SRI LANKA SUPREME COURT **Judgements Delivered (2019)**

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Judgments Delivered in 2019

19/12/19	S.C. Appeal 73/2011	Kongahagedara Sumanawathie, Land No.114, Mahagama Colony, Sevenagala. Plaintiff -Vs- Siripala Subasinghe, No.23, Ela, Kurugamvatiya, Mahagama Colony, Sevanagala. Defendant AND Siripala Subasinghe, No.23, Ela, Kurugamvatiya, Mahagama Colony, Sevanagala. Defendant -Appellant -Vs- Kongahagedara Sumanawathie, Land No.114, Mahagama Colony, Sevenagala. Plaintiff-Respondent AND NOW BETWEEN Kongahagedara Sumanawathie, Land No.114, Mahagama Colony, Sevenagala. Plaintiff-Respondent-Appellant -Vs- Siripala Subasinghe, No.23, Ela, Kurugamvatiya, Mahagama Colony, Sevanagala. Defendant-Appellant-Respondent Hattasinghe Arachchige Kusumawathie, No.23, Ela, Kurugamvatiya, Mahagama Colony, Sevanagala. Substituted Defendant – Appellant - Respondent
18/12/19	S.C. Appeal No. 221/2012	R.M. Siriwardena of Ihalagama, Alahenegama. Plaintiff. Vs. Rathnayake Mudiyanselage Jayathilaka of Thalahenegama, Alahenegama. Defendant. AND BETWEEN IN THE COURT OF APPEAL. Rathnayake Mudiyanselage Jayathilaka of Thalahenegama, Alahenegama. Defendant – Appellant. Vs R.M. Siriwardena of Ihalagama, Alahenegame. Plaintiff- Respondent. AND NOW BETWEEN IN THE SUPREME COURT. Rathnayake Mudiyanselage Jayathilaka of Thalahenegama, Alahenegama. Defendant – Appellant – Petitioner. Vs. R.M. Siriwardena of Ihalagama, Alahenegama. Plaintiff – Respondent – Respondent.
18/12/19	SC APPEAL NO.106/2014	1. Mahagamage Chandramadu, Puwakdoola, Pnikahatha, Kahadawa. with 223 othersAPPLICANTS -VS- Paradigm Clothing [Private] Limited of No.107, Pallidora Road, Dehiwala. RESPONDENT AND BETWEEN, Paradigm Clothing [Private] Limited of No.107, Pallidora Road, Dehiwala. RESPONDENT-APPELLANT.Vs- 1. Mahagamage Chandramadu, Puwakdoola, Pnikahatha, Kahadawa. with 223 others APPLICANTS- RESPONDENTS. AND NOW BETWEEN, Paradigm Clothing [Private] Limited of No.107, Pallidora Road, Dehiwala. RESPONDENT-APPELLANT- APPELLANT -VS- 1. Mahagamage Chandramadu, Puwakdoola, Pnikahatha, Kahadawa. 2. K. Malini, Ellawatta, Gonadeniya, wth 223 others APPLICANTS-RESPONDENTS- RESPONDENTS.

