we are informed that the School has already exceeded the relevant quota for Methodist students under the proximate category. Therefore, the Petitioner's daughter could only be admitted, subject to the above specified conditions, if there are residual seats in the other 4 categories which, in terms of the Circular, ought to be proportionately divided among the remaining categories. There is no material before us to determine

whether any such seats were left vacant in other categories. However, the 1st Respondent has informed this Court that 13 Methodist students in total have been admitted to Grade I for the year 2018. This corresponds to the aforesaid 8.36% percentage which the School has maintained under clause 4.2 of the Circular No. 22/2017. It appears therefore that there is no room to accommodate the Petitioner's daughter's application, in the facts and circumstances of the Petitioner's case.

Where an equal protection claim is advanced, an intentional and purposeful discrimination must be shown by any person protesting discrimination in the administration of the law. In **Wijesinghe v Attorney General [1978-79-80] 1 SLR 102** His Lordship Justice Wanasundera with whom Justice Sharvananda and Justice Ismail agreed, quoting Stone CJ.'s dictum in ***Snowden v Hughes***, held that:

> "*The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.*"

In the present case, the School has conducted their admission process based on the proportion of children belonging to different denominations that existed at the time of vesting the school to the government, as reflected in "P14." The Court cannot necessarily fault them for adopting the said criterion since it is not repugnant to the statutory requirements. The Respondent has also drawn attention to the fact that they have been unable to admit two other candidates, despite them securing 45 marks and 74 marks, as the relevant quota for that year has been filled. Where this is the case, I cannot conclude that the Respondents acted with an insidious discriminatory purpose when they refused to admit the Petitioner's daughter. Every similarly circumstanced candidate in the non-Roman Catholic category has been treated in the similar manner.

Therefore, having considered the facts and circumstances in this case, I hold that the Petitioner has failed to establish that 1st Respondent has violated her right guaranteed under Article 12 (1) of the Constitution.

Accordingly, this Application is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA PC.
I agree

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH. K. MALALGODA PC.
I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR. Application No. 466/2015

1. M. G. Padmaseeli
   No. 08-B, 63/4, National Housing Scheme,
   Mattegoda.

2. K. G. I. Shirani
   No. 191/2/D, Hubutiyawa,
   Nittambuwa.

3. L. A. Samanthi Gunasinghe
   No. 203/14, Kotagedara Road,
   Madapatha,
   Piliyandala.

4. H. G. Malani
   No. 55-C2, Suriya Garden,
   Maalapalla,
   Homagama.

5. W. M. V. Priyanthi Sirisuriya
   No. 241/1/C, 3rd Lane,
   Kalapaluwawa,
   Rajagiriya.

6. S. P. Neela Kumudini
   No. ¾, "Amba Sewana",
   Pilikuththuwa,
   Buthpitiya.

Petitioners

Vs.

1. Sri Lanka Transport Board,
No. 200, Kirula Road,
Colombo 05.

2. Ramal Siriwardena
Chairman,
Sri Lanka Transport Board,
No. 200, Kirula Road,
Colombo 05.

3. P. D. Balasuriya
Chief Executive Officer,
Sri Lanka Transport Board,
No. 200, Kirula Road,
Colombo 05.

4. N. Godakanda
Director General,
Department of Management Services,
Ministry of Finance,
General Treasury,
Colombo 01.

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

BEFORE : Sisira J. de Abrew, J.

Nalin Perera, J. and

Prasanna S. Jayawardena, PC, J.

COUNSEL : J. C. Weliamuna, PC, with Pasindu Silva for the Petitioners.

Dr. Avanti Perera, SSC, for the Attorney General.

ARGUED &
DECIDED ON: 16.05.2018

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

The Petitioners were recruited to the Sri Lanka Transport Board on contract basis, and their contracts had gone on till December, 2015. The Sri Lanka Transport Board in October 2015 has taken a decision to absorb the 06 Petitioners to the permanent cadre. This is reflected in 2R5. But this decision has not been implemented and after December 2015 the contracts of the Petitioners had not been extended. The Petitioners therefore complained that their fundamental rights guaranteed under Article 12(1) of the Constitution have been violated. Under Section 11 (1) B of Sri Lanka Transport Board Act No. 27 of 2005, the Sri Lanka Transport Board has the power to recruit security officers to the Sri Lanka Transport Board.

According to the document marked 'P7' which is the list of security officers of the Sri Lanka Transport Board, the approved cadre of security officers is thirteen.

It appears that in P7, 08 contract security officers (lady security officers) had been included in the approved cadre of thirteen. This includes the 06 Petitioners.

Thus it appears that the Board has the capacity to appoint the 06 Petitioners as security officers to the permanent cadre. They have in fact decided do so by document marked 2R5. We therefore hold that

the decision not to recruit the 06 Petitioners to the permanent cadre is unreasonable and arbitrary.

For the above reasons, we hold that Sri Lanka Transport Board (1st Respondent) has violated the fundamental rights of the Petitioners guaranteed by Article 12 (1) of the Constitution.

Considering all these matters, we direct the 1st Respondent to recruit all 06 Petitioners to the permanent cadre with immediate effect.

The 1st Respondent is directed to recruit the 06 Petitioners to the permanent cadre as security officers grade ix.

The 1st Respondent is directed to implement the direction given by this Court within 02 months from the date of this judgment (toady).

JUDGE OF THE SUPREME COURT

Nalin Perera, J.

I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. 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 application under and in terms of Article 126 read with Article 17 of the Constitution.

1. **PALLE KANKANAMGE SUNIL SHANTHA**,
   Imbulgahakanda, Sadagoda,
   Meegahathenna.

2. **LOKUNARANGODAGE SHANTHA**,
   Amundara, Rideewita,
   Meegahathenna.

2A. PALLE KANKANAMGE YAMUNA NANDANI WIJEGUNAWARDENA,
597/01, Imbulgahakanda,
Sadagoda, Meegahathenna.

PETITIONERS

SC (FR) Application 479/2009

VS.

1. **SUB-INSPECTOR SENEVIRATNE,**
   Police Station, Meegahathenna.

2. **MUKUNANA KARIYAKARANAGE ANURUDDHA MANGALA,**
   Amundara, Rideewita,
   Polgampala.

3. **OFFICER IN CHARGE MEEGAHATHENNA POLICE STATION,**
   Police Station, Meegahathenna.

4. **THE INSPECTOR-GENERAL OF POLICE**
   Police Headquarters,
   Colombo 1.

5. HON. ATTORNEY GENERAL
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE: S. Eva Wanasundera, PC, J.
Prasanna Jayawardena, PC, J.
Murdu Fernando, PC, J.

COUNSEL: Ms. Ermiza Tegal with Ms. Thiyagi Piyadasa and Ms. Shalomi Daniel for the Petitioners.
Shyamal Collure with A.P. Jayaweera for the 1st and 3rd Respondents.
Ms.S. Herath, SSC, for the 4th and 5th Respondents.

WRITTEN SUBMISSIONS FILED: By the Petitioners, on 17th October 2016, 30th March 2017 and 05th April 2018.
By the 1st and 3rd Respondents, on 11th May 2018.
By the 4th and 5th Respondents, on 31st May 2018.

ARGUED ON: 22nd March 2018

DECIDED ON: 23rd October 2018

Prasanna Jayawardena, PC, J.

The two petitioners filed this fundamental rights application complaining that the 1st, 2nd and 3rd respondents arrested the petitioners without a warrant and without any reasonable basis, wrongfully detained the petitioners and subjected them to torture and cruel, inhuman and degrading treatment. The petitioners also complained that the 1st and 3rd respondents failed to afford the petitioners their right to equal protection under the law. The petitioners stated that, thereby, the 1st, 2nd and 3rd respondents have violated the petitioners' rights guaranteed by Articles 11, 13 (1), 13 (2) and 12 (1) of the Constitution.

The petitioners state that these violations of their fundamental rights have caused grave physical, psychological and financial harm, damage and loss to them and claim substantial compensation from the respondents.

At the time of the filing of this application, the 1st petitioner was a 40 year old man, who was unemployed and says he was dependent on his two sisters. The 2nd petitioner was a 47 year old man who was married to the 1st petitioner's sister. They had three children, two of whom were in school and the other a student at a vocational training centre. The 2nd petitioner says he was a coconut plucker.

At the time of the relevant events, the 1st respondent was a Sub-Inspector of Police attached to the Meegahathenna Police Station, the 2nd respondent was a corporal in the Sri Lanka Army and the 3rd respondent was the Officer-in-Charge of the Meegahathenna Police Station. The 4th and 5th respondents are the Inspector-General of Police and the Hon. Attorney General.

When this application was supported by learned counsel for the petitioners, this Court granted the petitioners leave to proceed under Article 11 of the Constitution. When this application was argued before us on 22nd March 2018, all learned counsel agreed that the reference to Article 12 in Journal Entry dated 25th November 2009, was an inadvertent error and this Court has only granted the petitioners leave to proceed under Article 11 of the Constitution.

The 3rd respondent filed his affidavit dated 16th September 2010 and the 1st respondent filed his affidavit dated 14th October 2010. The 1st petitioner and 2nd petitioners filed separate counter affidavits, both dated 18th January 2011.

Subsequently, the 2nd petitioner died on 10th October 2011. In view of the nature of this application, this Court made an Order dated 27th January 2017 directing that the deceased 2nd petitioner's wife be substituted in his place as the 2A petitioner, for the purpose of continuing with the application.

The factual positions taken by the 1st and 2nd petitioners on the one hand and those taken by the 1st and 3rd respondents on the other hand are very different. In view of these widely disparate stories, this Court will have to ascertain what did occur with regard to these events. Setting out the cases pleaded by the parties, shorn of embellishment and unnecessary detail, will assist that endeavour.

The 1st petitioner's case.

In the petition, the 1st petitioner alleges that the officers of the Meegahathenna Police Station had ill will towards him after an earlier dispute and had brought a *"false charge of theft"* against him in Matugama Magistrate's Court Case No. 30046, which is pending trial.

The 1st petitioner says that he was in his house in the afternoon of 01st March 2009 and that around 2.30pm, the 1st respondent and two unidentified men came to his house, got hold of him, hit him repeatedly and dragged him to a Police *"cab"*, which was parked nearby. The 1st petitioner was taken to the Meegahathenna Police Station. The 1st petitioner found it difficult to get off the vehicle and walk inside the

Police Station since his legs had been cuffed together. When he asked that his legs be freed, the 1st respondent beat him with a pole and compelled him to crawl into the Police Station.

Once the 1st petitioner was inside the Police Station, he was taken to the Crimes Division where the cuffs fixed on his legs were removed. Then, two police officers brought a pole which looked like a *mole gaha* [a long and sturdy pestle] and some rope. The rope was used to tie the petitioner's wrists and ankles together. The *mole gaha* was then passed between the arms and legs of the 1st petitioner and its two ends were placed on two tables. As a result, the 1st petitioner was left hanging from the *mole gaha* by his wrists and ankles. Thereafter, the 3rd respondent beat the 1st petitioner on his back and on the soles of his feet with a pole, while asking him to return the goods he stole ["ගත්න බඩු දීපං"]. When the 1st petitioner denied knowledge of any stolen goods, the 3rd respondent took hold of the 1st petitioner's legs and turned him around the *mole gaha*, leaving him feeling *"blinded and dizzy"*. The 3rd respondent continued the beating ordering the 1st petitioner to *"tell the truth at least now"* ["දැන්වත් ඇත්ත කියපං"]. The 1st petitioner was screaming in pain. Despite this, the 3rd respondent kept beating him for a while and then left him hanging from the *mole gaha* until about 5.30 pm [on 01st March 2009] when two other police officers untied him and brought him to the ground.

After being brought down to the ground, the police officers cuffed the 1st petitioner's left ankle to one leg of a table and his right wrist to another leg of the same table. He was left in that position until about 4pm on 03rd March 2009 without any food or water and he was not allowed to use the toilet. No one, including his sisters who had come to the Police Station, was allowed to see him during this time. Around 4 pm on 03rd March 2009, the 1st respondent removed the handcuffs and forced the 1st petitioner to sign a statement, which he was not allowed to read.

Thereafter, the 1st respondent took the petitioner to the Meegahathenna Hospital and showed him to a doctor who examined the petitioner and filled a form. The 1st petitioner told the doctor that he had been assaulted by the police.

The 1st petitioner was then brought back to the Police Station and was kept there till he was produced in the Matugama Magistrate's Court at about 5.30pm on 03rd March 2009. The 1st petitioner says that the 1st respondent asked him not to inform the Magistrate that he had been assaulted at the police station. The learned Magistrate made Order remanding the petitioner until 11th March 2009. When the 1st petitioner was produced in the Magistrate's Court on 11th March 2009, he was represented by counsel, who informed the learned Magistrate that the 1st petitioner had been assaulted by the 1st and 3rd respondents at the Police Station. The learned Magistrate ordered that the 1st petitioner be treated at the Kalutara Remand Prison Hospital. The 1st petitioner was produced in Court again on 13th March 2009 and released on bail. The case record in Matugama Magistrate's Court case No. BR 334/09 instituted against the 1st and 2nd petitioners with regard to the theft of a

television and cassette recorder was marked “P5”. The 1st petitioner denied any involvement in that theft.

The 1st petitioner says that he continues to suffer severe pain due to the injuries he sustained when he was beaten by the 1st and 3rd respondents and that he had received medical treatment at the General Hospital, Kalutara on 16th March 2009. He says he still has pain and a feeling of numbness in his hands and neck.

The 1st petitioner also stated that, after he was arrested on suspicion of the aforesaid theft, he has been wrongly added as a suspect in Matugama Magistrate’s Court case No.s BR 1275/07 and BR 11/09 instituted with regard to alleged offences of armed robbery and house trespass. He produced the B-Reports in these two cases marked “P6A” and “P6B” and denied any involvement in these incidents.

Finally, the 1st petitioner said that one M.K.Gunawathie *“had been influenced by the police”* to make a statement that she saw the 1st and 2nd petitioners walking away from the house where the theft occurred with the items that were stolen. An affidavit by Gunawathie to that effect was marked “P7”.

On an Order made by this Court, the General Hospital, Kalutara has submitted a copy of Admission Form No. 19276 recording the details of the treatment the 1st petitioner received at that hospital on 16th March 2009.

The 2nd petitioner’s case

The 2nd petitioner says that in the evening of 02nd March 2009, the 2nd respondent came to his house and inquired about a theft of goods from the 2nd respondent’s house. When the 2nd petitioner replied that he was unaware of a theft, the 2nd respondent hit him on his face, mouth and chest and he fell to the ground. The 2nd respondent then shouted “එස් අයි මහත්තයා...අල්ලා ගත්තා...” [*“Sub-inspector, I caught him”*]. The 1st respondent, who had been hiding outside the house, then ran into the house shouting “උඹ දුවන්න එපා මම පොලීසියෙන්...” [*“Don’t run, I am a police officer”*], and handcuffed the petitioner. The 1st and 2nd respondents took the 2nd petitioner to a small unused house and made him raise his hands and stand against a wall, while the 1st respondent beat him on the back and chest with a club. Thereafter, the 2nd petitioner was taken to the Meegahathenna Police Station in a three wheeler.

When they arrived at the Meegahathenna Police Station at about 7pm [*ie:* on 02nd March 2009], the 2nd petitioner was handcuffed to an iron rod on a door near the Armoury. He was kept in this position and was not given any food or water and was not allowed to go to the toilet until about 6.30 am the next day - *ie:* 03rd March 2009 - when his handcuffs were removed and he was permitted to use the toilet. While being escorted by a Home Guard towards the toilet, he vomited and there was blood in the vomitus. The 2nd petitioner then fainted and fell.

The 2nd petitioner regained consciousness in the General Hospital, Kalutara and he remained there receiving medical treatment until he was discharged on 09th March 2009 and taken to prison. On 11th March 2009, he was produced before the Magistrate's Court of Matugama, and was released on bail on 13th March 2009.

The 2nd petitioner states that he had to receive further medical treatment from the General Hospital, Kalutara and that he is unable to engage in his job of coconut plucking because he feels weak and dizzy and suffers constant body aches.

On an Order made by this Court, the General Hospital, Kalutara has submitted a copy of Admission Form No. 15676 recording the details of the admission of the 2nd petitioner to that hospital on 03rd March 2009 and the medical treatment he received until he was discharged from hospital on 09th March 2009.

The 3rd respondent's position

In his affidavit, the 3rd respondent states that, prior to the events which form the subject matter of this application, the 1st petitioner had been accused of committing offences of robbery and house trespass and had been identified as the culprit by the virtual complainant. Matugama Magistrate's Court Case No. 30046 had been filed against the 1st petitioner in respect of these offences and that case was pending. The 1st petitioner had absconded and evaded arrest for some time in this case. A copy of the case record in that Case was marked "3R1". The 1st petitioner had also been arrested on 10th March 2004 for having a large quantity of illicit liquor in his possession. Matugama Magistrate's Court Case No. 66298 had been filed against the 1st petitioner in respect of this offence and a copy of the case record was marked "3R2".

With regard to the allegations made by the 1st petitioner, the 3rd respondent flatly denied that the 1st petitioner was brought to the Meegahathenna Police Station on 01st March 2009.

With regard to the events of 02nd March 2009, the 3rd respondent states that he left the Meegahathenna Police Station at 6.15 am on that day and proceeded to Dodangoda to attend to official duties and returned to the Meegahathenna Police Station at about 8.45 pm on the same day. When he arrived at the Police Station, he was informed that the 1st respondent had arrested the 1st and 2nd petitioners and brought them to the Police Station at around 7.35pm on that day - *ie:* on 02nd March 2009. In this connection, the 3rd respondent produced Extracts from the Routine Information Book marked "3R3" and Extracts of the Running Chart of the Police Vehicle bearing registration No. 61-7508 marked "3R4".

The 3rd respondent states that the records maintained at the Meegahathenna Police Station establish that the 1st petitioner had been arrested around 5.30pm on 02nd March 2009. Earlier on the same day, the 2nd petitioner had been arrested around

4.50pm with the use of minimum force, as set out in the 1st respondent's notes. These arrests were made in connection with the theft of a television and cassette recorder from W.A. Amarawathie's house on 28th February 2009. He said that the only Police *"cab"* belonging to the Meegahathenna Police Station had not been used on 02nd March 2009. In this connection, Extracts of the Running Chart of the Police *"cab"* of the Meegahathenna Police Station were marked "3R5(a)" to "3R5(d)".

The 3rd respondent denied the 1st petitioner's allegations of assault, torture and ill treatment. He denied that the 1st petitioner was kept cuffed to a table in the Crimes Division and said the 1st petitioner was detained in the police cell within the Police Station. The 3rd respondent also produced, marked "3R6", the Medico Legal Examination Form issued in respect of the 1st petitioner. The 3rd respondent said that the 1st petitioner was provided with food and water and was allowed to use the toilet.

The 3rd respondent stated that, on 03rd March 2009, the 1st petitioner was produced in Matugama Magistrate's Court Case No. B 334/09 with regard to the aforesaid theft of a television and cassette recorder from Amarawathie's house and was remanded. A copy of the case record in this case was marked "3R7". The 1st petitioner was also produced in Court in connection with Matugama Magistrate's Court Case No.s 53217/07 and BR 11/09 involving other offences of robbery and assault. Further, the 1st petitioner was remanded in Matugama Magistrate's Court Case No. 1275/2007 on suspicion of offences of robbery and assault and was remanded till 11th March 2009. The 1st petitioner has been identified by the virtual complainant in that case as one of the offenders. Copies of these case records were marked "3R8" and "3R9".

With regard to the allegations made by the 2nd petitioner, the 3rd respondent denied that the 2nd petitioner had been handcuffed to an iron rod fixed on a door near the Armoury and said the 2nd petitioner was detained in the police cell within the Police Station and was provided with food and water and allowed to use the toilet.

The 3rd respondent stated that, at about 6.30am on 03rd March 2009, the 2nd petitioner complained of a stomach disorder and said that he wished to use the toilet. Sometime later, the 2nd petitioner had complained of an abdominal pain and said that he had previously undergone abdominal surgery. The 3rd respondent directed that the 2nd petitioner be taken to the Meegahathenna District Hospital. The doctor there instructed that the 2nd petitioner be admitted to the General Hospital, Kalutara.

The 3rd respondent stated that another suspect named Indika Namal who was suspected of having committed the aforesaid theft with the 1st and 2nd petitioners, had been absconding immediately after the theft took place on 28th February 2009. Indika Namal had been arrested on 27th March 2009. The stolen television and cassette recorder had been recovered on a statement made by him. A copy of the further B Report filed in Matugama Magistrate's Court Case No.BR 334/2009 on 27th March 2009, was marked "3R13".

The 3rd respondent stated that Gunawathie voluntarily made a statement marked "3R12(b)" identifying the 1st and 2nd petitioners as the thieves.

The 1st respondent's position

In his affidavit, the 1st respondent states that, on 02nd March 2009, Amarawathie made a complaint regarding the theft of goods from her house on 28th February 2009 and he telephoned the 3rd respondent and informed him of the complaint. The 3rd respondent instructed him to make investigations and apprehend any suspects.

In pursuance of these instructions, the 1st respondent left the Meegahathenna Police Station at about 2.55pm on the same day, with a Home Guard. The 1st respondent requested the 2nd respondent, who was the son of the complainant, to accompany him and give directions to the scene of the crime. They travelled in a privately owned three wheeler. They proceeded to the complainant's [Amarawathie's] house and the 1st respondent inspected the scene of the crime and made his notes.

Thereafter, the 1st respondent, accompanied by the others, went to the residence of the 2nd petitioner who had been identified as one of the thieves by Gunawathie. The 1st respondent took cover behind a boulder near the 2nd petitioner's house and sent the 2nd respondent to speak to the 2nd petitioner. When the 2nd petitioner saw the 2nd respondent, the 2nd petitioner drew a knife from his waistband and attempted to stab the 2nd respondent. The 1st respondent ran to the aid of the 2nd respondent and they both grappled with the 2nd petitioner to subdue him. The 2nd petitioner tried to stab them and escape. However, the 2nd petitioner fell to the ground and injured his upper lip. When the 2nd petitioner fell, the 1st respondent was able to handcuff him and inform him of the reason for his arrest. This was at about 4.50pm on 02nd March 2009.The 1st respondent then went to the 1st petitioner's house and arrested him at about 5.30 pm on the same day. He informed the 1st petitioner of the reasons for his arrest. The 1st and 2nd petitioners were brought to the Meegahathenna Police Station at about 7.35pm.

The 1st respondent denied the petitioners' allegations of assault, torture and ill-treatment.

Determination

Article 11 of the Constitution declares *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*. This Court has consistently recognised that this constitutional prohibition is an absolute ban which protects all persons in Sri Lanka and which expresses the fundamental obligation of every civilized State to protect all those within its territory from torture or cruel, inhuman or degrading treatment or punishment. Thus, Article 11 echoes Article 5 of the Universal Declaration of Human Rights, 1948 and is mirrored in Article 7 of the International Convention on Civil and Political Rights, 1966. The high importance and

absolute inviolability of the right enshrined in Article 11 was recognised by the makers of our Constitution when it was entrenched by Article 83 (a). In VELMURUGU vs. THE ATTORNEY GENERAL [1981 1 SLR 406 at p.453], Wanasundera J referred to the *"preferred position"* of Article 11 and commented that it *"should rightly be singled out for special treatment."*. Further, in recognition of the duty of the State to ensure that the prohibition declared by Article 11 is obeyed by those acting on its behalf, the Legislature has, giving effect to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, enacted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 providing a statutory framework to punish acts of torture or cruel, inhuman or degrading treatment or punishment committed by or on behalf of public officers.

Accordingly, when allegations of a violation of Article 11 are made before us, this Court, as guardian of the fundamental rights enshrined in our Constitution, must ensure that it gives full and meaningful effect to the protection afforded to all persons by Article 11. A careful examination of the facts is required of the Court. Appropriate relief has to be given when a violation of Article 11 is established.

At this point, it is also relevant observe that the Case Records and B Reports marked "3R1", "3R2", "3R8", "3R9" and "3R13" show that the 1st petitioner is an accused or suspect in several cases filed on charges of robbery, house trespass, assault, theft and possession of a large quantity of illicit liquor. Indika Namal has said that the theft of Amarawathie's goods was committed by the 1st and 2nd petitioners and himself and Gunawathie has clearly stated in "3R12(b)" that she saw the 1st and 2nd petitioners leaving Amarawathie's house carrying the stolen goods. I am not inclined to place weight on the subsequent affidavit marked "P7" which Gunawathie furnished to the 1st petitioner claiming that the Police influenced her to make a false statement. I think the much more likely turn of events is that the 1st petitioner persuaded or intimidated her into giving him "P7". The 1st petitioner's friend, Jayasinghe has, in the statement marked "3R12(h)", said he and the 1st petitioner spent the early part of the evening of 28th February 2009 drinking toddy and then they both went to the stream to catch fish using the shameful method of drawing electricity from a power line using a wire and then placing the other end of the wire into the stream to electrocute fish. Jayasinghe says that, at around 7.30pm [which is shortly before the theft occurred], the 1st petitioner joined two other unidentified men [whom Indika Namal had identified as the 2nd petitioner and himself] and asked Jayasinghe to go back to his own house. Jayasinghe saw the two men then heading towards Rideewita, which is where Amarawathie's house is and where the theft took place. He did not clearly state whether or not the 1st petitioner went with these two men and he said it was dark at that time. This material suggests that the 1st petitioner is suspected of being a habitual petty criminal and a thug - a nuisance and, at times, a menace, to the peaceful and law-abiding people of his village. There is certainly evidence to suspect the 1st petitioner of the theft of goods from Amarawathie's house.

As for the 2nd petitioner, he has been positively identified by both Gunawathie and Indika Namal as one of the thieves. Although the 2nd petitioner is not stained by the dubious past record of the 1st petitioner, he is suspected of being a cohort of his brother-in-law, the 1st petitioner, in carrying out the theft.

However, it hardly has to be emphasised that the 1st petitioner being suspected of a litany of crimes and both petitioners being identified as the culprits in the theft for which they were arrested, does not, in any way, prejudice their entitlement to the full scope of the protection guaranteed to all persons by Article 11 of the Constitution. Thus, from the beginning of the exercise of its fundamental rights jurisdiction, this Court has assured the protection of Article 11 to every man, however heinous a crime he is alleged to have committed. As Samarakoon CJ said in KAPUGEEKIYANA vs. HEETIARACHCHI [1984 2 SLR 153 at p.158] *"…Counsel for the Petitioner submitted that even a suspect on the blackest of criminal charges is entitled to his fundamental rights. This is no doubt true."* Similarly, Atukorale J stated in AMAL SUDATH SILVA vs. KODITHUWAKKU [1987 2 SLR 119 at p.127], *"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."*

To move to the facts before us, the petitioners and the respondents tell widely disparate stories. The key areas on which there are irreconcilable differences are: (i) the date on which the 1st petitioner was arrested; (ii) the circumstances and manner of the arrest of the 1st and 2nd petitioners; and (iii) the manner in which the petitioners were treated at the Meegahathenna Police Station after the arrests.

We are now called on to decide which version of the factual events is most likely to be the true one. When doing so, we have to keep in mind that, while cogent evidence is required to establish a charge of torture or cruel, inhuman or degrading treatment or punishment, the applicable standard of proof is one of a balance of probability; and the degree of proof required to establish that balance of probability could rise with the severity of the alleged torture and the gravity of the consequences of a finding of torture by the Court - *vide:* VELMURUGU vs. THE ATTORNEY GENERAL [*supra* at p.440-442], JEGANATHAN vs. THE ATTORNEY GENERAL [1982 1 SLR 295 at p.302], GUNAWARDENA vs. PERERA [1983 1 SLR 305 at p.313], KAPUGEEKIYANA vs. HETTIARACHCHI [*supra* at p.165], SAMAN vs. LEELADASA [1989 1 SLR 1 at p.12-13], DE SILVA vs. RODRIGO [1991 2 SLR 307 at p. 315, CHANNA PIERIS vs. THE ATTORNEY GENERAL [1994 1 SLR 01 at p. 107], AMARASINGHE vs. SENEVIRATNE [2011 BALJ 1 at p.3-4] and SAJITH SARANGA vs. PRASAD [SC FR 727/2011 decided on 22nd July 2016 at p.13].

It also has to be recognised that a petitioner who is placed in a situation such as this can, in many cases, do no more than state what he says happened and rely on the affidavits of his relations or friends who witnessed part of the events and any available medical reports, to corroborate his account. If there is no dispute about when a petitioner was brought to the police station, the police records are likely to fix the time period when he was in custody. However, if the time period of custody is in

dispute, as in the present case, the police records can be sometimes tailored to suit what the police want to say. It has also to be kept in mind that it is fanciful to expect a petitioner to furnish supporting affidavits from persons who may have witnessed the alleged torture such as, for example, police officers attached to the police station whose loyalties are firmly with their colleagues who are charged with torture or other detainees in the police station who are under the thrall of the police. These realities have been identified by this Court from the commencement of the exercise of its fundamental rights jurisdiction. Thus, in VELMURUGU v AG [*supra* at p.438], Sharvananda J, as he then was, citing the decision of the European Commission of Human Rights in the oft-cited "Greek Case", referred to the fact that *"There are certain inherent difficulties in the proof of allegations of torture or ill-treatment."*.

Consequently, where a Court is faced with a situation, such as in the present case, where a petitioner complains he was tortured and the respondents completely deny any torture, reliable medical records which indicate that the petitioner was, in fact, tortured, are not only cogent evidence of the charge of torture but would also disprove the very foundation of the respondents' position and, thereby, discredit the respondents and cast grave doubt on their other claims too.

I will begin by examining the case presented by **the 1st petitioner** and the positions taken in reply by the 1st and 3rd respondents.

As set out earlier, the 1st petitioner says he was tortured using a method where the victim's wrists and ankles are tied together and he is then suspended from a pole passed through his arms and legs while he is beaten and also turned around to disorient him further. If these charges are true, there can be no doubt that this is unmistakably "torture" within the meaning of Article 11 of the Constitution. In DE SILVA vs. RODRIGO, RATNAPALA vs. DHARMASIRI [1993 1 SLR 224], JAYASINGHE vs. SAMARAWICKREMA [1994 2 SLR 18], WEERASINGHE vs. PREMARATNE [1998 1 SLR 127], DISSANAYAKE vs. PREMARATNE [1998 2 SLR 211] and UKWATTA vs. MARASINGHE [2011 BLR 120] where the petitioners were subjected to similar ordeals, charges of torture were upheld by this Court.

Next, the 1st petitioner has also said that he was forced to crawl into the police station when he was brought there on 01st March 2009.

In my view, compelling a man to crawl into a police station strips him of his dignity and grossly humiliates him. It seeks to reduce the victim to the level of an abject slave. If this charge is true, it would undoubtedly amount to degrading treatment within the meaning of Article 11 of the Constitution. In SUBASINGHE vs. SANDUN [1999 2 SLR 23], Bandaranayake J, as she then was, held that the petitioner who had been made to walk in handcuffs across a busy road junction, had been subjected to degrading treatment within the meaning of Article 11. In SAJITH SARANGA vs. PRASAD, H.N.J. Perera J, as he then was, held that the Police publicly parading the petitioner while identifying him as a *"Grease Yaka"*, constituted degrading treatment within the meaning of Article 11. In the "Greek Case", the

European Commission was of the view that a manner of treatment which grossly humiliates a man, could be regarded as being "degrading".

The 1st petitioner goes on to say that, after the torture ended and he was brought down to the ground [at about 5.30 pm on 01st March 2009], police officers cuffed his left ankle to one leg of a table and cuffed his right wrist to another leg of the same table. He says he was left in that position until about 4pm on 03rd March 2009 - *ie:* for almost 48 hours. He says that, despite his pleas, he was not given any food or water and he was not allowed to use the toilet during this time. He says no one, including his sisters who had come to the Police Station, was allowed to see him.

A man whose left ankle is cuffed to one place and whose right wrist is cuffed to another place, is made to assume an awkward posture in which he must remain so long as the cuffs are in place. When this is prolonged over 48 hours and the victim is not given any food or water or allowed access to a toilet during that time, the victim will, inevitably, suffer discomfort, disorientation and grave humiliation. If these charges are true, they, combined together, constitute cruel, inhuman or degrading treatment or punishment within the meaning of Article 11 of the Constitution.

As observed earlier, it will be useful to commence with the medical evidence relating to the 1st petitioner.

In support of their complete denial of any torture, the 1st and 3rd respondents rely on the Medico-Legal Examination Form marked "3R6" issued by the District Medical Officer of the Meegahathenna District Hospital, who is said to have examined the 1st petitioner on 03rd March 2009. The District Medical Officer stated that the 1st petitioner showed no external injuries. Although the 1st petitioner says that he complained of having been assaulted, "3R6" does not mention that.

However, the Admission Form of the General Hospital, Kalutara at which the 1st petitioner received medical treatment on 16th March 2009 after he was released on bail, tells a different story. The medical officer has recorded that the 1st petitioner complained he had been tortured by the police who put him in the *"dhammchakka position"* and assaulted him with a wooden pole and that the 1st petitioner suffers from body aches, pain and numbness of both hands. The medical officer has observed that the left suprascapular area of the 1st petitioner's back was tender and that the 1st petitioner suffered from paresthesia, which is a burning or prickling or numb sensation in the hands or feet or limbs. The medical officer has stated that there were no external injuries to be seen. The medical officer has then directed that the 1st petitioner be examined by the Judicial Medical Officer.

The Medico-Legal Report marked "P2" records that, on 17th March 2009, the Judicial Medical Officer examined the 1st petitioner, who said that he had been beaten on 01st March 2009 while he was suspended from a pole by his wrists and ankles which had been tied together. The Judicial Medical Officer has observed *"Two healed linear abrasions measuring 3" and 1 1/2" situated at the back of the right wrist"* and

"Two healed linear abrasions measuring 2" and 1" situated at the back of the left wrist" and has stated *"Injuries are compatible with the history given by the injured."*.

It is seen that the observations of the medical officer at the General Hospital, Kalutara are in line with the symptoms the 1st petitioner would be expected to exhibit after being tortured in the manner he describes. Common sense dictates that, if the 1st petitioner had been suspended from a *mole gaha* by his wrists and ankles, the assailant had to stand to one side of the 1st petitioner and would be able to easily reach the upper part of the 1st petitioner's back during the course of the beating. Hence, tenderness in only the left suprascapular area of the 1st petitioner's back [approximately, the upper left shoulder area of the back] is in line with what the 1st petitioner says. Similarly, paresthesia is what one would expect in a man who has been hung from his wrists and ankles and beaten on the soles of his feet.

With regard to the medical officer of the General Hospital, Kalutara not having seen external injuries, it is likely that bruises and marks after a beating on 01st March 2009 would have faded away by the time the medical officer examined the 1st petitioner at the General Hospital, Kalutara on 16th March 2009. It has to be also realised that it is not invariably the case that there will be tell-tale bruises and marks to reveal a beating. The regrettable truth is that those who have custody of prisoners and detainees in the course of their duties and are disposed towards cruelty or sadism, have ample time and opportunity to practice the dark arts of torture on a plentiful supply of victims. It is known that many such persons have developed an ability to administer a painful and traumatic beating but leave little external trace of it which can be seen after any immediate bruising or discolouration fades away in a few days. As Sharvananda J, as he then was, said in VELMURUGU v AG [*supra* at p.438] *"…..traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves.... few external marks."* Similar views were expressed in FERNANDO v PERERA [1992 1 SLR 411 at p.419], DE SILVA v EDIRISURIYA [SC FR Application No. 09/2011 dated 03rd March 2017 at p.27], SAJITH SURANGA v PRASAD [*supra* at p.16] and NANDAPALA v SERGEANT SUNIL [SC FR Application No. 224/2006 at p.12]

Therefore, I cannot read overmuch into the medical officer of the General Hospital, Kalutara not recording external injuries in the Admission Form when he examined the 1st petitioner two weeks after the alleged torture.

However, the more specialized eye of the Judicial Medical Officer who examined the 1st petitioner and issued "P2" has unerringly observed the healed linear abrasions on both wrists, which are the remnants of distinctive tell-tale wounds caused by rope abrasions when a man is hung from his wrists. As the Judicial Medical Officer has stated, these marks are compatible with the method of torture the 1st petitioner described.

In NALIKA KUMARI vs. NIHAL MAHINDA [1997 3 SLR 331 at p. 340] where, as in the present case, the respondents denied the petitioner's claim that she had been

suspended by her wrists and beaten, Fernando ACJ held that the medical report of injuries which encircled the petitioner's wrists *"like a bangle"* constituted *"conclusive"* evidence which corroborated the petitioner's claim and disproved the respondent's denial.

The medical reports produced in the present case are cogent evidence that the 1st petitioner was tortured in the manner he described in such graphic detail. This medical evidence also exposes the 1st and 3rd respondents' total denial of torture, as being a deliberate falsehood. This discredits their entire case and casts strong doubt on their other claims. The rest of the evidence too has to be examined keeping in mind this doubt.

In the aforesaid circumstances, I am inclined to believe the 1st petitioner's allegation that he was tortured in the manner he describes and I disbelieve the respondents' denial.

Accordingly, I hold that the 1st petitioner has established that he was tortured by the 3rd respondent, assisted by the 1st respondent, in the manner the 1st petitioner describes and that the 1st and 3rd respondents have, thereby, violated the 1st petitioner's fundamental rights guaranteed by Article 11 of the Constitution.

Before parting with this issue, it is necessary to say a word about the Medico-Legal Examination Form marked "3R6" issued by the District Medical Officer of the Meegahathenna District Hospital. In light of the tell-tale symptoms observed by the medical officer of the General Hospital, Kalutara and the healed injuries recorded by the Judicial Medical Officer a full two weeks after the torture carried out on 01st March 2009, it is inconceivable that the District Medical Officer of the Meegahathenna District Hospital could have failed to see, at the very least, the wounds on both wrists. Therefore, I am compelled to say that the report marked "3R6" issued by District Medical Officer of the Meegahathenna District Hospital is false. Perhaps, the District Medical Officer issued a false report to please the police or perhaps he did not bother to carefully examine the 1st petitioner. Either way, the District Medical Officer has acted in breach of his professional duties. It is stressed that, in instances where the police present a prisoner to a Government medical officer for a medico-legal examination, the medical officer must do his duty diligently and impartially and issue an accurate report. On previous occasions too, this Court has had occasion to emphasise this duty where it was found that a false medical report had been issued - *vide:* AMAL SUDATH SILVA vs. KODITHUWAKKU [*supra* at p.125], SUMITH DIAS vs. RANATUNGA [1999 2 SLR 8 at p.15-16] and SAJITH SARANGA vs. PRASAD [*supra* at p.16].

Next, it is necessary to examine the 1st petitioner's claim that he was arrested at about 2.30pm on 01st March 2009 and brought to the Meegahathenna Police Station and that, after he was tortured, he was cuffed to the table in the manner he described and left there from 5.30pm on 01st March 2009 for almost 48 hours without food and water or access to a toilet.

The 1st and 3rd respondents deny that the 1st petitioner was arrested on 01st March 2009, and say that he was arrested and brought to the police station at 7. 35pm on 02nd March 2009. They say the 1st petitioner was detained in the police cell and given food and water and allowed access to the toilet, until he was produced in Court in the evening of 03rd March 2009.

When seeking to ascertain which of these versions is to be believed, it is relevant to observe that the theft of the television and cassette recorder from Amawarathie's house occurred around 7.30pm on 28th February 2009. There is a high degree of probability that Amarawathie or her son, who is the 2nd respondent and a Corporal in the Sri Lanka Army, verbally informed the Meegahathenna Police of the theft that very night or in the morning of the next day - *ie:* on 01st March 2009. It is also likely that the Meegahathenna Police would have paid prompt attention to the complaint of theft. The fact that Gunawathie saw the 1st and 2nd petitioners walking away with the stolen goods would have been conveyed to the police. As mentioned earlier, the 1st petitioner was suspected to be a habitual criminal and the 3rd respondent has stated that the 1st petitioner had absconded on an earlier occasion when he was about to be arrested for offences of robbery and house trespass. In these circumstances, the 1st petitioner was an obvious suspect and there were reasonable grounds for the Meegahathenna Police to arrest him on 01st March 2009, pending the recording of Amarawathie's complaint on 02nd March 2009.

In the present case, the 1st petitioner had categorically stated in his affidavit that he was arrested by the 1st respondent at around 2.30 pm on 01st March 2009 and that he was within the Meegahathenna Police Station from 3.15 pm on that day till he was produced in Court in the evening of 03rd March 2009. His account of his ordeal during that time has been described earlier. The 1st petitioner's account is corroborated by the complaint dated 03rd March 2009 marked "P1A" made by his sister, Sanduni Dilrukshi to the Human Rights Commission and the affidavit dated 28th April 2009 marked "P1B" made by his sister, Sudharma Priyadarshini.

It is seen that the 1st petitioner's affidavit, Sanduni Dilrukshi's complaint and Sudharma Priyadarshini's affidavit all state that the 1st petitioner was arrested on 01nd March 2009 and make it clear that the 1st petitioner did not return to their house on that day. Sudharma Priyadarshini says that when she and her sister attempted to see the 1st petitioner at the police station at 8am on the next day - *ie:* on 02nd March 2009 - they were not permitted to do so. Sudharma Priyadarshini says that when she and her sister again went to the police station at 4pm on the same day - *ie:* on 02nd March 2009 - they met the 1st petitioner who was cuffed to a table and who told them that he had been inhumanly assaulted by the 3rd respondent on the previous day - *ie:* on 01st March 2009 – and that she saw that his hands had a blueish colour.

It is seen that the averments in all three accounts mesh in every detail within the sphere of each person's knowledge of the events. While, no doubt, this could be the

outcome of careful artifice, it has to be recognised that it could well be that they all tell the same story simply because that was the truth.

Thus, the 1st petitioner has made very serious charges against the 1st and 3rd respondents with regard to the events of 01st March 2009 and the manner in which he was made to crawl into police station and, after the torture ended, was cuffed to a table and kept in one position for close to 48 hours. He has supported his account with the best evidence that was available to him, including medical records.

Faced with these charges, the very least the 1st and 3rd respondents were required to do was to give a reliable account of what they did on 01st March 2009 and seek to establish that they were occupied with other activities or were elsewhere and could not have ill-treated the 1st petitioner on 01st March 2009. The respondents should have also produced a complete set of the records of the Meegahathenna Police Station relating to 01st March 2009 and sought to demonstrate that these records show that the 1st petitioner was not brought to the police station till 7.35pm on 02nd March 2009, as the respondents claim.

However, apart from bald denials that the 1st petitioner was arrested on 01st March 2009, neither the 1st respondent nor the 3rd respondent has said a word in their affidavits setting out what they did on that day.

In my view that omission leads to an inference that the 1st and 3rd respondents are unable to establish that they were occupied with other activities or were elsewhere on 01st March 2009 and, therefore, could not have ill-treated the 1st petitioner on that day, in the manner he claims.

Further, when one looks at the Extracts from Information Books produced by the respondents, it is seen that they have failed to produce photocopies of the relevant pages of the Information Books. Instead, the respondents have produced typed extracts, some of which contain lines which have been `x-ed out'. It has to be kept in mind that an Information Book is maintained by a police station to contemporaneously and sequentially record the events which take place on each day and the entries therein are, invariably, made in hand or are typed on sheets of paper which are then pasted in the book. Thus, a perusal of the photocopies of the relevant pages will, in most cases, be a reliable account of the chronological flow of events.

In this light, and since there is a critically important disparity between the 1st petitioner's statement that he was arrested on 01st March 2009 and the respondents' position that he was arrested on 02nd March 2009, the respondents should have produced photocopies of the relevant pages of the Information Books to support their claim that the 1st petitioner was *not* arrested on 01st March 2009. If the pages were not easily readable, typed copies could have *also* been provided for ease of reading. Instead, the respondents have chosen to furnish only typed Extracts which, needless to say, were open to alteration or change to suit the position taken by them. To my

mind, the respondents' decision to refrain from producing photocopies of the relevant pages of the Information Books for the scrutiny of Court, casts another shadow of doubt on their story. See also CALDERA v LIYANAGE [2004] 2 SLR 262 at p 273].

Next, with regard to the events of 01st March 2009, the Extracts of the Routine Information Book marked "3R3" record that the 3rd respondent had conducted training classes for his police officers in the morning and that at 5.30pm he went on patrol throughout his area travelling in the police station's three wheeler.

Thus, even the typed Extracts marked "3R3" firmly place the 3rd respondent inside the police station when the 1st petitioner says he was brought to the police station on 01st March 2009 and tortured by the 3rd respondent. Further, "3R3" states that the 3rd respondent left the police station at 5.30pm to go on a three hour patrol. This time coincides with the time the 1st petitioner says the torture ended.

Thus, it is clear that, on 01st March 2009, the 3rd respondent was in the Meegahathenna Police Station during the time period the 1st petitioner says he was tortured by the 3rd respondent.

As for the 1st respondent, apart from the fact that he offers no account of what he did on 01st March 2009, there is nothing in any one of the large number of documents produced by the respondents which sheds any light on what the 1st respondent did on that day.

The resulting inference is that, on 01st March 2009, the 1st respondent was on duty during the time period the 1st petitioner says he was arrested by the 1st respondent and brought to the Meegahathenna Police Station and then tortured by the 3rd respondent with the assistance of the 1st respondent.