18/12/19	SC Appeal No. 72/2012	SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREMA Lenagala, Weragala. PLAINTIFF 1. SUDU HAKURAGE HARAMANIS Koskande, Viyana Ovita, Deraniyagala. 2. SUDU HAKURAGE PUNCHI SINGHO Andahena, Lenagala, Weragala. 3. SUDU HAKURAGE JAYASEKERA Lenagala, Weragala. (deceased) 3A. VITHARAMALAGE LEELAWATHIE Lenagala, Weragala. 4. SUDU HAKURAGE NANDORIS (alias) NANDUWA Lenagala, Weragala. (deceased) 4A. SUDU HAKURAGE ALPENIS Lenagala, Weragala. 5. SUDU HAKURAGE JEELIS 6. SUDU HAKURAGE THEMIS 7. SUDU HAKURAGE PODINERIS 8. SUDU HAKURAGE GUNASENA 9. SUDU HAKURAGE JAYARATNE 10. SUDU HAKURAGE PODISINGHO (deceased) 10A. SUDU HAKURAGE SWARNALATHA 11. SUDU HAKURAGE SEDERIS 12. SUDU HAKURAGE ALPENIS 13. SUDU HAKURAGE ASILIN 14. SUDU HAKURAGE ARIYADASA 15. SUDU HAKURAGE RANASINGHE All of Lenagala, Weragala. DEFENDANTS AND BETWEEN 10A. SUDU HAKURAGE SWARNALATHA 14. SUDU HAKURAGE ARIYADASA 10A AND 14 DEFENDANT- APPELLANT-RESPONDENTS VS. SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREM A Lenagala, Weragala. PLAINTIFF-RESPONDENT 1. SUDU HAKURAGE HARAMANIS Koskande, Viyana Ovita, Deraniyagala. 2. SUDU HAKURAGE PUNCHI SINGHO Andahena, Lenagala, Weragala.. 3. SUDU HAKURAGE JAYASEKERA Lenagala, Weragala. (deceased) 3A. VITHARAMALAGE LEELAWATHIE Lenagala, Weragala. 4. SUDU HAKURAGE NANDORIS (alias) NANDUWA (deceased) Lenagala, Weragala. 4A. SUDU HAKURAGE ALPENIS Lenagala, Weragala 5. SUDU HAKURAGE JEELIS 6. SUDU HAKURAGE THEMIS 7. SUDU HAKURAGE PODINERIS 8. SUDU HAKURAGE GUNASENA 9. SUDU HAKURAGE JAYARATNE (deceased) 9A. PARANA MANNALAGE AMARA WIJESINGHE 9B. SUDUSINGHE HEWAWITHARANALAGE CHAMIKA CHATHURANGA JAYARATNE 10.SUDU HAKURAGE SEDERIS (deceased) 11.SUDU HAKURAGE ALPENIS 12.SUDU HAKURAGE ASILIN 13.SUDU HAKURAGE RANASINGHE DEFENDANT-RESPONDENTS AND NOW BETWEEN 9A. PARANA MANNALAGE AMARA WIJESINGHE 9B. SUDUSINGHE HEWAWITHARANALAGE CHAMIKA CHATHURANGA JAYARATNE Both of Lenagala, Weragala. 9A AND 9B DEFENDANTS-RESPONDENTS- PETITIONERS VS. 10A. SUDU HAKURAGE SWARNALATHA 14. SUDU HAKURAGE ARIYADASA 10A AND 14 DEFENDANTS- APPELLANTS-RESPONDENTS SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREMA (deceased) Lenagala, Weragala. PLAINTIFF-RESPONDENT-RESPONDENT 1A. WEERASURIYA AMARAWANSAGE JAYANTHAA JAYAWATHI 1B. THAMARA KUMARI ABEYWICKRAMA 1C. AJITH DHAMMIKA ABEYWICKRAMA 1D. NAYANA KUMARI ABEYWICKRAMA SUBSTITUTED PLAINTIFFS-RESPONDENTS-RESPONDENTS 1. SUDU HAKURAGE HARAMANIS Koskande, Viyana Ovita, Deraniyagala. (deceased) 1A. SUDU HAKURAGE GUNAWARDHANE R13, Veediyawatte, Viyana Owita, Deraniyagala. 2. SUDU HAKURAGE PUNCHI SINGHO (deceased) Andahena, Lenagala, Weragala. 2A. WINSON SENEVIRATNE Pahala Lenagala, Weragala. 3. SUDU HAKURAGE JAYASEKERA Lenagala, Weragala