It is also relevant to observe here that, when the petition and annexed documents were filed in this Court on 22nd June 2009, the 1st petitioner and his sisters stated that he was arrested and tortured on 01st March 2009. I cannot think of a reason why the 1st petitioner would claim that he was arrested and tortured on 01st March 2009 if, in fact, these events had occurred on 02nd March 2009. The 1st petitioner had everything to lose and nothing to gain by falsely claiming that he was arrested on 01st March 2009 if, in fact, he was arrested on the next day; especially since, in either scenario, he was at the police station overnight and could have been subjected to the torture he claims. Further, the 1st petitioner had no way of knowing that the 1st and 3rd respondents will take up a position that he was arrested only on 02nd March 2009, since the respondents filed their affidavits only on 16th September 2010 and 14th October 2010.

As for the events of 02nd March 2009, the 3rd respondent says he set off from the Meegahathenna Police Station at 6.15am and travelled to Dodangoda in police jeep bearing registration No. 61-7508 to attend the opening Dodangoda Police Station and that he returned to the Meegahathenna Police Station only at about 8.45pm - *ie:*

twelve and a half hours later and that, by then, the 1st and 2nd petitioners had been brought to the police station. The 3rd respondent also states that the police station's double cab bearing registration No. LD 3917 was not used on 02nd March 2009.

This account is also stated in the Extracts of the Routine Information Book marked "3R3" which records an extensive circuit covering the towns and villages of Meegahathenna, Morahela, Horawela and Matugama on the way to Dodangoda and then the towns and villages of Kalutara, Katukurunda, Rendapala and Walallawita on the way back to Meegahathenna, covering a total journey of 210 kilometres.

However, these claims are starkly contradicted by the jeep's Running Chart marked "3R4" which unequivocally records that the jeep travelled only 40 kilometres on 02nd March 2009 and consumed only 05 litres of fuel with an average rate of consumption of fuel of 08 kilometres per litre. Further, the Running Chart only refers to the 3rd respondent going out on a patrol covering Meegahathenna, Morahela, Horawela and Matugama, which also appears to tally with the travelled distance of 40 kilometres recorded in the Running Chart [since the distance from Meegahathenna to Matugama is about 17 kilometres and a return journey would cover close to 40 kilometres]. It is unlikely that this patrol could have occupied twelve and a half hours, as claimed by the 3rd respondent.

Next, the 3rd respondent's categorical statement that the police station's double cab was not used on 02nd March 2009 is contradicted by the double cab's Running Charts marked "3R5(a)" which record that the vehicle was used on that day.

The documentary evidence referred to above establishes that the 3rd respondent's statements that he was away from the Meegahathenna Police Station from 6.15am to 8.45pm on 02nd March 2009, cannot be believed.

With regard to the 1st respondent, he says he arrested the 1st petitioner at 5.30pm on 02nd March 2009 and brought him to the police station at 7.35pm and then detained the 1st petitioner in the police cell till the evening of 03rd March 2009.

In support of this position, the 1st respondent has produced his supporting notes and Extracts from the Information Book of the Meegahathenna Police Station, which he says confirm his position. However, these too are typed documents and not the original pages of the information book or photocopies of those pages. I have earlier referred to the suspicion which will attach to these typewritten documents.

The 1st respondent has also produced supporting affidavits given by the 2nd respondent, the home guard and the three wheeler driver who he says accompanied him when they arrested the 1st petitioner on 02nd March 2009 and who confirm the 1st respondent's account with regard to the arrest of the 1st petitioner. Further, he has produced affidavits from three detainees who were in custody in the Meegahathenna Police Station on 02nd March 2009 and who state that the 1st petitioner was brought to the police station at 7.35pm on that day and detained in the police cell. However, as observed earlier, these affidavits from colleagues and others whose interests are

to cooperate with the respondents, must be viewed with care and circumspection. It has to be recognised that the persons who provided these affidavits have powerful motives to support the respondents' version of events. As Eva Wanasundera J commented in SAMPATH KUMARA v. SALWATURA [SC FR 244/2010 decided on 30th May 2017 at p.9], *"….. affidavits by the inmates of the police cell …. cannot be taken as valid evidence of the absence of the Petitioner in police custody."*. Accordingly, I am unable to regard these affidavits as material which establishes the truth of what the 1st respondent says.

To sum up, the aforesaid infirmities in the 3rd respondent's statements and the fact that his complete denial that the 1st petitioner was tortured has been shown to be false by medical evidence, leads me to reject the 3rd respondent's affidavit and conclude that he cannot be believed. Thereafter, the conclusion that the 3rd respondent's position is false and the medical evidence which proves that the 1st petitioner was tortured, lead me to disbelieve the 1st respondent who has taken the same positions as the 3rd respondent. Their interests are the same and there is little doubt that they are collaborators in their stories and denials.

On the other hand, I have no reason to doubt the truth of what the 1st petitioner says when he states he was arrested on 01st March 2009 and subjected to the treatment he describes. It is supported by what his sisters have seen and said. The fact that he was tortured has been proved by medical evidence.

Further, I am of the view that the 1st petitioner's allegations that he was made to crawl into the police station and, after he was tortured, was kept manacled to a table in an awkward position and without food, water or access to a toilet for close to 48 hours, is the *"much more plausible and probable version"* to use the words of Fernando J in EKANAYAKE vs. HEWAWASAM [2003 1 SLR 209 at p.214]. To echo Kulatunga J's phrasing in FERNANDO v PERERA [*supra* at p.419], the 1st petitioner's story has the *"ring of truth"*. I disbelieve the respondents' claim that the 1st petitioner was kept in the police cell.

In these circumstances, I also hold that the 1st and 3rd respondents have subjected the 1st petitioner to cruel, inhuman or degrading treatment or punishment and have, thereby, violated the 1st petitioner's fundamental rights guaranteed by Article 11 of the Constitution.

Next, it is necessary to examine the case presented by **the 2nd petitioner** and the positions taken in reply by the 1st and 3rd respondents.

As set out earlier, the 2nd petitioner says that, in the evening of 02nd March 2009, he was assaulted by the 2nd respondent on his face, mouth and chest and he fell down. The 1st respondent has specifically stated that he sent the 2nd respondent to accost the 2nd petitioner for the purpose of arresting the 2nd petitioner. Therefore, it would seem that the 2nd respondent was acting with the authority of the 1st respondent when he allegedly assaulted the 2nd petitioner. In this regard, in FAIZ vs.

ATTORNEY GENERAL [1995 1 SLR 372 at p. 383] Fernando J held *"The act of a private individual would be executive if such act is done with the authority of the executive: such authority transforms an otherwise purely private act into executive or administrative action; such authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation and the like (including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest ratification or adoption."*.

The 2nd petitioner says that while the 2nd respondent was assaulting him, the 1st respondent ran in and arrested him. He says he was then taken to a small unused house where he was made to stand against a wall while the 1st respondent beat him on his back and chest with a club.

In this regard, it has to be recognised that identifying what acts constitute torture will depend on the nature of the acts that are being examined and their consequences. Deliberate acts by a state officer [or a person acting on his behalf] which are aimed at inflicting acute physical or mental pain upon a victim, would ordinarily be regarded as amounting to torture within the meaning of Article 11 of the Constitution, especially where such acts are repeated or continued over a period of time or are aimed at subjugation, intimidation, coercion, revenge or extracting information or a confession. Depending on the circumstances, an isolated act or a sudden incident in the course of an unexpected scuffle may not be regarded as amounting to torture as defined in Article 11 of the Constitution. It is always a matter of the degree, persons and circumstances, which result in the threshold of torture being crossed. Thus, in WIJAYASIRIWARDENE vs. KUMARA [1989 2 SLR 312 at p.319], Fernando J observed that the question of whether excessive force had been used amounting to an act of torture or cruel, inhuman or degrading treatment *"….. would depend on the persons and the circumstances. A degree of force which would be cruel in relation to a frail old lady, would not necessarily be cruel in relation to a tough young man, force which would be degrading if used on a student inside a quiet orderly classroom, would not be so regarded, if used in an atmosphere charged with tension and violence."*. See also SAMAN vs. LEELADASA [*supra* at p.13].

This is perhaps an appropriate opportunity to observe that Article 11 specifies no limitation with regard to the purpose for which torture or cruel, inhuman or degrading treatment or punishment is carried out. Instead, the prohibition declared by Article 11 is absolute, irrespective of the purpose of the forbidden acts. It is seen that, in contrast, section 12 of our Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act defines "torture" *attracting criminal liability*, as any act which inflicts severe pain, whether physical or mental *and* which is done *for one of the purposes* referred to in that provision. I am mindful of the comments made *obiter* by Amerasinghe J in W.M.K. DE SILVA vs. CEYLON FERTILIZER CORPORATION [1989 2 SLR 393 at p. 405] and Fernando J in SAMAN vs. LEELADASA [*supra* at p. 13] which appear to draw a connection between the definition of "torture" in Article 1.1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 [which refers to the

"purpose" for which the impugned acts are done] and what constitutes "torture" for the purposes of Article 11 of the Constitution. However, I am of the respectful view that a narrow definition of "torture" on a "*purpose related basis"* should not be applied to restrict the sweep of the absolute prohibition declared by Article 11. Instead, in my view, that narrow definition is relevant only to define criminal liability as set out in section 12 of our Act, which is based on the aforesaid Convention.

The 2nd petitioner alleges that the 2nd respondent acted on the instructions of the 1st respondent, and assaulted him, as described earlier. In WIJAYASIRIWARDENE vs. KUMARA [*supra* at p.318], Fernando J commented that *"Learned President's Counsel for the Petitioner quite rightly submitted that the Police are not entitled to lay a finger on a person being arrested, even if he be a hardened criminal, in the absence of attempts to resist or to escape."*

The 2nd petitioner says that, thereafter, the 1st respondent beat him in the manner set out above. It is evident that, if this charge is true, the 1st respondent has subjected the 2nd petitioner to a deliberate and sustained beating with a club. There can be no dispute that a beating of such nature is, at the least, within the province of cruel, inhuman or degrading treatment or punishment. It has been repeatedly held by this Court that, a police officer who subjects a victim to a sustained beating inflicts cruel, inhuman or degrading treatment or and punishment and, if the severity of the beating warrants, "torture" within the meaning of Article 11 of the Constitution - *vide:* SAMANTHILAKA vs. ERNEST PERERA [1990 1 SLR 318], GAMLATH vs. DE SILVA [1991 2 SLR 267], WIMAL VIDYAMANI vs. JAYATILLEKE [1993 2 SLR 64], ABASIN BANDA vs. GUNARATNE [1995 1 SLR 244], ABEYWICKREMA vs. GUNARATNE [1997 3 SLR 225], SISIRA KUMARA vs. PERERA [1998 1 SLR 162], RIFAIDEEN vs. JAYALATH [1998 2 SLR 253], PRIYANKARA vs. SISIRA KUMARA [1998 2 SLR 267], DISSANAYAKE vs. SUJEEWA [1998 2 SLR 413], SUMITH DIAS vs. RANATUNGA, CHAMINDA vs. GUNAWARDENA [1999 2 SLR 80], KODITUWAKKUGE NIHAL vs. KOTALAWALA [2000 1 SLR 218], DIAS vs. EKANAYAKE [2001 1 SLR 224], SIRIMAWATHIE FERNANDO vs. WICKREMARATNE [2001 1 SLR 259], ERANDAKA vs. HALWELA [2004 1 SLR 268], KUMAR vs. SILVA [2006 2 SLR 236], SAMARASEKERA vs. VIJITHA ALWIS [2009 1 SLR 213], AMARASINGHE vs. SENEVIRATNE and PERERA vs. 6118, POLICE CONSTABLE [2016 BALJ 123].

Next, with regard to the 2nd petitioner's description of the events after he was brought to the Police Station, I am of the view that, handcuffing a man to an iron rod and making him assume a posture in which he is kept for close to 12 hours without any food or water during that time and without access to a toilet, would cause him to suffer substantial discomfort and a degree of disorientation and pain. I am of the view that, if these charges are true, it would constitute cruel, inhuman or degrading treatment or punishment within the meaning of Article 11 of the Constitution.

When examining which version of the events is to be believed, it will again be useful to commence with the medical evidence relating to the 2nd petitioner.

The Admission Form of the General Hospital, Kalutara records that the 2nd petitioner was brought to the hospital at 8.11am on 03rd March 2009 with a record of one instance of haematemesis [vomiting with blood in the vomitus], having fainted and with abdominal pain. The medical officer has recorded that the 2nd petitioner complained that he had been assaulted by a police officer. The medical officer has also recorded that the 2nd petitioner has a swollen upper lip and a lacerated inner lip. The medical officer has directed that the 1st petitioner be examined by the Judicial Medical Officer. It is seen that these medical records match exactly with what the 2nd petitioner says happened.

The Medico-Legal Report marked "P4" records that the Judicial Medical Officer examined the 2nd petitioner on 04th March 2009 and observed that the 2nd petitioner had a *"Tender back of chest"* and contusions on the right cheek and upper lip. The Judicial Medical Officer has also recorded that an Endoscopy was done and that there was no identifiable cause for the incident of haematemesis. The Judicial Medical Officer has gone on to state that the *"Injuries were in keeping with the history"* of which the 2nd petitioner complained.

It is seen that these medical records corroborate the 2nd petitioner's complaint that the 2nd respondent assaulted him on his face, mouth and chest and that, thereafter, he was taken to the small unused house and the 1st respondent administered a sustained beating on the 2nd petitioner's back and chest. Further, the explicit finding that the Endoscopy did not reveal an internal cause for the haematemesis, raises an inference that the incident of haematemesis and fainting was in some way related to the 2nd petitioner's complaint that he vomited and fainted in the aftermath of the assault and being shackled to an iron rod for close to twelve hours.

The affidavit marked "P3B" by the 2nd petitioner's wife also states that the 2nd petitioner was assaulted when he was arrested and that he was then taken in the direction of the small unused house - *ie:* the location where the 2nd petitioner says he was made to stand against a wall and was beaten with a club by the 1st respondent. The 2nd petitioner's wife also says that, when she saw the 2nd petitioner at the General Hospital, Kalutara on 04th March 2009, the 2nd petitioner complained to her that the 1st respondent had subjected him to a repeated beating.

When examining the evidence with regard to the 1st petitioner, I reached the conclusion that the positions taken by the 1st and 3rd respondents with regard to the 1st petitioner cannot be believed. In view of that finding that the 1st and 3rd respondents are unworthy of credit, I see no reason to think that the denial by the 1st respondent that he administered a beating to the 2nd petitioner, should be believed. Similarly, I have no reason to think that the 1st and 3rd respondents' claim that the 2nd petitioner was detained in the police cell together with the 1st petitioner should be believed. I would think it much more likely that, for purposes of eliciting information regarding the theft, the 1st and 2nd petitioners were kept apart.

On the other hand, I have no reason to doubt the truth of what the 2nd petitioner says. It is supported by what his wife has seen and said. The medical evidence corroborates his statement that he was beaten. In the aforesaid circumstances, I am of the view that the evidence before us is sufficient to establish, on a balance of probabilities, the truth of what the 2nd petitioner says.

In these circumstances, I hold that the 1st and 3rd respondents have subjected the 2nd petitioner to cruel, inhuman or degrading treatment or punishment and, thereby, the 1st and 3rd respondents have violated the 2nd petitioner's fundamental rights guaranteed by Article 11 of the Constitution. I have already held that the 1st and 3rd respondents have violated the 1st petitioner's fundamental rights guaranteed by Article 11 of the Constitution.

I am of the view that this is an instance where the 1st and 3rd respondents should be required to personally pay compensation to the 1st and 2A petitioners. In this regard, it should be mentioned that learned Senior State Counsel has submitted that, although the 2A petitioner was substituted in place of her deceased husband, the 2A petitioner is not entitled to receive compensation which may have been awarded to the 2nd petitioner had he been alive. I cannot accept that contention. The 2A petitioner has been substituted in place of the deceased 2nd petitioner by an Order of this Court and, therefore, stands in his shoes and is entitled to receive compensation that may have been awarded to the 2nd petitioner.

I direct that, as compensation, the 1st and 3rd respondents shall each pay a sum of Rs. 50,000/- to the 1st petitioner and a sum of Rs. 50,000/- to the 2A petitioner. In addition, the State must bear responsibility for the acts of the 1st and 3rd respondents and pay compensation in a sum of Rs. 50,000/- each to the 1st and 2A petitioners.

Judge of the Supreme Court

S.Eva Wanasundera, PC, J.
I agree.

Judge of the Supreme Court

Murdu Fernando, PC, J.
I agree.

Judge of the Supreme Court

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

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

Rajakaruna Herath Mudiyanselage
Keerthirathna,
Surakkulama,
Mudalakkuliya.
Petitioner

SC. FR. Application No. 491/2011

Vs.

1. Premarathna
Police Constable,
Police Station,
Anamaduwa.

2. Officer in Charge,
Police Station,
Anamaduwa.

3. Inspector General of Police,
Sri Lanka Police Headquarters,
Colombo 01.

4. Honourable Attorney General,
Department of the Attorney General,
Colombo 12.
Respondents

BEFORE : Sisira J. de Abrew, J.
Priyantha Jayawardena, PC, J. &
Nalin Perera, J.

COUNSEL : Upul Kumarapperuma with Shanaka Perera for the Petitioner.

Varunika Hettige, DSG, for the Respondents.

ARGUED & DECIDED ON : 25.06.2018

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

The Petitioner in his petition states that the 1st Respondent, Police Constable, Premarathna attached to Anamaduwa Police Station, on 18/01/2011 came to his residence and wanted to arrest him on a warrant issued by the learned Magistrate of Anamaduwa; that the 1st Respondent on 18/01/2011 did not arrest when he was told that the Petitioner was suffering from an ailment called Epilepsy; that on 19/01/2011 when he (the Petitioner) went to the Anamaduwa Police Station with his father-in-law, he (the Petitioner) was arrested by the 1st Respondent and put him into the Police cell; and that thereafter on 19/01/2011 he was produced before the Magistrate and remanded him. The 2nd Respondent in his affidavit filed in this Court, admits that the Petitioner was produced in the Magistrate's Court in connection with M. C. Case No. MC/53886/10/A. Later on 05/04/2011 on an application made by the Police, the Petitioner was discharged by the learned Magistrate on the ground that the Petitioner was not the suspect in the Magistrate's Court Case No. 53886/10/A.

The 2nd Respondent, Inspector, Herath Mudiyanselage Upul Priyalal in his affidavit admits that on 18/01/2011, he was the Officer-in-Charge of the Police Station of Anamaduwa and that the official identification Number of the police constable Premarathna is 23078. The 1st Respondent, police constable Premarathna hereinafter in this order will be referred to as police constable 23078 Premarathna.

The 2nd Respondent in his affidavit admits that the Petitioner in this case was arrested by a sub inspector attached to his Police Station. His name was SI Nisansala. However, the 2nd Respondent further states that the Petitioner was arrested on 18/01/2011. However, the Petitioner states that he was not arrested on 18/01/2011, but was arrested on 19/01/2011 when he went to the Police Station on a massage given by PC 23078 Premarathna. However, the arrest of the Petitioner is admitted by the Officer-in-Charge of Police Station, IP. Herath Mudiyanselage Upul Priyalal. He is the 2nd Respondent in this case. The said IP. Herath Mudiyanselage Upul Priyalal further admits that after the arrest of the Petitioner, the Petitioner was produced before him and later the Petitioner was produced before the Magistrate. IP. Upul Priyalal however admits that he on 31/03/2011 by way of a motion informed the Magistrate that the Petitioner is not the suspect who was wanted in the said Magistrate's Court Case. The case was called on 05/04/2011 and the learned Magistrate discharged the Petitioner from the said Magistrate's Court case.

IP. Upul Priyalal in his affidavit dated 24/09/2012 admits that he informed the Magistrate that the Petitioner (R.H.M. Keerthirathna) was not the person who was required in the said

Magistrate's Court case. From the affidavit of IP. Upul Priyalal, it is clear that the Petitioner was arrested on 18/01/2011 and was produced before the Magistrate and that the Petitioner was on remand from 19/01/2011 to 05/04/2011. Although the IP. Upul Priyalal states that the Petitioner was arrested on 18/01/2011, Petitioner says that he was arrested on 19/01/2011.

From the affidavit of IP. Upul Priyalal, it is clear that the arrest of the Petitioner is wrong and producing the Petitioner as a suspect in the Magistrate's Court is also wrong. The Petitioner admits that before he was produced before the Magistrate he was in the custody of the Police. The fact that he was also in the custody of the Police can be seen from the affidavit of IP. Upul Priyalal.

It is clear from the affidavit of the 2nd Respondent, IP. Upul Priyalal that the Petitioner was arrested due to mistaken identity.

Considering all these matters, the following matters are clear;

1. The arrest of the Petitioner by police officers attached to Anamaduwa Police Station.

2. The fact that the Petitioner was in police custody on 19/01/2011.

3. The fact that the Petitioner was produced before the Magistrate as a suspect.

4. The fact that the Petitioner has to be on remand on an application made by the Police.

5. The Petitioner was discharged by the learned Magistrate on a motion filed by the 2nd Respondent.

Although IP. Upul Priyalal takes up the position that it was SI. Nisansala who arrested the Petitioner, there is no affidavit given by SI. Nisansala to the above effect.

Considering all these matters, we hold that the Petitioner has been arrested not on 18/01/2011, but on 19/01/2011 and the said arrest has been made by police constable 23078 Premarathna.

Considering all the above matters, we hold that the arrest of the Petitioner by the 1st Respondent, police constable 23078 Premarathna is wrong and without any reasons and keeping the Petitioner in the custody of the Police is also wrong.

The production of the Petitioner as a suspect in the Magistrate's Court is also wrong.

From the affidavit of IP. Upul Priyalal, it appears that he was the Officer-in-Charge of Anamaduwa Police Station on 18/01/2011 and 19/01/2011. There is no dispute on this matter.

It is also clear that after the arrest, the Petitioner was produced before the said IP. Upul Priyalal who is the 2nd Respondent.

When we consider all the above matters, it is clear that producing the Petitioner as a suspect in the Magistrate's Court has

taken place in the hands of IP. Upul Priyalal.

For the above reasons, we hold that keeping the Petitioner inside the Police Station and producing him before the Magistrate's Court as a suspect are wrong.

Considering all these matters, we hold that the 1st Respondent (police constable 23078 Premarathna) and Officer-in-Charge of the Police Station, Anamaduwa IP. Herath Mudiyanselage Upul Priyalal who is the 2nd Respondent have violated the fundamental rights of the petitioner guaranteed by Articles 12(1) and 13(1) of the Constitution.

Considering the facts of this case, we direct the 3rd Respondent, the Inspector General of Police to conduct an inquiry about the wrongful arrest of the Petitioner and take necessary legal steps.

Considering all the above matters, we order the 1st Respondent, police constable 23078 Premarathna to pay Rs. 25,000/- to the Petitioner.

We also order the Officer-in-Charge of Police Station, Anamaduwa, Inspector Herath Mudiyanselage Upul Priyalal who is the 2nd Respondent to pay Rs.50,000/- to the Petitioner. The 1st and the 2nd Respondents have acted in this case as State Officers. Therefore State is liable to pay compensation to the Petitioner. Considering all the above matters, we order the State to pay Rs. 500,000/- to the Petitioner. The said sum of money Rs. 500,000/- should be paid from funds of the Police Department.

We direct the 3rd Respondent to take all necessary steps to ensure the payment of the said sum within three months from today. Rs. 25,000/- ordered against the 1st Respondent, police constable 23078 Premarathna should be paid from his personal funds. Rs. 50,000/- ordered against the Officer-in-Charge of Police Station, Anamaduwa, Herath Mudiyanselage Upul Priyalal should be paid from his personal funds.

We direct the 1st and 2nd Respondents to pay the said sum of money within 03 months from today.

The Registrar of this Court is directed to send certified copies of this judgment to all the Respondents.

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 Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Hewawasam Sarukkalige Rathnasiri Fernando,
07 D,Warapitiya,
Darga Nagaraya.

PETITIONER

SC (F/R) Application
No: 514/2010

Vs.

(1) Police Sergeant Dayarathna
(Service No 501)
Police Station,
Welipenna.

(2) Police Constable Madusanka
(Service No 67080)
Police Station,
Welipenna.

(3) Jayasingha
Police Staff Assistant,
Police Station,
Welipenna.

(4) Police Inspector
A.D.Kariyawasam,
Office-in-Charge,
Police Station,
Welipenna.

(5) Inspector General of Police,
Police Headquarters,
Colombo 01.

(6) Honorable Attorney General,
Attorney General Department,
Colombo 12.

RESPONDENTS

Before:

S. Eva Wanasundera, P.C. J,
Prasanna Jayawardena, P.C. J. and
Murdu N.B. Fernando, P.C. J.

Counsel:

Shantha Jayawaradena with Chamara Nanayakkarawasam for the Petitioner
Shyamal Collure with Dilani Samayawardena for the 1st to 3rd Respondents
Varunika Hettige, DSG for the Attorney General.

Argued on: 22.03.2018

Decided on: 27.11.2018

Murdu N.B. Fernando, P.C. J,

The Petitioner has filed this application seeking a declaration that the 1st to 4th Respondents and / or any one or more of them have infringed the Petitioner's Fundamental Rights guaranteed under Article 11 and / or 12 (1) and/or 13 (1) of the Constitution.

Leave to proceed was granted on 09-12-2010 for the alleged violation of Article 11 and 12 (1) of the Constitution against the 1st to 3rd Respondents.

By order dated 15-12-2014 the preliminary objection raised by the 1st to 3rd Respondents was overruled and the Petitioner was permitted to tender fresh affidavit.

The relevant facts as narrated in the Petition is as follows,

The Petitioner at the time of the incident was 50 years of age, married with four children and was employed as a Toddy Tapper in Parapathkotuwa, in the Welipanna Police Division. He was employed under one Sanath Kumara who held a legally valid Tapping License.

On 09-08-2010 at around 3.30pm, when the Petitioner was at his place of work, the 1st and 2nd Respondents clad in civil had come on a motor bike and asked for toddy. The Petitioner has said he did not have toddy for sale. The Petitioner alleged that the 1st and the 2nd Respondents smelt of liquor at that time. The 1st and 2nd Respondents insisted that they be given a bottle of toddy and when the Petitioner indicated he does not have toddy, the 1st and 2nd Respondents have threatened the Petitioner and said "how dare you say you don't have toddy. We are from the police".

Thereafter the 2nd Respondent had grabbed the toddy tapping knife from the Petitioner and in the process got his palm cut and thereafter deliberately cut the Petitioner on his left shoulder with the knife and the 2nd Respondent together with the 1st Respondent assaulted the Petitioner on his face, chest and abdomen.

Thereafter the Petitioner alleged that the 1st and 2nd Respondents had removed the Petitioner's shirt and sarong, tied the petitioner's hands behind his back and dragged the Petitioner along the road for about 400 meters.

Having seen the Petitioner being dragged along road, several villagers had intervened and objected to the treatment metered out to the Petitioner. One had brought a sarong and got the 1st and 2nd Respondents to untie the Petitioner's hands for the Petitioner to wear the sarong and another had bandaged the wound with a piece of cloth and another videographed the entire incident with a mobile phone.

Thereafter the 3rd Respondent came to the scene and the 1st to 3rd Respondents had tried to take the Petitioner to the Police Station in their motor bikes and on being insisted by the villagers that the Petitioner was badly wounded took him in a three-wheeler to the Police Station.

On the night of 09.08.2010 the Petitioner was taken to the Wettawa Government Hospital (District Hospital, Mathugama) where on admission the Petitioner had stated that he was assaulted by the Police. His family members visited him at the hospital and to them also he had

stated that he was assaulted by the police. That night the Petitioner developed a severe pain in his right-ear and on the next day 10.08.2010 the Petitioner was examined by the DMO (District Medical Officer). On the same day the Magistrate visited the Petitioner and at about 2 pm two police officers recorded a statement from the Petitioner and he was asked to place his signature without reading or showing it to him. At about 3.30pm the Petitioner was taken to the Nagoda Government Hospital. Then on the same day at around 10 pm the Petitioner was taken to the Kalutara Remand Prison.

Thereafter Police filed 2 cases against the Petitioner, one under Sections 315,317 and 183 of the Penal Code on 10-08-2010 and one under the Excise Ordinance on 17-08-2010 for possession of 40 drams of toddy without a valid licence. On 17-08-2010 he was produced before the Magistrate Court and enlarged on bail and on the direction of the Magistrate examined by the JMO (Judicial Medical Officer) of Colombo and referred to the ENT clinic of the National Hospital.

Meanwhile on 13.08.2010 the Petitioner's wife had made a complaint to the Human Rights Commission, National Police Commission, IGP and others regarding the violation of Petitioner's Fundamental Rights. (The complaint and the acknowledgment is marked as P6 and P7)

In their objections the 1st to 3rd Respondents claimed, that they left the Welipanna Police Station on the instructions of the 4th Respondent clad in civvies on private motor cycles to check on certain information pertaining to offences under the Excise Ordinance and having taken one person into custody they proceeded to where the Petitioner was said to be selling toddy.

The 1st and 2nd Respondents further stated that on the instructions of the 1st Respondent, the 2nd Respondent went to purchase toddy and gave the Petitioner Rs. 100 and accepted a bottle of toddy and signaled to the 1st Respondent and when the 1st Respondent approached the Petitioner to arrest him, the persons said to be drinking toddy took to their heels and the Petitioner alleged to be smelling of liquor offered a sum of Rs 1000 and begged not to arrest him. Then the Petitioner went inside, picked a manna knife and attacked the 2nd Respondent and in the process cut the 2nd Respondent's hand. Thereafter both the 1st and 2nd Respondents grappled with the Petitioner, used minimum force and retrieved the knife and then saw that the Petitioner had a cut injury on his shoulder.

The 1st and 2nd Respondents also denied that they removed the Petitioner's clothes or dragged him along the road and further claimed that these proceedings have been instituted maliciously at the instigation of certain parties with vested interests in order to discourage action being taken against illegal activities in the area.

The 1st to 3rd Respondents produced in-and-out entries and extracts of the information book as proof in this regard and maintained that minimum force was used to retrieve the knife from the Petitioner.

In ascertaining whether the Petitioner's Fundamental Rights guaranteed under Article 11 and 12 (1) of the Constitution has been violated by the 1st and 3rd Respondents, I have carefully analyzed the facts pertaining to this matter, the medical evidence submitted to this court namely, the Admission form and Treatment Sheet maintained by the Matugama District Hospital and Kalutara General Hospital, the Colombo Chief JMO's Medico-Legal Report and the ENT Surgeon's Report, the CD filed of record and the Court proceedings pertaining to the two cases filed in the Magistrate Court of Matugama.

In the Medico-Legal Report, the Chief JMO has opined that out of the five injuries sustained by the Petitioner, four on the head and lower abdomen are grievous blunt force type (assault by hand) injuries, one on the left shoulder (cut with manna knife) is non grievous sharp force type injury and the injury in the ear drum is a blunt force type (slapping) technically grievous injury compatible with the history given by the Petitioner with regard to the manner and time of causation.

The Petitioner upon his admission to Matugama District Hospital on the day of assault, namely 09.08.2010 has stated that he was assaulted by police and the Petitioner's wife in her complaint to Human Rights Commission made on 13.08.2010 has also stated that on the date of assault itself the Petitioner informed her of the assault by police.

The consistent position taken by the Petitioner with regard to the assault by police, gives credibility to the version of the Petitioner. I have also viewed the CD tendered to this court which is a contemporaneous recording which corroborates the Petitioner's version and the affidavit (P2) submitted by the person who videographed the incident on his mobile and the affidavit of

another villager (P3) and also the submissions made by the Counsel for the Petitioner in the Magistrate Court of Matugama pertaining to the assault by the police (P4).

I have also carefully analyzed the version of the 1st to 3rd Respondents, the stand, that 2nd Respondent acted as a decoy, the bare denial of the allegation of demanding toddy, use of minimum force by the 1st and 2nd Respondents on the Petitioner to retrieve the knife, the two B Reports filed in the Magistrate Court especially, the account given by the OIC of the Station pertaining to the conduct of the Petitioner being an affront to conducting raids and justifying the 1st and 2nd Respondents version, the List of productions, the proceedings in the Magistrate Court case (P4 and P5), airing of the CD by a media channel, the interdiction and reinstatement of the Respondents and disciplinary proceedings currently proceeding against the 1st and 2nd Respondents.

On a careful consideration of the available evidence, I accept the Petitioner's version which appears to be true and supported by cogent evidence including medical evidence and reject the version of the Respondents.

Before proceeding further, I wish to advert that the main allegation of the Petitioner is against the 1st and 2nd Respondents. There is no evidence to implicate the involvement of the 3rd Respondent. Therefore I observe that the Petitioner's Fundamental Rights have not been violated by the 3rd Respondent.

This Court granted Petitioner leave to proceed for the alleged violation of Article 11 and 12 (1) of the Constitution.

Article 11 provides that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 12(1) provides that "all persons are equal before law and are entitled to the equal protection of the law."

In a plethora of cases, this Court has unhesitantly condemned acts of torture whenever they were proved to have occurred and has held such acts violate Article 11 of the Constitution.

Athukorale J (with Sharvananda CJ and de Alwis J agreeing) in **Amal Sudath Silva Vs Kodithuwakku [1987] 2 SLR 119** at page 126 held, that

> "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 restriction or limitation…….. *The police force, being an organ of the State, is enjoined by the constitution to secure & advance this right*…….. It is therefore the duty of this court to protect and defend this right jealously to its, fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion…" (emphasis added)

Shirani Thilakawardena J (with S.N.Silva CJ and Ratnayake J agreeing) in **Nandapala Vs Sergeant Sunil SC(FR)224/2006 S.C.M. 27.04.2009**, repeating Plato's timeless quotation 'Quis Custodiet ipsos custodes?" or "who will guard the guardians" went on to state, I quote,

> "There are both direct and indirect consequences to the Police, to Society and ultimately, to the Rule of law, that result from the systematic failures within the Police service…… We see violence like that which was apparent in the present case perpetrated with total impunity by certain police officers against civilians, to secure bribes, to extract public punishments for private disputes or often, for seemingly no reason at all other than to taunt and harass the public with "a show" of their unchecked police powers, such power ultimately blinding them to their own corruption. Power that were vested in them by the donning of uniforms to separate them and identify them as upholders of the Rule of Law are sadly used instead to subdue and pervert it…."

In the case referred to above, the van that the Petitioner was travelling was stopped at a check point to conduct a search of the vehicle and interrogate the vehicle's occupants. The Petitioner and the other occupants of the vehicle were taken into police custody, brought to the police station and brutally assaulted. It was later revealed that the Petitioner and the other occupants were not involved in any criminal activity nor robbery as accused at the time of arrest

but were returning after attending to their legitimate furniture business and there was no justification for the conduct of the police.

Kulatunge J (with Ramanathan J and Wadugodapitiya J agreeing) in **Ratnasiri and another Vs Devasurendran [1994] 3 SLR page 127** at page 134 held,

> "On the basis of the evidence which I accept, I hold that the Petitioners were whilst they remained in police custody, subjected to treatment "which caused severe pain or suffering" to them (both physical and mental) without lawful sanction, which treatment constitutes "an aggravated form of inhuman treatment or punishment which grossly humiliates the individuals before others" and that such treatment is violative of the Petitioner's rights under Article 11 of the Constitution."

The Honorable Judge also referred to the judgment of Amerasinghe J in W.M.K. Silva Vs Chairman Fertilizer Corporation [1989] 2 SLR page 393 and other commentaries in deciding, that the Petitioners of the above referred case, a driver and a conducter of a private omnibus who had an altercation with the Respondent police officer in civil with regard to insurance of a bus ticket which ended up in a brawl in the bus were subjected to inhuman treatment when at the police station the police officers acting under the colour of office assaulted the Petitioners.

Justice A.R.B. Amerasinghe in his book "Our Fundamental Rights of Personal Security and Physical Liberty" at page 28 stated,

> "Something might be degrading in the relevant sense, if it grossly humiliates an individual before others, or drives him to act against his will or conscience",

Shirani Bandaranayake J (with G.P.S.de Silva CJ and Coomaraswamy J agreeing) in **Abeywickrema V Gunaratne [1997] 3 SLR page 225** expressed the view that,

> "when a man who made an endeavor to earn his living by carrying on an honest occupation, is taken into custody, assaulted and locked up in a cell in my view he has been subjected to degrading treatment"

In the case referred to above the Police assaulted and arrested a three-wheel driver who had taken a passenger on hire to the Police Station, on the pretext that he was under the influence of liquor.

The MLR showed that the Petitioner had not consumed any liquor. There was no complaint made against the Petitioner and there were no reasons at all to suspect the Petitioner of having committed any offence, therefore after obtaining the AJMO's Report there was no reason at all for detaining the Petitioner and held that the Respondents in that case violated the Petitioner's rights under Article 11 of the Constitution.

In **Suppaiah Sivakumar Vs Sergeant Jayaratne SC(FR)56/2012 S.C.M. 26.07.2018** Aluwihare P.C. J in holding that the Respondents violated the Petitioner's rights under Article 11 and 12 (1) of the Constitution stated,

> "the Petitioner was an ordinary citizen out there enjoying Theru celebrations with his family when the Respondents assaulted him. He was dragged along the road and proclaimed to be an offender in front of his relatives and the general public. When a man is assaulted, taken into custody, and locked up in a cell, simply because he happened to be in the vicinity of a riot, in my view, he has been subjected to "degrading treatment". The medical reports forwarded by the Kandy Hospital corroborates the physical suffering the Petitioner had to undergo on account of the Respondents' actions. The affidavits filed by his wife and the relatives further confirm that they witnessed the Petitioner being treated like an offender in front of the public. There can be no question that such a conduct caused humiliation to the Petitioner……"

In the present case, the 1st and 2nd Respondent police officers in civvies came to the place where the Petitioner, a toddy tapper was attending to his routine daily work, and demanded toddy and when informed that toddy was not available, verbally abused and assaulted the Petitioner and subsequently removed his outer garments and dragged him along the road with his hands tied at the back. The medical evidence, the affidavits, the video recording available before this Court, confirms the physical suffering, the mental agony and humiliation that the Petitioner had to undergo in public in the hands of the 1st and 2nd Respondents.

Based on the jurisprudence of our Courts in my view, the above conduct of the 1st and 2nd Respondents amount to "degrading treatment" and causing humiliation to the Petitioner before the general public.

For the foregoing reasons, I determine and hold that the Petitioner has established that his Fundamental Right of Freedom from torture and cruel, inhuman and degrading treatment guaranteed to him under Article 11 of the Constitution and the Right to Equal Protection of Law guaranteed under Article 12 (1) of the Constitution have been violated by the actions of the 1st and 2nd Respondents.

I allow the Petitioner's application and direct the State to pay to the Petitioner Rs. 100,000 as compensation and costs fixed at Rs. 25,000. I also direct the 1st and 2nd Respondents to pay personally Rs. 50,000 as compensation from each of them respectively to the Petitioner.

Judge of the Supreme Court

S. Eva Wanasundera P.C. J

I agree

Judge of the Supreme Court

Prasanna Jayawardena P.C. J

I agree

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Galapita Hene Gedara Nandani Kumari,
Kahakotuwe Gedara,

Borgambara, Kaikawela,

Matale.

Petitioner

SC /FR/ Application No 599/2009

Vs,

1. Padma Kumari Ekanayake,
   Kahakotuwe Gedara,
   Borgambara, Kaikawela,
   Matale.

2. H.M. Ekanayake,
   Office-in-Charge,
   Matale Prison,
   Matale.

3. Office-in-charge,
   Police Station,
   Raththota.

4. PS 12862 Wasantha,
   Police Station,
   Raththota.

5. Superintendent of Prison,
   Bogambara Prison,
   Kandy.

6. B.M. Amunugama,
   Female Guard,
   Bogambara Prison,
   Kandy.

7. L.D. Wijesingha,
   Female Guard,
   Bogambara Prison,
   Kandy.

8. M.S. Kumari Subasingha,
   Female Guard,
   Bogambara Prison,
   Kandy.

9. N.P. Somapala,
   Female Guard,
   Bogambara Prison,
   Kandy.

10. Commissioner General of Prisons,
    Department of Prisons,
    Baseline Road,
    Colombo 09.

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

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

Respondents

Before: **Sisira J. de. Abrew J**
Vijith K. Malalgoda PC J
Murdu N.B. Fernando PC J

Counsel: Shantha Jayawardena with Dinesh de. Silva, Hirannya Damunupola and Chamara Nanayakkarawasam for Petitioner

Saliya Peiris, PC with Thenuka Nandasiri for 2nd Respondent

Rasika Balasuriya with Dulanga Kumari for 4th Respondent

Asthika Devendra with W. Sandaruwan for 6th to 9th Respondents

Varunika Hettige, DSG for 10th, 11th and 12th Respondents

Argued on: 26.09.2018

Judgment on: 23.11.2018

Vijith K. Malalgoda PC J

Petitioner to the present application Galapita Hene Gedara Nandani Kumari had come before this court alleging the violation of her Fundamental Rights guaranteed under Articles 11, 12 (1) and 13 (2) of the Constitution by the Respondents. When this matter was supported on 18.11.2009, the court granted leave to proceed,

a) For the alleged violation of Article 11 of the Constitution against 2nd ,4th,6th,7th,8th and 9th Respondents and,
b) For the alleged violation of Article 12 (1) of the Constitution against 2nd and 4th to the 11th Respondents.

The Petitioner who is a housewife, was married to one S.M. Abeyrathne a graduate teacher, and was 45 years of age and a mother of 3 children, at the time the alleged incident referred to in the petition was taken place.

According to the Petitioner, an incident had taken place near her house on 27th June 2008 around 2.00 pm with one Padma Kumari Ekanayake when she was trying to dispose the garbage which was collected near her house, which ended up by the said Padma Kumari assaulting the Petitioner with a club. The son and the brother of the Petitioner rescued her from the said assault but her son had received a blow at that time. The Petitioner admits giving few blows to the said Padma Kumari with the Eacle broom she had in her hand to escape from the assault but denies that she had a knife with her at that time. On the same day around 3.30 pm two women Police Constables accompanied by two male Police Constables came to her house in a private vehicle and arrested her and taken to the Raththota Police Station in the same vehicle.

The Petitioner narrates the events that took place thereafter as follows;

a) At the Police Station the Petitioner got to know that there was a complaint lodged by the said Padma Kumari of cutting her with a knife by the Petitioner which she denied to the Police.
b) The Petitioner informed Police of the assault by the said Padma Kumari but the Police refused to entertain her complaint
c) The said Padma Kumari had got herself admitted to Raththota Hospital
d) A statement was recorded from the Petitioner by an officer, but the said statement was never read over to her by the said officer. She was forced to sign the statement saying "තමුසේ කවුද කියවලා බලන්න. තමුසෙගේ කට වැඩියි. මට ගෙදර යන්න පරක්කු වෙනවා මෙන්න මේකට අත්සන් කරනවා."
e) The Petitioner was kept at the Police station the whole night and was sent to courts around 12.00 noon by the 3rd Respondent through 4th Respondent PS 12862 Wasantha.

f) When the Petitioner was produced before court, the 4th Respondent objected for bail informing that the complainant is critically injured and hospitalized. Court remanded the Petitioner for fiscal custody until 30.11.2008

g) With the said remand order the Petitioner was taken to the Matale Remand Prison where the 2nd Respondent, the husband of the said Padma Kumari functioned as the Officer-in-Charge by the 4th Respondent

h) When she was produced at the Remand Prison, the Petitioner saw the 4th Respondent greeting the 2nd Respondent by holding his hand and saying, "ඔන්න මචං අපේ වැඩේ හරි"

i) The same evening around 5.30 pm the Petitioner was taken to Kandy Remand Prison. At that time the Petitioner heard the female officer accompanied her to Kandy, saying, "මේක මාතලේ බන්ධනාගාරයේ ඕ. අයි. සී ගෙ එකක්"

j) Following morning, the Petitioner was taken to a room by several female prison guards including the 7th and 9th Respondents and assaulted her for some time. Even though the Petitioner pleaded with them not to assault, they continued to assault her until the 6th and the 8th Respondents wanted her to be taken to their room

k) While the Petitioner being taken to the new room, she was pushed by an officer from her behind. When she fell into the room, she was kicked by the officers, she was assaulted inside room by 6th to 9th Respondents and during the said assault, she was slapped several times on her ears, knocked her head on the wall several times. During the said assault, she heard either the 6th or the 8th Respondent saying, "තෝව බාගෙට මරන්න කියලයි ඕ. අයි. සී මහත්තය අපිට කිව්වෙ"

l) Since the Petitioner started vomiting after the said assault, she was taken before a medical officer but, due to the presence of the 6th Respondent the Petitioner refrained from complaining against those who assaulted her little while ago.

m) Before taking her to Matale on the following day morning, at Kandy she was threatened not to divulge the assault to anybody, saying that she will be subject to assault once again if she returned

n) At Matale Remand the 2nd Respondent threatened her with death if she continues to make trouble and warned her not to talk to anybody as to what happened to her at the Remand

o) Even though the Petitioner requested her Attorney-at-Law to inform court with regard to the brutal assault on her at the Remand Prison, the Attorney-at-Law did not inform court of the assault, but only moved bail on her. The Petitioner was granted bail on that day

As revealed above the Petitioner had not complained to anybody except to her Attorney-at-Law, of the assault on her until she was bailed out from courts, but, the Petitioner explain the reason for not complaining the assault to the prison doctor but had taken up the position that her Attorney-at-Law did not make use of the opportunity to inform the Magistrate when she was produced before court. However it is transpired from the material placed before this court that, the Petitioner got herself admitted to the Matale hospital immediately after her release on the 30th itself.

The Consultant Judicial Medical Officer Matale who examined the Petitioner at the Matale hospital had recorded the short history given by the patient as follows;

> "Alleged assault by four female prison officers at Bogambara Remand Prison on 29.06.2008 after the victim had been remanded. Earlier the examinee was arrested by

Raththota Police following a quarrel with neighbor, wife of a prison officer H.M. Ekanayake."

During his examination the Consultant Judicial Medical Officer had observed five injuries, out of which the 5th injury, "high frequency hearing impairment" had been found as a grievous injury and under explanatory remakes he had remarked, that there is a "Permanent impairment of hearing on both ears"

In support of the above observation, a copy of the G.H.T including the tests carried out and the examination notes of the Consultant E.N.T Surgeon were also placed before this court marked P-3A.

As further observed by me the Petitioner made a detailed statement before the learned Magistrate Matale on 17.10.2008 when the case against her was called before the Magistrate for the 1st time after enlarging her on bail. However prior to 17/10, the Petitioner on 08.08.2008 had made a complaint to Women and Children Unit of Kandy Police and to the Human Rights Commission on 04.07.2008 through her husband.

Whilst challenging the above position taken up by the Petitioner, the Respondents, specially the 2nd and the 6th to the 9th Respondents heavily relied on the subsequent inquiries carried out by the prison authorities and the affidavit given by the Chief Jailer and the statement made by Medical Officer attached to the Kandy Remand Prison on the day in question to an official who conducted an inquiry.

In his affidavit the Chief Jailer had submitted that there was no possibility of assaulting a prisoner during the day time as complained by the Petitioner, without the knowledge of the

others and had further submitted that the Petitioner did not complained of such assault to him when he visited the new prisoners around 3.30 pm on 29.06.2008 (8R4)

In her statement made at the Prison Inquiry, produced marked 6R2 the Prison Doctor A. Hairu Nisha had stated that she examined the new admissions between 10.00 -11.00 including the Petitioner. The Petitioner did not complain of any assault to her and she was found to be in fit condition. Therefore she entered fit in front of her name in the admissions register but when the prisoner informed that she is taking treatment for some condition in both her hands form Kandy Hospital, the doctor had cut the previous entry by drawing a line and recorded that the prisoner is taking "treatment for numbness of both hands GHK"

As observed by me earlier, the Petitioner had explained the reasons for not making a complaint to the Prison Doctor, specially in the presence of the 6th Respondent, and she had to continue to be in remand prison until the following morning. One cannot expect a person who has neither been to a prison before nor had a criminal record to come out with a complainant against the lady Prison Officers under whose custody she had to be until the following morning. This position is explained by the Petitioner in the following terms in her counter affidavit;

> "I being a new remandee was retained within the premises while the others were taken for an event. I was produced before the Medical Officer by the 6th Respondent who gestured threatening me not to reveal the assault. I did not reveal the assault accordingly as I feared reprisals and instead cried before the doctor due to the mental and physical pain I was suffering"

I have no reason to reject the above position taken by the Petitioner. The reserve officer at Raththota Police Station had not made any adverse comments with regard to the conditions of

the Petitioner when she was produced at the reserve at 16.40 hours by PS 6502 Premachandra who recorded the statement of the Petitioner. The Petitioner makes no complaint of assault against the officers at Raththota Police Station. The Petitioner who was remanded for Fiscal Custody on 28.06.2008 was enlarged on bail on 30.06.2008 and on 30th itself she got herself admitted to Matale Hospital, and was in hospital until 8th July, until she was discharged. As referred to above the Consultant Judicial Medical Officer had observed 5 injuries including one grievous injury, permanent impairment of hearing of both ears.

When referring to the assault, the Petitioner had taken up the position that she was pushed inside the room of the 6th and 8th Respondents by some body from behind and when she fell inside the room, she was first kicked and thereafter pulled her up and assaulted by the 6th to 9th Respondents where she was slapped on her ears several times and knocked her head against the wall.

In the absence of any other material to establish that the Petitioner had received the injuries referred to in the Medico Legal Report including the 5th injury, at a different place, either prior to being arrested or after the release from the custody, I have no reason to disbelieve the Petitioner as to how she received those injuries. In this regard I am further mindful of the fact that the Petitioner is a house wife with three children and was taken into custody for an altercation between two village women over disposing some garbage. She is neither being in the prison custody previously, nor charged before a Court of Law on criminal charges.

The next issue to be considered by this court is whether there was any undue influence on the officers of Raththota Police Station in conducting investigations in the present case.

As revealed before this court, the first complaint into this incident had been made by one Padma Kumari to Raththota Police Station on 27.06.2008 at 15.00 hours (R-1) but a police party consist of PS 6502 Premachandra, PS 28766 Jayakody, WPC 6011 Kumari and WPC 4623 Shalika had left the Police Station in order to arrest the petitioner on the instructions of the Office–in-Charge at 14.30 hours (R-2 out entry) in a private van, i.e. 30 minutes prior to the first complaint being recorded. The Petitioner was arrested by the said team at her place at 15.10 hours six kilometers away from the Police Station for the alleged offence of assault to the complainant Kumari (R-2 return entry)

According to the first complaint, (R-1) the complainant had taken up the position that she received a cut injury in one of her finger due to the attack by the Petitioner with a knife.

The complainant, who was issued with a MLE form, had got herself admitted to the Raththota Hospital on the same day. The said MLE form is produced marked R-9 and it confirm that the complainant had a non-grievous cut injury inflicted by a sharp weapon, but under the remarks column the Medical Officer District Hospital Raththota had observed that “Possibility of self-inflicted cannot be excluded”

When the Petitioner was produced before the Magistrate’s Court, the Police had requested the learned Magistrate to remand the suspect for 14 days. An application was made on behalf of the suspect (Petitioner) for bail by an Attorney-at-Law. In the journal entry the learned Magistrate had recorded the day’s proceedings as follows;

> “සැකකාරිය බී වාර්ථාවක් සමගින් P.S 12862 වසන්ත විසින් ඉ/කරයි. සැ. නි. බී. ගුණසේකර මිය පෙනී සිටිමින් ඇප අයැද සිටී.

තුවාලකාරිය තව දුරටත් රෝහලේ නේවාසිකව ප්‍රතිකාර ලබන බැවින්ද, පිහියෙන් කපා තුවාල කර ඇති බවට බී වාර්ථාවෙන් කරුණු වාර්ථා කර ඇති බැවින්ද, වැ. විමර්ෂණ අවසන්වනතුරු සැකකාරිය 2008. 06. 30 දින දක්වා රිමාන්ඩ් බන්ධනාගාර ගත කරමි.

කැඳවනු 2008. 06. 30"

When considering matters already referred to above, it is observed that this is a complaint received by police over an altercation between two women in a village over disposing garbage in a compound but, for some reason the police had taken an undue interest in arresting the suspect in the manner as discussed. The police team had left the station in a private vehicle, even prior to a first complaint being recorded. The complainant was hospitalized over a non-grievous injury inflicted on a finger but the medical officer who examined the patient, had not ruled out the possibility of self-inflicted injury. At the Magistrate's Court, bail was objected to for the reason that;

a) Injury inflicted by a knife
b) Complainant is receiving treatment at the hospital.

Even though the police, when reporting facts before the Magistrate had taken up the position that the suspect (Petitioner) had used a knife to inflict the injury, no investigation was carried out to recover the knife used by the suspect at the time of her arrest or during subsequent investigation. (R-2)

When the above facts are taken into consideration with the position taken up by the Petitioner that she heard the 4th Respondent who took her to the Remand Prison informing the 2nd Respondent that "ඔන්න මචං අපේ වැඩේ හරි" is a clear indications that the investigations

said to have conducts by Raththota Police, was not carried impartially but it was carried with the intention of remanding the Petitioner due to some influence on them.

During the argument before this court, the learned counsel who represented the Respondents had challenged the position taken up by the Petitioner with regard to certain statements said to have made by some of the Respondents and argued that it is unsafe to act purely on the affidavit of the Petitioner and come to a conclusion that those Respondents have made such statements in the presence of the Petitioner, in the absence of any corroboration.

I do agree with the submission of the counsel that there is no corroboration by way of another affidavit before this court, but I cannot agree with the rest of the argument since the position taken up by the Petitioner is corroborated from independent material placed before this court. The statements said to have made by the 2nd, 4th and 6th to the 9th Respondents reveal the interest taken by the 2nd and 6th to the 9th Respondents in this matter. The 4th Respondent was not involved in the initial investigation and therefore it is not safe to make him liable for the interest the police had taken in conducting the investigation as referred to in this judgment. During the argument it was brought to the notice of court, the death of 5th Respondent whilst pending the present application.

When considering the matters referred to above in this judgment, I observe that the officers of Raththota Police Station had arrested the Petitioner even prior to a first complaint being received form Padma Kumari the wife of the 2nd Respondent who was the Officer-in-Charge of Matale Remand Prison. Bail was objected to by Raththota Police when they filed the 'B' Report before court. The learned Magistrate based on the 'B' Report before him, remanded the Petitioner for Fiscal Custody considering the fact that,

a) Injury inflicted by a knife

b) Injured is receiving treatment at Hospital.

However the only injury the Medical Officer found with the complainant was a non-grievous cut injury on a finger, which cannot be ruled out the possibility of self-inflicted injury.

At Kandy Remand Prison the Petitioner was subjected to physical assault by 4 lady prison guards whom the Petitioner identified as 6th to 9th Respondents. They kicked her, slapped her on her ears and her head was knocked against the wall. The Consultant Judicial Medical Officer Matale, had observed 5 injuries including a grievous injury, "a high frequency hearing impairment," which he identified as a permanent disability.

When considering all these matters I observe that the investigations said to have carried out by the Raththota Police and the subsequent incidents took place both at Matale Remand Prison and Kandy Remand Prison by the 2nd, 6th to the 9th Respondents are in violation of the Fundamental Rights guaranteed under article 11 and 12 (1) of the Constitution.

The Petitioner who is a housewife with 3 children was subject to cruel and inhuman treatment in the hands of the prison officials when she was remanded for causing a simple cut injury on a finger of the wife of the 2nd Respondent, the Officer-in-Charge of the Remand Prison Matale. As further revealed before us, the Petitioner was acquitted and discharged from the case filed against her on the said complaint before the Magistrate's Court of Matale, but she suffer from a permanent disability due to the said brutal assault on her during the time she was in Remand Prison.

The said conduct of the 2nd and 6th to the 9th Respondents can only be explained in the following word used by *Atukorale J* in the case of ***Amal Sudath Silva V. Kodituwakku (1987) 2 Sri LR 119,***

> "Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous method of treatment within the confines of the very premises in which he is held in custody…….
>
> The Petitioner may be a hard-core criminal whose tribe deserves no sympathy, but if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection- guaranteed by our constitution."

In the said circumstances, I hold that the Fundamental Rights guaranteed under Article 11 had been violated by the 2nd and 6th to the 9th Respondents and Article 12 (1) had been violated by the 2nd, 6th to 11th Respondents.

In determining the relief to be granted to the Petitioner I am mindful of the following observations made by *Kulatunge J* in the case of ***Gamlath V. Nevil Silva and others (1991) 2 Sri LR 267 at 278*** to the effect that;

> "….. violations of Article 11 of the Constitution which symbolizes man's inhumanity to man continue. Such infractions make the state primarily liable. In awarding just and equitable relief we are mindful of the fact that the state has to pay compensation out of public funds; but this court cannot on that ground resile from making an appropriate order. The state has to pay in view of the principle of state responsibility for executive and administrative action. If payment of compensation in default is a burden on public funds, it cannot be helped. In any event compensation ordered is payable to the citizen whose rights are violated and Constitutes a just levy on public funds in favour of the citizen…."

When considering all the matters referred to above in this judgment I grant the Petitioner,

a) A declaration that her Fundamental Rights guaranteed under Article 11 of the Constitution have been infringed by the 2nd , 6th to the 9th Respondents
b) A declaration that her Fundamental Rights guaranteed under Article 12 (1) of the Constitution have been infringed by the 2nd, 6th to the 11th Respondents
c) Compensation in a sum of Rupees five hundred thousand (500,000/-) together with cost in a sum of Rupees fifty thousand (50,000/-) payable by the state
d) Compensation in a sum of Rupees two hundred thousand (200,000/-) payable by the 2nd Respondent from his personal funds
e) Compensation in a sum of Rupees seventy five thousand (75,000/-) by each of the 6th to 9th Respondents [Total Compensation payable by the 6th to the 9th Respondents is Rupees three hundred thousand (300,000/-)] from their personal funds

I further direct the 12th Respondent, Attorney General to consider prosecuting the Respondents who are liable to be prosecuted under the provisions of the Torture Act if no steps had been taken so far to prosecute them before the relevant Magistrate's Court.

Application allowed.

Judge of the Supreme Court

Sisira J. de. Abrew J

I agree,

Judge of the Supreme Court

Murdu N.B. Fernando 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 clarification/variation of a Judgment already delivered by this Court.

1. A.A.Sarath, 83/15,
   Wijithapura Mawatha,
   Mahakandara
   Madapatha.

   And 23 Others

Petitioners

SC FR 661/2012

Vs

1. Commissioner General of Excise,
   Department of Excise,
   No. 34, W.A.D.Ramanayake
   Mawatha, Colombo 2.

   And 82 Others

Respondents

AND NOW BETWEEN

31. W.A.P.W.K. Wickramarachchi,

And 45 Others

31st to 62nd and 67th to 82nd
Respondents – Petitioners,
All, C/O The Department of Excise,
No. 34, W.A.D.Ramanayake

Mawatha, Colombo 02.

Respondent Petitioners

Vs

A.A. Sarath, 83/15, Wijithapura Mawatha, Mahakandara, Madapatha

And 23 Others

Petitioner Respondents

1. Commissioner General of Excise,Department of Excise, No. 34, W.A.D.Ramanayake Mawatha, Colombo 02.

   And 34 Others
   17 th to 30th and 63rd to 66th Respondent Respondents C/o The Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02.

83. The Attorney General, Attorney General's Department, Hulftsdorp Street, Colombo 12.

Respondent Respondents

BEFORE **: S. EVA WANASUNDERA PCJ,**
PRIYANTHA JAYAWARDENA PCJ &
VIJITH K. MALALGODA PCJ.

COUNSEL :Manohara de Silva PC for the 31st to 62nd and 67th to 82nd Respondent Petitioners.
Sanjeeva Jayawardena PC with Nilshantha Sirimanne and Ms. LakminiVarusawithana for the Petitioner Respondents.
RajithaPerera SSC for the 1st to 6th, 7A to 15A and 83rd Respondent Respondents.

HEARD THE PARTIES ON THE NEW PETITION FOR CLARIFICATION / VARIATION OF THE **JUDGMENT ALREADY DELIVERED ON :** 17.11.2017.

DECIDED ON : **11. 06. 2018.**

S. EVA WANASUNDERA PCJ.

The aforementioned Fundamental Rights Application was argued before the Supreme Court on 30.03.2016. The date of the Petition of the said Fundamental Rights Application is 19.11.2012. The Judgment written by the then Chief Justice with both the other judges who sat on the bench which heard the matter agreeing with the Chief Justice was delivered on **14.07.2016** wherein it was held that the act of the **1st Respondent in making promotions contrary to 1R7 violated the fundamental rights of the 24 Petitioners** enshrined in Article 12(1) of the Constitution. The Petitioners were granted compensation of Rs. 5000/- per each of them to be paid **by the 1st Respondent, the Commissioner General of Excise.**It was declared by this judgment that the promotions effected in excess of the quota fixed by 1R7 and contained in the documents marked **P7(a) and P7(b) were illegal and null and void**.

Document 1R7 is a document filed by the 1st Respondent himself. By the said judgment the 1st Respondent was found to be the wrong doer. P7(a) and P7(b) were documents filed by the Petitioners. It is however the same document as P6(a). The document P7(a) demonstrates that 29 persons were appointed on the results of the **examination** held for the promotions **and** the marks received at the **interview** held in that regard. P7(b) demonstrates that 20 persons were appointed under the **merit basis** on the marks received at the interview. Altogether the number of promotions effected by the 1st Respondent Commissioner General of Excise **to take effect from 19.10.2012were 49 in number.** By giving effect to the judgement of the then Chief Justice, all these promotions which were **granted wrongfully against the contents of 1R7, in effect, should be cancelled**, the reason being that**those promotions** appointing them as Excise Sergeants **were done by having infringed the fundamental rights of the 24 Petitioners. The said judgment further declares that the documents P7(a) and P7(b) are null and void.**

The said Judgment also directed the 1st Respondent to seek **the approval of the Public Service Commission** to fill the **balance vacancies** in terms of the approved scheme of recruitment and to take action to fill such vacancies as **expeditiously as possible following a transparent procedure**. The said judgment was delivered as far back as **14.07.2016**.

The matter before us now is as follows:-

On 05.10.2016, i.e. about **3 months after** the date of **delivery of the judgment**, **46 Respondents** filed a motion with a Petition and Affidavit and documents marked **X1 and X2** submitting that they need to **"**obtain a **clarification** from this Court regarding **the balance vacancies** to be filled as directed by this Court in the said Judgment dated 14.07.2016**."The expectation of the 46 Respondents is** , in the words of the counsel who appeared and has prepared the written submissions filed, is that;

" Court be pleased to **vary** and/or **clarify** the said **judgment** and make an appropriate order which would **enable the balance 46 selectees** i.e. these Respondent Petitioners, to hold the rank **of Excise Sergeant** as appointed by

letters marked P7(a) and P7(b) annexed to the Petition, in view of the fact that **approval had been granted to fill the said 67 vacancies"**

The date of the document X1 is **22.12.2011** and the date of X2 is **15.01.2012**.
I observe that **both** these documents are dated about 10 to 11 months **prior to the filing of the Original Petition** by the 24 Petitioners dated **19.11.2012 .** The Original Petitioners in fact challenged the appointments made by the Commissioner General of Excise as per documents P7(a) and P7(b). The **date of P7(a) and P7(b**) are the lists of promotions in which all the names of the promotees are contained.Both these documents are dated **23.10.2012,** which declare granting of the promotions with effect from **19.10.2012**.

In fact, going through the proceedings recorded in the minute sheets of this case and the contents of the judgment of this court, I find that the Respondents had argued that the Petitioners' fundamental rights application was time barred and the Chief Justice had considered the same and overruled that preliminary objection on the footing that the Petitioners had come to know about the Promotions given by P7(a) and P7(b) on the same day that they were issued to the Respondents, i.e. on **23.10.2012** and the date of the Petition i.e. 19.11.2012 was within one month of the Petitioners having come to know about the said promotions.

It is noted **that X1 and X2** on which the Respondents are basing their application for clarification, are dated about **10 months prior** to **even the filing** of this fundamental rights application by the Petitioners. So, it is obvious that by the time the said Respondents filed their objections after leave to proceed was granted by Court , the Respondents would have been fully aware of the documents X1 and X2**if they in fact existed** in the files regarding the promotions of the personnel belonging to the service of the workers in the Excise Department.Moreover, by the time leave to proceed was granted and objections were filed, they would have surely seen and known about the existence of X1 and X2. **Yet, I observe that the Respondents had failed to bring the said documents to the attention of Court** prior to the fixing of the matter for hearing or even thereafter when the matter was argued. Even at the time their written submissions were filed, **none** of the Respondents, meaning those who got promoted upon the impugned decisions of the 1st Respondent and those public officers who were made Respondents (including the 1st Respondent)to the

Application by the Petitioners **had brought up the existence of these two documents X1 and X2.**

If they were available in the official files, **there is no way that they would have missed seeing the documents** as quite relevant or important to pursue their arguments that the Respondents had done the promotions quite correctly according to law. That was the **key argument** in the Fundamental Rights Application which was opposed by the Respondent Petitioners in the present application for clarification. Neither the Senior State Counsel for the official Respondents nor the senior Counsel who appeared for the persons who got promoted, made any mention of such documents as X1 and X2. It cannot just be, by an oversight that they did not make use of the said documents to pursue their cause in this particular case. It is thus to be presumed that they **did not exist** in those official files ' at the time the leave to proceed was granted', 'at the time the objections were drafted and filed', 'at the several times that the Senior State Counsel undertook to look into the possibility of adjusting the matter', 'at the time the matter was argued before the Supreme Court' or'at the time of filing their written submissions' **, all of which occurred within a long period of about 3 and a half years.**How could the Petitioner Respondents, all of a sudden have seen and/or discovered, what could not have been seen or discovered , all that time?The newly produced documents, X1 and X2 should have existed within the file/cupboard/premises or wherever within the premises of the office of the 1st Respondent.

As such, a serious question arises about the authenticity of the said documents and the contents thereof. If the said documents were existing at the time period pertinent to this matter, the first and foremost argument of the 1st Respondent would have been that "X1 and X2 are proof of the fact that 67 persons were the cadre to be filled as approved by the proper authorities." These documents would have been **the key documents** which the Senior State Counsel would have decided to file with the objections on behalf of the 1st Respondent.

I have gone through the Affidavit dated 05.10.2016 affirmed **by only 5 personsout of 46 Respondent Petitioners** who are seeking to vary the judgment already delivered. In the said Affidavit, there is **no statement** within the 11 paragraphs thereof **explaining how the said documents X1 and X2 were recovered** and **from whose custody and which file etc.** Those documents have only been issued as

'true copy' by the Administrative Officer of the Excise Department for and on behalf of the Commissioner General of Excise. The five Affirmants affirm the position only in this way; " We state that subsequent to the delivery of the aforementioned judgment, it was revealed that (a) the 1st Respondent had by letter dated 22.12.2011 inter alia sought approval from the Ministry of Finance and Planning to fill sixty seven (67) vacancies in the rank of Excise Sergeant, and (b) the Minstry of Finance and Planning by its letter dated 15.01.2012 in response to the above letter dated 22.12.2011 had inter alia granted its approval to fill the said 67 vacancies in the rank of Excise Sergeant. Certified copies of letters dated 22.12.2011 and 15.01,2012 are annexed hereto marked X1 and X2." There is no explanation offered as to **the new finding of the old documents.**

In fact it is the 1st Respondent who should explain to Court **why X1 and X2 werenot produced at the time the case was argued** and/ or at the time of filing the objections. Instead, on 29.08.2017, the Senior State Counsel on behalf of the Respondents including the 1st Respondent, has fileda motion with a letter in this regard dated 18.08.2017 sent by the Acting Commissioner General of Excise as on that date, to the Hon. Attorney General. The said letter is filed by the State calling the same as a 'report'. It is **not an Affidavit** and it does not explain why the said documents X1 and X2 were not brought before court at the particular time when objections were filed or when the matter was argued. **This Court is unable to find out any reason as to why the documents were not produced earlier** and how the documents were found as late as three months after the delivery of the judgment. It can be seen and understood that no person from the Commissioner General's Department is willing to give an Affidavit to this Court explaining how the documents X1 and X2 were discovered at such a late stage.

On the other hand, the judgment has the effect of granting only 21 persons to be holding the post of Excise Sergeant and the 1st Respondent was directed by Court to seek approval from the authorities to fill the other 46 vacancies and get it done expeditiously. I fail to understand why the 1st Respondent cannot comply with the judgment. The Commissioner General of Excise has to take action accordingly. If this Court is supposed to recognize the contents of X1 and X2 and **vary the judgment to hold quite the contrary** of what has been already decided and concluded, **why can't the Commissioner General of Excise seek the approval of the Public Service Commission as ordered so to do, by the Supreme Court and get the needful done** instead of trying to get the same done through the Supreme

Court by bringing up the " forgotten documents" or "unseen documents" or "hidden documents" and begging court quite unnecessarily to vary the judgment which was delivered after having considered the documents and argumentssubmitted by all parties at the time of hearing the Fundamental Rights Case?

In the case of ***JeyarajFernandopulle Vs Premachandra De Silva and Others 1996 1 SLR 70,*** it was held that, " The Court has inherent powers to correct decisions made per incuriam. A decision will be regarded as given per incuriam **if it was in ignorance of some inconsistent statute or binding decision** – wherefore 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."

I do not find that the judgment delivered in this matter is per incuriam. The Judges have heard the case clearly on the matters submitted to court by way of the pleadings which were filed with regard to the case as well as oral submissions and written submissions filed by all the parties. Court has not acted in ignorance of any statute or any binding decisions. The judgement written by the then Chief Justice cannot be held as per incuriam.

I have considered the matters complained of by the Respondent Petitioners by their Petition and Affidavit as well as the Written Submissions filed by the counsel for the Respondent Petitioners. The Written Submissions of the Petitioner Respondents and the Written Submissions filed by the Senior State Counsel on behalf of the 1st to 6th, 7a to 15a and the 83rdRespondent Respondents were also considered by me along with the case law which were referred to, by all the parties. I have considered the oral submissions submitted by all the parties from the well of the Court as well.

Further to the matters explained by me, it is my considered view that when many arguments are submitted before the Apex Court, even though that particular Court is bound to consider each and every and all the submissions made by each party represented before Court, one by one and analyze the same to reach a just and equitable finality in the matter before Court, **the Court in writing the judgment cannot be expected to grant reasons for each and every argument**

which was argued before the particular Court, when the **final decision**is arrived at. The Respondent Petitioners alleged that "the Supreme Court delivered judgment refusing the reliefs sought in paragraph (d) of the prayer to the Petition, but granted the reliefs sought by the aforesaid paragraph (c) , **not for the reason that was alleged,** but on the basis that promotions were made in excess of the approved cadre." It would not be correct to state the same because the **most prominent reason** was that, the basis that the promotions were made were truly, according to the documents before Court, namely P 6(a) / 1R7, in which the cadre approved was **only 21 whereas the 1st Respondent had given promotions to 67 persons.** Nobody can say that the said reason is not a valid reason. It is noted that it was

one of the alleged reasons harped on by the Petitioner Respondents. The then Chief Justice had reached at the decision, having regard to the **most prominent reason and both the other judges who sat with him had agreed with the same.**

I hold that the Judgment of the then Chief Justice should not be varied for the aforementioned reasons. The Application for variation/clarification is hereby dismissed with 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

In the matter of an application under and in terms of Article 126 of the Constitution.

Loku Hetiarachchige Sanjana Pradeep Kumara

Petitioner

SC FR Application No.825/09

Vs.

1. S. M. J. Samaranayake,
   Chief Inspector of Police,
   Officer in Charge Police Station,
   Kirindiwela.

2. Nandatissa Sambandaperuma,
   Home Guard,
   Police Station,
   Kirindiwela

3. Laxman Cooray,
   Superintendent of Police,
   Gampaha.

   Presently detained at the Terrorist Investigation Division.

4. Sarath Kumara,
   Senior Superintendent of Police,
   Senior Superintendent of Police Office, Gampaha.

5. K. P. P. Pathirana,
   Deputy Inspector General of Police,
   Western (North) Range,
   DIG's Office,
   Peliyagoda.

6. Inspector General of Police,
Police Headquarters,
Colombo 01.

7. Sarath Weerasekara,
Rear Admiral, Headquarters of the Department of Civil Defence,
Station Road,
Colombo 04.

7A. Ananda Peris,
Rear Admiral, Headquarters of the Department of Civil Defence,
Station Road,
Colombo 04.

8. K. P. Karunaratne,
Hospital Road,
Radawana.

9. Nimalsiri Wijethunge,
Hospital Road,
Radawana.

10. Dias Kumara Wijethunge,
No.436D, Hospital Road,
Radawana.

11. Yashmi Sambandaperuma,
No.172, Obawatta Road,
Radawana.

12. Ananda Sarathkumara,
No.176, Landa,
Radawana.

13. Kapila Sambandaperuma,
No.188/2, Rambutangahawatta,
Radawana.

14. Amitha Sambandaperuma,
No.17/B, Radawana,
Kirindiwela.

15. Aminda Rajapaksha,
Member of Dompe Pradeahiya Sabha,
Dompe Pradeshiya Sabha, Kirindiwela.

16. Dompe Pradeshiya Sabha,
Kirindiwela.

17. J. A. Jayawardane,
Chairman,
Dompe Pradeshiya Sabha,
Kirindiwela.

18. Honourable Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

BEFORE: **S.E.WANASUNDERA, PC, J**
BUWANEKA ALUWIHARE, PC, J &
K.T. CHITRASIRI, J.

COUNSEL: Asthika Devendra with Lilan Warusavithana for Petitioner.
W.D.Weeraratne for 1st, 2nd and 8th to 17th Respondents
Nadun de Silva for 3rd Respondent
Viraj Dayaratne, DSG for 6th and 18th Respondents.

ARGUED ON: **03.03.2016**

DECIDED ON: 05.03.2018

ALUWIHARE, PC, J:

The Court granted leave to proceed in this matter for the alleged infringement of Article 12 (1) and 12 (2) of the Constitution.

The facts relating to this incident are as follows:
The Petitioner says that in 2008 he commenced constructing a house on a plot of land he had purchased in 2007 and by June, 2008 he managed to have the ground floor built and had proceeded to build the upper floor. On 6th July, 2008 the Petitioner who belongs to the Christian faith along with a crowd of about 14 people and led by the Pastor of his church offered prayers at the construction site. In the midst of the prayers a crowd of about 30 people had trespassed onto the land. The Petitioner states that the 2nd and 12th to 14th Respondents threatened the crowd congregated and had made specific reference to the 2nd Respondent who had been armed with a club. According to the Petitioner the 2nd Respondent had told him that there is no room for churches or to build houses and that he will be killed if he were to come again.

As a result of this intervention of the people referred to, the gathering had dispersed. The Petitioner states that he refrained from lodging a complaint at the Police Station as he had observed the unruly crowd, including the 2nd Respondent, heading towards the Police Station. Another reason he attributes for his reticence to make a complaint was the thought, that he has to live peacefully with the neighbors and wanted to avoid a confrontation with them.

After this incident a Police Officer, however, from the Kirindiwela Police Station had visited him at his residence and had a statement recorded from him in relation to a complaint alleged to have been made against him.

A couple of days later, upon being informed that the temporary hut he had put up to store building material at the construction site had been broken into, the Petitioner had visited the site and found the hut had in fact been broken into and the construction equipment and building material removed. He also had observed the word "බුදු සරණයි" written on the front wall of the hut.

The Petitioner asserts that he proceeded to Kirindiwela Police Station to lodge a complaint and had met the 1st Respondent, the O.I.C of the station. The Petitioner had been directed by the 1st Respondent to the Minor Offences Branch and from there he was redirected to the Crime Branch. The Crime Branch however, had not entertained his complaint but the police officers had visited the scene of the incident. The Petitioner had stated further that while he was waiting at the Police Station a lady police officer wanted the Petitioner to attend an inquiry before the Superintendent of Police, Gampaha, the 3rd Respondent, where the persons who intimidated him had also been asked to attend.

When the Petitioner attended the inquiry on 11th July, 2009 he had seen a crowd of people demonstrating against him. The Petitioner had attended the meeting with Pastor Chaminda and Rev. Sister Kalyani whilst the 8th to the 14th Respondents had also attended the inquiry. The Petitioner had alleged that the 3rd Respondent conducted the inquiry in a partial manner. The Petitioner also alleges that, after much persuasion the 3rd Respondent gave directions to have his complaint recorded.

Again on 14th July, 2009 he was informed by the Pastor that damage had been caused to his partly built house. As the Petitioner had no confidence in the 3rd Respondent, he had complained to the 5th Respondent, the Deputy Inspector General of Police Western Province (North) who had promptly acted on the complaint of the Petitioner and had given necessary directions to the 4th Respondent to make inquiries personally. On the very day, the Petitioner states that his statement was recorded by an officer, on the direction of the 3rd Respondent. Petitioner had been further requested to attend the Police Station on 21st July,2009 and Police had visited the scene on that date.

The police had also taken steps to have facts reported to the Magistrate's Court of Pugoda and 8 persons had been cited as suspects (8th to 14th Respondents to the present application). The Petitioner alleges that some of the building material removed from his construction site had been used to repair a road by the 15th Respondent. The Petitioner had lodged another complaint with regard to the use of building material as well.

In the application before this court, the Petitioner had referred to three distinct incidents, the first one on 6th July, 2009, where the Petitioner alleges that a crowd of people threatened him and forced him to leave the building site.

The second incident, according to the Petitioner had occurred two days later, *i.e.* 8th July, 2009 where the hut where the building material was stored had been broken into.

The third incident had happened a few days thereafter, on the 14th July where damage had been caused to the structure of the partly built house.

With regard to the first incident, the Petitioner elected not to make any complaint or take any action.

As to the third incident, the Petitioner had complained to the 5th Respondent, who had taken prompt action and consequently facts had been reported to the court and suspects named. Thus, the issue of any transgression of the fundamental rights of the Petitioner does not arise in relation to the first and the third incidents referred to above.

The only aspect that needs consideration is whether the conduct of the 1st and the 3rd Respondents, in not having entertained the complaint of the Petitioner and the delay in acting upon his complaint had infringed the fundamental lights of the Petitioner.

It would be relevant at this stage to consider the positions taken by the 1st and the 3rd Respondents. The 3rd and 4th Respondents in their statements of objections had denied all the allegations leveled against them. The 3rd Respondent had stated that he accorded a fair hearing to the Petitioner. However, he has not placed any material before this Court that could assist the court in appreciating these circumstances. The 1st Respondent, on the other hand, asserted that the Petitioner never made a complaint to the Police Station on 08. 07. 2009 and that by the time his officers were ready to take down the Petitioner's statement, the Petitioner had left. In support of his assertion, he had produced an entry made by Police Constable Sisira on 08. 07. 2009 at 05. 05 pm ("1R2") which is to the following effect: "මේ අවස්ථාවේදී, අපරාධ අංශයේ ස්ථානාධිපතිතුමා බල අපරාධ තොරතුරු සටහන් පොත කියවන බැවින් ඔහුට එම ලේඛනය කියවා අවසන් වන තෙක් රැඳී සිටින ලෙසට උපදෙස් දුන්නා. [...] මා අපරාධ අංශයේ ස්ථානාධිපතිතුමා පොත කියවා පැය 1700 ට අවසන් වීමෙන් පසුව පැමිණිල්ල සටහන් කිරීමට බලන විට එල්. එච්. සංජන ප්‍රදීප් කුමාර යන අය හා අනෙකුත් දෙදෙනා සිටියේ නැත."

It was contended on behalf of the Petitioner that the 1st Respondent had failed to act on the complaint of the Petitioner with due diligence, and that the 1st Respondent had acted with bias towards the persons who were named as suspects. The attention of this Court was drawn to the fact that the 'B' report filed before the learned Magistrate reveals commission of offences under Sections 142, 43, 369 and 437 of the Penal Code which are cognizable offences. It was contended, however, that the 1st Respondent instead of taking steps to arrest the suspects, had moved for summons on them through the court.

The 8th to 14th Respondents to this application are private individuals. Article 126 speaks of an infringement by executive or administrative action. In the present case, the Petitioner seeks, *inter alia*, a declaration that the 1st to the 4th Respondents and 6th to the 17th Respondents violated his fundamental rights. This court, however, is only seized of the jurisdiction to determine whether the failure of the 1st, 3rd and the 4th Respondents to record his complaint and direct investigations violated his fundamental rights. Claims against the 2nd and 8th to the 17th Respondents cannot be pursued as their alleged conduct is a matter pending before the Magistrate's Court. In any event, 8th to the 14th Respondents are private individuals who are not amenable within the fundamental rights jurisdiction.

Although this Court has held in the case of **Faiz v Attorney General [1995] 1 SLR 372** that "*The act of a private individual would be executive if such act is done with the authority of the executive; such authority, transforms an otherwise purely private act into executive or administrative action (including inaction in circumstances where there is a duty to act)"* there is, however, no material before this Court to warrant such a conclusion.

It appears that the initial complaint had been by the villagers with regard to the conduct of the Petitioner and an inquiry, according to the 3rd Respondent, had been held with the participation of the Petitioner and two other members of the clergy and a few others representing the complainants. The 3rd Respondent states that both parties were advised to maintain peace. It also appears that the situation had caused some tension in the area which is evident from the 'news clip' from a newspaper filed by the Petitioners (P4) which had reported a protest march by the villagers agitating over distress caused to the villagers as a result of the activities of the Petitioner.

Where an equal protection claim is advanced, an intentional and purposeful discrimination must be shown by any person protesting discrimination in the administration of the law. In **Wijeisnghe v Attorney General [1978-79-80] 1 SLR 102** His Lordship Justice Wanasundera with whom Justice Sharvananda and Justice Ismail agreed, quoting Stone CJ.'s dictum in ***Snowden v Hughes***, held that:

> "*The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.*"

It was further pointed out that "*Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption, negligence or error of judgement, I do not think a person can be allowed to come under Article*

126 and allege that there has been a violation of the constitutional guarantees. There may also be other instances where mistakes or wrongful acts are done in the course of proceedings for which ordinarily there are built-in safeguards or adequate procedures for obtaining relief."

This Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and our powers are given in very wide terms; but the authority vested, is not absolute and we have to concede that there are limits which we cannot transgress, however hard and unfortunate a case may be. We have to take cognizance of the distinction between ordinary rights and fundamental rights, and it is only a breach of a fundamental right that calls for our intervention.

In the present case, while the conduct of the 1st and the 3rd Respondent delay in acting upon his complaint very much falls short of the standards of professionalism, I do not hold that it constitutes a violation of the Petitioner's fundamental rights. There is no evidence to conclude that the 1st, 3rd and 4th Respondents acted with an insidious discriminatory purpose. Neither is there sufficient material to conclude that the delay prevented the Petitioner from a fair investigation. Proceedings before the Magistrate's Court, Pugoda are pending and both the learned Magistrate and the 6th Respondent have issued orders to the Respondents to conduct impartial investigations. There is also no evidence to conclude that the delay definitively facilitated the subsequent damage of the property. Furthermore, the learned Senior Deputy Solicitor General for the 6th and 18th Respondents has brought to the attention of this court that disciplinary actions have already been taken against the 1st Respondent.

Having considered the facts and circumstances in this case I hold that the Petitioner had not established that the 1st, 3rd and the 4th Respondents violated his Fundamental Rights guaranteed under Article 12 (1) and (2) of the Constitution.

I wish, however, to record my disapproval in the strongest terms of the dereliction of the professional duties on the part the 1st and the 3rd Respondents.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA P.C

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 application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. **H.M. Ranaweera,** Hitigegama, Hatton
2. **W.M. Wimalaratne,** Galgodehinna, Morohenegama
3. **W.G. Siriyaratne,** Pitakanda, Hitigegama, Hatton
4. **W.A. Shriyani,** Hitigegama, Hatton
5. **P.W.G.S. Sunil Jayawardana,** Parathalawa, Polpitiya, Pitawala

Petitioners

SC /FR/ Application No 507/2012

Vs,

1. **S. M. Gotabhaya Jayaratna, Secretary, Ministry of Education,** "Isurupaya" Pellawatte, Battaramulla.

1A. **W.M. Bandusena, Secretary, Ministry of Education** "Isurupaya" Pellawatte, Battaramulla.

1B. Mr. Sunil Hettiarachchi, Secretary, Ministry of Education, "Isurupaya" Pellawatte, Battaramulla.

2. **M. Premawansa, Secretary, Provincial Ministry of Education,** Central Provincial Council, Kandy.

3. **Principal,** Madeniya Maha Vidyalaya, Hitigegama, Hatton.

4. **Divisional Secretary, Ambagamuwa Divisional Secretariat Division,** Divisional Secretariat Office, Ginigathhena.

5. **S.U. Wijeratne, Additional Secretary (Planning) Ministry of Education,** "Isurupaya" Pellawatte, Battaramulla.

6. **Mr. Milton Premasiri, Principal,** Sir Nissankamalla Maha Vidyalaya, Hitigegama, Hatton.

7. **R.S. Senaratne, Divisional Director of Education, Ambagamuwa Division,** Divisional Education Office, Ginigathhena, Hatton.

7A. **P.B. Wijerathne, Divisional Director of Education, Ambagamuwa Division,** Divisional Education Office, Ginigathhena, Hatton.

8. **Hon. the Attorney General,** Attorney General's Department, Colombo 12.

Respondents

Before: Hon. Justice Nalin Perera
Hon. Justice Vijith K. Malalgoda PC
Hon. Justice L.T.B. Dehideniya

Counsel: Mr. J.C. Weliamuna, PC with Senura Abeywardena for Petitioners

Ms. Viveka Siriwardena, DSG for the Attorney General

Argued on: 26.07.2018

Judgment on: 10.10.2018

Vijith K. Malalgoda PC J

The Petitioners to the present application namely, H.M Ranaweera, W.M. Wimalaratne, W.G. Siriyarathne, W.A. Shriyani and P.W.G.S. Sunil Jayawardena who are parents of the students studying at Madeniya Maha Vidyalaya in the Divisional Secretariat Division of Ambagamuwa in the Hatton Educational Zone of the District of Nuwara Eliya had come before this court alleging the violation of their children's fundamental rights guaranteed under Article 12 (1) of the Constitution.

The Petitioners whilst referring to the said Madeniya Maha Vidyalaya, had submitted that the said school with a total student's population of 250 students has classes from grade one up to the G.C.E. Advance Level in the Commerce and Arts streams. It is further submitted that the said school is also considered a secondary school for 05 other Primary Schools namely, Velhela Polpitiya Vidyalaya, Morothotawatta Primary School, Minuwandeniya Maha Vidyalaya, Kehelwarawa Vidyalaya and Kothalla Maha Vidyalaya.

The Petitioners have alleged before this court that one or more of the Respondents, have unlawfully, arbitrary, unfair and discriminatorily decided to cancel the selection of the said school to be developed as part of the 1000 secondary schools development programme and also the arbitrary selection of the Sri Nissankamalla Maha Vidyalaya as the school to be developed under the said programme, was a violation of their children's fundamental rights guaranteed under Article 12 (1) of the Constitution.

In support of their contention the Petitioners have submitted before this court that,

a) In 2010 the Government announced a programme to develop 1000 schools and a circular was thereafter issued in 2011 by the then Secretary of the Ministry of Education with the criteria for selection.

b) Madeniya Maha Vidyalaya is one of the few schools in the Ambagamuwa Education Division which offer Advanced Level classes (Arts and Commerce streams) in the Sinhala medium

c) There are only two Central Schools in the said Division which offer Advance Level classes in science stream in the Sinhala Medium

d) There are at least 04 primary schools which are feeder schools to Madeniya Maha Vidyalaya

e) According to the said circular, Schools are selected depending on the geographical location taking into account, access to school, common amenities, the number of students in the Primary and secondary schools, the student flow, the distance between the schools cultural and environmental factors,

f) Each Divisional Secretary Division should have 2-3 secondary schools to be developed

g) Such identified schools should have at least 3-5 feeder Primary Schools in close proximity

h) Based on the above criteria Madeniya Maha Vidyalaya had all the requirement to be selected as one of such school in the Ambagamuwa Divisional Secretary Division

i) Since there were rumours in year 2011 that the political authorities were arbitrarily selecting schools for Development under the said programme, the school Development Society made representation to the Zonal Director of Education, the Chief Minister and the Minister of Education to interfere and do justice to Madeniya Maha Vidyalaya

j) In December 2011, the 3rd Respondent, Principle of Madeniya Maha Vidyalaya received the circular dated 24th November 2011 (P-2) along with an annexure disclosing that the

school has been selected under the said programme and the primary section will be removed in 5 years

k) Even though, Madeniya Maha Vidyalaya, was selected to be developed under the said programme, the Petitioner later learnt that the said selection of the school to be developed under the said programme has been revoked and Sri Nissankamalla Maha Vidyalaya had been inserted in the place of Madeniya Maha Vidyalaya

Whilst denying the above position taken up by the Petitioners, the 7th Respondent the Divisional Director of Education, Zonal Education Officer Hatton had submitted before this court that,

a) the selection of schools to be developed under the said programme was carried out by the Officers of the Education Department by strictly adhering to the concept paper prepared by the Ministry of Education (R1)

b) Sri Nissankamalla Maha Vidyalaya was included in the initial selection list of schools on the basis that it satisfied the criteria for selection

c) Once the selections were made, the Island wide selections including the selection for Ambagamuwa Divisional Secretarial Division, was published in News Papers on 12th June 2011. (R-3) In the said advertisement numbers 113-116 referred to the selections for Ambagamuwa Divisional Secretariat Division, including, Ginigathhena Madya Maha Vidyalaya, Sri Nissankamalla Maha Vidyalaya, Lakshapana Central College and Ambagamuwa Maha Vidyalaya

d) However representations were made to include Madeniya Maha Vidyalaya by interested parties

e) Since both schools are located within close proximity to each other, it was not possible to include Madeniya Maha Vidyalaya into the Programme but two reports were submitted

one by the 7th Respondent (R-5) and another by a team comprising of a Director of Education and a Deputy Director of Education from the Provincial Education Department and an Assistant Director of Education and a Development Assistant from the Department of Education (R-6) considering the representation made with regard to the suitability of the school to be selected under the said programme. Both those reports recommended Nissankamalla Maha Vidyalaya as the most suitable school to be developed under the said programme.

f) In the said circumstances steps were taken to include Nissankamalla Maha Vidyalaya into the said programme

However when going through the documents submitted before this court it appears that the school authorities of Madeniya Maha Vidyalaya as well as Nissankamalla Maha Vidyalaya were getting ready to get their names into the said programme by dropping their grade one classes for the year 2012 but both these schools cannot be included in the said programme since the two schools were situated within close proximity.