17/ 12/ 19	Case No: SC FR 75/2012	Ratnayaka Weerakoonge Sandya Kumari, No: 4, Main Street, Meegahatenna. Petitioner Vs- 1) Mr. Lakshitha Weerasinghe, Sub Inspector of Police, Police Station Meegahatenna. 2) Mr. Shanthalal (3534) Sergeant, Police Station Meegahatenna. 3) Mr. Himala Rajapakse, Officer-In-Charge, Police Station Meegahatenna. 4) Mr. Lalith Pathinayake, Senior Superintendent of Police, SSP office, Nagoda, Kalutara. 5) Mr. N.K.Illangakoon, Inspector General of Police, Police Head Quarters, Colombo 1. 5A) Mr. Pujith Jayasundara, Inspector General of Police, Police Head Quarters, Colombo 01. 6) Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
17/ 12/ 19	SC Appeal 134/2019	The Democratic Socialist Republic of Sri Lanka Complainant Vs. Ranathunga Arachchilage Ranjith Chandrathilake No. 13, Wijaya Mawatha, Veyangoda. Accused NOW BETWEEN Ranathunga Arachchilage Ranjith Chandrathilake No. 13, Wijaya Mawatha, Veyangoda. Accused –Appellant Vs. The Attorney General Attorney General's Department Colombo 12 Complainant- Respondent AND NOW BETWEEN Ranathunga Arachchilage Ranjith Chandrathilake No. 13, Wijaya Mawatha, Veyangoda. Accused –Appellant- Petitioner Vs. The Attorney General Attorney General's Department Colombo 12 Complainant- Respondent- Respondent
16/ 12/ 19	SC/ FR Application 577/2010	Rathnayake Tharanga Lakmali 272/ A, Yapa 05, Moraketiya, Embilipitiya. (In respect of the infringement of the fundamental rights of her husband Ranamukage Ajith Prasanna who is now deceased) PETITIONER Vs. 1. Niroshan Abeykoon Inspector of Police Officer-in-Charge Crime Branch Embilipitiya Police Station Embilipitiya. 2. Suraweera Arachchige Wasantha Suraweera, Police Sergeant 32215 Embilipitiya Police Station Embilipitiya. 3. Police Constable 41953 Hewa Sangappulige Chaminda Embilipitiya Police Station Embilipitiya. 4. Police Constable 20527 Pushpakumara Embilipitiya Police Station Embilipitiya. 5. Inspector of Police Peter Embilipitiya Police Station Embilipitiya. 6. Vijitha Kumara, Chief Inspector of Police, Embilipitiya Headquaters Police Station, Embilipitiya. 7. Ananda Samarasekera Assistant Superintendent of Police ASP's Office, Embilipitiya 8. Mahinda Balasooriya Inspector General of Police Police Headquaters, Colombo 01. 8A. Mr. Pujitha Jayasundara, Inspector General of Police Police Headquaters, Colombo 01 9. Dr. Uthpala Attygalle Judicial Medical Officer Embilipitiya (Discharged from the proceedings) 10. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS

16/12/19	SC Appeal No: 126/2016	B. Premarajah Jayawardena, No.1, Alwis Avenue, Mount Lavinia. PLAINTIFF -VS- 1. B. Upali Dayananda Janapriya Jayawardena, 87/3, Bandaranayake Mawatha, Katubedda, Moratuwa. 2. Alvarapillai Vengadasam, 104, 4th Cross Street, Colombo 11, and No. 125, Bankshall Street, Colombo 11 RESPONDENTS AND BETWEEN Alvarapillai Vengadasam, 104, 4th Cross Street, Colombo 11, and No. 125, Bankshall Street, Colombo 11 2nd DEFENDANT-APPELLANT -VS- B. Premarajah Jayawardena No.1, Alwis Avenue, Mount Lavinia. PLAINTIFF-RESPONDENT B. Upali Dayananda Janapriya Jayawardena, 87/3, Bandaranayake Mawatha, Katubedda, Moratuwa. 