Even though the Petitioners alleged that the impugn decision to drop Madeniya Maha Vidyalaya was taken in the latter part of year 2011 after sending the circular in November 2011, from the document produced marked R-3, it is clear that there is a decision to include Nissankamalla Maha Vidyalaya into the programme much prior to the above date. In the said circumstances it is clear that, even if there is a decision in the latter part of 2011, the said decision had only affirm the decision already taken to include Nissankamalla Maha Vidyalaya into 1000 schools programme.

The Petitioners before this court had failed to challenge the original decision taken prior to June 2011, which was published in the News Papers on 12th June 2011.

In the said circumstance I see no merit in the application before us. The Petitioners have failed to establish that the fundamental rights of their children guaranteed under Article 12 (1) had been violated by anyone of the Respondent.

I therefore make order dismissing this application.

Application is dismissed no costs.

Judge of the Supreme Court

Justice Nalin Perera

I agree,

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree,

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 as amended

SC/HC/CA/LA No. 134/2016

WP/HCCA/COL/97/2010(F)

DC Colombo Case No. 19673/L

1. Nawinna Kottage Dona Lalitha Padmini
2. Wellalagodage Ganga Geeth Kumara

Both of No. F41,
Bandaranaikapura,
Rajagiriya.

Plaintiffs

-Vs-

1. N.K.D. Pradeepa Nishanthi Kumari
   No. F43, Bandaranaikapura,
   Rajagiriya.
2. Dammika Weerakoon,
   No. F43, Bandaranaikapura,
   Rajagiriya.
3. National Housing Development Authority
   Chittampalam A. Gardiner Mawatha,
   Colombo 02.

Defendants

Between

1. N.K.D. Pradeepa Nishanthi Kumari
   No. F43, Bandaranaikapura,
   Rajagiriya.
2. Dammika Weerakoon,
   No. F43, Bandaranaikapura,
   Rajagiriya.

Defendant – Appellants

-Vs-

1. Nawinna Kottage Dona Lalitha Padmini
2. Wellalagodage Ganga Geeth Kumara
   Both of No. F41,
   Bandaranaikapura,
   Rajagiriya.

Plaintiff – Respondents

3. National Housing Development Authority
   Chittampalam A. Gardiner Mawatha,
   Colombo 02.

3rd Defendant – Respondent

And Now Between

1. Nawinna Kottage Dona Lalitha Padmini
2. Wellalagodage Ganga Geeth Kumara
   Both of No. F41,
   Bandaranaikapura,
   Rajagiriya.

Plaintiff – Respondent – Petitioners

-Vs-

1. N.K.D. Pradeepa Nishanthi Kumari
   No. F43, Bandaranaikapura,
   Rajagiriya.
2. Dammika Weerakoon,
   No. F43, Bandaranaikapura,
   Rajagiriya.

Defendant – Appellant – Respondents

Before: Priyasath Dep, PC, CJ

Priyantha Jayawardena, PC, J

Nalin Perera, J

Counsel: Sanath Weerasinghe with Jayalath Hissella for the Plaintiff –Respondent – Petitioners

Pubudu de Silva instructed by S. Weerasooriya for the 1st and 2nd Defendant – Appellant – Respondents

Argued on: 28th of August, 2017

Decided on: 07th of September, 2018

Priyantha Jayawardena PC, J

Facts of the case

This is an Appeal filed against the judgment of the Provincial High Court of the Western Province (exercising Civil Appellate Jurisdiction) dated 16th of February, 2016 setting aside the judgment of the District Court of Colombo dated 07th of May, 2010.

The Plaintiff – Respondent – Petitioners (hereinafter referred to as the Petitioners), instituted action in the District Court of Colombo and later amended the said Plaint. The 1st and 2nd Defendant – Appellant – Respondents (hereinafter referred to as the Respondents), filed a common answer while the 3rd Defendant filed a separate answer.

When the case was taken up for trial, admissions were recorded and issues were framed. Thereafter, the 3rd Defendant moved Court to try issues raised by the said Defendant as Preliminary issues. The Court answered the said questions of law in favour of the 3rd Defendant and discharged the 3rd Defendant from the case.

Thereafter, the trial against the Respondents commenced by leading evidence by the Petitioners. The Petitioners' case was concluded on the 28th of April, 2009 and further trial was fixed for the 17th of July, 2009 for the Respondents to start the case.

However, when the case was taken up for further trial on the 17th of July, 2009, the Respondents were not present in court on the said date. Moreover, the Counsel for the Respondents informed court that the Registered Attorney of the Respondents has not received instructions to appear on that day. The court concluded the trial on that day without fixing it for ex-parte trial, and granted a date for the correction of proceedings.

When the case was taken up for correction of proceedings, an application was made to lead evidence on behalf of the Respondents which was refused by court as the trial was concluded on the 17th of July, 2009.

Thereafter, having considered the evidence led at the trial, the court delivered the judgment on 07th of May 2010, granting relief to the Petitioners as prayed for in the prayer of the amended Plaint.

Being aggrieved by the aforesaid judgment, the Respondents preferred a petition of appeal to the Provincial High Court of the Western Province [exercising Civil Appellate jurisdiction in Colombo] (hereinafter referred to as the Provincial High Court), on the 07th of July, 2010.

When the Respondents filed the petition of appeal in the original court, the District Judge had made the following minute on the 07th of July, 2010;

"The 1st and 2nd Defendant – Appellants tendered the petition of appeal.

(i) File the petition of appeal of record.
(ii) The petition of appeal has been presented on the 61st date.
(iii) Retain a sub-file and forward the original to the Provincial High Court."

When the Provincial High Court of the Western Province took up the said appeal for hearing, neither party brought it to the notice of the court that the petition of appeal has been filed out of time. On the contrary, the parties had made submissions on the merits. Therefore, the court allowed the appeal and set aside the said judgment of the District Court.

Being aggrieved by the said Judgment, the Petitioners filed the instant application for Special Leave to Appeal and pleaded inter-alia;

b) Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to appreciate that the Respondents have not complied with mandatory provisions contained in section 755(3) of the Civil Procedure Code in failing to file petition of appeal within sixty days from the date of Judgment of the Learned District Judge?
f) Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to comply with mandatory provisions contained in Section 758(2) of the Civil Procedure Code in failing to afford the Petitioners an opportunity of being heard on the question of prescription of the action instituted by the Petitioners?

When the instant application was taken up for support, the Counsel for the Petitioner invited this court to decide the aforementioned questions of law first.

Submissions by the Petitioners

The Counsel for the Petitioners submitted that the learned District Judge had specifically stated in journal entry dated 07th July, 2010 that the petition of appeal had been presented on the 61st date.

Moreover, the Petitioners drew the attention of court to Section 755(3) of the Civil Procedure Code where it states that;

> "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 of decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition shall be exempt from stamp duty:
>
> Provided that, if such petition is not presented to the original Court within sixty days from the date of the judgment or decree appealed against, the Court shall refuse to receive the appeal." [Emphasis added]

The Petitioners in support of their contention cited the case of *Peter Singho v. Costa* (1992) 1 SLR 49 where it was held that; in computing the time limits for filing the notice of appeal and petition of appeal, only the date on which the judgment was pronounced can be excluded.

The Petitioner also drew the attention of the court to section 758(2) of the Civil Procedure Code which states the following;

> "The court in deciding any appeal shall not be confined to grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground."

Therefore, the Petitioners submitted that the said Provincial High Court should have cited *ex mero motu* and dismissed the petition of appeal filed by the Respondents as it was out time, notwithstanding the fact that it was not raised by the Petitioners before the Provincial High Court.

Submissions by the Respondents

The Respondents submitted that the District Court of Colombo delivered the judgment on 07th of May 2010, in favour of the Petitioners. Being aggrieved by the aforesaid judgment, the Respondents preferred a petition of appeal to the Provincial High Court of the Western Province on the 07th of July, 2010.

However, when the said Appeal was taken up for hearing before the said court, the Petitioners did not raise an objection to the maintainability of the said appeal on the basis that it has not been filed within the stipulated period of 60 days from the date of delivery of the judgment of the District Court.

Furthermore, the said time restriction has certain exceptions under the provisions of the Civil Procedure Code and should be considered together with Section 759(2) of the Civil Procedure Code.

Moreover, the Petitioners neither in their oral argument nor in their written submissions raised the said objections before the Provincial High Court. Instead they have participated in the arguments before the Provincial High Court without objecting to the petition of appeal. Hence, the Petitioners have by their conduct, acquiesced in the process and have waived off their right to object to the jurisdiction of the Provincial High Court which heard the Appeal. Therefore, the Respondents argued that the Petitioners are now barred from raising the said objection under the principles of estoppel and equity, and stated that, if the time bar objection was raised before the Provincial High Court, the Respondents would have had the opportunity to adduce reasons for the same.

The Respondents further submitted that the learned Judge of the Provincial High Court in an exhaustive manner has considered the oral submissions and written submissions of the parties and thereafter delivered the judgment on the merits of the Appeal. Thus, the Appellant – Petitioners are now only entitled to raise questions of law, arising from the judgment of the Provincial High Court. Therefore, it was submitted that the preliminary objection should be over ruled.

Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to appreciate that the Respondents have not complied with mandatory provisions contained in section 755(3) of the Civil Procedure Code in failing to file petition of appeal within sixty days from the date of Judgment of the Learned District Judge?

In this application, the District Court judgment was delivered in favour of the petitioners on the 07th of May, 2010. Being aggrieved by the said judgment, the Respondents filed the Notice of Appeal on the 14th of May, 2010 and the petition of appeal on the 07th of July, 2010.

Thus, the District Judge made the aforementioned minute on the 07th of July, 2010 to the effect that the petition of appeal was filed on the 61st date.

Are the Petitioners entitled to raise the time bar objection before the Supreme Court for the first time?

The question of law that needs to be considered by this court is whether the delay in filing the petition of appeal by the Respondents in the Provincial High Court can be raised for the first time before the Supreme Court.

Admittedly, the Provincial High Court has not taken into consideration, the aforementioned minute of the learned District Judge where it was stated that the petition of appeal has been filed out of time. Furthermore, neither party had brought it to the notice of the Provincial High Court. On the contrary, parties participated in the proceedings before the Provincial High Court without any objection to the hearing of the appeal. Thus, the Provincial High Court has delivered the judgment on merits of the appeal and allowed the appeal and the judgment of the learned District Court Judge was set aside.

Being aggrieved by the said judgment, the Petitioners filed a petition of appeal in the Supreme Court. When the instant application was taken up for support, the Petitioners submitted that the petition of appeal addressed to the Provincial High Court had been filed out of time and therefore, the said Provincial High Court ought to have rejected the said petition of appeal.

The Counsel for the Respondents submitted that the said time bar objection was not raised before the Provincial High Court and it was raised for the first time before the Supreme Court. Hence, it was submitted that the Petitioners have acquiesced in the process by participating in

the proceedings before the Provincial High Court and thus, the Petitioners are now estopped from raising the time bar objection.

Therefore, this Court was called upon to determine whether it is possible to raise an objection on the time restriction for the first time in the Supreme Court.

It is important to note that the subject matter of this case is a dispute between private individuals. Hence, the civil adjudication system applies to the instant case and it is subject to private law regimes. In this context, it is necessary to consider whether a litigant should be allowed by courts to implement strategies in order to achieve their object by taking advantage of the lacunas in the legal system or by inviting courts to interpret the law in their favour.

Spenser Bower at page 308 of his work Estoppel by Representation 1966 (2nd Edition) says that;

> "So too, when a party litigant, being in a position to object that the matter in difference is outside the local, pecuniary or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberately elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal has no jurisdiction over the cause or parties, except in that class of case, already noticed, where the allowance of the estoppel would result in a totally new jurisdiction being created. The like estoppel is raised by a party's attendance at the hearing and taking part in the proceedings without raising any objection to the personal disqualification of a member of the tribunal, or to the non – compliance of any notice, summons, or service of the process, with statutory requirements or rules of court, or to the informality of a writ."

Further, I am of the opinion that, such matters contribute to the delays in resolving a dispute. Further, it gives certain parties an undue advantage over their opponents. As such, the courts shall not encourage such matters.

In the case of *Ranaweera and Others v. Sub-Inspector Wilson Siriwardena and Others* [2008] 1 SLR 260 at 272 it was held;

> "The time bar is a plea available to a respondent of a fundamental rights application to resist the application filed against him. A time bar or prescription which affects jurisdiction of court must be specifically pleaded in the very first opportunity and if it is not so pleaded, the court is entitled to proceed on the basis that the respondent has waived his right to raise the defence of time bar in defence of the claim raised against him."

I am of the opinion that if a particular matter which was within the knowledge of a party was not raised before a court, it should not be entertained later in an appeal, unless it is a pure question of law. A similar view was expressed by H.W.R. Wade & C.F. Forsyth in Administrative Law 9th Ed, Page 464;

> "The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged."

However, the court will not preclude a party to raise an objection to entertain an appeal on the basis that it was filed out of time, notwithstanding granting of leave to appeal if such party was not heard prior to granting of special leave as the said party did not receive an opportunity to be heard before being granted special leave.

This was held in *Mohomed Bhai v. Divaiva* 39 NLR 564 at 565;

> "On July 8th an application to this court, for leave to appeal was filed. The journal entry describes it as a petition of appeal against the Commissioner's refusal of leave to appeal.
>
> This court allowed the application. The appeal came on for hearing in due course.
>
> Counsel for the Respondent took the objection that the appeal was not in order as leave to appeal had been granted without jurisdiction inasmuch as the application had not been filed within seven days of the Commissioner's refusal. He relied upon

section 7 of the Interpretation Ordinance for the computation of the period of time and according to that section Sundays are not excluded in the reckoning.

Appellant's Counsel conceded that the application was out of time and he contended that this court having granted leave to appeal could not now reject the appeal and that the period had possibly been reckoned in accordance with a prevailing practice and that this ought not to be disturbed. He cited *Boyagoda v. Mendis* 30 NLR 321.

With regard to the first objection, it is in my opinion not entitled to succeed. The first order was obtained *ex parte* and the respondent had then no opportunity of objecting. This court has repeatedly held that an application to set aside an *ex parte* order should be made to the court making the order and that such a court had power to set aside such an order.

…….

…….

……. There can be no doubt that this court would not have granted leave had it known that the application was out of time, and that its order was made *per incuriam*."

Further an objection of patent lack of jurisdiction or a pure question of law can be raised in an appeal, provided that it is not a question of fact or a mixed question of law and fact.

In the *Tasmania case* (1890) 15 AC 223 it was held that; if an issue is a pure question of law, it can be raised in appeal. Later this judgment was followed in Sri Lanka, in the case of *Manian v. Sanmugam* 22 NLR 249.

In the case of *Talagala v. Gangodawila Co-operative Stores Society Ltd.* 48 NLR 472 at 474 it was held*;*

"Where the question raised for the first time in appeal, however, is a pure question of law, and is not a mixed question of law and fact, it can be dealt with."

In *W. Robison Fernando v. S. Henrietta Fernando* 74 NLR 57 at 58 it was held;

> "Where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself *ex mero motu* to raise the point even if the parties fail to do so."

In the case of *The Attorney General v. Punchirala* 21 NLR 51 it was held that; a court is bound to apply statute law whether an issue is raised on it or not.

Have the Petitioners waived their right to object to the Petition of Appeal?

As discussed above, the Petitioners ought to have known that the petition of appeal had been filed out of time. However, the Petitioners for reasons best known to them, chose not to raise the objection of time bar before the Provincial High Court and participated in the proceedings before the Provincial High Court. However, considering all the related facts of the case, I am of the view that the Petitioners have waived their right to object to the petition of appeal that was filed out of time.

The Halsbury's Laws of England, 5th Ed, Vol 19 states as follows:

> "An application to challenge the jurisdiction of the court must be made at the outset of the proceedings, for if the defendant takes any step in the proceedings other than a step to challenge the jurisdiction, he will be taken to have waived any opportunity for challenge which he might otherwise have had, and to have submitted to the jurisdiction of the court."

In the case of *Rodrigo v. Raymond* [2002] 2 SLR 79 at 83 and 84, it was held;

> "Failure to frame an issue on such a vital matter will amount to waiver of objections in regard to lack of jurisdiction of the court to hear and determine the respondent's action. The defendant is deemed to have consented and submitted to the jurisdiction of the court, and he cannot now be permitted to challenge the jurisdiction of the court… The defendant had ample opportunity of objecting to the jurisdiction of the court. If he has chosen or elected to waive such objections, he cannot subsequently be permitted to challenge it."

Are the Petitioners estopped from raising the time bar objection?

The Petitioners in the instant application have failed to raise an objection at the court of first instance, with regard to the Respondents filing the petition of appeal on the 61st date. Furthermore, both parties did not raise the time bar objection and participated in the proceedings before the Provincial High Court.

The Petitioners raised the time bar objection for the first time in the Supreme Court. Therefore, it must be considered if the Petitioners are estopped by their conduct from raising the time bar objection before the Supreme Court.

According to C.D. Field's 'Law relating to estoppel' revised by Gopal S. Chaturvedi, 3rd Ed, page 166;

> "In order to constitute abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights. Acquiescence or standing by when there is a duty to speak or assert a right creates an estoppel. In such cases knowledge of the act must be brought by the acquiescing party. Acquiescence does not mean simply an intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done."

Therefore, waiver of an objection by a party aggrieved does not afford them the right to raise such objection at a later stage, as they are estopped by their prior conduct.

Conclusion

The Petitioners have failed to bring to the attention of the Provincial High Court that the Respondents failed to file the petition of appeal within the stipulated time and participated in the hearing of the appeal in the Provincial High Court.

No satisfactory explanation was given by the Petitioners for not raising the time bar objection before the Provincial High Court. Furthermore, there is no material to show that the Provincial High Court deprived the Petitioners of raising such an objection.

I am of the view that by not raising an objection to the maintainability of the appeal before the Provincial High Court and participating in the hearing of the appeal without raising an objection, the Petitioners have acquiesced in the process and waived their right to raise the said objection. Therefore, now the Petitioners are estopped from raising the said objection before this court.

I am of the opinion that, when a court has jurisdiction of the subject matter and the parties, a judgment delivered by such a court cannot be impeached in appeal on the basis of irregularities in the procedure, as it goes to the root of the case.

Further, according to section 765 of the Civil Procedure Code Act No. 79 of 1988 as amended, the Civil Appellate Court can entertain an appeal filed out of time.

Section 758(2) of the Civil Procedure Code, has no applicability to the present Petition.

Accordingly, the below mentioned questions of law are answered as follows:

- Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to appreciate that the Respondents have not complied with mandatory provisions contained in section 755(3) of the Civil Procedure Code in failing to file Petition of Appeal within sixty days from the date of Judgment of the Learned District Judge? - No
- Have the learned Judges of the Provincial High Court of the Western Province erred in law as well as in fact in omitting to comply with mandatory provisions contained in Section 758(2) of the Civil Procedure Code in failing to afford the Petitioners an opportunity of being heard on the question of prescription of the action instituted by the Petitioners? – No

For the aforementioned reasons, I overrule the preliminary objections raised by the Petitioners.

I order a sum of Rs. 30,000/- as costs and the Petitioners should pay the said sum of Rupees to the Respondents within eight (8) weeks from today.

Judge of the Supreme Court

Priyasath Dep PC, CJ

I agree **Chief Justice**

Nalin Perera, J

I agree **Judge of the Supreme Court**

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Hemantha Situge, Attorney at Law.

Weerasekera Arachchige Dona
Saddhawathie, No. 732,
Sri Nanda Mawatha,
Madinnagoda,
Rajagiriya.

Complainant

Vs

SC RULE 03 / 2014

Hemantha Situge,
Law Library,
Hulftsdorp,
Colombo 12.

Respondent

BEFORE : S. EVA WANASUNDERA PCJ.
B. P. ALUWIHARE PCJ. &
SISIRA J. DE ABREW J.

COUNSEL : Saliya Pieris PC for the Bar Association of Sri Lanka.
Thusith Mudalige Deputy Solicitor General for the Hon. Attorney General.
Dr. S. F. A. Coorey for the Respondent.

Inquiry Dates :20.02.2014, 01.12.2014, 11.12.2014,19.01.2015, 08.12.2015,24.03.2016, 17.06.2016, 01.08.2016, 24.11.2016,17.01.2017, 03.04.2017, 14.06.2017, 06.09.2017 and 03.10.2017.

DECIDED ON : 24. 01. 2018

S. EVA WANASUNDERA PCJ.

Rule dated 30.01.2014 was issued on the Respondent Attorney at Law (hereinafter referred to as the Respondent) to show cause as to why he should not be suspended from practice or removed from the office of Attorney at Law of the Supreme Court in terms of Section 42(2) of the Judicature Act No. 2 of 1978.

When the charge sheet was read out to him on 20.02.2014, the Respondent pleaded ' not guilty '. Thereafter this Court had made order on the same day 'suspending the Respondent from practicing or doing any other activity connected or concerned with the legal system until such time this matter is fully determined by this Court.'

This matter had arisen from and out of a complaint made by Weerasekera Arachchige Dona Saddhawathie, the Complainant (hereinafter referred to as the Complainant) to the Bar Association on or around **17.08.2009 complaining** that the Respondent had taken Ten Thousand Rupees (Rs. 10,000/-) to file action against Perera and Sons Company regarding the said company sending / disposing of dirty water into the drain flowing down the drain along the road and into the land of the Complainant, illegally, in a manner which was causing the Complainant and her neighbours a lot of hardship, **but had failed to do so** from **20.11.2008**, the date on which the Complainant had handed over the papers and the said money to the Respondent.

In the affidavit of the Complainant, **she has annexed a copy of a notice** sent by the Respondent under Sec. 461 of the Civil Procedure Code, to the Hon. Attorney General dated **10.03.2009** and a letter of **response** in that regard dated **23.04.2009 from the Hon. Attorney General**. It is obvious that the Respondent had sent the Sec. 461 notice to the Attorney General **within 4 months from the date of undertaking to file action**.

The Complainant's prayer is only to get the Respondent to return the Rs. 10000/- to her along with the documents given to the Respondent. There is no list of the documents given by the Complainant to the Respondent in the Affidavit or the complaint made to the Bar Association.

The Bar Association had held a disciplinary inquiry and made order on 06.02.2010 stating that " the Panel is of the view that appropriate action be taken against the Respondent." The Administrative Secretary to the BASL had forwarded the same to the Registrar of the Supreme Court on 03.03.2010 and in turn by an order of the Supreme Court, the Registrar had sent a letter to the Hon. Attorney General to prepare the Draft Rule against the Respondent.

The Rule dated 30.01.2014 reads as follows:-

TO THE RESPONDENT ABOVE NAMED.

WHEREAS

(a) A disciplinary inquiry was held by the panel 'A' of the Professional Purposes Committee of the Bar Association of Sri Lanka in respect of the deceit and malpractice by you, and the said Panel was of the view that you are guilty of professional misconduct and that this is a fit case to be reported to the Supreme Court for appropriate action,

(b) Thereafter the findings of the said Panel was submitted to the Overall Chairman of the Professional Purposes Committee of the Bar Association of Sri Lanka, who directed that the findings of the inquiry of the said Panel be forwarded to Executive Committee of the Bar Association of Sri Lanka,

(c) The Executive Committee endorsed the decision of the Professional Purposes Committee to refer the matter to the Supreme Court for appropriate action.

AND WHEREAS, the complaint made by the said Weerasekera Arachchige Dona Saddhawathie and the Order of the Panel 'A' of the Professional Purposes Committee of the Bar Association of Sri Lanka disclose that;

(a) On or around 20.11.2008 the said Weerasekera Arachchige Dona Saddhawathie retained you to file action against a private company for polluting the environment by releasing waste, harmful to human life and
(b) You were paid a sum of Rupees Ten Thousand as professional fees and
(c) You failed to institute proceedings as undertaken by you and
(d) Thereafter you avoided meeting the said Weerasekera Arachchige Dona Saddhawathie and
(e) You have failed to return the total amount you received from the said Weerasekera Arachchige Dona Saddhawathie.

AND WHEREAS in the circumstances your conduct discloses that;

(a) You being an Attorney at Law, by means of your conduct have acted in a manner detrimental and or prejudicial to the interest of the said Complainant, whom you chose to represent,
(b) You being an Attorney at Law, have failed to exercise skill and due diligence in prosecuting the interests of the said Weerasekera Arachchige Dona Saddhawathie referred to above.

AND WHEREAS;

(a) You have by reason of the aforesaid acts and conduct, committed ; deceit and/or malpractice within the meaning of Section 42(2) of the Judicature Act which renders you unfit to remain as an Attorney at Law, and
(b) By reason of the aforesaid conduct you have acted in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys at Law of good repute and competence and have thus committed a breach of Rule 60 of the Supreme Court Rule (Conduct and Etiquette of Attorneys at Law) of 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka and,

(c) By reason of the aforesaid acts and conduct, you have conducted yourself in a manner which would render yourself unfit to remain an Attorney at Law and have thus committed a breach of Rule 60 of the said Rules,
(d) By reason of the aforesaid acts and conduct, you have conducted yourself in a manner which is inexcusable and as such to be regarded as deplorable by your fellow professionals and have thus committed a breach of Rule 60 of the said Rules,
(e) By reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney at Law and have thus committed a breach of Rule 61 of the said Rules,

AND WHEREAS this Court is of the view that proceedings must be initiated against you for suspension from practice or removal from the office of Attorney at Law should be taken under Section 42(2) of the Judicature Act read with Supreme Court Rules (Part VII) of 1978 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The evidence commenced on 01.12.2014 with the Complainant giving evidence. She produced her affidavits filed before the Disciplinary Committee of the BASL as P1 and P2. She also gave evidence marking as P3 the Money Order for Rs.10,000/-which she admitted to have encashed after she received the same from the Respondent. Documents P4 and P5 were also marked in evidence through her. They were the Sec. 461 notice sent to the Hon. Attorney General and the letter of response from the Attorney General. P6 was the last document produced, which is the file maintained by the BASL. The Respondent had not participated at the inquiry before the Disciplinary Committee even though he had been noticed to appear. It was conducted ex parte.

At the end of her evidence she was cross examined by the Counsel of the Respondent, namely Dr. Sunil Cooray. At page 18 of the proceedings on 01.12.2014, the Complainant's answers to the cross examination reads as follows:-

ප්‍ර. සිටුගේ මහත්තයාට බාර දුන්නානේ නඩුව හදන්න.කඩදාසි බාර දුන්නනේ ඒ කඩදාසි තමුන්ට ආපසු ලැබුනාද ?

උ. ඔව්.

ප්‍ර. කොහොමද ලැබුනේ ? ඒ කොයි කාලෙද ?

උ. තැපෑලෙන් ලැබුනේ. මට හරියට මතක නෑ.

ප්‍ර. මනිඔඩරය ලැබුනාට පස්සේද ,ඊට ඉස්සරලද ලැබුනේ ?

උ. නඩුවක් තිබුනානේ මම ඒ ෆයිල් ඔක්කොම මම භාර දුන්නා සුනිල් ජයකොඩි මහත්තයාට.

ප්‍ර. තමුන්ට තැපෑලෙන් ලැබුන ලියවිලි තමුන් වෙන නීතිඥ මහත්තයෙකුට බාර දුන්නද?

උ. ඔව්.

ප්‍ර. ඒ සුනිල් ජයකොඩි නීතිඥ මහත්තයාද ?

උ. ඔව්.

ප්‍ර. ඒ මහත්තයා නඩුවක් ෆයිල් කලාද ? ඒ නඩුව තවම ඉවර නැද්ද ?

උ. නෑ, ඒක තියනවා.අංක එකේ. කොළඹ දිසා අධිකරණයේ.

ප්‍ර. මම අහන්නේ ඒ ලියවිලි සුනිල් ජයකොඩි මහත්තයාට බාර දෙන්න ඉස්සරවෙලා තමුන්ට ලැබුනනේ ඒ ලියවිලි ලැබුනද?කොහාමද ලැබුනේ තැපැලෙන්ද කොයි කාලෙද ?

උ. තැපෑලෙන් ලැබුනා. දැන් අවුරුදු 2 ක් විතර වෙනවා.

At the end of the re-examination, Court asked questions from the Complainant and she answered as follows:-

ප්‍ර. තමන් මේ මහත්තයාට නඩුවක් ගොනු කරන්න කියලා කිවනේ.ඒක ගොනු වුනේ නෑ. තමන් මේ අධිකරණයට පැමිනිලි කලේ ඒ නිසයි කියලා කිව්වොත් හරිද ? ඉස්සරලා නීතිඥ සංගමයට කියලා,සංගමය තුලින් මේ අධිකරණයට ඒක යොමු වුනා ?

උ. ඔව්.

ප්‍ර. තමුන්ට ෆයිල් එක ලැබුනනේ,අවුරුදු දෙකකට කලින්, ඒ දුන්න කඩදාසි ටික ඒ කඩදාසි ලැබෙන්න ඉස්සරද, ඔය පියතිලක මහතා අන්තරා වුනේ නැත්නම් ඊට පස්සේද ?

උ. ඊට පස්සේ.

On the same day, i.e. on 01.12.2014, the Respondent also had given evidence before this Court. He narrated the incident with the Complainant in this way. The Complainant wanted him to draft papers to be filed against the Central Environmental Authority and Perera and Sons Company. As he was of the firm belief that a notice under Sec. 461 should be sent to the Attorney General before filing action against the Central Environmental Authority, he had despatched the said notice. He had told the Complainant that he does only counselling and had asked her to suggest a name of another lawyer to file proxy. As the complainant had suggested the name of lawyer, M.A.Piyathilake, he had drafted the papers and sent the same to lawyer Piyathilake by registered post to be filed in District Court of Colombo. Mr. Piyathilake had told him that he was about to file the case but then he had passed away within one or two months. The Complainant had paid the fees for drafting, to the Respondent in three instalments. Rs. 4000/- had been paid within three or four days after the consultation. Rs. 3000/- had been paid after a long delay and the last Rs. 3000/- had been paid after he demanded the same to finish the drafting of papers. He admits that the full amount was Rs. 10,000/- and that the Complainant had paid the same to him.

The Respondent had given evidence on a second day as well, i.e. on 11.12.2014. He had denied that he ever received any notice from the Bar Association. He stressed on the point that he did not undertake to file a case but he undertook to only draft papers to get an enjoining order and an injunction against the Managing Director of Perera and Sons to stop the pollution done to the environment by disposing toxic matter into the drain by the road and into her land. He had drafted the papers and sent the same to M.A.Piyathilake , Attorney at Law to file the same. Apparently at that time he had not known Piyathilake personally but had spoken to him over the telephone. He had produced in evidence marked as R1, certified copies of pages 1 to 45 of the District Court Case No. 00187/09 DSP.

The name of the month in the draft Plaint had been tipexed and changed and filed in the District Court and an enjoining order had been obtained by the counsel , Sunil Jayakody who was retained by the Complainant to support the Plaint to get the enjoining order. By the day this evidence was given in the Supreme Court, the said case is in Appeal in the Civil Appellate High Court case number, WP/HCCA/COL 63/2013 F. The date of the Plaint is 07.10.2009. The Respondent had stated that he wanted to incorporate the Plan of the land

belonging to the Complainant into which the polluted water was directed to, by the company Perera and Sons. She had come to see him many times but had always brought wrong Plans and not the correct Plan. He had explained the delay in drafting the papers to get the enjoining order. Anyway the plaint had been filed in the District Court and supported for an enjoining order by counsel Sunil Jayakody and the case has been going on since then and now in appeal before the Civil Appellate High Court.

However, it is the stand taken by the Respondent that the job of work undertaken by the Respondent from the Complainant was only to draft the papers and none other, which he completed and sent to the lawyer Piyathilaka for filing as requested by the Complainant for a fee of Rs. 10000/-. As at the date of the Complainant giving evidence, she gave evidence and stated that the money which was paid to the Respondent for the case, had been paid back to her by the Respondent through post by money order to the value of Rs.10000/- which she had by then encashed.

As at present, it was informed to this Court that the complainant had passed away in 2016.

The Respondent gave evidence on yet another date, i.e. on 06.09.2017. Under cross examination he was questioned as to why he did not hand over the draft papers to the Complainant. He answered that Mr**.** U.R.De Silva, Attorney at Law, to whom the Complainant had complained at that time against the Respondent, had **advised** the Respondent to send by registered post, the documents and the draft papers to Piyathilaka, the instructing Attorney of the Complainant, to file the action. The said Piyathilaka had died at the age of 58 years. After Piyathilaka died the Complainant had retained the services of one Mrs. Bandaranaike as instructing Attorney to file proxy and the papers in Court. Then the counsel to support the papers was also retained by the Complainant and that was counsel Sunil Jayakody.

The said counsel, Mahawadu Kudupitiyage Sunil Jayakody gave evidence on 06.09.2017 and on 03.10.2017. He was called as a witness for the Defense. He had been the counsel for the Plaintiff, Weerasekera Arachchige Dona Saddhawathie in the District Court of Colombo case No. 187/2009 DSP. He was retained by the instructing Attorney, Piyathilaka , to whom the Respondent had sent by registered

post, the papers drafted by the Respondent on behalf of the Complainant, to be filed in the District Court. Witness Sunil Jayakody, Attorney at Law said that when Attorney at Law Piyathilaka asked him whether he could appear as counsel, he had answered in the affirmative and that is how he became the counsel for the said client Saddhawathie. As Piyathilaka had died soon thereafter, another instructing Attorney by the name Mrs. C.Bandaranaike had been the instructing attorney throughout the case. Sunil Jayakody had received a file of papers from Piyathilaka who had told that the papers to be filed were in the file that he handed over to him.

The file had contained a motion, the Plaint, the Affidavit and other documents with a covering letter by Situge, the Respondent in this matter, to Piyathilaka. The said covering letter on a letter head of Situge dated 21.08.2009 was marked as V2 in evidence. The draft affidavit which was in that file was marked as V3. The case number DSP 187/09 was filed in the District Court. An enjoining order was obtained from Court. The case was heard. As at present the Appeal from the judgment of the District Court was filed in the Civil Appellate High Court which bears the number as WP/HCCA/CO 63/2013 (F). Both the case records are before this court as called for by order of this Court.

After having perused the said case records, Deputy Solicitor General Thusith Mudalige cross examined the witness Jayakody on 03.10.2017. It was elicited from him that firstly he received the Plaint and Affidavit in a file and thereafter he received the original complete file from Piyathilaka, which had been sent by Situge to Piyathilake. It is only in that file that he found the covering letter sent by Situge, marked as V2. Jayakody was cross examined regarding documents mentioned as annexed to the Affidavit V3. The Complainant Saddhawathie had brought the said documents and had handed them over to Sunil Jayakody. In the proceedings of 03.10.2017 at page 15, Jayakody explained how he had been asked by Piyathilaka only to appear and support the papers which were already drafted by Situge as Situge had a difficulty in appearing and supporting the matter before court. He further submitted that he obtained an enjoining order from court when the papers were filed and supported on behalf of Saddhawathie, the Complainant in the case in hand.

The complainant's case was closed by the Deputy Solicitor General for the Complainant and the counsel for the Respondent also closed his case for the

defense, informing this court that they are not calling any other witnesses, at the end of the day on 03.10.2017.

I find from the evidence before this Court that the work undertaken by the Respondent was to draft the papers to get an enjoining order/ injunction against Perera and Sons and the Central Environment Authority. The Complainant had given Rs. 10,000/- to the Respondent in three instalments for him to draft the papers. He had completed his job of work and sent it to the instructing Attorney by registered post as directed by none other than Mr. U.R. De Silva, Attorney at Law due to the fact that there had been complaints made by the Complainant. The Complainant had complained against the Respondent to the Bar Association as she was dissatisfied with the fact that the papers were not drafted soon and she wanted the money paid to the Respondent returned.

The Respondent has been on suspension for the last three years and nine months. I do not find that he is guilty of misconduct on the charges in the Rule mentioned above. I make order discharging him from the charges. The suspension is cancelled. The Respondent is allowed to practice his profession.

Judge of the Supreme Court

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

In the matter of an application under in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

PKW Wijesinghe
No. 120/A, Anura Publications,
Kudugala Road, Wattaegama,
Kandy.

Petitioner

SC/Spl. 19/2007

Vs

1. Upali Chandrasiri
   Sub Inspector of Police,
   Police Station
   Wattegama.

2. Thilakaratne
   Police Sergeant
   Police Station
   Wattegama.
   Colombo 01.
3. Officer-in-Charge,
   Police Station,
   Wattegama.
4. DIG Central Province-West
   Police Headquarters,
   Kandy.
5. Inspector General of Police
   Police Head Quarters,
   Kandy.
6. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

Respondents

Before : Sisira J de Abrew J
Nalin Perera J
Prasanna Jayawardena PC J

Counsel : A.S.M. Perera President's Counsel with P. Kumarawadu for the Petitioner
Ronalad Perera President's Counsel for the 1st and the 2nd Respondents
S. Herath SSC for the 3rd to 6th Respondents

Argued on : 16.1.2018

Decided on : 21.6.2018

Sisira J De Abrew J.

The petitioner in his petition has stated the following facts. On 15.1.2007, the petitioner was summoned to Wattegama Police Station on a complaint made by his niece regarding an allegation that had he obtained jewellery and a loan of Rs.100,000/- from the said complainant. The petitioner with his Attorney-at-Law Saman Ratnayake and one Jayawardena who is one of his friends went to the Police Station. At the Police Station Saman Ratnayake Attorney-at-Law explained to the 1st Respondent who conducted the inquiry that the complaint of the complainant was regarding a civil dispute and left the Police Station. Thereafter when the petitioner tried to sit on a chair to make a statement the1st Respondent shouted at him saying 'who asked you to sit' and started slapping the petitioner. At this stage the 2nd Respondent too slapped the petitioner. Thereafter the petitioner's hands were tied together at his back with a rope by the 1st and the 2nd Respondents and they started slapping the petitioner again. When the petitioner requested the two Police Officers (the 1st and the 2nd Respondents)

not to assault him as he is a heart patient they did not listen and threaten to kill him. Thereafter he was hand cuffed and put to a police jeep. Thereafter Saman Ratnayake Attorney-at-Law and Abeyratne Attorney-at-Law came to the Police Station and spoke to the 1st Respondent. On the same day the petitioner was taken to the Wattegama hospital and later to Yakgahapitiya hospital as the doctor attached to Wattegama hospital was not available. The petitioner told the doctor at the Yakgahapitiya hospital that he was suffering from a pain due to the police assault. On the same day (15.1.2007), the Police produced the petitioner before the Magistrate Teldeniya on an allegation of obstructing duties of Police Officers. The learned Magistrate remanded the petitioner and further ordered that the petitioner be given medical treatments through Prison Hospital. On 17.1.2007 the learned Magistrate enlarged the Petitioner on bail. On 18.1.2017 the petitioner got himself admitted to Kandy General Hospital.

On 19.2.2007, when the petitioner was taking his daughter to the school, the 2nd Respondent who came on a motor cycle tried to knock him down. Thereafter on the same day when the petitioner was passing the Police Station, the 1st Respondent threateningly raised his finger at him. Thereafter the 1st Respondent filed another B Report against the petitioner in the Magistrate's Court alleging that the petitioner on 20.2.2007 tried to knock down the 1st Respondent by his vehicle.

The above facts are narrated in the amended petition filed by the petitioner in this court. Learned President's Counsel for the petitioner at the hearing before us submitted that he does not claim relief in respect of the incident alleged to have taken place on 19.2.2007. In order to support the incident alleged to have taken place on 15.1.2007 at the police station, the petitioner has annexed an affidavit from Maldeniya Gedera Jayawardena

who went with him to the Police Station on the said date. Maldeniya Gedera Jayawardena in his affidavit states that the 1st Respondent assaulted the petitioner when he tried to sit on a chair saying 'who asked you to sit'; that the 2nd Respondent too assaulted the petitioner; that on a request made by the petitioner, he informed Saman Ratnatake Attorney-at-Law; and that later Saman Ratnatake Attorney-at-Law and Abeyratne Attorney-at-Law came and spoke to the 1st Respondent. Saman Ratnatake Attorney-at-Law in his affidavit marked P3 states that on 15.1.2007 he with the petitioner came to the Police Station and after explaining to the 1st Respondent that matter complained of was a civil dispute he left the Police Station. Later on hearing that the petitioner had been assaulted by the police, he came to Wattegama Police Station and saw the petitioner crying inside a police jeep. He further states in his affidavit that the petitioner was handcuffed and that he learnt from the petitioner that the petitioner was assaulted by the 1st and the 2nd Respondents.

The 1st Respondent in his affidavit filed in this court has taken up the position that after Saman Ratnatake Attorney-at-Law left the Police Station, the petitioner started shouting at him and as a result he could not perform his duty; and that therefore he produced the petitioner before the learned Magistrate.

The petitioner complains that his fundamental rights guaranteed by Articles 11,12(1),13(1) and 13(2) of the Constitution have been violated by the Respondents. This court by its order dated 1.11.2007 granted leave to proceed for alleged violations of Articles 11 and 12(1) of the Constitution. This court has made an order directing the Judicial Medical Officer (JMO) to submit Medico Legal Report (MLR) relating to the petitioner. The JMO has produced the MLR. According to the MLR there were abrasions on both

wrist joints of the petitioner It has to be noted here that the JMO Kandy examined the petitioner on 19.1.2007. The petitioner after being enlarged on bail got himself admitted to General Hospital, Kandy. When the doctor at Yakgahapitiya hospital examined the petitioner at 1.45 p.m. on 15.1.2007, he did not observe the above injuries of the petitioner. The said doctor has certified in the Medico Legal Examination Form (MLE Form) that the petitioner did not have any injuries (vide document marked 4R3). The incident described by the petitioner took place on 15.1.2007. Therefore, the question that arises is whether the injuries observed by the JMO were caused while in police custody or after the petitioner was released on bail. When I consider the above matters, I feel that it is difficult to conclude with certainty that the said injuries were caused while he was in the custody of police.

Although the petitioner in his amended petition takes up the position that he complained to the doctor at Yakgahapitiya hospital that he was suffering from a pain due to the assault or torture by the Police Officers, the said doctor in the MLE Form does not support the said version of the petitioner.

The version of the petitioner that he was kept in a police jeep after being handcuffed has been corroborated by the affidavits of two lawyers. Thus, allegation appears to be true. But the Police had reasons to use minimum force to control him as he was obstructing police duties. Although Saman Ratnatake Attorney-at-Law in his affidavit marked P3 states that he told the learned Magistrate that the petitioner had been assaulted by the police, according to the proceedings of the Magistrate's Court dated 15.1.2007 no such submission had been made by Saman Ratnatake Attorney-at-Law who represented the petitioner before the learned

Magistrate. The learned Magistrate had made an order to the effect that the petitioner should be given medical treatments through Prison Hospital. The learned Senior State Counsel pointed out that this order may have been made as the 1st Respondent in his B Report had stated that he used minimum force towards the petitioner when he obstructed the police duties. Further the 1st Respondent had moved in the said B Report that the petitioner be produced in the Mental Hospital and to obtain a report through Prison Hospital. In my view there is merit in the above contention of learned Senior State Counsel.

When I consider all the above matters, I am unable to place reliance on the story of the petitioner. If court can't place reliance on the story narrated by the petitioner it cannot declare that the petitioner fundamental rights guaranteed by the the Constitution have been violated. This view is supported by the the judgment of this court in the case of Channa Peiris Vs Attorney General [1994] 1 SLR 1 wherin this court held as follows.

"In regard to violations of Article 11 (by torture, cruel, inhuman or degrading treatment or punishment), three general observations apply:

(i) The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.

(ii) Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.

(iii) Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."

For the above reasons, I hold that there is no merit in story narrated by the petitioner in his amended petition. I therefore dismiss the amended petition of the petitioner. Considering the facts of this case I do not make an order for costs.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

IN THE 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. Spl. LA. No. 57/2017

CA. Appeal No. CA 25/2010

High Court of Gampaha Case No. 302/2004

K. A. Shantha Udayalal

Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

BEFORE : Sisira J. de Abrew, J.
Priyantha Jayawardena, PC, J. and
K. T. Chitrasiri, J.

COUNSEL : Indica Mallawaratchy for the Accused-Appellant-Petitioner.

Shanaka Wijesinghe, DSG, for the Attorney General.

ARGUED & DECIDED ON : 30.01.2018

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

We are inclined to grant leave in this case on questions of law set out in paragraph 9 (a) and (b) of the petition of appeal dated 16/03/2017 which are set out below:-

(a). Have their Lordships erred by concluding that the trial judges are empowered to utilize the police statements of witnesses, inquest evidence and non-summary evidence not produced at the trial for the purpose of dissecting the case facts and evidence to ascertain the truth at the trial?

(b). Have their Lordships erred by failing to consider that the trial judge had perused, relied upon and compared the police statement, inquest evidence and the non-summary evidence with that of the substantive evidence of the sole eye-witness at the time of writing the judgment?

We have perused the judgment of the trial Judge and we are of the opinion that the learned trial Judge has utilized the police statement of the alleged eye witness, non-summary evidence and inquest evidence which were not properly admitted in evidence. The question that must be considered is whether the learned trial Judge is permitted under the law to use the police statement, non-summary evidence and evidence led at the inquest at the time of writing the judgment when the said matters were not properly admitted in evidence.

In this connection it is relevant to consider certain judicial decisions of this Court. In Inspector of Police, Gampaha Vs. Perera 33 NLR page 69, the Court observed the following facts: "Where after examining the Complainant and his witnesses, the Magistrate cited the police to produce extracts from the Information Book for his perusal, before issuing process". It was held that the use of the Information Book was irregular.

In Wickramasinghe Vs. Fernando 29 NLR page 403, the following facts were observed by Court. "Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement made by him to the police". Court held as follows: "The use of the Police Information Book was irregular".

In Paulis Appu Vs. Don Davit 32 NLR page 335, the following facts were observed by Court. "Where at the close of a case, the Police Magistrate reserved judgment noting that he wished to

peruse the Information Book". Court held as follows: "The use of Information Book for the purpose of arriving at a decision was irregular". Considering the principles laid down in the above judicial decisions, we hold that the trial Judge has no power to utilize the statements made by the witness to the police, inquest evidence and non-summary evidence when they were not properly admitted in evidence.

In the present case, it is very clear that the learned High Court Judge has used the police statement, non-summary evidence and inquest evidence which were not properly admitted in evidence. I therefore hold that the decision of the learned trial Judge to peruse the said documents was wrong and contrary to law.

The learned Judges of the Court of Appeal have made the following observations in their judgment dated 15/02/2017. "However, the statement made to the police, inquest evidence and non-summary evidence can be utilized by the learned trial Judge for the purpose of guidance when dissecting the case facts and evidence to ascertain the truth during the course of the trial and not rely upon the above to form the judgment without considering the material facts".

When I consider the above judicial decision, I am of the opinion that the observation by the Court of Appeal Judges is wrong.

I would like to refer to a judicial decision in Punchimahaththaya Vs. The State 76 NLR page 564 wherein the Court held as follows: "Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statements of witnesses recorded by

the Police in the course of their investigation (i.e. statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise. Section 122(3) of the Criminal Procedure Code which enables such statements to be sent for to aid the Court is applicable only to Courts of inquiry or trial".

The trial Judge when convicting the Accused has used the police statement made by the witness and the evidence of the witness given at the non-summary inquiry and the inquest proceedings. This decision of the trial Judge is also wrong and contrary to law.

Considering all the above judicial decisions, I hold that the decision of the learned trial Judge to peruse the said document was wrong and contrary to law. For the above reasons, I also hold that the judgment of the Court of Appeal is contrary to law.

Considering all these matters, we are unable to permit the judgment of the Court of Appeal and the High Court to stand. We therefore, set aside both judgments of the Court of Appeal and the High Court. In view of the conclusions reached above, we answer the above questions of law in the affirmative.

Having considered the evidence led at the trial, we order a re-trial.

Learned High Court Judge of Gampaha is directed to expeditiously conclude this case.

Registrar of this Court is directed to send a copy of this

judgment to the High Court and the Court of Appeal.

Registrar of the Court of Appeal is hereby directed to send the original case record to the High Court of Gampaha.

JUDGE OF THE SUPREME CORUT

Priyantha Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to appeal against the Judgment dated 02nd May 2018 of the Court of Appeal Application No.CA(Writ) 152/2015.

SC.SPL. LA NO.160/2018

C.A.Writ Application No.152/2015

S.P. Morawaka

Liquidator,

Janatha Fertilizer Enterprise Limited,

19, Dhawalasingharama Mawatha,

Colombo 15.

Petitioner

Vs.

1. Commissioner General of Labour,

   Department of Labour,

   Labour Secretariat,

   Colombo 5.

2. Assistant Commissioner of Labour

   (Colombo North),

District Labour Office, 4th Floor,

Labour Secretariat,

Department of Labour,

Colombo 5.

3 Labour Officer,

District Labour Office,

Department of Labour,

Anuradhapura.

4. Assistant Commissioner of Labour,

District Labour Office,

Anuradhapura.

5. D.K. Wijesundara,

No.741/3, Freeman Mawatha,

Anuradhapura.

6. Assistant Secretary (Admission),

Ministry of Agriculture,

"Govijana Mandiraya",

Battaramulla.

Respondents

AND NOW BETWEEN

D.K. Wijesundara,

No.741/3, Freeman Mawatha,

Anuradhapura.

5th Respondent-Petitioner

Vs.

S.P. Morawaka

Liquidator,

Janatha Fertilizer Enterprise Limited,

19, Dhawalasingharama Mawatha,

Colombo 15.

Petitioner-Respondent

1. Commissioner General of Labour,

   Department of Labour,

   Labour Secretariat,

   Colombo 5.

2. Assistant Commissioner of Labour

   (Colombo North),

   District Labour Office, 4th Floor

   Labour Secretariat,

   Department of Labour,

   Colombo 5.

3. Labour Officer,

   District Labour Office,

   Department of Labour,

   Anuradhapura.

4. Assistant Commissioner of Labour,

   District Labour Office,

   Anuradhapura.

5. Assistant Secretary (Admission),

   Ministry of Agriculture,

   "Govijana Mandiraya",

   Battaramulla.

   1st, 2nd , 3rd, 4th and 6th Respondents-Respondents

BEFORE : **SISIRA J. DE ABREW, J.**

NALIN PERERA, J. &

MURDU N.B. FERNANDO, PC, J.

COUNSEL : Chula Bandara with Anuradha Dias for the 5th Respondent-Petitioner.

Thilan Liyanage with Sahan Vas Gunawardena for the Petitioner-Respondent.

Vicum de Abrew DSG for the Attorney-General.

ARGUED &

DECIDED ON : 04.10.2018.

SISIRA J. DE ABREW, J.

Heard Counsel in support of their respective cases. We are inclined to grant Leave in this case. Leave to Appeal is granted on questions of law stated in paragraph 12 "b" & "c" of the Petition dated 12.06.2018 which are set out below;

b. Did their Lordships of the Court of Appeal misinterpret the impugned document P21 to come to the conclusion that it refers to the imposition of personal liability on the respondent liquidator?

c. If so, did their Lordships of the Court of Appeal err in law by quashing the award embodied in the impugned document marked P21?

Parties now agree to argue the main case and the submissions were made by the parties in respect of the main case. The 5th Respondent-Petitioner (D.K. Wijesundara) was working in this particular Company called Janatha Estate Fertilizer Enterprises Ltd., from 1981. The Commissioner of Labour by its letter dated 09.10.2014 directed the Liquidator of the Company to pay Rs.2,136,415.50 to D.K. Wijesundara, the 5th Respondent-Petitioner. Being aggrieved by the said decision of the Commissioner of Labour (P21) the Liquidator (Petitioner-Respondent) filed this case in the Court of Appeal seeking to quash the said document marked P21. The Court of Appeal by its judgment dated 02.05.2018 exercising the writ jurisdiction quashed the said document marked P21. We note that the 5th Respondent-Petitioner (D.K. Wijesundara) has been working in the said Company from 1981 and he is entitled to the said amount. The Company is now under Liquidation. Under Section 47 of the Employees' Provident Fund Act No. 15 of 1958 as amended by Act No. 16 of 1970, 08 of 1971, 24 of 1971, 26 of 1981, 01 of 1985, 42 of 1988, 14 of 1992 the employer includes Liquidator of a Company. Thus, when the Company is

under Liquidation, it becomes a duty of the Liquidator to comply with the direction given by the Commissioner of Labour marked P21.

Learned Counsel appearing for the Petitioner-Respondent (the Liquidator) too agrees with this position. When we consider the above matters, we are of the opinion that the Court of Appeal was in error when they quashed the said document marked P21. We therefore answer the above questions of law in the affirmative.

For the above reasons, we set aside the judgment of the Court of Appeal dated 02.05.2018 and dismiss the Writ application filed by the Petitioner-Respondent in the Court of Appeal.

Appeal allowed.

JUDGE OF THE SUPREME COURT

NALIN PERERA, J.

I agree**.**

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, 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 Special

Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under Article 128(2) of the Constitution.

SC SPL LA 210/2016
WP/HCCA/GMP/10/2013(Revision)
27/2011(Revision)
19/2010(Revision)
LA/369/2006
LA/325/2005
D.C. Negombo 2892/P

Corinne Marvin Therese Fernandopulle,
"Arunagiri", Thoppuwa, Kochchikade.
Presently at
No. 28, Ronald Street, Black Town,
New South Wales 2148, Sydney,
Australia.
By her Attorney Tutullo Richard Jansz,
No. 85, Anderson Road, Kalubowila,
Dehiwela.

Plaintiff

Vs

1. Ignatius Robin Fernandopulle,
2. Lucille Bernadette Leonie Fernandopulle,
   Both of
   No. 11, Railway Station Road,
   Negombo.

Defendants

AND BETWEEN

1. Ignatius Robin Fernandopulle,
2. Lucille Bernadette Leonie Fernandopulle,
   Both of

No. 11, Railway Station Road,
Negombo.

1ST and 2nd Defendant Petitioners

Vs

Corinne Marvin Therese
Fernandopulle, "Arunagiri",
Thoppuwa, Kochchikade.
Presently at
No. 28, Ronald Street, Black
Town, New South Wales,
2148, Sydney, Australia.

Plaintiff Respondent

AND THEN BETWEEN

1. Ignatius Robin Fernandopulle,
2. Lucille Bernadette Leonie
Fernandopulle,
Both of
No. 11, Railway Station Road,
Negombo.

1ST and 2nd Defendant Petitioner
Petitioners

Vs

Corinne Marvin Therese
Fernandopulle, "Arunagiri",
Thoppuwa, Kochchikade.
Presently at

No. 28, Ronald Street, Black
Town, New South Wales,
2148, Sydney, Australia.

Plaintiff Respondent
Respondent

AND THEREAFTER BETWEEN

3. Ignatius Robin Fernandopulle,
4. Lucille Bernadette Leonie
Fernandopulle,
Both of
No. 11, Railway Station Road,
Negombo.

1ST and 2nd Defendant Petitioner
Petitioner Petitioners

Vs

Corinne Marvin Therese
Fernandopulle, “Arunagiri”,
Thoppuwa, Kochchikade.
Presently at
No. 28, Ronald Street, Black
Town, New South Wales,
2148, Sydney, Australia.

Plaintiff Respondent
Respondent Respondent

AND THEREAFTER AGAIN BETWEEN

5. Ignatius Robin Fernandopulle,
6. Lucille Bernadette Leonie Fernandopulle,
Both of
No. 11, Railway Station Road,
Negombo.

1ST and 2nd Defendant Petitioner Petitioner Petitioner Petitioners

Vs

Corinne Marvin Therese Fernandopulle, "Arunagiri", Thoppuwa, Kochchikade.
Presently at
No. 28, Ronald Street, Black Town, New South Wales, 2148, Sydney, Australia.

Plaintiff Respondent Respondent Respondent Respondent

AND THEREAFTER AGAIN BETWEEN

1. Ignatius Robin Fernandopulle,
2. Lucille Bernadette Leonie Fernandopulle,
Both of
No. 11, Railway Station Road,
Negombo.

1ST and 2nd Defendant Petitioner Petitioner Petitioner Petitioner

Petitioners

Vs

Corinne Marvin Therese
Fernandopulle, “Arunagiri”,
Thoppuwa, Kochchikade.
Presently at
No. 28, Ronald Street, Black
Town, New South Wales,
2148, Sydney, Australia.

Plaintiff Respondent
Respondent Respondent
Respondent Respondent

AND NOW BETWEEN

3. Ignatius Robin Fernandopulle,
4. Lucille Bernadette Leonie
Fernandopulle,
Both of
No. 11, Railway Station Road,
Negombo.

1ST and 2nd Defendant Petitioner
Petitioner Petitioner Petitioner
Petitioner Petitioners

Vs

Corinne Marvin Therese
Fernandopulle, “Arunagiri”,
Thoppuwa, Kochchikade.
Presently at
No. 28, Ronald Street, Black
Town, New South Wales,

2148, Sydney, Australia.

Plaintiff Respondent
Respondent Respondent
Respondent Respondent
Respondent.

1. Herath Hitimakilage Nilanga Priyangani, Minuwangoda Road, Negombo.
2. Muhandiramge Stanley Lorence Moraes, No. 265/31, St. Joseph's Lane, Negombo.
3. National Development Bank, No. 14, Nawam Mawatha, Colombo 02.

Proposed to be added as 2nd 3rd and 4th Respondents.

BEFORE S. EVA WANASUNDERA PCJ.
BUWANEKA ALUWIHARE PCJ. &
VIJITH K. MALALGODA PCJ.

COUNSEL THE 1ST PETITIONER I.R.FERNANDOPULLE FOR HIMSELF AND THE 2ND PETITIONER

ERANJAN ATAPATTU WITH VARUNI CARTHELIS FOR THE ' PROPOSED TO BE ADDED 1ST AND 2ND RESPONDENTS'.

KUSHLAN SENEVIRATNE FOR THE 'PROPOSED TO BE ADDED 3RD RESPONDENT'.

SUPPORTED FOR LEAVE TO APPEAL ON: 19.06.2018.

DECIDED re LEAVE TO APPEAL ON: 05.07. 2018.

S. EVA WANASUNDERA PCJ.

The Bench reserved the order on whether Leave to Appeal should be granted or not in this Application, at the end of submissions made by parties.

The 1st and 2nd Defendant Petitioner Petitioner Petitioner Petitioner Petitioner Petitioners (hereinafter referred to as Petitioners) have filed a Petition dated 20.10.2016 against the Plaintiff Respondent Respondent Respondent Respondent Respondent Respondent (hereinafter referred to as Respondents) **and against** "Proposed to be added as 2nd 3rd and 4th Respondents", seeking leave to appeal from the **order** of the High Court of Civil Appeals in case number WP/ HCCA/GMP/**10/2013 (Revision Application) dated 8.9.2016,** in the first instance. This Revision Application had been filed against the judgment in the Partition Action No. 2982/P before the District Court of Negombo.

The impugned Order runs from page 18 to 22 of the Civil Appellate High Court brief before us and the matters before that Court have been gone into by the Judges of that Court with regard to the Revision Application made by the Petitioners. The said order of two judges of the High Court has gone into the merits of the application and specifically stressed on the fact that , it is only **after the final decree** in the Partition Case No. 2892/P that the Petitioners had made the application under Section 48(4) of the Partition Act for revision. The registration of the final decree in the volume/folios at the Land Registry had been entered in Partition Case No. 2892/P. The said volume/folios are filed of record as X and Y at pages 109 to 116 which clearly shows that the final decree

had been entered in the D.C.Case 2892/P and registered at the Land Registry and that therefore a revision application cannot be entertained by Court. Deeds of Transfer No. 142 dated 06.09.2006 and No 117 dated 11.04.2013 had been executed after the final decree was registered in the land registry in March/ April, 2006.

The Plaintiff Respondent before the High Court has correctly transferred her share to Nilanka Priyangani , the " proposed to be added 2nd Respondent' before this Court and in turn she has transferred the same to the " proposed to be added 3rd Respondent before this Court, Mohandiramge Stanley Lorence Moraes and he has mortgaged the land to the National Development Bank, the 'Proposed to be added 4th Respondent' before this Court. After all these years, the Petitioners have no right to make an application under Sec. 48(4) of the Partition Act. The learned High Court Judge and the District Judge has held as such quite correctly according to the law.

The learned judges of the High Court has mentioned that the present 1st and 2nd Defendant Petitioners, who are father and daughter had made the same revision application twice over before other judges of the same High Court and had received orders refusing the application for Revision and somehow the two judges who has written the third Order which is impugned by the Petitioners has specifically come to a finding that the intention of the said Petitioners seems to be to delay and prolong litigation against the Plaintiff. The High Court also has granted costs of Rs. 25000/- against the Petitioners.

The Counsel for the National Development Bank informed this Court that the customer who had mortgaged the property to the Bank has already paid the money with interest and that the mortgage has been cancelled. The Bank made the application to be discharged from the proceedings before this Court.

I do not see any reason to interfere with the findings in the judgment of the Civil Appellate High Court. **Application for leave to appeal is refused**.

The main Application before this Court is dismissed with legal costs to be paid by the Petitioners to the Plaintiff Respondent and the 2nd , 3rd and 4th 'proposed to be added Respondents'.

Judge of the Supreme Court.

Buwaneka Aluwihare PCJ.
I agree.

Judge of the Supreme Court.

Vijith K. Malagoda PCJ.
I agree.

Judge of the Supreme Court.

SC.SPL.LA.No. 239/2017

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

In 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.No. 239/2017

CA.Appeal No.138/2016

HC. Kegalle Case No.1468/2000

1. Illandarage Wasantha Detawala,
   Karadupana,Kegalle.

2. Mahanamagam Geeganage Piyadasa alias Baale
   Detawala, Karadupana, Kegalle.

3. Panawala Ralalage Sarath Bandara Panawala,
   Thibbatumunuwa, Hettimulla,
   Kegalle.

Accused-Petitioners-Petitioners

-Vs-

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

Complainant-Respondent-Respondent

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

Chitrasiri, J &

Vijith K. Malalgoda, PC, J

Counsel: R. Arsecularatne PC for the Accused-Petitioner-Petitioners.

Varunika Hettige SSC for the Hon. A.G.

Argued &
Decided on: 12.01.2018

Sisira J.de Abrew, J

Heard both counsel in support of their respective cases.

Having heard both counsel, Court decides to grant leave to appeal on the following questions of law:-

1“ Whether the Court of Appeal in view of the material submitted to the Court of Appeal erred in law when refusing the relisting application by its order dated 28.09.2017

1“ Whether the Court of Appeal erred in law by taking up the inquiry of the revision application in the absence of the counsel for the Petitioners on 14.06.2017 and thereafter dismissing the same after hearing the counsel for the Respondent only.

Learned President's counsel submits that he filed a Revision application against the order of the learned High Court Judge dated 13.10.2016 wherein he decided to call for the defence of the accused. When the High Court Judge decided to call for the defence of the accused, the accused filed a Revision application in the Court of Appeal. This revision application had been fixed for hearing on 14.06.2017. Learned President's Counsel submits that on 14.06.2017 he was absent in the Court of Appeal for the hearing of the Revision application and the Court of appeal has taken up the argument in the Revision application and dismissed the said Revision application.

Learned President's Counsel submits that he was not able to be present on 14.06.2017 as he has taken the next date as 16.06.2017. In support of his contention, he has produced the file cover of the case that he maintained and his diary which indicate that the case in the Court of Appeal had been fixed for 16.06.2017 but not for 14.06.2017. When we peruse the file cover and the diary of the learned President's Counsel that was submitted to the Court of Appeal, we are satisfied that he has taken the date of the hearing of the Court of Appeal case as 16.06.2017. But the actual date of hearing had been on 14.06.2017. After perusing the file cover and the copy of the learned President's Counsel's diary submitted to the Court of Appeal, we are satisfied that the learned President's Counsel had taken the date as 16.06.2017 mistakenly. When the case was dismissed on 14.06.2017, he filed a re-listing application to relist the Revision Application in the Court of Appeal. He had filed a motion to the said effect . When we consider the above material we are satisfied that he has produced sufficient grounds to allow the re-listing application. When we consider the above material,we are of the opinion that the Court of Appeal should have allowed the re-listing application and also should have vacated the order made on 14.06.2017.

Considering the aforementioned matters, we answer the above questions of law in the affirmative.

Considering all these matters we set aside the orders of the Court of Appeal dated 14.06.2017 and 28.09.2017. We direct the Court of Appeal to hear the Revision Application of the Accused-Appellant on its merits.

We direct the Registrar of this Court to send a copy of this order to the Court of Appeal.

JUDGE OF THE SUPREME COURT

Chitrasiri, 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 DEMOCATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of section 451 of the Code of Criminal Procedure Act No. 15 of 1979, Act No.21 of 1988, against the judgment dated 08.09.2016 in the Trial-at-Bar bearing No. 7781/201

Supreme Court
Case No: SC/TAB/2A – D/2017

High Court
Trial-at-Bar Case No: 7781/2015

Vithanalage Anura Thushara De Mel

1st Accused - Appellant

Srinayaka Pathiranalage Chaminda Ravi Jayanath

2nd **Accused – Appellant**

Kowile Gedara Dissanayaka Mudiyanselage Sarath Bandara

3rd Accused - Appellant

Arumadura Lawrence Romelo Duminda Silva

4th Accused -Appellant

Vs.

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

Complainant-Respondent

Before	:	Priyasath Dep PC, CJ
	:	Buwaneka Aluwihare, PC, J
	:	Priyantha Jayawardena, PC, J
	:	H.N.J. Perera, J
	:	Vijith Kumara Malalgoda, PC, J
Counsel	:	Anuja Premaratne, PC with Iromie Jayarathna, Ms. Nayana Dissanayake, Ms. Naushalya Rajapaksha and Ms. Imasha Senadeera for the 1st Accused-Appellant.
		Anura Meddegoda, PC with Ravindra de Silva and Saranga Wadasinghe for the 2nd Accused-Appellant.
		Saliya Pieris, PC with Anjana Rathnasiri and Ms. Harindrini Corea for the 3rd Accused-Appellant.
		Anil Silva , PC with Shavindra Fernando, PC, Shanaka Ranasinghe, PC and Nisith Abeysuriya, for the 4th Accused-Appellant.
		Thusith Mudalige, DSG with Mrs. Nadee Suwandurugoda, SC for the Attorney General.
Argued on	:	27.11.2017, 26.03.2018, 27.03.2018, 08.05.2018, 10.05.2018, 14.05.2018, 18.05.2018, 04.06.2018, 20.06.2018, 21.06.2018, 03.07.2018, 12.07.2018,18.07.2018, 20.07.2018 and 25.07.2018.
Decided on	:	11.10.2018

The Hon. Attorney General forwarded indictment against the Accused for committing offences described in the indictment. On an application made by the Attorney General the Chief Justice ordered a trial-at-bar. The case commenced before a Trial at Bar consisting of Hon. A.L. Shiran Gunaratne (Chairman), Hon.

Mrs. Padmini N. Ranawaka and Hon. M.C.B.S Moraes. The following Accused were indicted. They are:

1. Vithanalage Anura Thushara De Mel
2. Hetti Kankanamlage Chandana Jagath Kumara
3. Srinayaka Pathiranalage Chaminda Ravi Jayanath
4. Kodippili Arachchige Lanka Rasanjana
5. Wijesuriya Aarachchige Malaka Sameera
6. Vidanagamage Amila
7. Kowile Gedara Dissanayaka Mudiyanselage Sarath Bandara
8. Morawaka Devage Suranga Premalal
9. Chaminda Saman Kumara Abeywickrema
10. Dissanayaka Mudiyanselage Priyantha Janaka Bandara Galaboda
11. Arumadura Lawrence Romelo Duminda Silva
12. Rohana Marasinghe
13. Nagoda Liyanaarachchi Shaminda

Charges

1. That the Accused, with persons unknown to the prosecution on or about the 8th day of October 2011 at Angoda, Mulleriyawa and Himbutana within the jurisdiction of this court were members of an unlawful assembly, the common object of which was criminal intimidation of voters with the use of firearms at the local government elections held on the said date, and thereby committed an offence punishable under section 140 of the Penal Code.

2. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, by continuing to be members of the said unlawful assembly by using force and violence on the crowd at the Angoda Rahula Vidyalaya polling station committed the offence of intimidation and rioting and which offence was committed in prosecution of the common object

of the said assembly or knew to be likely to be committed in prosecution of the common object of the said assembly and therefore the Accused being a member of such unlawful assembly at the time of committing that offence has committed an offence punishable under section 144 to be read with section 146 of the Penal Code.

3. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, committed criminal intimidation on Hewpathirannahalage Thivanka Madushani Pathirana in prosecution of the common object of the same assembly and as the Accused as a member of the said unlawful assembly knew that such offence could have been committed in the prosecution of the common object of the of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence has committed offences of Criminal Intimidation punishable under section 486 to be read with section 146 of the Penal Code.

4. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge committed criminal intimidation on Police Constable 87075 Madadenidurayalage Damith Suranga Kumara who was on guard duty at Rahula Vidyalaya, Angoda by threatening the said Madadenidurayalage Damith Suranga Kumara by using a pistol in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence has committed criminal intimidation, punishable under section 486 to be read with section 146 of the Penal Code.

5. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, with one or more members of the said unlawful assembly caused the death of Bharatha Lakshman Premachandra and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code

6. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Mulleriyawa that one or more of the members of the said unlawful assembly caused the death of Gusmithinadura Damitha Darshana Jayathilake and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code.

7. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Mulleriyawa, that one or more of the members of the said unlawful assembly caused the death of Jalabdeen Mohammed Azeem and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that

assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code.

8. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Mulleriyawa, that one or more of the members of the said unlawful assembly caused the death of Maniwel Kumaraswamy and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code.

9. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, and continuing to be members of the same unlawful assembly that one or more Accused shot at Rajapurage Gamini and caused injures to him with intention or knowledge under such circumstances that if he by that act caused death, the Accused would be guilty of murder and thereby committed the offence of attempt to Murder in prosecution of that object and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in the prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence of Attempted Murder punishable under section 300 to be read with section 146 of the Penal Code.

10. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, by using force and violence on the crowd at the Angoda Rahula Vidyalaya polling station committed the offence of rioting and thereby committed offences punishable under section 144 to be read with section 32 of the Penal Code.

11. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Bharatha Lakshman Premachandra and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

12. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Gusthinadura Damitha Darshana Jayathilake and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

13. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Jalabdeen Mohammed Azeem and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

14. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Maniwel Kumaraswamy and thereby committed an

offence punishable under section 296 read together with section 32 of the Penal Code.

15. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Angoda with persons unknown to the prosecution committed the offence of criminal intimidation on Hewpathirannahalage Thivanka Madushani Pathirana and thereby committed an offence punishable under section 486 read together with section 32 of the Penal Code.

16. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge at Angoda, with persons unknown to the prosecution committed the offence of criminal intimidation on Police Constable 87075 Madadenidurayalage Damith Suranga Kumara who was on guard duty at Rahula Vidyalaya, Angoda by placing a pistol on his chest and thereby committed an offence punishable under section 486 read together with section 32 of the Penal Code.

17. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge at Mulleriyawa with persons unknown to the prosecution jointly possess an unlicensed automatic T-56 firearm and thereby committed an offence punishable under section 22(3) read with section 22(1) of the Firearms Ordinance No 33 of 1916 as amended by Act No. 22 of 1996.

The prosecution led evidence under Section 241 of the Code of Criminal Procedure Act No. 15 of 1979 and satisfied the Court that the 10th Accused is

absconding and obtained an order to try him in his absence and the trial against him proceeded in his absence.

The indictment was read over and all the Accused other than the 10th Accused pleaded not guilty.

The Prosecution led the evidence of several witnesses and closed the prosecution case. The prosecution case is briefly as follows:

Background

The present appeal revolves around two well-known politicians of the previous regime who are namely Duminda Silva, the11th Accused in the High Court (4th Accused – Appellant) and Bharatha Lakshman Premachandra, one of the deceased. At the time relevant to this incident the said Bharatha Lakshman Premachandra had been a trade union advisor to His Excellency, the President and he was also a former member of the Parliament. In the past he has served as the UPFA organizer for the Kolonnawa electorate and had been engaged in active politics.

The 11th Accused (4th Accused – Appellant) had started his political career from the UNP and thereafter became a member of the UPFA. He had been elected to the Parliament for the first time in 2010. At the time relevant to this application, he had been serving as the UPFA Organizer for the Kolonnawa electorate.

Kotikawatta – Mulleriyawa Pradeshiya Sabha is situated within the Kolonnawa electorate and one Prasanna Solangaarachchi was its Chairman prior to the local government elections held on the 8th of October 2011. Said Solangaarachchi contested for the same position at the said local government elections. The evidence revealed that the deceased Bharatha Lakshman supported said Solangaarachchi during the election period by attending his rallies and speaking on behalf of him.

The 11th Accused (4th Accused – Appellant) supported one Sumudu Rukshan who also contested for the same Pradeshiya Sabha from the same party. Consequently there was a strong competition between the said two contestants and their supporters, since the contestant who obtained the highest number of votes would be elected as the Chairman of the Pradeshiya Sabha.

The events pertaining to this application unfolded on the 8th of October 2011 on which day the said local government elections were held in the country to elect members to the local government bodies. Kolonnawa electorate, the electorate pertinent to the present application comprised of Mulleriyawa-Kotikawatta Pradeshiya Sabha and Kolonnawa Urban Council.

Prosecution Case

Three main witnesses for the Prosecution namely Priyantha Dissanayake (PW2) Kalubadanage Hemantha Kumara (PW3) and Lasantha Wanasundara (PW4) gave evidence regarding events that occurred on 8th of October 2011. Priyantha Dissanayake had been a MSD officer in-charge of the security contingent of the 11th accused. Lasantha had also been an officer attached to the MSD who was providing security to the 11th accused. Hemantha(PW3) had been an officer attached to the Mirihana police station at the time.

The events at "Tamilnadu Watta"

The 11th Accused who had been the UPFA Organizer for the Kolonnawa electorate had left his residence on the 8th of October 2011 at about 6.30 am and had gone to "Tamilnadu Watta" polling booth.

Priyantha Dissanayake had gone to Tamilnadu Watta with some other security officers after the 11th Accused arrived at the said place. According to Hemantha Kumara, the 11th Accused had been seated on a chair close to the road and had been speaking to the voters and had advised them to vote only for PA and if they

were going to vote for the UNP to refrain from voting. 11th Accused had been interfering with the voters in the said manner at Tamilnadu Watta from 7.30 am to 11.30 am and he had been later asked to leave the place by ASP Priyantha.(The witnesses Priyantha Dissanayake and Lasantha Wanasunera did not refer to the fact that the 11th Accused was interfering with the voters at Tamilnadu watte)

Thereafter 11th Accused had gone to Ramesh's house for lunch (a supporter of the 11th Accused) where he had also consumed intoxicating beverages which had been confirmed by Prosecution Witness No.137 Dr. Shehan.

The 3rd Accused had arrived at Tamilnadu Watta around 12 noon along with some supporters.Thereafter at or about 2.45 the whole group along with the 11th Accused had left Tamilnadu Watta..

The Appellants' position was that the group together with the 11th Accused had intended to go to Ambatale, where the residence of one Sumudu Rukshan (a contestant for local government elections supported by the 11th Accused) was situated. Evidence led by the Prosecution also revealed that two security officers of the 11th Accused had been sent to the said Sumudu's residence prior to the arrival of the 11th Accused.

Incident near 'Kande Vihare'

On the way to said Sumudu's house, the vehicle procession of the 11th Accused had stopped at a place called 'Kande Vihare.' The 11th Accused's vehicle procession consisted of a pilot vehicle (i.e. a defender jeep) that carried the security contingent of the 11th Accused which was followed by the vehicle in which the 11th Accused travelled. This vehicle was followed by another Pajero jeep in which the private security officers of the 11th Accused travelled. When the vehicle procession was stopped at the said Kande Vihare, the 1st Accused was given a T56 by the 3rd Accused at the behest of the 11th Accused. The 11th Accused had ordered to stop the jeep and had asked the 3rd Accused to get down from the

jeep and hand over the T56 to the 1st Accused who was in the Pajero jeep behind the 11th Accused's vehicle.

Incident near 'Rajasinghe Vidyalaya'

After the said incident, while the vehicles were travelling to Ambathale, the vehicle procession has again stopped at a place called Rajasinghe Vidyalaya where the 11th Accused had assaulted a youth who happened to be a supporter of Solangaarachchi.

Incident near 'Rahula Vidyalaya'

Once again the vehicle procession had stopped near a place called Rahula Vidyalaya where the 11th Accused had intimidated one Madushani Pathirana (PW 57) who happened to be the wife of Prasanna Solangaarachchi. Prosecution Witnesses Priyantha, Hemantha Kumara and Lasantha had stated that 11th Accused had gone up to said Madushani and had asked who she had voted for. She had stated that she voted for her husband.

According to Witness Madushani Pathirana the 11th accused came up to her and asked certain questions about to whom she voted. Thereafter her position is that the 11th accused advanced towards her and a person named "Pinky Akka" who was close to her dragged her to the Anura Boutique

Thereafter a commotion had taken place near the said place after the said conversation in the course of which one Damith Suranga (PW101) had also been intimidated with the use of a pistol. According to said Damith Suranga, a jeep that had followed the jeep of the 11th Accused had carried people who were displaying around eight T56 weapons.

Incident near 'Himbutana Junction'

The procession of vehicles of the 11th Accused then met with the vehicle of deceased Bharatha Premachandra. The Jeep of the said Bharatha Lakshaman had approached from the opposite direction and the 11th Accused's vehicle had blocked the said jeep from moving forward. Thereafter there had been a verbal argument between the 11th Accused and the deceased Bharatha Lakshman which was followed by the 11th Accused assaulting the deceased. At this moment, one Rajapurage Gamini (PW119) who was the PSO of the deceased Bharatha Lakshman had shot the 11th Accused in the exercise of his right of private defence. Afterwards the 10th Accused who was in possession of the pistol of the 11th Accused had open fired at the PSO causing him critical injuries. Then an illegal T56 had been used to shoot the said Bhratha Lakshman and persons who accompanied him which resulted in the death of three more people who are namely Damitha Darshana Jayathilake, Mohammed Azeem and Maniwel Kumaraswamy.

The said illegal T56 had been recovered pursuant to a statement made by the 3rd Accused under Section 27 of the Evidence Ordinance which had been marked and produced as X1. As per the report of the government analyst, all 27 spent cartridges recovered from the crime scene had been fired from this weapon.

The Defence case.

After the close of the prosecution case .The Learned Judges of the Trial at Bar called upon the Accused for their defence. Whereupon all the accused made statements from the dock.

3rd accused called a number of witnesses on his behalf and on behalf of the 11th accused his father Premalal Silva gave evidence.

It is the position of the defence that the prosecution failed to establish that there was an unlawful assembly. As there are serious contradictions and inconsistencies in the evidence of the prosecution witnesses the Court should

not act on their evidence. In any event it was submitted that the prosecution failed to prove the case beyond reasonable doubt.

The judgment and sentence

After the recording of evidence was concluded oral submissions were made by the prosecution as well as the defence. Thereafter written submissions were filed.

On 08.09.2016 Hon. Padmini N. Ranawaka delivered a judgment which will be referred to as the majority judgment. Hon. M.C.B.S Moraes agreed with that judgment. By the said Majority Judgment the 2nd, 4th, 5th, 6th, 8th and 9th Accused were acquitted from all the charges levelled against them. The Prosecution at the end of the case submitted that there was no evidence against the 12th and 13th accused. Accordingly 12th and 13th accused were also acquitted from all the charges levelled against them.

In the indictment the prosecution included charges based on unlawful assembly and common intention. Charges 1-9 based on unlawful assembly (section 140/146) and Charges 10, 11, 12, 13, 14, 15 and 16 were based on common intention(section 32). Charge 17 is for joint possession of a firearm against all accused, an offence punishable under Firearms Ordinance. In the Majority Judgment it was held that charges based on Section 32 of the Penal Code cannot be proved .

By the Majority Judgment the 1st accused was convicted of charges 1, 5, 6, 7, 8, 9 and 17 of the indictment. The 3rd, 7th, 10th 11th accused were convicted on charges1, 2, 3, 4, 5, 6, 7, 8, 9 and 17 of the Indictment.

Sentence

The court imposed the following sentences on the accused who were convicted.

The 1st accused: -

Count 1 : 6 months RI and a fine of Rs. 10,000/= (default of which 3 months simple imprisonment)

Count 5-8 : Death Sentence

Count 9 : 20 years RI

Count 17 : Life Imprisonment

The 3rd 7th, 10th and 11th accused:-

Count 1 : 6 months RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 2 : 2 years RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 3 : 2 years RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 4 : 2 years RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 5-8 : Death Sentence

Count 9 : 20 years RI

Count 17 : Life Imprisonment

Hon. A.L. Shiran Gunaratne the Chairman of the Trial at Bar delivered a separate judgment and acquitted all the accused of all the charges.

Being aggrieved by the said convictions and sentences the 1st, 3rd, 7th and 11th accused appellant appealed to the Supreme Court to have the said convictions and sentences set aside.

The Accused -Appellants raised the following grounds of appeal which are common to all the appellants. They are broadly divided into several grounds.

1. There was no valid or proper Judgment within the law.

2 The prosecution failed to establish beyond doubt that there was an unlawful assembly and the accused -appellants are members of the unlawful assembly.

3. The evidence of the witnesses were not properly assessed and evaluated. There is a serious doubts of their testimonial trustworthiness.

4.. There were serious mis directions on the facts as well as law which not only occasioned a miscarriage of justice and a denial of a fair trial.

5 There is a serious doubt that the investigation was biased, manipulated , flawed and unreasonable and a trial and convictions based on such an investigation cannot be sustained.

. Whether the Judgment is valid in law

The learned President's Counsel who appeared for the 11th Accused-Appellant made extensive submissions on the validity of the Judgment. The learned President's Counsel who appeared for the other accused -appellants associated with the submission made on behalf of the 11th Accused-Appellant.

In this case the judgment was not unanimous but a divided judgment referred to as majority judgment. Hon. M.C.B.S Moraes who did not write a separate judgment agreed with the judgment of Hon Padmini Ranawaka . Hon. Shiran Gunaratne wrote a separate judgment and he acquitted all the accused of all charges.

The question is whether a trial at bar requires a unanimous judgment or not. The learned President's Counsel submitted that the law does not contemplate a divided judgment. It was submitted that whenever a divided judgment is considered to be valid there should be provisions in the Constitution or in the Code of Procedure Act.

The learned President's Counsel referred to Article 132(4) of the Constitution which deals with Judgments of the Supreme Court. It states that "the Judgment of the Supreme Court shall when it is not a unanimous decision be the decision of the majority."

It was pointed out that a similar provisions have been made in respect of the Judgments of the Court of Appeal in Article 146(4) of the Constitution.

In the High Court, the trials are held by a Judge sitting alone or trial by a Jury. Provisions have been made regarding acceptable verdicts returned by a Jury in Section 209(2) of the Code of Criminal Procedure Act No. 15 of 1979. The

acceptable verdicts are unanimous or 5 to 2. The jury can bring a verdict of 4 to 3 but it is not an acceptable verdict and a re- trial has to be ordered.

It should be noted that no such provisions are found in the Code of Criminal Procedure Act No. 15 of 1979 regarding Judgments of the Trial at Bar.

The learned President's Counsel submitted that in the light of the above legislative scheme it is necessary that there should be at least consultations among the three judges who may after consultations arrive at different decisions if it becomes necessary. He had referred to the cases of Paskaralingam Vs P.R.P. Perera and others 1998(2) SLR pg 169, Wijepala Mendis Vs. P.R.P. Perera and others 1999(2) SLR 110, which deals with findings of the Special Presidential Commissions. Case of Wijerama Vs. Paul 76 NLR 241. Deals with principles of administrative law.

It was submitted that according to the minute made by Hon. M.C.B.S Moraes it is clear that he has not even read the judgment of the Hon. Shiran Gunaratne, the Chairman of the Trial at Bar. It is a basic principle that the accused are entitled to a considered decision. The learned President's Counsel further submitted that in this case the accused were deprived of that basic right to a fair trial as the reasoning of the Chairman of the Trial at Bar has not been considered by Hon. M.C.B.S Moraes.

Although the record may not indicate it does not necessarily mean that the Judge M.C.B.S.Moraes did not consider the separate judgment of Hon. Shiran Goonerathne. As a matter of practice judges do consult other judges hearing the case.

It is the submission of the learned President's Counsel that the Accused were deprived of a substance of a fair trial and therefore the convictions and the sentences including the sentence of death imposed is bad in law and should be set aside.

In section 450 of the Code of Criminal Procedure Act which deals with trial-at-bar or in the Constitution there is no requirement that the judgment of the trial at bar should be a unanimous judgment . In a bench comprised of three judges the possible decisions are either unanimous or 2 to 1 decision which is referred to as majority decision. There is nothing to indicate that a majority decision is unacceptable. If that is so there should be provision to order a re-trial if the

decision is not a unanimous decision. The purpose of constituting a three member bench is to arrive at a decision to avoid a stalemate. Therefore I am of the view that a decision made by the majority is a valid decision.

2 The prosecution failed to establish beyond doubt that there was an unlawful assembly and that the accused -appellants are members of the unlawful assembly.

The Accused -Appellants were convicted on the basis that they were members of an unlawful assembly. The unlawful assembly is described in section 138 of the Penal Code. Ist Count in the Indictment states that the accused were members of an unlawful assembly and thereby committed an offence punishable under section 140 of the Penal Code. Section 140 states:

'Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

2nd Count is for committing rioting being members of the unlawful assembly , an offence punishable under section 144 of the Penal Code.

Section 143 states:

'Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting'

Section 144

Whoever is guilty of rioting shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counts 3 and 4 of the indictment is for being members of an unlawful assembly and committing criminal intimidation an offence punishable under section 486 read with 146 of the Penal Code) Counts 5-8 is for being members of the unlawful assembly and committing murder an offence punishable under section 296 read with 146 of the Penal Code. Counts 9 is for being members of the unlawful assembly committing attempted murder an offence punishable under section 300 read with 146 of the Penal Code.

Section 146 imposes vicarious liability on members of the unlawful assembly .It states:

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence.

Count 10 -16 based on common intention a principle like unlawful assembly which imposes vicarious liability. Section 32 refers to common intention. It states:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone"

Count No. 17 is for joint possession of a firearm an offence punishable under section 22 of the Firearms Ordinance.

In this case the Accused-Appellants were found guilty of Charges 1-9 based on unlawful assembly and charge 17 based on joint possession. In order to prove charges based on unlawful assembly the prosecution has to prove that there was an unlawful assembly beyond reasonable doubt.

The existence of and criminal liability under Unlawful Assembly

The first requisite for imposing liability under section 146 of the Penal Code is that the person sought to be held liable for the act of another should have been at the time of the commission of the offence a member of the unlawful assembly. The liability will extend not only to offence committed in prosecution of the common object but also to offences which the members of the assembly knew to be likely committed in prosecution of that object.

During the Appeal, it was contended on behalf of the 11th Accused that on account of the near-fatal injuries he received, the 11th Accused withdrew and ceased to be

a member of the Unlawful Assembly before the final act of shooting took place and therefore cannot be held liable for the offence of murder. The 11th Accused having suffered damage first was unaware of what transpired afterwards. His physical presence at the scene was no physical presence as he was unconscious. It was contended that the 11th accused ceased to be a member of the unlawful assembly almost immediately as he suffered injuries to his head.

In same vein it was also argued that the act of shooting was unforeseen as it was brought about by the sudden altercation that took place between the parties. This altercation, according to the defence was a supervening incident which fundamentally altered the course of events which took place thereafter.

The Prosecution is required to establish that there existed a unlawful assembly with the common object averred in count1 of the Indictment. The question of whether the 11th Accused was a member of the unlawful assembly or not at the time of the shooting occurred needs to be considered only if the Court comes to a finding that there existed an unlawful assembly.

While inference as to the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used and the behavior of the assembly at or before the scene of occurrence, the prosecution will not succeed in discharging its burden by simply demonstrating circumstances which align with the common object. Conversely, it is their burden to not only establish the common object but also prove that the existence of common object is the only conclusion consistent with the facts and circumstances existed at that point.

In my view it would be artificial to focus exclusively only on the events that took place concerning the group led by the 11th Accused and the entourage of the deceased Baratha Lakshman Premachandra. This last scene must be examined in the background of all the peripheral events that took place throughout the day, a day on which local government elections were held and at a time voting was

taking place. The bitter political rivalry between the 11th Accused and the deceased Baratha Lakshman Premachandra is undisputed. It is in evidence that ASP Priyantha had called on Baratha Lakshman Premachandra to warn him against harm being caused to the deceased at the behest of the 11th Accused. Furthermore, the Court is justified drawing an inference under section 114 of the Evidence Ordinance that in this country, it is expected that rivalry among candidates and their supporters run high on an election day. To ensure elections are conducted in an orderly manner, statutes have put in place provisions for the peaceful conduct of elections. These Statutes specify the prohibited conduct and the restrictions imposed on individuals on such days.

Section 81A of the Local Authorities Elections Ordinance No. 53 of 1946 as amended specify a series of conduct that are prohibited on the election day which include, *inter alia*,

"*1) No person shall, on any date on which a poll is taken at a polling station, do any of the following acts within a distance of a quarter of a mile of the entrance of that polling station:-*

> *(a) canvassing for votes;*
>
> *(b) soliciting the vote of any voter;*
>
> *(c) persuading any voter not to vote for a candidate of any particular political party or independent group. […]*

(2) No person shall, on any date on which a poll is taken at any polling station-

> *(b) shout or otherwise act in a disorderly manner within or at the entrance of a polling station or in any public or private place in the neighbourhood thereof, so as to cause annoyance to any person*

> *visiting the polling station for the poll or so* as to interfere with the work of the officers and other persons on duty at the polling station.

Owing to the seriousness of such conduct, the said Act also empowers;

"Any police officer may take such steps, and use such force, as may be reasonably necessary for preventing any contravention of the provisions of subsection (2) and may seize any apparatus used for such contravention."

Section 82C (1) of the same also prohibits persons from using violence on behalf of any other person to influence voters;

> "(1) *Every person who directly, or indirectly by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel such person to vote or refrain from voting or on account of such person having voted or refrained from voting or on account of such person having voted or refrained from voting at an election under this Ordinance, or who by abduction duress, or any fraudulent device or contrivance impedes or prevents the free exercise of the franchise of any elector, or thereby compels induces or prevails upon any elector either to give or refrain from giving his vote at such election shall be guilty of the offence of undue influence*"

In a democratic society ensuring that the voter is free to exercise the franchise freely is of paramount importance and in this context some of the provisions referred to are salient, in that they are geared towards maintaining public tranquility—the very essence of the concept of vicarious liability under unlawful assembly. Dr. G. L Peiris in his book Offences under the Penal Code of Ceylon states *"These offences have as their aim the protection of society against certain*

risks which may arise from gathering of a large number of persons……..An assembly of persons becomes the concern of the criminal law only ***when objects of the assembly are incompatible with the maintenance of social order and peace".*** (Emphasis added)

It is reasonable to presume that at least the 11th Accused who happened to be a member of a Parliament was alive to these restrictions. By and large, he was expected not only to adhere to these restrictions but also to lead by example and reflect the importance of abiding by the law.

In this factual backdrop, the presence of political stalwarts accompanied by their associate armed with fire arms, to my view, is sufficient to kindle a fear psychosis in the minds of the average voter. Such a scenario would certainly have an intimidating effect on the minds of a voter, the common object alleged in count No.1.

I am also of the view that in deciding as to whether there exists an unlawful assembly or not, the incident that is altogether have taken place on the day must be considered cumulatively and not in isolation. It is then and only then, one could appreciate the objective of the group of people and by extension direct their mind to appreciate whether what ultimately took place was within the foreseeability of the unlawful assembly.

The counsel for the 11th Accused takes up the position that the 11th accused along with the convoy was merely visiting from one polling center to the other. It was but a customary act of showing support and keeping vigilantism, in their opinion.

The fact that the convoy led by the 11th Accused travelled from Thamilnadu watte to Himbutana is not disputed. The 11th Accused was interfering with voters at Thamilnadu watte near a polling booth. He remained in the vicinity of that polling booth from 7.30 am till about 11.30 am until he was asked by an Assistant

Superintendent of Police to leave the premises. It is an indication that the police officer had viewed the presence of the 11th Accused and his group near the polling booth as inappropriate under the circumstances. This confirms that on the said date, the 11th Accused embarked on a prohibited journey. He was flouting the Elections Laws and lingering around the polling booth with his group. When he was asked to leave by the ASP, he went to one Ramesh's place, which was in the vicinity, to have lunch where he also intoxicated himself. The evidence given by PW 137, Dr. Shehan that the 11th Accused was intoxicated has not been controverted. Around 12 noon, the 3rd Accused arrived at Thamilnadu watte and thereafter after lunching and intoxicating themselves, the convoy left the area around 2. 45 pm. I find the events that took place within a span of 1hour and 15 minutes from the time the 11th accused and his group leaving the house of Ramesh (2.45 p.m) and the incident of shooting that happened in Himbutana(4.00pm) are vital to decide the issues in this matter. On their way, they stopped at Kandey Viharaya where the 1st Accused was given a T56 at the behest of the 11th Accused. Up until this exchange, it is common ground that the 1st Accused did not carry a T56 gun. After receiving this gun from the back of the 11th Accused vehicle and carrying it with him, the 1st Accused has also uttered "මේකෙන් මම තියන්නේ නැහැ. මගේ වෙපන් එකෙන් තියන්නත් එපා. කිසිම හේතුවකට වෙඩි තියන්න එපා. අපිට නඩු කන්න බෑ". The context in these words were suddenly uttered further reinforce the illegal nature of the entire transaction. After the exchange of guns, the group had again stopped at the Rajasinghe Vidyalaya and assaulted a supporter of Solangaarachchi. Around 3 pm, the group, fully armed and showcasing weapons, arrived at Rahula Vidyalaya which was again a Polling station. It is there that the11th Accused and his convoy intimidated and caused a riot.

Concisely, the 11th Accused and his convoy commenced the day by lingering near a polling station—which was clearly a conduct unwarranted and prohibited by

the law. He stayed there up to the point where the Assistant Superintendent of Police of the area had to ask him to leave. At 12 O' clock, he led his convoy to have lunch. They finish their lunch around 2.45 pm and set their course to visit another Polling station. It was just a couple of hours ago that the 11th Accused was asked to leave one polling station, clearly communicating to him that his presence near a polling station is undesirable. Despite the warning, the11th Accused continued to audaciously defy the law and proceed to another polling station. Mid way, he asked his convoy to stop and ordered the 3rd Accused to handover a fully loaded T56 gun to the 1st Accused without having any ostensible reason to do so. Shortly afterwards, the convoy assaulted a supporter of Solangaarachchi and finally arrived at the Rahula Vidyalaya, where his weapon power were fully displayed against the voters.

Starting from the time the polling commenced and till the time it was drawing to an end, the 11th Accused spent his day, marauding between polling stations with weapons, defying officials discharging their duties, and assaulting and victimizing people associated with Solangaarachchi. The only time they were not seeing intimidating people were when the group was having lunch. No sooner than they finished their lunch, the group was seen assaulting, threatening, chasing people and flaunting their fire arms near Rahula Vidyalaya. Their conduct both before and after lunch revolved around intimidating voters by directly and indirectly showing their power near polling stations.

The final act of confrontation that took place around 4 pm between the deceased and the 11th Accused undoubtedly influenced by these events that took place on that day.

PW 57 Madushani Pathirana, PW 101 Damith Suranga, PW 102 Suminda Kumara, PW 64 Wimalawathie have all given evidence to this effect. The evidence given by PW 101 and PW 102 who are STF officers executing their duty

on that day, is consistent that it was pursuant to the arrival of the 11th Accused's convoy that violence took place at Rahula Vidyalaya. They confirm that the group of people who arrived with the 11th Accused used obscene and filth language and intimidated the crowd gathered there. The evidence of PW 101 Damtih Suranga that the occupants of the van that came behind the 11th Accused vehicle displayed around 8 T-56 guns remains unchallenged.

The defence argued that the 11th Accused merely asked a question as to who PW 57 voted for, and that this cannot amount to intimidation. Admittedly, taken in isolation, a single question of 'who did you vote for' would not raise any alarms. But, the same question when asked by a well-known politician on an election day surrounded by a group of people who arrived in brazenly carrying weapons could acquire a completely different hue. No sooner than she answered, the 11th Accused has advanced towards her which forced PW 57 to retreat to a room for safety. Persons who came with the 11th Accused's convoy assaulted people gathered there, threatened certain others using fire arms and chased after several others as well. PW 101 Damith Suranga who was a Special Task Force Officer discharging his duties near the polling station has given evidence that he was threatened with a firearm being pressed to his chest. All these overwhelmingly indicate that the sudden escalation of tension took place with the arrival of the 11th Accused and the convoy. The scare, the threatening and arms-display took place quite boldly while an election was being held on the other side of the road in the polling station.

If as contended by the defence, the conduct of the 11th Accused was to show support and monitor the area, there could not have been any necessity for him to travel with an entire battalion of people in 10-15 vehicles, flaunt T56 guns, use obscene language, threaten the civilians and interfere with the officials who were stationed there to maintain peace. If the 11th Accused only asked an innocent question as to 'who did you vote for', there would not have been any reason for

females gathered in that area to erupt into a commotion, shout "ගැහැණුන්ට ගහන පිරිමි උඹලා පොන්නයෝ, කොන්ද පණ නැති පිරිමි" and run for safety. The conduct and the reaction it generated is wholly incompatible with showing support and unrelated to the purported vigilantism. When the arms and the conduct of the accused persons are factored in, there can be no doubt that they had the illegal objective of intimidating the voters in the area.

The encounter between the deceased Baratha Lakshxman and the 11th Accused takes place shortly after the tense situation at Rahula. It is important to note that the distance between the two places was around 500 meters and the time difference was not more than 5 minutes between the two incidents. All these factors are relevant for determining whether the act of shooting was a fundamentally different act which the 11th Accused could not have foreseen.

The fact that the deceased changing his course and deciding to come to Himbutana may have been an unaccounted factor. However, it is only tangential to the foreseeability of the actions of the unlawful assembly. The prosecution is not called to establish that the 11th Accused possessed clairvoyance in predicting the trajectory of his adversary to the last detail. It is only required to show that objectively there were grounds that veritably suggested to the 11th Accused that death could be caused in prosecution of their common object. The question is to assess whether the members of the unlawful assembly in a tense situation would have resorted to use their firearms which they brazenly carried.

There is evidence to hold that the 11th accused obstructed the vehicle of the deceased Baratha Lakshman. And there are clear signs that when fire broke out, the deceased Baratha Lakshman, understanding the difference of fire arm power, attempted to retreat and flee the scene. is also evidence that the 11th Accused's pilot vehicle proceeded forward without any hindrance which could only mean that the 11th Accused's obstruction of the deceased's convoy was deliberate. I

could only construe that this act of deliberate obstruction was an attempt by the 11th Accused to mark his territory by showcasing his man power. The altercation that took place between the two parties was the immediate result of the said vehicle obstruction.

It is also relevant that this group led by the 11th Accused possessed illegal weapons. All the 27 spent cartridges that were found at the crime scene had been fired by only one T56 gun and they had been traced back to "XI". According to PW 114, Brigadier Gamage, this illegal weapon that had been lost by the Army on 22. 04. 2000 in Elephant Pass. All this evidence remains unchallenged. This gun was fully loaded and ready to be used. There could not have been any necessity for the group led by the 11th Accused to carry "X1" with them. There were10 police officers from MSD with pistols and 3 officers with 2 T-56 guns from the Mirihana Police authorized to guard the 11th Accused. He had more than sufficient gun power at his disposal to protect himself. If not for an insidious purpose, there could not have been any reasonable ground for the 11th Accused and his group to possess and pass around a fully loaded illegal "X1". It was carried by the unlawful assembly to use it when the necessity arose.

On an election day which holds significance for both parties—whose enmity is widely known—it is untenable that a seasoned politician of the 11th Accused's caliber would not foresee that his act of obstructing the deceased's journey and pushing him, would escape without a serious reaction from the other side. He was fully apprised of the firearm capacity of his side. He was undoubtedly the central figure of that assemblage. Starting from deciding the itinerary to the places where he should stop to talk and stop to have lunch, almost every action of that assemblage centered on his presence. The arms detentors were not merely showcasing their weapons. They were bearing the arms to use them when it is necessary to use them. No person in the position of the 11th Accused would be so misguided to believe that the weapon bearers would throw away the weapons and

resort to bare hands when the necessity arises. It was just 500 meters beyond and less than 5 minutes ago that the 11th Accused caused a riot at Rahula Vidyalaya. Undoubtedly, this display of power and authority remained fresh in the members' minds. It may even translate into providing encouragement to pursue and achieve their criminal objectives. In such a volatile context, when the 11th accused blocked the vehicle convoy, got down and tried to assault the deceased, ordinary reason would have well forewarned him of the likely escalation of violence which could result in causing death. In my opinion, there was nothing in that sequence of events which could be deemed as 'supervening' that 'fundamentally' altered the results of their actions.]

The evidence clearly establish the existence of an unlawful assembly which continued and existed at the time of shooting.

Involvement of the 11th Accused

Nevertheless, the learned counsel for the 11th Accused was at pains to point out, that the 11th Accused did not take part in the subsequent shooting. That owing to the injuries to his head, he withdrew and ceased to be a member of the unlawful assembly. The learned counsel urged that at least insofar as the 11th accused is concerned, he could not be held liable for the murders that took place.

It was further argued that the 11th Accused took no active participation in the incident after he suffered the head injury. The Counsel submitted that the law of vicarious liability under Section 146 of the Penal Code is crystal clear that only an active presence with an active mind could make a person vicariously liable for the acts of the unlawful assembly. In the event where it is proven that a person was in a circumstance which deprived him of the ability to physically withdraw

or expressly disavow his association with the unlawful assembly, he must be presumed to have withdrawn from the unlawful assembly.

The Appellant has brought to our attention **Nawab Ali v the State of Uttar Pradesh 1974 AIR 1128** and **Akbar Sheikh and others v State of West Bengal [2009] INSC 884 (5 May 2009)** in support of this position. In my opinion, these cases do not completely tally with the present factual matrix. In Nawab Ali case, there was clear evidence that the accused had physically left the house before the murder took place where as in Akbar Sheikh case, the question for determination was whether some of the appellants were mere bystanders or actual members of the unlawful assembly. Both these situations do not squarely address the issues raised in the present appeal.

On the other hand, Justice Dayal's decision in **Rex vs Sadla And Ors AIR 1950 All 418** is a case on point: "*The question whether Sadla can be said to have been a member of the unlawful assembly after he had fallen down and been beaten depends on the determination of the fact whether he, who formed a member of the unlawful assembly from the beginning, had withdrawn himself from the unlawful assembly and had thus dissociated himself with any further membership.* ***It does not solely depend on the fact that he became incapable of taking part in the attack. His withdrawal from the unlawful assembly could be either actual and voluntary, which would be if be removed himself from the assembly and went away, clearly indicating that he was averse to taking any further part in the incident.*** *If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless in assaulting the victim. He can, however, in such a position disavow his share in the common object by expressions, leaving no doubt that he did not share the object any more. If he is*

also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unlawful assembly and that he had withdrawn himself from the unlawful assembly." This has been cited verbatim by Dr. Gour in Penal Law of India (11th Edition) at page 1336.

It is therefore seen that where a person has been incapacitated to render any physical assistance, and at the same time is in a liminal state which makes it difficult to ascertain whether he disavowed the common object, the benefit of that doubt accrues to the accused. There can be no difference of opinion that where the evidence shows that the accused was placed in a predicament which virtually rendered his participation an impossibility, the burden of proving that he continued to be a member still remains with the prosecution. If he could neither move, nor express himself, it would be fair to presume that he was incapable of both taking part and of sharing the object of the unlawful assembly and that he had withdrawn himself from the unlawful assembly.

Even still, in my opinion, this presumption is not a truism which has to be applied irrespective of the facts and the circumstances of the case. It can be rebutted where there is sufficient evidence to hold that the probability of a person continuing to be a member of that assembly is greater than its converse. In simple terms, the question that arises for determination in all these cases, is simply as follows;

"*Where there is clear evidence that a person who is the leader of a group commits the first act in a criminal offence and thereby triggers retaliation, and during the course of that retaliation which he himself triggered, ends up receiving the first injury, should he escape the liability for his actions and intentions*?".

In my opinion, the aspect of withdrawal should not be examined in a complete vacuum. Particularly, if there is evidence that a man who has lent himself to a criminal enterprise, knowing that the weapons they carried will be used with an intent sufficient for murder, suffers the first injury in the course of that transaction he initiated, the Court must carefully weigh the circumstance surrounding the incident to see whether it was more probable than not that he continued to be a member of that enterprise. As Dr. Gour and Justice Dayal themselves concur '*It does not solely depend on the fact that he became incapable of taking part in the attack*.' In order to give a finding on that point, all evidence on the record, direct, indirect or circumstantial has to be carefully appraised keeping in view the normal course of human conduct.

Justice Ahmed's observation in **Bindeshwari Singh And Anr. vs The State AIR 1958 Pat 12**. decided 9 years after the Sadla case is most illuminating in this regard.

"*Normally and more particularly, when in the course of a single transaction many acts are committed by different members of the unlawful assembly in quick session within a short time, the rule of inference should be in favour of his continuing to be the member of that assembly till the close of that transaction. For if the interval between the different acts is short the probabilities are more against the inference that any of these members retired in the midst of the transaction and did not continue to be present till the time the transaction lasted. Otherwise the very application of constructive liability as contemplated by section 149 of the IPC will fail*."

This observation is in fact not inconsistent with the decision in **Rex v Sadla**. The Court in the Sadla's case drew the presumption in favor of the accused because the circumstances surrounding his injury and participation left a doubt about his membership in the unlawful assembly. Sadla was presumed to have withdrawn

because there was ample time for him to get back on his feet and render support to assembly. It was therefore the opinion of the judges that a man who ostensibly entered the scene with the object of killing a person, after having suffered and injury and in a dazed situation which prevents him from openly disavowing the object, but still having ample time to get back on his feet to rejoin, should be given the benefit of the doubt. For in such an instance, it is up to the prosecution to show in unequivocal terms that his continued presence amounted to a form of support. If the prosecution stops their case at the point of the accused receiving injury and fails to explain the reason as to why the accused remained there for the remainder of the time without rendering assistance, he must be taken to have disassociated himself with the assembly.

In present appeal, the unchallenged evidence of PW 4 Lasantha Wanasundara is to the effect that **the entire incident in Himbutana lasted only a little more than a minute.** 4 eye-witnesses (PW 4, PW 2, PW 3, PW 47) whose presence was most natural on the spot, have supported the prosecution that the shooting took place almost immediately after the 11th Accused assaulted the deceased. **And up to the very minute he was shot in his head, the 11th Accused was leading the unlawful assembly. This means that there could only have been a millisecond difference in time between the first shot and the retaliation.**

Now had there been a significant difference between in time and space between the parties and the commission of the crime, or that the act of shooting was of fundamentally a different character, it could be argued that the 11th Accused may have retired from the unlawful assembly and dissociated himself with the actions. But as I have discussed earlier, causing death using firearms was very much a foreseeable consequence of their criminal enterprise. It is also true that the 11th Accused was a member of that assembly when the transaction—which lasted for fleeting 60 or more seconds—commenced. At the same time, there is no evidence to suggest that, at any time prior to that, the 11th Accused showed a tendency to

disassociate himself with the object of the assembly. The deceased's fatal injuries were inflicted imminently after the 11th Accused's injury. His presence continued to be assistive and operative on the actions of the unlawful assembly. Therefore criminal liability could be imposed on the basis of unlawful assembly. Therefore his conviction and sentence is in accordance with the law.

Involvement of 3rd Accused- Chaminda Ravi Jayanath alias Dematagoda Chaminda

(1) The 3rd Accused had been present at Tamilnadu Watte and was seen by PW 3 Hemantha Kumara near Ramesh's house around 12.00 noon. (Vol II A page 607). The 3rd Accused was known to this witness as a person who used to visit the 11th Accused in order to meet him. According to witness Hemantha Kumara the 3rd accused had arrived with a group of about 15 to 20 people in several vehicles (page 608). When the group left Ramesh's house at Tamilnadu watte, the 3rd accused had travelled in the same vehicle in which the 11th Accused travelled. (10th accused Galaboda had also been in the same vehicle). The 3rd Accused in fact had admitted in his dock statement that he joined and accompanied the 11th accused in one of the vehicles up to Himbutana. Thus, he was very much a part of the group of people who travelled along with the 11th Accused on the day in question.

(2) The next stop had been at a polling booth at Kande Viharaya.: According to witness Hemantha Kumara at this location one of the persons (Tharindu) who was in the 11th Accused's group had an altercation with a bystander and there had been a near exchange of blows. Witness had said " අර තරිඳු කියන එක්කෙනා එනන කොල්ලට , අර එහා පැත්තේන් කතා කරපු එක්කෙනාට බැනපු හින්ද එනන කට්ටිය ඇ

විස්සුනා .....එතන හිටපු පිරිස ගහගන්න ගියා" (page 630) and further the witness had added that " අර තරිඳු කියන කෙනා එතැන හිටපු පිරිමි කෙනෙකුට කුණුහරපයෙන් බැන්නා ". At this juncture this witness along with others had swiftly removed the 11th accused to the vehicle as he felt the situation would lead to a commotion "කොලහලයක් ඇති වෙන්න යන හින්දා අපි එහෙම කිව්වා". When this incident happened, the 3rd accused also had been present there and the witness had seen a revolver tucked in the 3rd Accused's waist.

(3) The next stop was the polling booth at Rajasinghe Vidiyalaya:
According to witness No.2 sergeant 14573 Dissanayake who also in the security contingent of the 11th accused, when the convoy of vehicles arrived at Rajasinghe Vidiyalaya, apart from witnessing the 11th Accused assaulting a youth this witness also had witnessed the 3rd accused assaulting the same youth who had taken to heels due to the assault.

According to this witness, he had seen the 3rd Accused getting into the vehicle that took the injured 11th accused to the hospital and even at the time the 3rd accused had been armed with a revolver.

(4) Next stop was near the polling booth at Rahula vidiyalaya:
According to witness Suminda Kumara who was attached to the Special Task Force (STF) who was on duty on this day and had been assigned to patrol the area where two polling booths were established, one at Rahula Vidiyalaya and the other at a temple near the Mulleriyawa police, presumably the polling booth that was established at Kande Viharaya.

The witness being new to the area had no familiarity with the area. His team had been given specific instructions to ensure that people do no congregate or hang around the polling stations and to remove such persons from the vicinity of the polling booths. Witness says between 2 and 2.30 pm about 15 to 20 vehicles approached the polling station. About 15 to 20 people had got down from the vehicles and had started speaking to the voters. He had specifically identified the 11th accused, among the crowed. Witness had said they created a commotion and people started running. In order to control the situation two other police teams were summoned to the scene. The witness had said that the villagers were infuriated by this incident, hooted and attacked the police jeep that arrived. Even at Rahula vidiyalaya, witness no 2 sergeant Priyantha Dissanayake, had seen the 3rd Accused armed with a revolver.

(5) According to witnesses, the 3rd also had been present armed with a revolver when the shooting took place at Himbutana, and when the firing started, he had shouted to the effect "open fire".

The evidence referred to above has clearly established that the 3rd accused had been an active member of the group led by the 11th Accused and conducted himself in furtherance of achieving the common object of the assembly.

The involvement of the 7th Accused Sarath Bandara:

Witness PW2 Priyantha Dissanayake who took part in an identification parade had identified the 7th Accused who was not known to him before the incident, as a person who was in the group led by the 11th Accused. His evidence as far as the 7th Accused is concerned was that, he was seen for the first time by the witness when they were at Ramesh's house and he had come to know him as

one of the 11th Accused's supporters. The 7th Accused had also been seen by this witness when they were at Rajasingha Vidiyalaya. The 7th Accused had been in close proximity to where a youth was assaulted. 7th accused also had been witnessed near the location where a woman was assaulted at Rahula Vidiyalaya. According to Witness Hemantha Kumara, the 7th accused had been known to him before the incident, though he did not know his name. As to the shooting incident at Himbutana, this witness had said that he saw the 7th Accused grabbing the firearm from the 1St Accused Anura and opening a burst of fire in the direction of the jeep of the deceased Baratha Lakshman Premachandra.

In his own words this witness had said "'"මම දැක්කේ ස්වාමිනි අනුර නිලදාරියගේ අතේ තිබ්බ අවිය සරත් කියන කෙනා අරගෙන බාරත මහත්මයාගේ ජීප් එක පැත්තට වෙඩි තියාගෙන යනවා දැක්කා ස්වාමිනි ".

Involvement of the 10th Accused.

The 10th Accused also had been identified by witness Hemantha Kumara as one of the persons who opened fire at Himbutana. The 10 th accused, according to witness Hemantha Kumara, was armed with the firearm of the 11th Accused when the initial firing occurred. Witness Hemanatha Kumara had said that he saw the 10th Accused Galaboda shooting towards the direction where the 11th Accused had fallen and also in the direction where the jeep of the deceased Baratha Lakshman was parked.

Considering the degree of involvement of the 3rd, 7th and the 10th Accused in this incident, it would be reasonable to infer beyond reasonable doubt that they were members of the unlawful assembly and ought to have foreseen these events, considering the propensity towards violent behaviour they displayed.

The liability of the 1st Accused

The 1st Accused had been found guilty for counts 1, 5 to 9, and 17. Counts 5 to 8 are for committing offences punishable under Section 296 of the Penal Code read with Section 146 of the Penal Code.

Count 9 for attempted murder under Section 300 read with Section 146 of the Penal Code.

Evidence reveals that the 1st Accused was one of the Police Officers who was sent from the Mirihana Police Station attached to the contingent, which was in charge of the security of the 11th Accused-Appellant. It is also a fact that the 1st Accused was also armed with an official T 56 weapon. (It is to be noted that although two police officers had been assigned to the 11th Accused, only one T56 gun was issued to both. At the time the entourage reached Kande Vihare, the T56 officially issued, was not with the 1st accused, but was with the other police officer who came from Mirihana police. (Page 68,74,351-V0l.II K)

The evidence led in this case reveals that at Kande Vihare that the 1st Accused was given another T 56 weapons by the 3rd Accused at the instance of the 11th Accused in this case. (Page 75 Vol. II-K) presumably because the 1st accused had no firearm with him at the time. It was this firearm that was grabbed by the 7th accused and opened fire. (Evidence of witness Hemantha).

It was submitted by the State in their written submissions that someone had grabbed the said T 56 weapon from the 1st Accused and shot at the deceased Bharatha Laxman.

Evidence of witness No.4 Wanasundera is to the effect that the 1st Accused was given a T 56 weapon by the 3rd Accused at the instance of the 11th Accused at Kande Vihare. It was submitted by the State that this evidence given by the witness Wanasundera remains unchallenged and the evidence that the said

witness Wanasundera had promptly made notes in his Pocket Note Book (PNB) was untouched.

The witness No.2 Dissanayake had also given evidence to the effect that a member of the unlawful assembly who came from behind the vehicles grabbed the T 56 weapon from the 1st Accused and shot at the scene. This piece of evidence too remains unchallenged. The said witness has also said that he saw only Galaboda firing and the 1st and 3rd Accused carrying weapons in their arms. It is not in dispute that the 1st Accused did carry a T 56 a weapon officially issued to him by the Mirihana Police this day. Therefore, there was nothing special about the 1st Accused carrying a T56 weapon at the time of the incident.

The learned Trial Judge had considered the dock statement of the 1st Accused and held that a mere denial from the 1st Accused does not explain the events which led to the four murders and the 11th Accused being shot. The learned Trial Judge had rejected the said dock statement of the 1st Accused.

The evidence led in this case establish that there was one official T 56 weapon in the pilot jeep which was in the possession of witness No.3.Hemantha.

Witness No 101 Damith Suranga clearly explained that he saw about eight (8) T 56 weapons being carried by the group- the rest of the T 56 weapons that was with the group were therefore illegal.

Witness No.2 Dissanayake has stated that he saw a member of the unlawful assembly who came from behind, grabbing the T 56 from the 1st Accused fire

towards deceased B. Laxman. And the witness Hemantha says that it was the 7th Accused who took the said T 56 from the 1st Accused and ran towards the deceased Baratha Lakshman having opened fire.

This clearly establishes that the 1st Accused did not fire or use the said T 56 weapon which was given to him by the 3rd Accused but someone else (according to witness Hemantha the 7th Accused) grabbed the said weapon from the 1st Accused and fired at the deceased B. Laxman.

If this evidence is accepted, it shows that although he 1st accused was armed with a T 56 weapon he did not use it or make an attempt to use it, at that time, but the 7th Accused grabbed the said weapon from the 1st Accused and shot at the deceased B. Laxman.

The evidence led in this case, therefore establishes that the 1st Accused who was a member of the security contingent attached to the 11th Accused had in his possession a T 56 weapon given to him by the 3rd Accused in this case.

11th Accused was a member of Parliament and the 1st accused was a police officer from the Mirihana Police Station attached to the security contingent of the 11th accused. The members of the said security contingent, including the 1st Accused had to accompany the 11th Accused wherever he went. The 1st Accused was one of the officers who's duty it was to look after the security of the 11th Accused. He was one of the officers who was assigned for the protection of the 11th Accused on that day. Therefore, he was compelled to accompany the 11th Accused wherever he went. In fact Witness Wanasundera had stated that the 3, 1,2,6.9, 12 and 13 Accused armed with weapons accompanied and followed the 11th

Accused where ever he went. Strictly speaking, he was on official duty as a member of the security contingent. Therefore, it is important to find out whether continued in the capacity of a member of the said security contingent until the end or whether he, during the course of the day commit any act to indicate that he too entertained the same object entertained by the other members of the unlawful assembly. Did the evidence led in this case establish, that the 1st Accused committed any act which showed that he too entertained the object of the other members of the unlawful assembly and was a member of the unlawful assembly himself?

Was there any evidence to show that at any given time of the day, the character of the 1st Accused of being a member of the official security contingent of the 11th Accused changed to that of a member of the unlawful assembly?

The evidence led in this case clearly shows that the 1st Accused did not refuse to take possession of the said T 56 weapon from the 3rd Accused. It is also very clear he himself did not ask for this weapon from the 3rd Accused. He had continued to possess the said weapon until the time of the incident-until it was grabbed from his possession by the 7th Accused. There is no evidence to show that the 1st Accused willingly gave the said weapon to anyone in the unlawful assembly to use it for commission of an offence.

He had also told the witness Wanasundera not to worry about it and that he is not going to use it.

The main question is whether there is evidence to show that the 1st Accused too entertained the same common object the other members of the unlawful assembly entertained.

Does the conduct of the 1st Accused indicate that he was prepared to achieve the desired result /common object at any cost?

Was the 1st Accused fully aware that considering the nature of the weapon he was armed that murder was likely to be committed in their attempt to achieve the common object?

The learned Trial Judge has acquitted the 2,4,5,6,8 and 9th Accused on the basis that although they were members of the private security of the 11th Accused and that there was no evidence to show that they have actively participated in the unlawful assembly. It is also not in dispute that the 1st Accused was at the scene of the crime as a member of the security contingent of the 11th Accused and that he had the official weapon issued to him in his possession on this day.

In his dock statement the 1st Accused had stated that he had in his possession the T 56 weapon which was officially issued to him on that day. He had denied shooting from the said weapon and also had stated that he took steps to take the 11th Accused to the hospital immediately after he was injured on that day.

On a perusal of the judgment of the learned Trial Judge, it is very clear that the 1st Accused had been convicted on the basis that he had possession with him the T 56 weapon given to him by the 3rd Accused at the instance of the 11th Accused. The evidence indicates that the 1st Accused had a T 5 weapon issued to him officially that day and there is no evidence to show that he used the said weapon on this day.

The evidence clearly establishes the fact that the 1st Accused did not use his weapon which was in his possession to shoot anyone. The T 56 weapon which was given to the 1st Accused by the 3rd Accused had been taken away by the 7th Accused.

As stated earlier the 1st Accused was a member of the security contingency attached to the 11th Accused on this day, and the 1st Accused had to be with the other security members and accompany the 11th Accused where ever he went. He too had been looking after the security of the 11th Accused like any the other

private security officer. The learned Trial Judge had acquitted the other accused who had served as private security officers on the basis that there was no evidence to show that they had actively taken part in the incidents that took place on this day. Except for the fact that the 1st Accused was made to carry or keep another T 56 weapon by the 3rd Accused at the instance of the 11th Accused at one point, there is no evidence to show that the 1st accused actively taken part in the incidents that took place on that day.

The prosecution has failed to prove the charges against the 1st Accused beyond reasonable doubt. Therefore he is acquitted of all charges.

Whether the evidence of the witnesses are properly assessed and evaluated.

It is the position of the defence that there are serious inconsistencies, contradictions and omissions in the prosecution case. It affected testimonial trustworthiness of the witnesses and due to that reasons the Court should have rejected the evidence and acquitted the accused. Therefore this Court has to consider whether the trial judges have correctly assessed and evaluated the evidence. Indian and Sri Lankan cases have considered question of credibility of witnesses and how to evaluate it. Therefore reference will be made to Indian and Sri Lankan authorities.

In *State of Bihar vs. Rada Krishna*- AIR, 1983 SC. 684 it was held that "One of the most difficult tasks of a Judge is to assess and evaluate the evidence of a witness and decide whether to believe or disbelieve it.

In *Bhoj Raj vs. Seetha Ram* – AIR 1936 PC. 60 , it was held that real test for either accepting or rejecting evidence are how consistent is the story with itself, how it stands the test of cross examination, how far it fixing with the rest of the evidence and the circumstances of the case.

In AG. Vs. Visuvalingam 47 NLR 286 discuss as to how to reject the evidence in view of the contradictions. It held that :

> *"Before the evidence of a witness is rejected on the ground of contradictions it is very important that the tribunal should direct its*

mind as to what contradictions matter and what do not and that the witness should be given an opportunity of explaining those that matter." "

R Vs. Julis., 65 NLR 505 at 519 deals with the question as to whether the evidence of a witness should be totally rejected if it is proved that he had given false evidence on one point.

In this case a reference was made to the well known maxim 'Falsus in Uno Falsus in Omnibus' (he who speaks falsely in one point will speak falsely upon all). It held that "In applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment , must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses…. "

Gardiris Appu vs. The King 52 NLR 344 deals with divisibility of credibility.

It was held that "when false evidence has been introduced into the case for the prosecution, it is open to the jury to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth."

Bhoginbhai Hirjibhai V State of Gujarat AIR 1983 SC 753 is a case very often cited in our criminal courts in dealing with contradictions and discrepancies. The relevant portion of the judgment is cited below.

Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
2. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of

surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
4. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
5. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.
6. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
7. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance.

More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

The majority judgment had considered the judgment in Bhoginbhai Hirjibhai V State of Gujarat AIR 1983 SC 753 and other cases. The question is whether they followed the principles enunciated in the judgments.. or not. The defence submitted that the majority judgment disregarded the major contradictions, inconsistencies, omissions and other discrepancies and therefore the judgment should be set aside. This Court will have to examine the evidence and come to a conclusion whether the trial judges had properly examine and evaluated the evidence.

In this case the main witnesses namely Priyantha Dissanayake, Lasantha Wanasundera and Hemanth Kumara are Police personnel attached to the security of the 11th Accused. Throughout the incident they were present with the members of the unlawful assembly. However they were not treated as accomplices. Therefore their evidence could be evaluated as that of other witnesses. It was alleged that they were belated and reluctant witnesses. They were initially reluctant to implicate the 11th Accused and their colleagues. They would had a fear that being present with the offenders there is a possibility of them being involved or implicated in the incident. Similarly the other police personnel present at the time of the incident were reluctant to come forward and give evidence.

The case Queen V Liyanage 67 NLR 193 is relevant to these witnesses.

“ The degree of suspicion which will attach to an accomplice’s evidence must vary according to the extent and nature of the complicity. Sometimes the accomplice is not a willing participant in the offence but a victim of it. Sometimes the accomplice acts under a form of pressure which it would have required some firmness to resist, as for instance when he is a subordinate Police Officer who

receives orders from his superior in the Force and finds it difficult to disobey such orders. The explanations to Section 114 of the Evidence Ordinance, show that "the force of the presumption to be drawn (against the evidence of an accomplice) varies as the malice to be imputed to the deponent". Whatever attenuates the wickedness of the accomplice tends at the same time to diminish the presumption that he will not acknowledge and confess it with sincerity and truth. The corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous.

There is a serious doubt that the investigation was biased, manipulated , flawed and unreasonable and a trial and convictions based on such an investigation cannot be sustained.

It was alleged that the investigation was partial and the investigators did not conduct an independent investigation. Defence alleged the CID went to the extend of fabricating evidence. It was alleged that CID wanted to fabricate a case against the 11th Accused. It was also suggested that CID disregarded the fatal injuries sustained by the 11th Accused and build up a case against the 11th Accused.

I am of the view that there is no motive for the CID to falsely implicate the 11th Accused who is a MP of the ruling party an advisor to the Defence Ministry.

The learned President's Counsel for the 11th Accused referred to the case of Victor Ivon vs. Sarath Silva 1998)1) SLR at 340 at 349 where Supreme Court held as follows.

> "A Citizen is entitled to a proper investigation- one which is fair, competent, timely and appropriate of a criminal complaint whether it is by him or against him. The criminal law exist for the protection of his righ,t property and reputation and lack of due investigation will deprive him the protection of the law."

This case is a quadruple murder case which requires the Police to vigorously conduct investigations irrespective of personalities involved and bring the offenders to justice. Accordingly Police have performed their task.

The learned President's Counsel submitted that when there are serious doubts about the conduct of the investigations an accused is entitled to be acquitted. We cannot accept this proposition. The Court acts on the evidence placed in court and independently consider the evidence of the witnesses and come to a finding. The fact that the investigation conducted by the police is partial and flawed will be considered by a trial Court and this is in itself is not a ground to set aside the conviction and acquit the accused.

Joint Possession

The Count 17 of the indictment is based on Joint possession and filed under Firearms Ordinance. The charge reads thus:

That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge at Mulleriyawa with persons unknown to the prosecution jointly possess an unlicensed automatic T-56 firearm and thereby committed an offence punishable under section 22(3) read with section 22(1) of the Firearms Ordinance No 33 of 1916 as amended by Act No. 22 of 1996.

All the accused were charged under count 17 for being jointly possessing an illegal firearm. They were charged based on joint possession. The general concept of possession is conscious and exclusive possession . This concept of joint possession is an exception to concept of exclusive possession.

In this case the accused who formed part of an unlawful assembly was moving with weapon . Some of them are security officers attached to MSD and Mirihana

Police who are authorized to carry firearms .Other than the police officers there were number of private body guards of the 11th Accused and his associates. There was evidence to prove that at various points members of the unlawful assembly were carrying firearms. The charge of joint possession is based on this evidence.

In the course of the investigations, police recovered a T-56 weapon and a revolver. This is in consequent to a statement made by the 3rd Accused. According to the Government Analyst the cartridges found at the scene were fired from T-56 .It was proved that it is a weapon used for the purpose of shooting at the scene.

According to the prosecution this weapon is an illegal weapon. The prosecution led the evidence of Brigadier Gamage. According to this witness the weapon X1 is an illegal weapon. His inquiries revealed that the weapon was lost by the army on 22.04.2000 when the Elephant pass camp was overrun by the LTTE.

Prosecution alleged that this weapon was brought to the scene by a member of the unlawful assembly and used by one or more members of the unlawful assembly. Therefore prosecution submits that all the members of the unlawful Assembly possessed this weapon.

In support of this position prosecution cited South African case of Bhekamacele cele and others v State- Case No. AR 237/2001:

1. The group had the intention (animus) to exercise possession of guns through the actual detentor and
2. The actual detentors had the intention to hold guns on behalf of the group.

It was submitted by the prosecution that the two ingredients referred to above are proved by the prosecution according to the required standard of proof.

I am of the view that it will be difficult to establish that members of the unlawful assembly jointly possessed this firearm. As some of the police personal possessed T56 weapons and there is a doubt whether members knew that this particular weapon was a stolen weapon or not.

The next question is whether individual liability could be attached to any member of the unlawful assembly. According to the police investigations, consequent to a statement made by the 3rd Accused T-56 weapon and a revolver were recovered. T-56 weapon is the weapon used at the scene of crime. However, these items were not recovered from the exclusive possession of the 3rd Accused. The effect of a statement made under section 27 of the Evidence Ordinance is that the Accused had the knowledge of the place where the item was kept or hidden. Solely on that evidence individual liability could not be established. The accused cannot be convicted of jointly possessing a firearm. Therefore, we are of the view that joint possession was not established .Therefore all the accused are acquitted on count 17.

Decision

We accept the evidence given by the main prosecution witnesses namely Priyantha Dissanayake, Hemantha Kumara and Lasantha Wanasundera. Prosecution proved beyond reasonable doubt the existence of an unlawful assembly. The offences were committed in furtherance of the common object and that the 11th Accused, 3rd Accused, 7th Accused and 10th Accused were members of an unlawful assembly at the time of the incident and liable for the commission of offences.

For the reasons set out in the judgment we acquit the 1st Accused (Ist Accused-Appellant) Vithanalage Anura Thushara De Mel of all charges. His appeal is allowed.

All the accused are acquitted of count 17 for joint possession of a weapon.

Convictions and sentences imposed on 11th Accused (4th Accused -Appellant), 3rd Accused (2nd Accused-Appellant), 7th Accused (3rd Accused- Appellant)10th Accused affirmed (except on count 17).

Appeals of 11th Accused, 3rd Accused, 7th and 10th Accused are dismissed.

Chief Justice

Buwaneka Aluwihare P.C., J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardena P.C., J.
I agree.

Judge of the Supreme Court

H.N.J. Perera, 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 mandates in the nature of Writs of *Certiorari, Prohibition* and *Mandamus* in terms of article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with the provisions of section 24 (1) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (as amended)

Anoma S. Polwatte,
No. 12, Kurunegala Road,
Nugawela

Petitioner

SC / Writ Application No. 01/2011

Vs,

1. Ms. L. Jayawickrama,
   Director General,
   The Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

   Mr. Ganesh R. Dharmawardena
   Director General,
   The Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

1st Substituted-Respondent

Ms. Dilrukshi Dias Wickramasinghe, PC
Director General,
The Commission to Investigate Allegations of Bribery or Corruption,
P.O. Box 1431,
36, Malalasekara Mawatha,
Colombo 07.

1st Substituted-Substituted-Respondent

Mr. Sarath Jayamanne, PC
Director General,
The Commission to Investigate Allegations of Bribery or Corruption,
P.O. Box 1431,
36, Malalasekara Mawatha,
Colombo 07.

1st Substituted-Substituted- Substituted-Respondent

2. Mr. J.A.S. Ravindra,
   Secretary,
   The Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

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

4. Rtd. Justice A. Ismail,
   Chairman,
   Former Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

5. Rtd. Justice P. Edussuriya,
   Member,
   Former Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

6. Mr. T.I. De. Silva,
   Member,
   Former Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

6A. Rtd. Justice D.J.De. S. Balapatabendi,
   Chairman,
   The Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

6B. Rtd. Justice L.K. Wimalachandra,
   Member,
   The Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

6C. Jayantha Wickramaratna,
   Member,
   The Commission to Investigate Allegations of Bribery or Corruption,
   P.O. Box 1431,
   36, Malalasekara Mawatha,
   Colombo 07.

7. Mr. P.B. Abeykoon,
   Secretary,
   Ministry of Public Administrations and Home Affairs,
   Independence Square,
   Colombo 07.

7A. Mr. J. Dadallage,
   Secretary,
   Ministry of Public Administrations and Home Affairs,
   Independence Square,
   Colombo 07.

7B. J. J. Rathnasiri,
   Secretary,
   Ministry of Public Administrations and Home Affairs,
   Independence Square,
   Colombo 07.

8. Mr. P.G. Amarakoon,
   Chief Secretary,
   Central Province,
   The Chief Secretary's Office,
   District Secretariat Building,
   Kandy.

9. Chief Secretary,
   Central Province,
   The Chief Secretary's Office,
   District Secretariat Building,
   Kandy.

Respondents

Before: B.P. Aluwihare PC J
H. Nalin J. Perera J
Vijith K. Malalgoda PC J

Counsel: Sanjeewa Jayawardane PC with Rajiv Amarasooriya for the Petitioner

Dilan Ratnayake DSG, with Ms. Thusitha Jayanetti for Respondents

Argued on: 08.02.2018

Judgment on: 26.07.2018

Vijith K. Malalgoda PC J

The Petitioner to the present application Anoma Senarath Polwatte filed the present application before this court, seeking mandates in the nature of Writs of *Certiorari, Prohibition* and *Mandamus* as against the Respondents acting in terms of Article 140 of the Constitution read with section 24 (1) of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994 and consequential interim orders referred to in the prayer to the application.

When this matter was supported for leave on 29th March 2011, this court after considering the material placed, had decided to grant leave but no interim relief was granted as prayed by the Petitioner, since the learned Senior State Counsel who represented the Respondents had given an undertaking that no further action will be taken with regard to the matter referred to in this application until this court makes a ruling.

The Petitioner, who is a Class I Officer of the Sri Lanka Administrative Service with a 24 year career, was holding the substantive position of the Provincial Land Commissioner of the Central Province, at the time the alleged investigation was commenced by the 1st Respondent. During the said period of 24 years, the Petitioner had held several important positions including the position as the Divisional Secretary Harispattuwe from July 1998 to February 2006. During this period the Petitioner was officially involved in acquisition of lands for the widening and development of the Kurunegala to Katugastota Highway and in fact her services were appreciated by the Secretary to the Ministry of Highways by his letter dated 02.02.2005 (P10 (a))

The Petitioner was subsequently transferred as the Divisional Secretary Kundasale in February 2006 and was appointed as the Provincial Land Commissioner by the Governor, Central Province in August 2006.

In August 2006 the Petitioner was noticed by Office-in-Charge, fraud Investigation at the Commission to Investigate Allegations of Bribery or Corruption to appear at the said office to attend an inquiry with regard to the payment of compensation under Katugastota-Kurunegala Road expansion project. As submitted by the Petitioner, the Petitioner attended the said inquiry and during the said inquiry the Petitioner was questioned on the payment of compensation in respect of the land acquired from and out of the land owned by her husband and herself. In this regard the Petitioner presented herself before the Commission on three occasions but it was the position taken by the Petitioner before us that the said inquiries were limited to a specific question put to her but, the allegation against the Petitioner was never explained and a detailed statement was not recorded depriving her of an opportunity to explain her position as against the complaint against her.

On or about the 1st week of November 2010, four years after her first statement was recorded, the Petitioner was served with summons to be present before the Chief Magistrate's Court of Colombo on 16.11.2010 in respect of a Bribery case bearing No. 60 147/01/ Bribery. With regard to the timing of the said case, the Petitioner had further submitted that as at 16.11.2010 the terms of office of the Commissioners of the Commission to Investigate Allegations of Bribery and Corruption had expired and no new appointments were made.

When the Petitioner presented herself before the learned Chief Magistrate of Colombo on 16.11.2010 she was served with a copy of the charge sheet and enlarged on personal bail with two sureties. When the charge sheet was served and read out to her, the Petitioner learnt that the charges against her were based on an allegation of payment of compensation with regard to a land during the road expansion of the Katugastota- Kurunegala Highway.

In the Petition filed before this court, the Petitioner had averred several grounds in challenging the decision of the Commission to Investigate Allegations of Bribery and Corruption to prosecute the Petitioner under the provisions of the Bribery Act; (under Section 70) and the said grounds can be summarized as follows;

a) There is a clear issue of patent *ultra vires* on the part of the 1st Respondent in her decision to execute the directive of the Commission, at a time when the Commission had ceased to have a legal existence.

b) There is no provision for the continuance of any prosecution by the 1st Respondent in the absence of the Commission.

c) The Bribery Act and amendments there to clearly provides a prohibition against the entertainment of any prosecution which is unaccompanied by the distinct sanction required by law.

The 1st and the 2nd Respondents to the above application whilst objecting to the grant of any relief had taken up the position that the Magistrate's Court action against the Petitioner had been lawfully instituted under section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 and a true copy of the directive received by the 1st Respondent was annexed to the statement of objection produced marked R-1.

As observed by this court, the Petitioner who was not satisfied by the said directive produced marked R-1 had raised an additional ground challenging the impugned decision to prosecute the Petitioner before the Magistrate's Court Colombo in the counter objections filed before this court. The said ground is to the effect that,

> "A perusal of the document R-1, confirms that at the very least, there was not even valid directive made in terms of section 11 of the Commission to Investigate Allegations of Bribery and Corruption Act."

had been raised and was canvased before this court during the argument stage.

Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 which deals with the directive to institute proceeding by the Commission reads as follows;

Section 11 Where the material received by the Commission in the course of an investigation conducted by it under this act, discloses the Commission of an offence by any

person under the Bribery Act or the Declaration of Assets and Liabilities Law, No 1 of 1975, the Commission shall direct the Director General to institute Criminal proceedings against such person in the appropriate court and the Director General shall institute proceedings accordingly.

When going through the above provision, it is clear that when an offence is disclosed either under Bribery Act or Declaration of Assets and Liabilities Law, during an investigations conducted under the provisions of the Commission to Investigate Allegations of Bribery or Corruption Act, there is a mandatory requirement for the Commission to direct the Director General (Commission shall direct) to institute proceedings.

Part I section 2 of the said Act provides for the establishment of a "Commission" and the relevant provisions in part I reads as follows;

PART I

Section 2 (1) There shall be established, for the purpose of this Act, a Commission (hereinafter referred to as the Commission) to Investigate Allegations of Bribery or Corruption made to the Commission in accordance with the succeeding provisions of this Act and to direct the institution of prosecutions under the Bribery Act and the Declaration of Assets and Liabilities Law No 1 of 1975.

(2)(a) The Commission shall consist of three members, two of whom shall be retired Judges of the Supreme Court or the Court of Appeal and one of whom shall be a person with wide experience relating to the Investigation of Crime and Law enforcement.

Even though the Act had not provided a specific provision as to how the directive should be made, there exist a prerequisite under section 11 of the Act to obtain a directive when the

investigations conducted, discloses the commission of an offence, before launching any prosecution.

Whilst producing the Directive received from the commission marked as R-1, the 1st Respondent, the Director General had submitted in her affidavit that,

> "By way of objection to paragraph 1 of the petition the 1st and 2nd Respondents admit only the jurisdiction and specifically state that there is a valid directive made under section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994 and accordingly the action has been lawfully instituted (A certified copy the directive made by the commission dated 02.03.2010 is annexed to this statement of objection as R-1)"

When going through the document R-1, I observe that it is a photocopy of a part of a journal sheet which carries journal entry No 28. If I reproduce the same journal entry in this judgment, it reads as follows;

> "(28) DG, Report of ADL at 14 and 20 considered. Direction is given for the institution of proceedings."

at the end of the above minute a short signature of somebody is found with the date 02.03.2010.

Any other journal entries found in the same folio are not before us and the maker of R-1 is also not to be found from the above entry. However the 1st Respondent in her objection filed before this court had confirmed that it is the directive she received from the Commission but she is silent on the maker of the said minute, or she has failed to annex an affidavit from the maker of the said minute.

On behalf of the Petitioner, several objections have raised for R-1 being considered as a valid directive made under section 11 of the Act but I will confine myself to some of the important issues raised on behalf of the Petitioner.

Objections such as, identification of the file, identification of the Folio without other corresponding minutes, identification of the author will not be considered in this judgment by me since I believe that the 1st Respondent being a responsible officer will confine herself to the relevant file only.

Even if this court accepts the position that the minute referred to in R-1 has been made by one of the member of the Commission, the important matter to be consider is whether the said directive is a valid directive within the meaning of section 11 of the Act.

In this regard it is important to consider the provisions in sections 2 (8), section 3 and section 5 of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994.

Section 2 (8)	The members of the Commission may exercise the powers conferred on the Commission either sitting together or separately and where a member of the commission exercise any such power sitting separately, his acts shall be deemed to be the act of the Commission.
Section 3 **(Functions of the Commission)**	The Commission shall subject to the other provisions of this Act, investigate allegations, contained in communications made to it under section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No 1 of 1975, direct the institution of proceedings against such person for such offence in the appropriate court.
Section 5 **(Powers of the Commission)**	For the purpose of discharging the functions assigned to it by this Act, the Commission shall have the power – (a) to (l)

When looking at the provisions of the above three provisions of the Act it is clear that by the above provisions, a clear distinction had been made between the powers of the Commission and

functions of the Commission. As identified in section 3 referred to above, when an offence is disclosed after an Investigation, Commission shall direct the institution of proceedings and the said conduct of the Commission had been identified within the Functions of the Commission. The powers of the Commission has been identified under section 5 of the Act and under section 2 (8), such powers of the Commission may exercise by its members either sitting together or separately.

Thus it is clear that the members of the Commission can exercise ancillary powers on his own though the full complement of the Commission is not available at one given time. But as for the exercise of functions such as the direction to be given to the Director General, it is crystal clear that the Act has not provided for one member alone to give such direction. However as already observed by me, R-1 refers to a directive given by one member and in the said directive, it is not clear as to whether the reports referred to, had been considered by the full commission before making such directive.

In the said circumstance, I have no hesitation to conclude that there is no valid directive made under section 11 of the Act to institute criminal proceedings before the Magistrate's Court, with regard to the investigations carried out by the fraud Investigation Unit of the Commission to Investigate Bribery and Corruption as against the Petitioner to the present Application. I therefore conclude the directive produced marked R-1 is patently illegal.

In addition to the above ground raised before us, the Petitioner raised another objection on the basis that,

a) There is a patent act of *ultra vires* when the Director General execute a directive of the Commission at a time when the Commission ceased to have legal existence
b) There is no provision in the Act to continue with the prosecution in the absence of the Commission

Since I have already concluded that there exist no valid directive to institute criminal proceedings, I don't think it is necessary to discuss the legal effect of a valid directive at a time the commission ceased to have legal existence.

As a third ground, the Petitioner has relied on section 78 (1) of the Bribery Act and submitted that a written sanction has been made a condition precedence to a prosecution been launched in the Magistrate's Court.

Section 78 (1) which is the basis for the above objection reads as follows;

> Section 78 (1) No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Commission.

During the argument before this court the Petitioner contended that there is a clear distinction between the Commission and the Director General under the provisions of the Act and when the Commission directs the Director General to institute Criminal proceedings, the implementation of the said directive should be within the provisions of section 78 (1) of the Bribery Act, where the functions of the Magistrate is restricted by the provision of the above section.

As submitted by the Petitioner, unless the Commission itself goes before the Magistrate's Court, no other person including the Director General is empowered to go before the Magistrate without the sanction of the Commission under the above provision.

I have already concluded with regard to the validity of the directive said to have given by the Commission to institute criminal proceedings against the Petitioner referred to in Document R-1, and in the light of the said conclusion reached, any other conclusions with regard to matters ancillary to the above, will have an academic value only. In other words I have already concluded that there is no valid directive made by the commission before this court and therefore there is no valid prosecution instituted before the Magistrate under the provisions of the Act. In the said circumstance, any consideration of the provisions of the section 78 (1) become academic and therefore I decide to refrain from making any observations with regard to the matters raised by the Petitioner on this issue.

As already concluded in this judgment the 1st Respondent had failed to provide a valid directive given by the Commission under section 11 of the Act and the directive produced marked R-1 is not a valid directive made under section 11 to institute proceedings before the Magistrate's Court. In the said circumstances I conclude that R-1 is patently *ultra vires* and attracts the ground of illegality. In the said circumstances I issue a mandate in the nature of writ of *Certiorari*

quashing the charge sheet served on the Petitioner by the 1st Respondent acting on the purported illegal direction produced marked R-1, as prayed in paragraph (h) to the petition.

I further make order issuing a mandate in the nature of a writ of *Prohibition* as prayed in paragraph (g) to the petition.

I make no order with regard to the other relief prayed by the Petitioner but state that the Petitioner is entitled to other relief which are consequential to the main relief granted by this court.

Petitioner is entitled to the cost as against the 1st Respondent to the present application.

Judge of the Supreme Court

B.P. Aluwihare PC J

I agree,

Judge of the Supreme Court

H. Nalin J. Perera J

I agree,

Judge of the Supreme Court

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

FRIGI Engineering Services (Pvt) Ltd.
M/S Dunham Bush Industries Sdn Bhd
Joint Venture
C/O: FRIGI Engineering Services (Pvt) Ltd.
145, Siri Dhamma Mawatha
Colombo 10

Petitioner

S.C.[FR] No.337/2015

Vs.

Secretary
Ministry of Food Security
CWE Secretariat Building
No.27, Vauxhall Street
Colombo 02

And 45 others

Respondents

BEFORE : **S.E.WANASUNDERA, PC, J.**
B.P.ALUWIHARE, PC, J.
K.T.CHITRASIRI, J.

COUNSEL : Dr.Mahinda Ralapanawa with Ms. Nisansala for the Petitioners
Malik Hanan instructed by D.Abeygunawardena for the 3rd Respondent
S.Rajaratnam, PC, Senior ASG for the 1st, 2nd & 4th to 46th Respondents

ARGUED ON : 24.01.2018

WRITTEN SUBMISSIONS ON : 09 and14.02.2018 by the Petitioner
08.02.2018 by the 3rdRespondents
05.02.2018 by the1st, 2nd, 4th and 45thResponde

DECIDED ON : 02.03.2018

CHITRASIRI, J.

Petitioner in this case has filed the present application in terms of Article 126 of the Constitution, seeking the following final reliefs:

a. *To declare the fundamental rights of the Petitioner guaranteed under Article 12(1) and/or 12(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka has been violated at the instance of the Respondents;*
b. *To make order to quash and/or invalidate decision of the Respondents to award the tender in favour of the 3rd Respondent as contained in letter dated 27th July 2015 of the 1st Respondent;*

However, on 21.01.2016 this court granted leave to proceed only on alleged violations under Articles 12(1) of the Constitution. This Article 12(1) stipulates thus:

> *12(1) All persons are equal before the law and are entitled to the equal protection of the law.*

In the averments found in the amended petition dated 16.11.2015 filed in this Court, it is stated that the Petitioner is a Joint Venture entity which was formed representing FRIGI Engineering Services (Pvt) Ltd and M/s Dunhan Bush Industries Sdn Bhd. In that petition it is also mentioned that FRIGI Engineering Services (Pvt) Ltd, which is a company incorporated in Sri Lanka has entered into a Memorandum of Understanding with M/s Dunham Bush industries Sdn Bhd, which is a company, incorporated in Malaysia for the purpose of engaging in the business of Air-conditioning in countries world over. This Memorandum of Understanding is marked as X3 and is filed with the petition of the Petitioner.

On 10th February 2014, 2nd Respondent had called for tenders from eligible and qualified tenderers under the National Competitive Bidding Method, for the Design, Supply and Installation Testing and Commissioning and Ventilation System for the National Measurement Laboratory Building of the Department of Measurement Units, Standards and Services. This document by which the tenders were called is marked as X4 and it specifies the eligibility of tenderers who intend placing bids for the same. Following are a few of those eligibility criteria:

4. Contracting firms eligible to Bid should be:

4.1 Registered with the Institute for Construction Training and Development (ICTAD) under the National Scheme of Registration of Contractors for Grade EMI under Medical Ventilation and Air Conditioning in old scheme.

4.2 Joint Ventures subject to the condition that the lead partner of the Joint Venture is a local contractor satisfying the qualification requirements stated in 4.1 above.

5. Qualification Requirements to qualify for Contract award include

I Current ICTAD registration Grade EMT under the category Mechanical Ventilation and Air Conditioning (MVAC) in new scheme or Grade EMI under Air conditioning in old scheme.

II Annual average turnover of Design, Supply and installation work related to Air Conditioning performed in the last five years shall not be less than Rupees Five Hundred Million (Rs.500,000,000,000).

III Bidders should have successfully completed at least 2 Design Supply and Installation projects related to Air Conditioning, each over Rupees Five Hundred Million (Rs.500,000,000,000) of this specialized nature, during last 5 years.

IV Liquid Assets and/or Credit facilities required shall not be less than Rupees One Hundred and Twenty Five Million (Rs.125 000 000 00).'

Petitioner has submitted the following experience to support the requirement referred to in clause 5(III) above which are mentioned in the documents marked X13 and X13A.

Lead Partner- **Frigi Engineering Services (Pvt) Ltd** **Design Experience in last five years**				
Year	**Employer**	**Description of Works**	**Amount**	**Responsibility to Joint Venture**
2010	Bandaranyake International Airport - Katunayake	Design, Supply, installation MVAC System to Departure Lounge, New Arrival Lounge and Extension check in area	Rs.345 million	100%
2012	Sri Lanka Customs Headquarters building	Design, Supply, installation of HVAC system	Rs.526 million	100%

Lead Partner- **Frigi Engineering Services (Pvt) Ltd** **Construction Experience in last five years**				
Year	**Employer**	**Description of Works**	**Amount**	**Responsibility to Joint Venture**
2012	Sri Lanka Customs	MVAC System	Rs.560million	100%

Dunham-Bush Industries Sdn Bhd **Construction Experience in last five years**				
Year	**Employer**	**Description of Works**	**Amount**	**Responsibility to Joint Venture**
2013	Zuhai United Laboratories - China	Design, Supply and Installation AC System	RMB25.84 million (Rs.555.6million)	100%
2013	United Laboratories (Inner Mongolin) Co-Ltd	Design, Supply and Installation AC System	RMB105.6 million (Rs.2,257.5 million)	100%

Having considered the respective bids received, Cabinet Appointed Government Procurement Committee [CAPC] has decided to recommend awarding the tender to the Petitioner. Thereafter, the Minister of Co-operatives and Internal Trade had submitted the said recommendation to the Cabinet of Ministers for approval. It is evident by the document marked X15.

However, consequent to an appeal lodged to the Government Procurement Appeal Board (PAB) by the 3rd Respondent against the decision of the CAPC, it had summoned the 3rd Respondent and the Petitioner for an inquiry, by the letter dated 08.07.2014 which was marked as X9. The PAB having held the said inquiry on 10.07.2014 has submitted its 08 page Report that was marked and produced as 2R1.

In the aforesaid report marked 2R1, it is observed that the recommended bidder namely the Petitioner had not obtained the required minimum marks for the overall compliance of the Bidding document. In arriving at the aforesaid decision, the PAB has given the following reasons.

1. Bid Security being in the name of FRIGI Engineering Services (Private) Limited which is only a partner in the aid Joint Venture;

2. The person who signed the Bid Form of the Petitioner did not have the required Power of Attorney to sign it. Furthermore, for the purpose of Clause 26.1 of Instructions to Bidders, this too is considered as non-compliance.

3. For the purpose of Clause 4.2 of Bidding Data in the Bidding Document, the documentary evidence submitted by the Malaysian company of the Joint Venture was not certified by the Sri Lankan Diplomatic Mission of Malaysia.

4. Similarly for the purpose of the abovementioned Clause 4.2, the requirement that the documentary evidence to confirm the foreign company as an active company should be certified by the Sri Lankan Diplomatic Mission of the respective country, was not complied with.

In accordance with the said document 2R1, PAB is of the view that the recommended bidder had not complied with a number of major, general and technical requirements as stipulated in the tender documents. Furthermore, it is observed that the Bid form submitted was not on behalf of the Joint Venture, but it was only on behalf of one of the partners of the Joint Venture, namely M/s FRIGI Engineering (Pvt.) Ltd. Also, the Bid Form did not carry any indication to show that it is from the Joint Ventures of M/s. FRIGI Engineering and Dunham Bush Joint Venture Industries. Therefore, it is seen that there are ample reasons for not awarding the tender to the Petitioner joint venture. Moreover, the Petitioner has failed to demonstrate that PAB, in making the recommendation, had acted illegally, arbitrarily, capriciously, mala fide and/or unreasonably, towards the Petitioner to establish any violation of its fundamental rights guaranteed under Article 12(1) of the Constitution.

In the circumstances, it is clear that with such infirmities, the Petitioner cannot legitimately expect that it would get the tender referred to in the advertisement marked X4, awarded in his favour. Therefore, there is no doubt that even if the

award made in favour of the 3rd Respondent is annulled, the petitioner is not entitled to have the tender awarded in its favour. Indeed, the Petitioner has not sought any relief to have the tender awarded to it, instead has sought only to quash the decision referred to in the letter dated 27.07.2015 marked X10. By that letter X10, Secretary to the Ministry of Food Security has informed the Petitioner of the decision to award the tender to the 3rd Respondent, namely M/S AIPPL Access International Joint Venture.

At this stage, it is necessary to note that Sujeewa Nishantha Akuranthilaka, in his capacity as the Director of the Measurement Units, Standards and Services Department, [2nd Respondent] in his affidavit dated 22nd November 2017, has stated that this particular tender cannot be awarded to any of the tenderers due to the reasons set out below.

1. *I state, according to the design of the laboratory building, fresh air supply and air conditioning was to be done by a single system. At present, the laboratory building is functioning with the support of a split type air conditioning machines without the high precision air conditioning and ventilation system.*

2. *I state that the failure to install the requisite air condition system has caused severe repercussions. The split type AC is unable to maintain the environmental condition of the laboratory, the air quality tests carried out by the National Building Research Organization (NBRO) and Industrial Technology Institute (IIT) reveal that formaldehyde levels of the internal air exceeds the standard permissible level. Moreover, there is high risk of the laboratory equipment becoming unsuitable as a result of the atmospheric conditions inside the laboratory.*

3. *I further state, the current specifications and design of air conditioning system was to be installed parallel to the construction work, however, the high precision air condition could not be installed due to unavoidable circumstances. The said tender was a Design and Build Tender but according to the current situation, it has to be redesigned since the construction of the laboratory has been completed.*

4. *I state that the prepared specification and design of the AC system is not effective for the present situation, the new design is capable of reducing the formaldehyde content level to levels approved by the Health and Labour Authorities whilst maintaining laboratory environmental conditions in conformity with international standards.*
   [Para. 5,6,7 & 8 of the affidavit dated 22.11.2017 *of the Director]*

Moreover, in the report of the Procurement Appeal Board [PAB] also, it is mentioned that the Technical Evaluation Committee (TEC) had found that none of the tenderers had fulfilled the following three requirements:

1. Specific experience of the Bidder;
2. Preliminary Design Approach; and
3. any other improvements to the Employer's Requirements suggested by the Bidder
   [Page 3 of the PAB report]

Learned Senior ASG on behalf of the 1st, 2nd, 4th and 45th Respondents submitted that the Minister of Finance and the Cabinet of Ministers have so far not sanctioned the request made in the Cabinet Memorandum marked 2R2 by which approval of the cabinet of Ministers was sought to award the tender to the 3rd Respondent. This is evident by the Cabinet Decision marked 2R3. Instead, the Cabinet has suggested calling for fresh tenders. The Ministry of Finance in its observations for the Cabinet Memorandum marked 2R2 has suggested calling for fresh tenders as none of the bidders have fulfilled the threshold requirement to award the tender.

Averments in the 2nd Respondent's Affidavit dated 22nd November 2017 indicate that it is necessary to change even the specifications and design that is required for the Laboratory. In such a situation, calling for fresh tenders would give an

opportunity for all bidders including the Petitioner, to submit the bids afresh in accordance with the revised specifications. Accordingly, the decision to call for fresh tenders to suit the present requirements of the laboratory Building of the Department of Measurement Units, Standards and Services is amply justified.

In the circumstances, the question of cancellation of the tender awarded to the 3rd Respondent will not arise. It is merely because, with the implementation of the decision of the Cabinet to call for fresh tenders to suit the present requirements of the laboratory building of the Department of Measurement Units, Standards and Services, then the decision to award the tender to the 3rd Respondent would automatically get annulled.

For the reasons set out hereinbefore, I am of the view that the Petitioner has failed to establish that its fundamental rights enshrined under Article 12(1) of the Constitution have been infringed.

The application is dismissed without 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.

K.H.G. Kithsiri,
477 F I,
Deniyawaththa Road,
Battaramulla.

PETITIONER

SC FR Application No. 362/2017

Vs.

1. Hon. Faizer Musthapha MP,
   Minister of Provincial Councils and Local Government,
   No. 206/1,Lake Drive,
   Colombo 08.

2. Hon. Karu Jayasuriya,
   Speaker of Parliament of Sri Lanka,
   No. 02,Amarasekera Mawatha,
   Colombo 05.

3. Jayantha C. Jayasuriya P.C.,
   Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

4. Mahinda Deshapriya,
   Chairman,
   Election Commission.

5. N.J. Abesekere P.C.
   Member,
   Election Commission.

6. Prof. S.R.H. Hoole
   Member,
   Election Commission

   The 4th to 6th Respondents above named

   [All of the
   Election Secretariat,
   Sarana Mawatha,Rajagiriya.]

RESPONDENTS

BEFORE: Buwaneka Aluwihare P.CJ
Vijith Malalgoda P.C J

COUNSEL: M.U.M Ali Sabry P.C with Ruwantha Cooray for the Petitiner
Indika Demuni de Silva P.C ASG with Dr. Avanthi Perera SSC and Noyomi Kahawita SC for the 1st, 3rd, 4th, and 6th Respondents

ARGUED: 13.12.2017

WRITTEN
SUBMISSIONS: Petitioner 14.12. 2017
Respondents 14.12. 2017

DECIDED ON: 10.01.2018

Aluwihare PC. J

The Petitioner has filed the present Application seeking a declaration:

(a) that the 1st and 3rd Respondents had infringed the Petitioner's and/or such other similarly circumstanced persons' fundamental rights guaranteed under Articles 10 and/or 12(1) and/or 12(2) and/or 14(1)(a) and/or 14(1)(g) and/or Article 84 of the Constitution by introducing amendments to the LOCAL AUTHORITIES ELECTIONS (AMENDMENT) Bill in violation of the procedure established by law, particularly in terms of the Constitution;

(b) that the 2nd Respondent namely the Speaker of the House of Parliament had violated the Petitioner's and/or such other similarly circumstanced persons' fundamental rights guaranteed under Articles 10 and/or 12(1) and/or 12(2) and/or 14(1)(a) and/or 14(1)(g) and/or Article 84 of the Constitution by granting the certificate in terms of Article 79 of the Constitution to the impugned Bill entitled LOCAL AUTHORITIES ELECTIONS (AMENDMENT) BILL to become law;

(c) that the 3rd Respondent's opinion submitted in terms of Article 77 of the Constitution that the LOCAL AUTHORITIES ELECTIONS (AMENDMENT) BILL is ready to be submitted to become law is violative of or had violated the Petitioner's and/or such other similarly circumstanced persons' fundamental rights guaranteed under Articles 10 and/or 12(1) and/or 12(2) and/or 14(1)(a) and/or 14(1)(g) and/or Article 84 of the Constitution;

(d) notwithstanding the enactment of the Bill entitled LOCAL AUTHORITIES ELECTIONS (AMENDMENT) the Petitioner and similarly circumstanced officers are entitled in law to contest the election and/or stand as a candidate at an election called for the purpose of electing candidates for the local authorities.

When this matter was taken up for support, the learned Additional Solicitor General appearing for the 1st, 3rd, 4th, 5th and 6th Respondents raised several preliminary objections with regard to the maintainability of this application in particular the jurisdiction of the Supreme Court to entertain and hear the Petitioner's Application. The court, however, permitted the Additional Solicitor General to raise, at the outset, the preliminary objection based on the time stipulation in Article 126(2) of the Constitution, prior to hearing the Petitioner's Counsel in support of his Application. It must be stated that the learned Additional Solicitor General reserved the right to make submissions on the other preliminary objections, subsequently. The learned ASG and the learned Presidents' Counsel for the Respondents were heard on the preliminary objection.

The objection in the main was that the Application of the Petitioner has been filed outside the mandatory period of one month stipulated in Article 126(2) of the Constitution and on that basis, the Respondents moved to have this application dismissed *in limine*.

Article 126(2) of the Constitution reads as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself*

or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges."

It was submitted on behalf of the Respondents that in order to consider whether the Petitioner has complied with Article126(2), relating to the stipulation of time *vis-à-vis* the alleged conduct of the Respondents that the Petitioner is challenging, the following dates would be of relevance:

It is common ground that the Local Authorities Elections (Amendment) Bill was published in the Gazette on 02nd June 2017. The Bill thereafter, was placed on the Order Paper of Parliament on the 20th June 2017. The Bill had been debated in Parliament on 24th August 2017. After the Bill was debated, The Local Authorities Elections (Amendment) Bill, together with committee stage amendments, had been passed by Parliament on 25th August 2017.The Bill had been certified by the Hon. Speaker in terms of Article 79 of the Constitution on 31st August 2017.

Accordingly, in terms of Article 80(1) of the Constitution, the Local Authorities Elections (Amendment) Act, No. 16 of 2017 (P5) came into force as a law, on 31st August 2017.

It was pointed out on behalf of the Respondents that the present Application of the Petitioner has been filed only on the 13th of October 2017, which was more than 30 days after, in relation to all of the relevant dates referred to above.

It was also pointed out on behalf of the Respondents that the Petitioner, in paragraph (e) of the prayer to the Petition, has impugned the introduction of amendments to the Local Authorities (Amendment) Bill at the Committee Stage which had taken place on 25th August 2017, and in that context the Application is time-barred by 18 days. Similarly, in paragraph (g) of the prayer to the Petition, the Petitioner has impugned the opinion of the 3rd Respondent which had been submitted, in terms of Article 77 of the Constitution, on the 25th August 2017. It was pointed out that the Application is once again time-barred by 18 days. It was also pointed out that in paragraph (f) of the prayer to the Petition, the Petitioner is impugning the certificate endorsed by the Hon. Speaker in terms of Article 79 of the Constitution on 31st August 2017.The Petition in that context is time-barred by 12 days. When one considers the date on which the Local Authorities Elections (Amendment) Act, No. 16 of 2017 came into operation, this Application is time-barred by 12 days.

It was the contention of the Learned Additional Solicitor General that the jurisprudence developed over time had made, the application of Article 126(2) in respect of the time limit granted to apply to the Supreme Court on an allegation of breach of fundamental rights, mandatory and not directory.

The learned ASG cited the case of *Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake*, SC 206/2008 (F/R), SC Minutes of 09.12.2016, where Justice Prasanna Jayawardena PC held:

'Article 126(2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may … "within one month thereof" … apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126(2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution.

In the case of *Ilangaratne* vs. *kandy Municipal Council* [1995 BALJ Vol.VI Part 1 p.10] his Lordship Justice Kulatunga observed that, *"the result of the express stipulation of a one month time limit in Article 126(2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of,. ……. if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application.".*

> His Lordship further observed in the said case; "… *the general rule that had emerged is that, this Court will regard compliance with the 'one month limit' stipulated by Article 126(2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed after the expiry of one month from the occurrence of the alleged infringement or imminent infringement."*

This court, however, in exceptional circumstances where the Petitioner was prevented, by reason beyond his control, from taking measures which would enable the filing of a Petition within one month of the alleged infringement and if there had been no lapse on the part of the Petitioner, has exercised its discretion in entertaining fundamental rights applications and had not hesitated to apply the maxim *lex non cogit ad impossibilia.*

This principle was laid down in the case of *Gamaethige vs. Siriwardena* [1988 1 SLR 384], where Justice Mark Fernando set out the general principle and held that, "*While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*.

If the facts and circumstances of an application make it clear that a Petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from that date on which he should have become aware of the alleged infringement:

In *Illangaratne vs. Kandy Municipal Council,* Kulatunga J held that; *"…..it would not suffice for the petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge."*.

His Lordship justice Prasanna Jayawardena P.C in the case of *Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake,(supra)*, referred to the burden caste on the Petitioner, when an application is filed out of the stipulated period referred to in Article 126(2) of the Constitution and stated:

> *'Needless to say, a Petitioner who seeks an exemption from the time limit of one month stipulated in Article 126(2) of the Constitution by claiming unavoidable circumstances which prevented him from invoking the jurisdiction of this Court earlier, will have to satisfy the Court that, he should be granted that exemption. In this connection, Fernando J commented, in GAMAETHIGE vs. SIRIWARDENA [at p. 401], "… there is a heavy burden on a petitioner who seeks that indulgence". ….*

The learned ASG referred to another principle that has emerged from the decisions of this Court. That is the principle that, other than in limited circumstances, time spent by a Petitioner in making appeals or seeking other administrative or judicial relief would not, normally, be excluded when calculating the period of one month stipulated by Article 126(2) of the Constitution. Therefore, if, upon the occurrence of an infringement of his Fundamental Rights, an aggrieved person does not file an application invoking the jurisdiction of this Court under Article 126(1) of the Constitution but, instead, choses to pursue other avenues of seeking relief, the time he spends

perambulating those avenues will not, usually, be excluded when counting the one month he has to invoke the jurisdiction of this Court under Article 126(1).

In this regard, Fernando J in the case of *Gamaethige vs. Siriwardena* (supra) held that;

> *"If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point in time, the filing of an appeal or application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time limit."*.

In *Gamaethige* vs. *Siriwardena,* Fernando J referred to the principle and stated that:

> *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both the infringement and knowledge exist (Siriwardena vs. Rodrigo). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*'

In paragraph 10 of the Petition, the Petitioner has averred that "*it came to the Petitioner's domain that, in or around 31st August 2017, the purported Bill which had been subject to committee stage amendments in the manner above, had been enacted as law and has been published as a Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka.*"

Therefore, the fact that the impugned law had been duly enacted by Parliament with Committee Stage amendments appears to have been within the knowledge of the Petitioner by 31.08.2017. It was the contention of the learned ASG that, as per the averments contained in paragraph 26 of the Petition, the Petitioner, in an attempt to circumvent the provisions of Article 126(2), has claimed that he has filed an application in the Human Rights Commission on this matter on 22nd September 2017.

Section 13(1) Human Rights Commission of Sri Lanka Act, No.21 of 1996 reads as follows:

> *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."*

In terms of the aforesaid section, the period of one month in Article 126(2) will have no application where an inquiry is pending before the Human Rights

Commission on a complaint made to it. Thus, the relevant period will not be taken into account in computing the period of one month referred to in Article 126(2) of the Constitution.

In the instant case, the Petitioner has marked and produced the complaint he had made to the Human Rights Commission of Sri Lanka on 22.09.2017 (P6) and an acknowledgment made thereon by the Human Rights Commission of receipt of same. It was contended on behalf of the Respondent that although the date of the said application is within a period of one month from the relevant dates referred to hereinbefore, the complaint P6, is insufficient to establish that an inquiry into such application was pending before the Human Rights Commission during the intervening period. It was further contended that in terms of Article 126(2) of the Constitution read with section 13(1) of the Human Rights Commission Act, it is the period within which an inquiry is pending before the Human Rights Commission which is excluded from the computation of the mandatory period of one month.

The scope and application of section 13(1) of the Human Rights Commission Act and the mandatory time period specified in Article 126(2) of the Constitution has been considered in the case of *H.K. Subasinghe v. The Inspector General of Police and others*, SC (Spl) No.16 of 1999, SC Minutes of 11.09.2000.

His Lordship S.N. Silva C J observed as follows:

> *"The Petitioner seems to bring the complaint within the time limit on the basis that he made a complaint to the Human Rights Commission of Sri Lanka within the stipulated time. In this regard the petitioner relies on section 31 of the Human Rights Commission of Sri Lanka Act, No.21 of 1996 which provides that when a complaint has been made within one month to the Human Rights Commission, the*

period within which the inquiry into such complaint was pending will not be taken into account in computing the period within which an application should be filed in this Court.

The petitioner has failed to adduce any evidence that there has been an inquiry pending before the Human Rights Commission. In the circumstances, we have upheld the preliminary objection by learned State Counsel."

The same issue was considered in the case of *Divalage Upalika Ranaweera and others v. Sub Inspector Vinisias and others*, [SC (F/R) Application No.654/2003], S.C Minutes of 13.05.2008. In the said case, His Lordship Amaratunga J. observed as follows:

"The second preliminary objection is that the petitioners' application has been filed out of time. The acts resulting in the alleged infringement of the petitioners' fundamental rights had taken place on 23.09.2003. The petition has been filed in this Court on 5.12.2003, after the expiry of the time limit of one month prescribed by Article 126 for filing an application for relief to be obtained under that Article.

In their petition the petitioners have stated that they had made a complaint to the Human Rights Commission on 22.10.2003, which is within one month from the date of the acts resulting in the alleged violation of the petitioners' fundamental rights. The petitioners have produced the receipt dated 22.10.2003, issued by the Human Rights Commission acknowledging the receipt of their complaint.

The time limit of one month prescribed by Article 126 of the Constitution for filing an application for the alleged violation of fundamental rights is mandatory…

In the written submissions tendered in answer to the learned State Counsel's preliminary objections, the petitioners have sought to invoke the aid of section 13(1) of the Human Rights Commission Act No.21 of 1996 to circumvent the time bar set out in article 126 of the Constitution."

Justice Amaratunga, having considered the provisions of section 13(1) of the Human Rights Commission Act, went on to hold that:

"It is very clear from the section quoted above that ***the mere act of making a complaint to the Human Rights Commission is not sufficient*** *to suspend the running of time relating to the time limit of one month prescribed by Article 126(2) of the Constitution. In terms of the said section 13(1),* ***the period of time to be excluded*** *in computing the period of one month prescribed by Article 126(2) of the Constitution is* ***'the period within which the inquiry into such complaint is pending before the Commission*** *……*

…Thus the Human Rights Commission is not legally obliged to hold an investigation into every complaint received by it regarding the alleged violation of a fundamental right. Therefore a party seeking to utilize section 13(1) of the Human Rights Commission Act to contend that 'the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an

application may be made to the Supreme Court' is ***obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission.***

…

In view of the failure of the petitioners to place any material before this Court to show that an inquiry into their complaint has been held by the Human Rights Commission or that an inquiry is still pending, I hold that the petitioners are not entitled to rely on section 13(1) of the Human Rights Commission Act to seek an exception from the time limit set out in Article 126(2) of the Constitution." (emphasis added)

His Lordship Justice Amaratunga considered the scope of section 13(1) of the Human Rights Commission Act in the case of *Kariyawasam v. Southern Provincial Road Development Authority* and 8 others (2007 2 S.L.R. 33). Having noted that there was evidence that an inquiry was pending before the Human Rights Commission relating to the matters urged before court, held therefore, that the Petitioner was entitled to the benefit conferred by that section.

The cases referred to above have been cited with approval in by her Ladyship Justice Wanasundera PC in the case of Alagaratnam *Manorajan v. Hon. G.A. Chandrasiri, Governor, Northern Province* in [SC Application No.261/2013 (F/R)], decided on 11.09.2014. Wanasundera J. held as follows:

"I am of the opinion that Section 13 of the Human Rights Commission Act No.31 of 1996 should not be interpreted and/or used as a rule to suspend the one month's time limit contemplated by Article 126(2) of the Constitution…The provisions of an ordinary Act of Parliament should not be allowed to be used to circumvent the provisions in the Constitution."

What needs to be considered in the instant Application is whether the Petitioner has made a complaint to the Human Rights Commission to circumvent the time limit imposed by Article 126(2) of the Constitution in view of the fact that, the averments in paragraph 10 of the Petition, demonstrates that the Petitioner was well aware of the impugned acts of the Respondents by 31.08.2017.

The document marked and produced as P3, the General Secretary of the Trade Union in his letter dated 20.09.2017 (of which the Petitioner is the President) refers to an Executive Committee meeting (of the Trade Union) held on 31.08.2017 at which the Petitioner had been authorized to file a case in the Supreme Court with regard to the grievances that had arisen as a result of enacting the Local Authorities Elections (Amendment) Act, No.16 of 2017, which had been passed by the Parliament on 25.08.2017. It was contended on behalf of the Respondents that the Petitioner, therefore, was aware of the impugned Act as far back as 31.08.2017 and had been mandated by the Trade Union to prosecute the matter before the Supreme Court.

The Learned ASG argued that on the face of the documents produced marked P6, the Petitioner appears to have made a complaint to the Human Rights Commission solely for the collateral purposes of circumventing the time limit prescribed in Article 126(2). In fact, the endorsement at the top of the complaint, said to have been made by the Human Rights Commission, states that it has been accepted as it is required for the purpose of filing a fundamental rights application before the Supreme Court:

> "ගරු ශ්‍රේෂ්ඨාධිකරණයේ මූලික අයිතිවාසිකම් පෙත්සමක් ගොනු කිරීමේ අවශ්‍යතාවය මත භාරගන්නා ලදි."

The learned Presidents' Counsel for the Petitioner argued that the above endorsement is not the writing of the Petitioner and he cannot be held

responsible for an endorsement made by an official of the Human Rights Commission. Even if it may be so, it would be reasonable to conclude that the official of the Commission had placed the endorsement based on the knowledge gathered from the Petitioner or else there cannot be a reason for him to have placed that endorsement on the printed format (provided by the Commission) that was used by the Petitioner to lodge his complaint to the Human Rights Commission.

The Petitioner himself has relied on this document to circumvent the period of limitation in Article 126(2) and had written in his own handwriting in two places that he intends to go before the Supreme Court in the future:

,ඉදිරියේදී ශ්‍රේෂ්ඨාධිකරණයේ මූලික අයිතිවාසිකම් "ඉදිරියේ ශ්‍රේෂ්ඨාධිකරණයට යාමට කටයුතු කරමි. (*Vide* the responses to the cages 8 and 11 of the Complaint to the Human Rights Commission).

Therefore, it is clear that the Petitioner had not filed the said application with the intention of pursuing it before the Human Rights Commission in seeking redress but only to obtain an advantage by bringing the application within the provisions of Article 126(2).

Cage 10 of the format used to lodge the complaint to the Human Rights Commission, requires a complainant to state the evidence he expects to place in order to substantiate his claim. The petitioner's response was , "will be furnished in the future". ("ඉදිරියේදී ඉදිරපත් කරමිනී).

The learned ASG contended that, when the foregoing facts are considered, the intention on the part of the Petitioner to circumvent the provisions of Article 126(2) is manifest.

As referred to earlier, the time limit of one month prescribed by Article 126 of the Constitution to invoke the fundamental rights jurisdiction for an alleged violation is mandatory. In a fit case, however, an application made outside the time limit of one month stipulated in Article 126 could be entertained where the

delay had resulted due to a reason or reasons as the case may be that are beyond the control of the Petitioner or where the court is satisfied that the circumstances prevailed at the time relevant, it would have been impossible for the Petitioner to have invoked the jurisdiction within 30 days and to be more precise where the Principle *lex non cogit ad impossibllia* would be applicable.

In the instant case the Petitioner is not relying on any such disability and the exception of time bar is sought on the basis that a complaint had been made to the Human Rights Commission within one month of the alleged infringement in terms of Section 14 of the Human Rights Act.

It is clear from the provision of the Act referred to above, that a mere act of making a complaint to the Human Rights Commission is not sufficient to suspend the running of time prescribed by Article 126(2) of the Constitution.

As held by this court, both in the case of *Subasinghe vs. the Inspector General of Police* - SC Special 16/99 S.C minutes of 11.09.2000 and the case of *Divalage Upalika Ranaweera and others vs. Sub Inspector Vinisias and others* – S.C. Application 654/2003 S.C minutes of 13.05.2008, a party seeking to utilize Section 13(1)of the Human Rights Commission Act to contend that "the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court" is obliged to place material before this court to show that an inquiry into his complaint is pending before the Human Rights Commission.

It is, however, evident from what had been stated by the Petitioner in his complaint to the Human Rights Commission, which I have referred to above, his desire had been to invoke the jurisdiction of this court and not to have an inquiry conducted by the Human Rights Commission.

In the above circumstances, I uphold the preliminary objection on time bar raised on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents and dismiss the Application of the Petitioner *in limine*.

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

1. W.A.P. Mudunkotuwa, No. 53/H/12, Police Flats, P.F.F.H.Q., Colombo 05.

And 189 Others.

Petitioners

SC FR 364 /2015 **Vs**

1. S. Dadallage, Secretary, Ministry of Public Administration, Provincial Councils, Government and Democratic Governance.

And 13 Others

Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
H. N. J. PERERA J. &
PRASANNA JAYAWARDENA PCJ.

COUNSEL : J. C. Weliamuna PC with Senura Abeywardena for the Petitioners.
S. Rajaratnam PC, SASG, for the Respondents.

ARGUED ON : 09.08.2018.

DECIDED ON : 22.10.2018.

S. EVA WANASUNDERA PCJ

This Court granted leave to proceed for the alleged violation under Article 12(1) of the Constitution on 03.02.2017 when the Counsel for the Petitioners who are one hundred and ninety in number, supported the Fundamental Rights Application filed against the members of the Public Service Commission, the Inspector General of Police, two senior superintendents of police, the Attorney General and the Secretary to the Ministry of Public Administration.

The 1st to 163rd Petitioners are officers and constables of the Sri Lanka Police. 164th Petitioner is a Reserve Woman Police Constable for the Cultural Troop of the Police, 165th to 169th Petitioners are Reserve Women Police Constables, 169th to 189th Petitioners are Police Constables who are on secondment to the Police Western Band (Western) of the Police and the 190th Petitioner is a Reserve Police Constable who was absorbed to the regular force as a Police Constable who was seconded to the Police Band.

All of the said Petitioners state that they **impugn the decisions contained in documents marked P7 and P8** issued by the Secretary to the Ministry of Public Administration , the **1st Respondent** and the Senior Superintendent of Police (Personnel) , Human Resource Development, the **12th Respondent**.

By the Document P6 dated 12.03.2015, the Inspector General of Police at that time had sought from all the Police Officers in the 'support services' to indicate details of their identity in accordance with the Annexure to P6. In the annexure to P6, there are 127 categories of the personnel working in the Police Department and the name given under 'the position held' and the 'name of the office' explaining the category they belong to. For example, under serial number 12, there are three positions, i.e. Senior Superintendent of Police, Superintendent of Police, and Assistant Superintendent of Police as the positions held and the 'name of office' is written under the category of "Western Band". Amongst other support services, similarly there would be SSP – Medical Officers , ASP - Engineers, SP - Architects,

etc. The 'Western Band' personnel were included as a 'Support Service'. The 'Eastern Band' was also named as one category in the support services even though they are allegedly , selected on a different basis and do not perform police functions. The Petitioners are **only those belonging to the 'Western Band'**.

P7 is an internal communication which does not make any difference between the 'Western Band' and the 'Eastern Band' and instead of naming them separately, there was only one category under the name 'Positions in the Bands'. In paragraph 3 of P7, the Director of Human Resources of the Police had **recommended** that the officers in the said Bands be considered as normal Police Officers.

The personnel in the other categories under the Support Services are functionally different and they do not enjoy police powers, as against the officers in the Western Band. The identity cards issued to the officers in the **Western Band** read thus:
" This is to certify that the holder of this identity card is a **duly appointed Police Officer** who is empowered to utilize same in the exercise of the legitimate duties entrusted to him/her." The identity cards issued to the other Support Services Officers read thus: " This is to certify that the holder of this identity card is **an officer attached to the Support Service Cadre of the Police Department who is not empowered to exercise normal Police Duties."**

It is obvious that , **on the face of the badges** , if an officer is categorized as an officer of the Support Service Cadre , then he/she is not empowered like a normal Police Officer to exercise normal Police duties but the Western Band officers are empowered as duly appointed Police Officers.

The Police Support Service was created by Sri Lanka Police Gazette No. 1565 dated 03.09.2008 Part II under 'Notifications'. That Gazette is marked and produced by the Petitioners as P1(f).

The officers of the Police Western Band consist of two categories of persons;

1. Those who firstly joined as normal police officers and then transferred to the Western Band.
2. Those who were recruited from time to time under recruitments advertised in the government gazettes, No. 337 dated 15.02.1985, No. 778 dated 30.07.1993, No, 979 dated 06.06.1997 and No. 1103 dated 22.10.1999.

These gazettes have been marked as P1(a) , P1(b), P1(c) and P1(d) by the Petitioners. They had to possess ordinary qualifications to be ordinary police officers **together with specific qualifications** required to be in the Western Band. They are persons who had to undergo normal training for the newly recruited police officers.

I observe that they were in a position to be made use of as ordinary policemen whenever exigency arises**.**

The Petitioners state that the Police Support Services were first introduced by P1(f) through a Police Gazette referred to above in the year 2008. They have different uniforms and shoulder badges. The Police Officers in the Western Band do not seem to have come under those units because they have been allowed to be ordinary Police Officers.

The Petitioners further argued that , even though they were categorized as Police Support Services, they were **never recognized as Support Service** Police Officers but as **ordinary Police Officers for promotions**. The position that the Petitioners have taken up in their submissions is mainly that when they are categorized as officers under the Support Services, they would not be entitled to and would not be considered for promotions under the normal promotion scheme for the normal ordinary police officers. In summary, the Petitioners really **want to be considered for promotions under the ordinary police officers' scheme. The Petitioners do not want to be categorized as Support Service Officers.**

Furthermore, the Petitioners claim that they have undergone training as ordinary police officers such as fire arm training, riot control and maintenance of law and order and in addition to that, the Respondents had in their pleadings conceded that, they have even the power to arrest. The Petitioners believe that when they are categorized as Support Service Officers, the standing or status they bear at the moment would be lowered down in the eyes of the public as well as by themselves. At the same time, they submit that the police officers who were transferred from other divisions to the Western Band are able to take part in the rounds of promotions as ordinary police officers , as have been illustrated by X5(a) and X5(b).

The Counsel for the **Respondents have submitted** that it is as far back as in 2008 that the officers who were recruited for professional services in the Police

Department were classified into four categories **as Police Medical Services, Police Engineering Services, Police Support Services and Police Special Services.** They were so classified and incorporated into the permanent cadre by the IGP Circular number 2070/2008 dated 27.06.2008. According to this Circular, under classification 4 , the **Police Support Services** details are mentioned. The number of officers under that classification were 455 in number and the names of the 'occupations' as such are named under 'computer engineers', 'hotel managers', 'gardeners' etc. and among those, is the occupation under ' cultural'. **The Western Band officers come under that category named as "cultural".**

This circular was revised by Circular No. 2070/2008(I) on 02.09.2008 in which some occupations classified under Support Services were re classified as Regular Services due to the fact that they had undergone special trainings. Yet, the officers of the Western Band were not revised to be as officers of the Regular Service. Then the said Circular with the revisions done was published in the Sri Lanka Police Gazette Notification No. 1565 dated 03.09.2008 incorporating all the amendments . This is the same document marked by the Petitioners as P1(f).

I observe that even though the Petitioners are complaining of this classification of 'Western Band' as part of the Police Support Services in the year 2015, it is something which had occurred in the year 2008. The Police Band had been there from the year 1906 and according to the Ceylon Police Gazette No. 5917 dated 09.08.1967, the police officers attached to the Police Band were to be treated as being engaged in specialized duties for the purpose of promotions and other administrative matters. It is my observation and understanding that they have right along been recognized as a 'different category' and not as regular police officers.

By document P7, the Senior Superintendent of Police, the Director/Personnel of the Human Resources Development Section has informed the Deputy Inspector General, Police Field Services Force Headquarters that the Secretary, **Ministry of Public Administration**, Provincial Councils and Local Government **has formulated Schemes of Recruitment and Promotions** for the **Support Services of the Police Department** in accordance with **Public Administration Circular No. 06/2006.**

In paragraph 3 of the Document P8 it is revealed that there were **discussion**s between the Officers of the **Police Department** and the Officers of **the Public Administration** at the Department of Management Services **on 21.01.2015. P8**

states further that, after having considered the matters agreed upon between the parties, the Secretary to the Ministry of Public Administration is agreeable to the positions indicated in the Annexure 1 which spells out the official names and positions of the 7565 officers of the Support Services. Annexure 1 indicates the salary scale and the step in the salary scale for each official position. The Western Band Officers are also included therein.

Having analyzed the contents of **P7 and P8**, I find that the Western Band Police Officers being under Support Services are **now on a very good footing with regard to the salary scales as well as their promotions.** There does not seem to be any good reason why they **do not want** to be within the **Support Services** of the Police but **want to be within the ordinary police officers** because there **already exists an SOR with regular promotions for the officers in the Support Services.**

The latest Recruitment Scheme for Police Constables – Western Band dated 20.02.2018 expressly states that the officers would be recruited under the Police Support Services.

The badge for the Support Services on the face of it , does not empower the Support Services Personnel to act as ordinary police officers. I do not find that alone to be putting them down in status. As long as these particular officers are allowed to wear the official clothes, a normal person would not, in my opinion , categorize them as some officers with any status below that of ordinary police officers. They have always been referred to as **ancillary** to the Regular Service of the Police Force.

I do not find any specific reason to decide that the Petitioners truly belong to the regular police service and not to the Police Support Service. The Petitioners are not entitled to any of the reliefs prayed for by the Petitioners in the Petition filed before this Court. Even though leave to proceed was granted for the violation of Article 12(1) of the Constitution, I do not find that the fundamental rights under the said Article 12(1) has been infringed by any of the Respondents at any time.

The Application of the Petitioners is dismissed. However I order no costs.

Judge of the Supreme Court

H.N.J. Perera Chief Justice.
I agree.

Chief Justice

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 under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. (FR) Application No. 384/2016

Upali Sarath Kumara,
Pothuwewa,
Maddegama,
Wellawa.

PETITIONER

-Vs-

1. S.A. Anura Sathurusinghe,
   Conservator General of Forests,
   Forest Department,
   " Sampathpaya"
   No.3,
   Battaramulla.

2. M.L. Abdul Majeed,
   Conservator of Forests
   (Planning and Monitoring)
   (formerly Protection and Law
   Enforcement),
   Forest Department,
   "Sampathpaya",
   No.3,
   Battaramulla.

3. Nimal Rathnaweera,
   Special Forester (Protection and Law
   Enforcement),
   Forest Department,
   "Sampathpaya",
   No.3, Battaramulla.

4. P.A.G.S. Nandakumara,
   Conservator of Forests
   (Protection and Law Enforcement)
   Forest Department,
   "Sampathpaya"
   No.3, Battaramulla.

5. R.S. Kulatunga,
   Additional Conservator General of Forests,
   (Forest Protection, Operations &
   Management),

Forest Department,
"Sampathpaya",
No.3, Battaramulla.

6. L.A.D. Geetha Indrani,
Additional Conservator
General of Forests
(Human Resource Management,
Administration & Institutional
Development),
Forest Department,
"Sampathpaya",
No.3,
Battaramulla.

7. Udaya R. Seneviratne,
Secretary,
Ministry of Mahaweli Development and
Environment,
No.82, "Sampathpaya",
Rajamalwatte Road,
Battaramulla.

8. A.H.L.D. Gamini Wijesinghe,
Director (Education Training and
Research),
Ministry of Mahaweli Development,
and Environment,
No.82,

"Sampathpaya",
Rajamalwatte Road,
Battaramulla.

9. Dharmasena Dissanayake,
Chairman,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo-05.

10. A. Salam Abdul Waid,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo- 05.

11. D. Shirantha Wijayatilaka,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo-05.

12. Prathap Ramanujam,
    Member,
    Public Service Commission,
    No.177,
    Nawala Road
    Narahenpita,
    Colombo -05.

13. V. Jegarasasingam,
    Member,
    Public Service Commission,
    No.177,
    Nawala Road,
    Narahenpita, Colombo-05.

14. Santi Nihal Seneviratne,
    Member,
    Public Service Commission,
    No.177,
    Nawala Road,
    Narahenpita, Colombo-05

15. S. Ranugge,
    Member,
    Public Service Commission,
    No.177,
    Nawala Road,
    Narahenpita, Colombo-05

16. D.L. Mendis,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05

17. Sarath Jayathilaka,
Member,
Public Service Commission,
No.177,
Nawala Road,
Narahenpita, Colombo-05.

18. Nayanamala Ranasinghe,
Director,
Sri Lanka Scientific Service/
Technological Service/Architectural
Service,
Ministry of Public Administration and
Management,
Independence Square,
Colombo-07.

19. Jagath Dias,
Director General of Pensions,

Maligawatte Secretariat,
Maligawatta,
Colombo-10.

20. M.L. Abdul Majeed,
72/10,
Sri Sangaraja Mawatha,
Colombo-10.

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

RESPONDENTS

Before : Sisira J de Abrew J
Vijith Malalgoda PC J
Murdu Fernando PC J

Counsel : Neranjan de Silva with Kalhara Gunawardena for the Petitioner
S Barrie SSC for the Respondents

Argued on : 28.5.2018

Decided on : 03.12.2018

Sisira J De Abrew J

The Petitioner in his petition filed in this court complains that his fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the Constitution have been violated by the Respondents. This Court by its order dated 24.1.2017, granted

leave to proceed for alleged violation of Article 12(1) of the Constitution. The Petitioner joined the Forest Department on 10.10.1980. He was later promoted as Range Forest Officer and Assistant Divisional Forest Officer. The 2nd Respondent, the Conservator of Forest by latter dated 16.12.2014 marked P6 called for explanations from the Petitioner on certain misconduct/irregularities alleged to have been committed by the Petitioner. Later the 1st Respondent (Conservator General of Forest) appointed an inquiring officer to conduct an inquiry. The Petitioner by letter dated 16.12.2015 marked P22 informed the 1st Respondent that he would retire on 6.2.2016 as he would be reaching sixty years on 6.2.2016. The Petitioner by the said letter, requested the 1st Respondent to take steps to pay his pension. The 1st Respondent (Conservator General of Forest) by letter dated 11.2.2016 marked P26 approved the retirement of the Petitioner under Section 12:2 of the Minutes on Pensions. The Petitioner retired on 6.2.2016 after 35 years of service. **It has to be noted here that the inquiry against the Petitioner had not been concluded on the day of his retirement.** The Petitioner filed this case on 25.10.2016. The inquiry against the Petitioner had not been concluded even on 25.10.2016. The Petitioner complains that he has so far not got his pension and his fundamental rights guaranteed by the Constitution have been violated by the Respondents. This court by its order dated 24.1.2017 granted leave to proceed for the alleged violation of the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. At this stage it is necessary to consider Section 12(2) of the Minutes on Pensions. It reads as follows.

"When any inquiry pending at the time of retirement of an officer from the public service, and concluded after such retirement, discloses any negligence, irregularity or misconduct on his part during his period of service, and if the explanation tendered by him in respect of the findings of such inquiry is

considered to be unsatisfactory by the competent authority or if no explanation is tendered by him in respect of those findings, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer under these Minutes."

The pension of the Petitioner has now been suspended. As I pointed earlier the 1nquiry against the Petitioner had not been concluded on the day of the retirement of the Petitioner. Can the Petitioner's pension be withheld or reduced under Section 12(2) of the Minutes on Pensions when the inquiry against him had not been concluded on the day of his retirement? When I consider Section 12(2) of the Minutes on Pensions, I hold the view that in order to withhold or reduce pension of an officer/employee of the Public Service under Section 12(2) of the Minutes on Pensions, the inquiry against the said officer/employee should come to an end. If the inquiry against the officer/employee of the Public Service has not been concluded on the day of the retirement, his pension cannot be withheld or reduced in terms of Section 12(2) of the Minutes on Pensions. Learned SSC cited Section 178 of the Public Service Commission Rules Published in Government Gazette No 1589/30 dated 20.2.2009 which reads as follows:-

> "178. An officer may be in service till 57 years of age without annual extensions of service. However, if a public officer intends to retire from the public service on completion of 55 years of age or thereafter, or on reaching the compulsory age of retirement he shall forward such request for retirement formally in writing to the Appointing Authority at least six months before the date he intends to retire. Provided however
>
> (i) Where disciplinary proceedings are pending against the officer or such disciplinary proceedings are contemplated the retirement of the officer shall be made subject to

Section 12 of the Minutes on Pensions. It shall be the duty of the Head of the Department and/or Head of Institution to bring such matters to the notice of the Appointing Authority when request for retirement of public officers are made.

(ii) Where the officer commits a misconduct warranting a disciplinary action against him after his retirement has been approved by the appointing authority, the order for retirement shall be converted from normal retirement to that of a retirement under Section 12 of the Minutes on Pensions by the Appointing Authority, when such misconduct is brought to the notice of the Appointing Authority before the effective date of retirement and shall serve or cause to be served a copy of the order on the officer concerned.

(iii) Where the Appointing Authority has granted a normal retirement to a public officer on the basis that no disciplinary proceedings are pending or contemplated and if such pending disciplinary proceedings or contemplated disciplinary action is brought to the notice of the Appointing Authority, after the normal retirement has been granted and before the effective date of retirement the Appointing Authority shall convert the normal retirement to that of a retirement under Section 12 of the Minutes on Pensions and shall serve or cause to be served a copy of the order on the officer concerned."

Learned Senior State Counsel contended that pension of the Petitioner could be suspended in terms of Section 12(1) of Minutes on Pensions. Section 12(1) of the Minutes on Pensions reads as follows.

"Where the explanation tendered by a public servant against whom, at the time of his retirement from public service, disciplinary proceedings were pending or contemplated in respect of his negligence, irregularity or misconduct, is considered to be unsatisfactory by the competent authority, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable or awarded to such public servant under these minutes."

An examination of Section12(1) of the Minutes on Pensions reveals that a pension of a public servant in terms 12(1) of Minutes on Pensions can be withheld or reduced only if the following factors are satisfied.

1. At the time of retirement of public servant from public service disciplinary proceedings were pending or contemplated in respect of negligence, irregularity or misconduct alleged to have been committed by him and
2. Where the explanation tendered by the public servant in respect of negligence, irregularity or misconduct alleged to have been committed by him is considered to be unsatisfactory by the competent authority.

After the above factors are fulfilled the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs can take a decision to either to withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer. However if this power has been delegated to an officer by the aforementioned Permanent Secretary, the said officer can take the decision. The above view is supported by the judicial decision in the case of Wilbert Godawela Vs Chandradasa and Others [1995] 2SLR 338 wherein His Lordship Justice Amarasinghe held as follows.

> *"A penson could in terms of Section 12 (1) be withheld or reduced only where*
> *(1) at the time of his retirement from the public service disciplinary proceedings were "pending or contemplated", and,*
> *(2) where the explanation tendered by the Public Servant concerned is considered to be unsatisfactory.*
> *In the matter before us there was no disciplinary proceedings pending at the time of retirement. Nor were such proceedings contemplated.*
> *It is only if an explanation tendered by the Public Servant concerned is unsatisfactory that his pension could be withheld or reduced."*

In the case of Peiris VS Wijesuriya Director of Irrigation and Others [1999] 1SLR 295 His Lordship Justice Amarasinghe observed the following facts.

> *"The petitioner who was a storekeeper in the Irrigation Department was interdicted on the detection of a shortage of goods. Before disciplinary proceedings commenced the petitioner reached the age of 55 years; whereupon he was retired subject to Rule 12 of the Minutes on Pensions. Thereafter a charge-sheet was served on the petitioner. The petitioner's explanation was rejected and he was paid a reduced commuted pension after deducting the value of the shortage. The petitioner urged that no disciplinary inquiry was held observing the time limits laid down by a circular issued by the Secretary, Ministry of Public Administration and that the retirement subject to Rule 12 (1) of Minutes on Pensions was illegal as disciplinary proceedings were not pending or contemplated at the time of his retirement as required by that Rule."*

His Lordship Justice Amarasinghe held as follows.

> *"The time limits laid down by the circular were directory and hence, the failure to observe them did not make the acts of the respondent invalid and though no disciplinary proceedings were pending at the time of the petitioner's retirement disciplinary proceedings were contemplated."*

The judicial decision in the above case has discussed a situation under Section 12(1) of the Minutes on Pensions. This judicial decision has no application to the present case as it (the present case) deals with a situation under Section 12(2) of the Minutes on Pensions.

It has to be noted here that no decision has been taken by the relevant officers to retire the Petitioner in terms of Section 12(1) of Minutes on Pensions. Therefore the above contention of the learned SSC does not arise for consideration. Section

178 of the Public Service Commission Rules does not support the contention of the learned SSC. At this stage I would like to consider the following question. Can the court consider an argument that although a decision has been taken to retire the Petitioner in terms Section 12(2) of the Minutes on Pensions, it is deemed to have been taken in terms Section 12(1) of the Minutes on Pensions. I now advert to this contention. Both sections contemplate an explanation tendered by the public servant. The explanation discussed in Section 12(1) of the Minutes on Pensions is the explanation tendered by the public servant **in respect of negligence, irregularity or misconduct** alleged to have been committed by him during his period of service. But the explanation discussed in Section 12(2) of the Minutes on Pensions is the explanation tendered by the public servant **in respect of the findings of the inquiry** conducted against him on charges relating to his negligence, irregularity or misconduct during his period of service. Section 12(2) contemplates a situation that arises after conclusion of the inquiry against the public servant. But in Section 12(1) of the Minutes on Pensions contemplates a situation where disciplinary proceedings were pending. Further I would like to concentrate on the following question. Is there a decision taken by the Competent Authority in terms of Section 12(1) of the Minutes on Pension to the effect that the explanation tendered by the Petitioner in respect of negligence, irregularity or misconduct alleged to have been committed by him is unsatisfactory? The answer is in the negative. When I consider the above matters, I hold the view that I cannot consider the above argument that is to say that although a decision has been taken to retire the Petitioner in terms Section 12(2) of the Minutes on Pensions, it is deemed to have been taken in terms Section 12(1) of the Minutes on Pensions.

In order to take a decision in terms Section 12(2) of the Minutes on Pensions, the following criteria must be satisfied.

1. Inquiry which was pending against public servant at the time of his retirement must come to an end.
2. The findings of the inquiry should disclose his negligence, irregularity or misconduct on his part during his period of service.
3. Explanation tendered by public servant in respect of the findings of the inquiry must be considered by the competent authority and there should be a decision by the competent authority to the effect that the said explanation is unsatisfactory. However if the public servant fails to tender an explanation this requirement (3^{rd} requirement) is not applicable.

After the above criteria are fulfilled, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs is required to take a decision either to withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer. However if this power has been legally delegated to an officer by the aforementioned Permanent Secretary, the said officer can take the decision. The Respondents have taken a decision to retire the Petitioner in terms Section 12(2) of the Minutes on Pensions without the above mentioned criteria being satisfied. When I consider all the above matters, I hold the view that the decision taken to retire the Petitioner under Section 12(2) of the Minutes on Pensions is wrong.

The Petitioner retired on 6.2.2016. For the last two years the Petitioner has not received any percentage of his pension. He has served the Forest Department for a period of 25 years.

When I consider all the above matters, I hold that the Petitioner's fundamental rights guaranteed under Article 12(1) of the Constitution have been violated when

the 1st Respondent decided to approve the retirement of the Petitioner in terms of Section 12(2) of the Minutes on Pensions. The Petitioner is entitled to receive his pension on the basis that he has retired on reaching the age of 60 years. For the above reasons, I direct the Respondents to pay the petitioner's pension from 6.2.2016 on the basis that he has retired on reaching the age of 60 years. I direct the Conservator General of Forests to take all necessary legal steps to implement this judgment within one month from the date of this Judgment. However this judgment does not preclude the Respondents from taking a decision under Section 12 (2) of the Minutes on Pensions after taking the necessary steps set out in the said section.

The petitioner is entitled to the costs of this case.

The Registrar of the Court is directed to send certified copies of this judgment to all the Respondents.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando 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 Sri Lanka

SC FR No. 859/2009

W.N.D. Gunasekara

378/10/B, Rathnarama Road,

Hokandara – North,

Hokandara.

Petitioner

-Vs-

1. Police Constable Chandana

(PC 25410)

Grandpass Police Station,

Grandpass

2. Anton Jayasinghe,

Police Transport Division,

Sub Garage,

Kundasale.

3. N.K.Illangakoon

Inspector General of Police

Police Headquarters,

Colombo 01

4. Hon. Attorney General

Attorney General's Department

Colombo 12

Respondents

Before : Hon. Priyasath Dep PC, CJ

Hon. S.E.Wanasundara PC, J and

Hon. Prasanna Jayawardena PC, J

Counsel : Sanjeewa Ranaweera for the Petitioner

Kamran Aziz for the 1st Respondent

Indunil Bandara for the 2nd Respondent

Malik Azeez SC for the 3rd & 4th Respondents

Argued on : 17th of January 2018

Decided on : 08.10.2018

Priyasath Dep PC, CJ

The Petitioner in this application has invoked the fundamental rights jurisdiction of this Court alleging that 1st and 2nd Respondents have violated his fundamental rights guaranteed by Article 11 of the Constitution. Leave to proceed was granted under Article 11 of the Constitution on 17.11.2009.

Version of the Petitioner

The Petitioner at the time relevant to this application was serving as an Instructor at the Automobile Engineering Training Institute (hereinafter referred to as the "Institute") of Orugodawatta on contract basis. On 25.06.2009 the Petitioner boarded a bus at Borella at or about 7.35 a.m to reach his work place which is located near the

Toyota Junction in Orugodawatta. Petitioner got off the bus around 7.50a.m and has tried to cross the road by walking on the pedestrian crossing at the said junction along with a group of people with the object of reaching the Institute located on the other side of the road. Petitioner avers that after he reached the island on the center of the road he waited for a while along with the said group of people for traffic to be cleared and thereafter crossed the road. At this point**,** Petitioner alleges that, 1st Respondent (PC 25410) who was directing the traffic at the said Toyota Junction rushed towards him and grabbed him by his shirt and shouted at him in an abusive language stating that he failed to comply with his directions. 1st Respondent has further dealt several blows to the Petitioner's head with his fist which has caused severe pain to the Petitioner. Despite Petitioner's repeated cries for help, 1st Respondent has continued to beat the Petitioner and has also lashed out at the Petitioner with his own umbrella until it has fallen apart.

In the course of the said assault by the 1st Respondent, Petitioner's shirt pocket was ripped off causing the ink pen which was kept inside the pocket to break apart and spill ink all over the Petitioner's shirt.

Thereafter the 1st Respondent has ordered the Petitioner to get into a red coloured three- wheeler. When the Petitioner failed to follow the said order, he was beaten again and was taken towards the middle of the road where the 2nd Respondent who was directing the traffic from the middle of the road joined him. Thereafter both Respondents have forced the Petitioner to get into a green coloured three-wheeler that was parked by the side of the road**.** However Petitioner refused to get into the three-wheeler. At this point the Petitioner has lost consciousness and several students and instructors of the Institute who have witnessed the incident had come to his help and have rescued him from the onslaught of the Respondents. The Petitioner who was taken to the Institute and thereafter was admitted to the National Hospital of Colombo. Petitioner has filed four affidavits from the Instructors and students of the said Institute who were at that time at the place of the incident to prove that the said incident took place as stated by him. Having received treatment from the National Hospital for the injuries sustained, on the following day was discharged from the hospital. Copies of Diagnosis Ticket, medical certificate, bed head ticket, treatment sheets and all medical reports have been filed as proof thereof.

The Petitioner has also lodged a complaint bearing No. 5/745698 with the Police Post at the hospital police, a copy of which he has been unable to obtain. By a letter dated 29.06.2009 marked P4 Petitioner has also written to the then Inspector General of Police requesting him to take necessary actions, however Petitioner has not received any reply to this date.

Thereafter, Petitioner has averred that he made a complaint to the Human Rights Commission (hereinafter referred to as the "HRC") alleging that the said attack by the Respondents amounted to a violation of his Fundamental Rights. By an Order dated 09.06.2010 this Court has directed the HRC to conclude the said inquiry (Inquiry no. HRC 3037/09) expeditiously and submit a report within three months and the same has been submitted to this court.

It is the contention of the Petitioner that his version of events is consistent with the medical evidence which was not challenged. As per the diagnosis ticket P3 (a) and the medical certificate P3 (b), history was given as 'assault to the head and chest by a policeman. Petitioner had complaint of ' faintishness +nausea +severe head ache+ chest pain+ contusion' He was under observation and he was given treatment accordingly. The Petitioner stated that the Respondents have not presented any evidence to controvert the aforementioned medical evidence or made any attempt to explain how the Petitioner has suffered from the said injuries. It is the contention of the Petitioner that Petitioner's version is consistent with the medical evidence produced.

During oral submissions, Counsel on behalf of the 1st Respondent argued that the affidavits P2 (a) to P2 (d) tendered by the Petitioner along with his petition were inconsistent with the Petitioner's version. The Petitioner whilst refuting the above submission submitted that the 1st Respondent could not pinpoint any material inconsistency between the said affidavits and the averments in the amended Petition. In response to 1st Respondent's contention that the said affidavits were not from independent witnesses as the said affidavits were given by the students and instructors of the Petitioner's work place, the Petitioner submits that the incident took place during the morning rush hour at the Toyota Junction and the people who witnessed this incident were people who were travelling to work. Petitioner became unconscious after the assault and was taken to the hospital. It is the contention of the Petitioner that in such circumstances he could not have ascertained the identity of the people who witnessed the incident except for those who were known to him. It is therefore practically impossible for him to obtain affidavits from people who were not from the Petitioner's work place. In support of his stance, Petitioner relies on Rul*e 44 (1) (c) of the Supreme Court Rules 1990* which requires a Petitioner to tender *in support of such petition such affidavits and documents as are available to him…"*

Therefore, Petitioner submitted that he complied with the Supreme Court Rules by tendering such affidavits and documents that are available to him.

Petitioner alleged that the aforesaid attack on him by the Respondents have caused severe physical and mental pain to the him. He has further averred that the cruel, inhuman and degrading treatment meted out to him by the Respondents amounted to a

violation of his fundamental rights guaranteed under Article 11 of the Constitution. Petitioner has cited the Article 11 of the Constitution which reads thus;

> "*No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*"

Petitioner submits that the medical evidence placed before the court establishes that an assault took place and that it caused severe physical and mental pain to the Petitioner. He stated that the said assault was carried out as a form of punishment for not complying with the directions of the 1st Respondent. Therefore, Petitioner submits that the assault complained of in this application clearly comes within the ambit of "torture" within the meaning of Article 11 of the Constitution.

Petitioner stated that he was humiliated as the said assault took place in public during morning rush hour whilst people were travelling to their work places including Petitioner's colleagues and students.

It is the contention of the Petitioner that the assault which was carried out on him in public clearly amounts to 'degrading treatment' within the meaning of Article 11".

Version of the 1st Respondent

The 1st Respondent in his statement of objections dated 22.01.2010 had stated that on 25.06.2009 he was on duty along with Police Constable 65190 G.L. Thilakeratne (who is not a Respondent) at the pedestrian crossing on Baseline Road, Orugodawatta near the Toyota Junction to direct the traffic between 7.00a.m to 8.30 a.m. He had been on the side where vehicles moved towards Colombo and Constable G.L. Thilakeratne on the opposite side of the road where vehicles moved out of Colombo. According to the 1st Respondent, at around 8.20 a.m Petitioner has crossed the road from the side where Constable G.L. Thilakeratne was on duty, signaling by hand to moving vehicles to stop and has walked towards the side where 1st Respondent was on duty. At that point 1st Respondent has told the Petitioner that he is not supposed to signal the moving vehicles to stop when a police officer is on duty to direct the traffic. The 1st Respondent states that thereafter Petitioner has started to reprimand the 1st Respondent by stating that he is delaying him further from reporting to work and has dragged him by his uniform to a side and has tried to walk away**.** Then the 1st Respondent has informed the Petitioner that his conduct amounted to obstructing the discharge of his official duties which is punishable in law and asked him to report to the police station. It was only at this point that the 1st Respondent was told that the Petitioner was a lecturer at the said Institute. Petitioner was allowed to go after a lecturer named K.W. Perera of the Institute came and gave an undertaking to produce

the Petitioner at the police station. The 1st Respondent has filed a certified copy of the notes made at the Police Station regarding the said incident, an affidavit by Constable G.L. Thilakaratne and an affidavit marked 1R3 by one of the motorists who witnessed the said incident as proof thereof.

1st Respondent submits that the Affidavit marked 1R3 is the only independent eye-witness evidence that has been presented to the Court. The said affidavit has been submitted by one Kulathunga Mudiyanselage Chandima in which he has affirmed that on 25.06.2009, the Petitioner abruptly crossed the road signaling the motorists to stop and that the affirmant barely managed to stop his motor bicycle and avoided injuring the Petitioner. He has then seen 1st Respondent and Petitioner speaking and that the Petitioner pushed the 1st Respondent aside and tried to walk away after which 1st Respondent has held the Petitioner's hand and had mentioned something to him. The affirmant has also stated he had not seen the 1st Respondent assaulting the Petitioner.

Petitioner on the other hand submitted that the affidavit marked 1R3 furnished by the 1st Respondent which is purported to be from an 'independent witness is false. The 1st Respondent has not provided any explanation as to how he ascertained the identity of the said motorcyclist. According to the Petitioner, the said motorcyclist does not say that he was known to the 1st Respondent nor does the 1st Respondent state in his statement of objection that he had any prior knowledge of the motorcyclist. The motorcyclist also did not have any interaction with the 1st Respondent/Petitioner or anyone else who were present at that time and has left the scene after witnessing the said incident. 1st Respondent has also not made any reference to the said motorcyclist in the other documents relied upon by him (i.e. 1R1 and 1R2)

1st Respondent in his Statement of Objections has specifically denied that he assaulted the Petitioner and has further averred that the affidavits marked P2(a) to P2(d) filed by the Petitioner are not from independent witnesses as they all belong to the said Institute and that the sequence of events set out in the affidavits are contradictory to the events set out in the Petition.

1st Respondent had submitted that there are several inconsistencies between the petition and the affidavits. In the Petition it is averred that the Petitioner was beaten with an umbrella and then forced to get into a red coloured three- wheeler whereas in the Affidavits it is stated that the Petitioner was taken to the other side of the road first and then beaten with the umbrella before being forced into a green coloured three-wheeler.

It is the contention of the 1st Respondent that when there are several contradictions and inconsistencies in the case presented by the Petitioner which cannot be reconciled, this court should reject the version given by the Petitioner.

1st Respondent further submitted that even the medical reports does not indicate the name of the 1st Respondent and that Petitioner has failed to establish that any assault took place and that there was a violation of Article 11 of the Constitution. Even if there was an assault 1st Respondent denies that it amounts to a violation of Article 11.

It is the contention of the 1st Respondent that the Petitioner committed a traffic offence by interfering with the duties of a police officer when he tried to push aside the 1st Respondent and walked away. It was submitted that in such circumstances 1st Respondent was entitled to take appropriate actions under the law against the Petitioner. 1st Respondent has cited Section 23(2) of the Criminal Procedure Code which reads thus;

> "*If such person forcibly resists the endeavor to arrest him or attempts to evade the arrest, the person making the arrest may use such means as are reasonably necessary to effect the arrest*"

1st Respondent has then cited the case of *Wijayasiriwardene Vs Kumara* 1989 (2) SLR 312 . In this case Mark Fernando J held that:

> *'the Police are not entitled to lay a finger on a person being arrested even if he be a harden criminal in the absence of attempts to resist or escape. However in the circumstances of the petitioner's attempt to go back to the sanctuary of the school premises the 1st Respondent dealt a blow on the face. While the use of some force was justified in the circumstances, , this was a quite excessive use of force"*
>
> *"The use of excessive force may well found in an action for damages in delict, but does not per se amount to cruel, inhuman or degrading treatment; that would depend on the persons and the circumstances. A degree of force which would be cruel in relation to a frail old lady would not necessarily be cruel in relation to a tough young man; force which would be degrading if used on a student inside a quiet orderly classroom, would not be so regarded if used in an atmosphere charged with tension and violence."*

In *Lucas Appuhamy Vs Matura and Others* 1994 (1) SLR 401 where the Petitioner offered resistance, and where 'minimum force' had to be used to bring the Petitioner under control it was deemed justified in the said circumstances.

1st Respondent has cited the case of *Subasinghe Mudiyanselage Kumarasinghe Vs Attorney General and Others,* SC Application No. 54/82 where it has been observed as follows;

"*The force that may be used under section 23(2) of the Code of Criminal Procedure Act to effect the arrest of a person who resists or evades arrest ought not therefore to be disproportionate to the purpose to be achieved. It may not be possible on the spur of the moment to determine what amount of force is proportionate for the purpose of effecting the arrest. Accordingly a police officer who exceeds this proportion without being vindictive or maliciously excessive cannot be said to violate the suspect's fundamental right guaranteed by Article 11*"

Therefore it is the contention of the 1st Respondent that even if force or excessive force was used by the 1st Respondent it does not amount to a violation of Article 11 and will only form basis for an action in delict.

1st Respondent alleged that the wrongful act of the Petitioner in the first instance which gave rise to the incident and that the tremendous pressure that was faced by him at the relevant time where he was directing traffic into Colombo at one of the most busiest road intersection in the country cannot be disregarded.

The Petitioner raises a question as to why action was not taken against the Petitioner in regard to allegation that the Petitioner did not comply with the directions given by 1st Respondent and crossed the road signaling the moving vehicles to stop and that the Petitioner tried to walk away by pulling the1st Respondent aside from his uniform.

If the 1st Respondent's position is correct, the Petitioner could have being charged under section 183 of the Penal Code for obstructing a public servant in the discharge of his functions and under section 323 of the Penal Code for voluntarily causing hurt to a public servant in the discharge of his duties.

At the inquiry held by the Human Rights Commission, the Ist Respondent had given an explanation.He stated that the head of the institute met the Officer in Charge of Grandpass Police, Chief Inspector Wickremasekera and settled the matter.Page 3 of the report of the Human Rights Commission dated 25.08.2010 states as follows:

''රාජකාරියට බාධාවක් සිදු කළේ නම් මෙම පුද්ගලයාව අත්අඩංගුවට නොගැනීමට හේතු විමසීමේදී **වගඋත්තරකරු පිළිතුරු ලබා දෙමින් ප්‍රකාශ කරන්නේ පැමිණිලිකරුගේ සේවා ස්ථානයේ ප්‍රධානියා පැමිණ ග්‍රෑන්ඩ්පාස් පොලිස් ස්ථානාධිපති ප්‍ර. පො.ප.සී. ඩබ්. වික්‍රමසේකර මහතා සමග සාකච්ඡා කර දෙපාර්ශවය සමථයකට එලඹුනු බවයි.** පැමිණිලිකරුට සිදු කල බව කියන පහරදීම සම්බන්ධයෙන් කරුණු විමසීමේදී වගඋත්තරකරු සඳහන් කරන්නේ ඔහු සඳහන් කරන ආකාරයෙන් පහරදීමක් තම විසින් සිදු නොකළ බවයි.''

Version of the 2nd Respondent

Petitioners Application is time Barred.

The 2nd Respondent at the stage of hearing took up the position that the application is time barred. The incident had taken place on 25-06-2009. The Complaint to the Human Rights Commission was made on 16-07.2009 within one month of the violation. The Fundamental Rights Application was filed on 4th November 2009.

The 1st Respondent Police Constable 25410 Chandana filed his statement of objections on 22.01.2010. 2nd Respondent was cited as Police Constable PC 62688 in the original Petition. In the amended petition filed on 13 December 2011, filed nearly two years after the original Petition his name Anton Jayasinghe was included as the 2nd Respondent for the first time. The Petitioner in the original Petition has stated that 'The Petitioner is not aware of the full names of the 1st and the 2nd Respondents and respectfully reserve his right to amend the caption to the Petition accordingly once their full names are ascertained'. The amended caption giving the name of the 2nd Respondent was filed on 13.12.2011.The 2nd Respondent filed his statement of objections on 24-09-2012.

The Petitioner submitted that 2nd Respondent's objection that this application is time barred is untenable for the reason that at the time this action was instituted, an inquiry was pending before the Human Rights Commission consequent to a complaint made by him on 16.07.2009 bearing No.3037/09. Therefore, the Petitioner submits that by virtue of Section 13(1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996, his application has been instituted within time. The submission made on behalf of the 2nd Respondent on 17.01.2018 when the case was argued before this court was that this application was time barred as the complaint to the Human Rights Commission was made only against the 1st Respondent. However Petitioner states that this was an argument put forward for the first time by the 2nd Respondent and that in his statement of objections he did not raise this objection.

The Petitioner has cited the following two cases in support of his position that the question of time bar is a threshold issue which should have been taken as a preliminary objection to the maintainability of the action.

In the case of *Lewla Thiththapajjalage Ilangaratne V Kandy Municipal Council and Others* 1995 BLR Vol VI Part 1 at p10 where Supreme Court has held that the question of time bar is a relevant matter to be considered when granting leave to proceed as if an application is out of time the Court has no jurisdiction to entertain it.

In *Romesh Cooray v Jayalath, Sub-Inspector of Police and Others* 2008 2 Sri L. R. 43 the question of time bar has been raised for the first time at the stage of argument and the statement of objection was completely silent on the said objection similar to the present case. Supreme Court having examined the Supreme Court Rules at page 51 held as follows:

"*Accordingly on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the Petitioner's objections are taken along with the objections/written submissions filed by the Respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the application could be heard without prejudice to any one's right. Therefore, as correctly pointed out by the Learned President's Counsel for the Petitioner, the earliest opportunity the 6th Respondent had of raising the aforementioned preliminary objection was at the time of filing of his objections and written submissions in terms of the Supreme Court Rules, 1990; as the objections and/or the written submissions should have contained any statement of fact and/or issue of law that the 6th Respondent intended to raise at the hearing"*)

I hold that the question of time bar should have been taken up as a preliminary objection at the time of filing objection or in the written submissions filed before the hearing .There is no merits in the objection raised by the 2nd Respondent and the objection overruled.

Involvement of the 2nd Respondent

2nd Respondent in his Statement of Objections dated 24.09.2012 has stated that he was not in any manner involved in the alleged incident described by the Petitioner in his amended Petition. According to him, at the time of the alleged incident he and other officers who accompanied him were near the Atomic Energy Authority and they have signed the relevant record book placed at the said Atomic Energy Authority at 7.50 a.m. 2nd Respondent has filed certified copies of the said entries marked 2R1 and two affidavits from two Police Constables who accompanied him at that time marked 2R2 and 2R3 respectively as proof thereof.

The affidavits marked 2R2 and 2R3 given by two police officers attached to the Grandpass police station stating that the 2nd Respondent was not on duty along with the 1st Respondent on 25.06.2009 but he was on duty with them near Atomic Energy Agency. The 1st Respondent in his objections stated that he was on duty along with a constable named G.L. Thilakeratne. The said Thilakeratne has given an affidavit marked 1R2 stating that he was on duty along with the 1st Respondent on 25.06.2009.

However the Petitioner submits that the 2nd Respondent's contention that he was not present when the incident took place is untenable given that the documents marked

2R1, 2R2 and 2R3 on which the 2nd respondent relies upon to prove his alibi suggests otherwise.

Petitioner states that 2R2 and 2R3 are non-descriptive affidavits. It is the submission of the Petitioner that the entries in 2R1 suggest that at the time of the incident in question the 2nd Respondent was patrolling in close proximity to the place of the incident.

It is the contention of the Petitioner that there are several discrepancies in the affidavit marked 2R1 submitted by the 2nd Respondents therefore it raises serious doubts about the authenticity of the entries made in the Information Book and that it gives the impression that 2R1 is a document specifically prepared for the purpose of this case.

2nd Respondent further stated that his name was not mentioned in the letter sent by the Petitioner to Inspector General of Police marked P4 and nor was he made a Respondent nor any allegation leveled against him in the complaint made by the Petitioner to the Human Rights Commission.

I have considered the totality of the material placed before this Court and I am of the view that there is a serious doubt regarding the presence and participation of the 2nd Respondent in the incident. He may have arrived at the scene after the incident and his regimental number was given by mistake as that of the 2nd Respondent and in the amended Petition filed after two years his name was added. It is probable that this is a case of mistaken identity. Further the allegations regarding his participation is vague. Therefore I hold that the 2nd Respondent is not guilty of violating Article 11 of the Constitution as alleged by the Petitioner.

Submissions on behalf of the 3rd Respondent (Inspector General of Police) and 4th Respondents(Attorney General)

Counsel for the 3rd and 4th Respondents have only made submissions in respect of the disciplinary action that has been taken against the 1st and 2nd Respondent.

3rd Respondent has submitted that the document marked P-04 was received by the 3rd Respondent and that a further complaint was received by the relevant Assistant Superintendent of Police who is the superior officer of the 1st Respondent. It has been submitted that consequent to the complaints a preliminary investigation has been conducted under the supervision of the Senior Superintendent of Police, Colombo North and accordingly the said Superintendent has recommended disciplinary action against the 1st Respondent in relation to the present fundamental rights application.

Further disciplinary action has been stayed until the decision of this court is pronounced.

Moreover it has also been submitted that no disciplinary action has been taken against the 2nd Respondent regarding these complaints. However disciplinary action has been taken against him for failing to mention about the present fundamental rights application in the application submitted by him for promotion which is a violation of a police department circular. The 1st Respondent is currently attached to the Pandarikulam police station in the Vavuniya division and the 2nd Respondent is currently attached to the Narahenpita Police Transport Division.

Conclusions and Findings:

In this case the main issue is whether the 1st Respondent subjected the Petitioner to torture or cruel, inhumane and degrading treatment and thereby violated Article 11 of the Constitution. However, I find that torture charge cannot be maintained. The main issue is whether the 1st Respondent subjected the Petitioner to cruel, inhumane and degrading treatment.

There are two different versions given by the Petitioner and the 1st Respondent. As regards to the proving of the allegations the burden is with the Petitioner. According to the Petitioner's version when he was crossing the road, without any provocation the 1st Respondent assaulted him repeatedly and dragged him and tried to put him into a three wheeler. However, due to the intervention of the staff members and students of the Institute he was allowed to go. It will be difficult to believe that without any provocation the 1st Respondent has assaulted the Petitioner. According to the Petitioner when crossing the road 1st Respondent was abusing the persons who were crossing the road. This being the rush hour where people are hastily rushing to the workplaces before the drawing of the redline. It is a common scene in our busy roads that during rush hour pedestrian crossing the road from various points. It is probable that the Petitioner with other pedestrians were crossing the road without waiting for the signals or directions of the police officer. There is no doubt there would have been a confrontation between the Petitioner and the 1st Respondent.

Even if the Petitioner crossed the road without obeying the directions of the 1st Respondent there is no justification in assaulting the Petitioner.

The 1st Respondent whilst denying the assault stated that even if he has used force on the Petitioner he had used minimum force to arrest the Petitioner for violating the law which he is entitled to use under section 23 of the Code of Criminal Procedure Act. He has cited several authorities.in *Wijayasiriwardene Vs Kumara* 1989 (2) SLR 312, *Lucas Appuhamy Vs Matura and Others 1994 (1) SLR Subasinghe Mudiyanselage Kumarasinghe Vs Attorney General and Others, SC Application No. 54/82*

Therefore, the 1st Respondent had submitted that he has not violated Article 11 of the Constitution.

On the other hand Petitioner states that the 1st Respondent abused and assaulted him. He had described the incident in the following manner. The 1st Respondent (PC 25410) grabbed him by his shirt and shouted at him in an abusive language stating that he failed to comply with his directions. 1st Respondent has further dealt several sharp blows to the Petitioner's head with his fist which has caused severe pain to the Petitioner. Despite Petitioner's repeated cries for help, 1st Respondent has continued to beat the Petitioner and has also lashed out at the Petitioner with his own umbrella until it has fallen apart.

There is no doubt that an assault could be a basis for a criminal prosecution or a civil action. The question is whether it amounts to a cruel, inhuman or degrading treatment or not. He had cited cited the case of *Subasinghe V Police Constable Sandun and Others* 1999 2 Sri L.R. 23 wherein the Petitioner in that case was taken handcuffed in a private vehicle to the Dankotuwa Junction by the Police and was made to walk with the handcuffs across the Dankotuwa junction. In that case Shirani A. Bandaranayake J has observed thus;

> "*the fact that the Petitioner was taken handcuffed in a private vehicle to the Dankotuwa town and 'exhibited' in the manner spoken to by the Petitioner in my view, is an affront to the Petitioner's dignity as a human being and amounts to "degrading treatment' within the meaning of Article 11*".

As there are two versions to this incident it is a difficult task to arrive at a decision. This was emphasised in Wijayasiriwardene v. Inspector of Police , Kandy & two others (supra)where the facts are somewhat similar.

"To decide whether the force used was in violation of Article 11 is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is". In that case it was held that the " case is on the right side of any reasonable line that could be drawn. The excessive force used does not amount to cruel, inhuman or degrading treatment".

I have considered the totality of evidence and I find that the Petitioner's version is supported by several witnesses and his complaint is prompt and consistent . He had made a complaint to the Police Post and also informed the Doctor that he was assaulted by the police. He followed up with a complaint to the Human Rights Commission, the Inspector General of Police and thereafter filed this Fundamental Rights Application. I find that 1st Respondent had subjected the Petitioner to degrading treatment and thus violated Article 11 of the Constitution .

I order the 1st Respondent to pay Rs. 50,000/- to the Petitioner as compensation .

Chief Justice.

S.E.Wanasundera P.C, J

I agree.

Judge of the Supreme Court

Prasanna Jayawardene P.C., J

I agree.

Judge of the Supreme Court