1st DEFENDANT- RESPONDENT AND BETWEEN B. Premarajah Jayawardena, No.1, Alwis Avenue, Mount Lavinia. PLAINTIFF-RESPONDENT- PETITIONER -VS- B. Upali Dayananda Janapriya Jayawardena, 87/3, Bandaranayake Mawatha, Katubedda, Moratuwa. (Now Deceased) 1stDEFENDENT-RESPONDENT- RESPONDENT 1a Kananke Acharige Wimalawathie, 1b Hiranya Keshini, 1c Harendra Geethal Jayawardena, 1d Buddika Dananjaya Jayawardena, All of 87/3, Bandaranayake Mawatha, Katubedda, Moratuwa. DEFENDANTS–RESPONDENTS-RESPONDENTS Alvarapillai Vengadasam, 104. 4th Cross Street, Colombo 11 and No.125, Bankshall Street Colombo 11. 2ndDEFENDANT-APPELLANT-RESPONDENT
11/12/19	SC Appeal No. 55/2012	JAYAKODI KURUNDUPATABENDIGE PERLY TISSA DE SILVA No. 109, Jayasiripura, Anuradhapura. PETITIONER VS. 1. DIVISIONAL SECRETARY, NORTH NUWARAGAMPALATHA Divisional Secretariat, North Nuwaragampalatha, Anuradhapura. 2. HERATH BANDA RATNAYAKA No. 577, Bulankulama Dissawa Mawatha, Anuradhapura. 3. THE MUNICIPAL COUNCIL, ANURADHAPURA Town Hall, Anuradhapura. RESPONDENTS AND NOW JAYAKODI KURUNDUPATABENDIGE PERLY TISSA DE SILVA No. 109, Jayasiripura, Anuradhapura. PETITIONER-PETITIONER/ APPELLANT VS. 1. DIVISIONAL SECRETARY, NORTH NUWARAGAMPALATHA Divisional Secretariat, North Nuwaragampalatha, Anuradhapura. 2. HERATH BANDA RATNAYAKA No. 577, Bulankulama Dissawa Mawatha, Anuradhapura. 3. THE MUNICIPAL COUNCIL, ANURADHAPURA Town Hall, Anuradhapura.
09/12/19	SC APPEAL NO. 36/2015.	Dassanayake Mudiyanselage Ranbanda, “Dharshana”, Narammala Road, Wadhakada. APPLICANT VS. People’s Bank, P.O Box 728, Colombo 02. RESPONDENT AND BETWEEN, People’s Bank, P.O Box 728, Colombo 02. RESPONDENT -APPELLANT VS. Dassanayake Mudiyanselage Ranbanda, “Dharshana”, Narammala Road, Wadhakada. APPLICANT –RESPONDENT AND NOW BETWEEN, Dassanayake Mudiyanselage Ranbanda, “Dharshana”, Narammala Road, Wadhakada. APPLICANTNT –RESPONDENT –APPELLANT VS. People’s Bank, P.O Box 728, Colombo 02. RESPONDENT –APPELLANT –RESPONDENT

04/12/19	S.C. Appeal 144/2011	Balasuriya Lekamlage Somawathie, No: 225, Makewita, Ja-ela Plaintiff -Vs- 1) Severinus Dilano Ranjith Alles, Central Mail Exchange, Parcels Division, Sri Chittampalam Gardiner Mawatha, Colombo 01. 2) Jayakody Arachchige Noyel Jayakody, 226A, Makewita, Ja-ela. Defendants AND BETWEEN Balasuriya Lekamlage Somawathie, No: 225, Makewita, Ja-ela Presently at: No.219/A, Makewita, Ja-ela. Plaintiff-Appellant -Vs- 1) Severinus Dilano Ranjith Alles, Central Mail Exchange, Parcels Division, Sri Chittampalam Gardiner Mawatha, Colombo 01. 2) Jayakody Arachchige Noyel Jayakody, 226A, Makewita, Ja-ela. Defendants-Respondents AND NOW BETWEEN Balasuriya Lekamlage Somawathie, No: 225, Makewita, Ja-ela Presently at: No.219/A, Makewita, Ja-ela. Plaintiff-Appellant-Appellant -Vs- 1) Severinus Dilano Ranjith Alles, Central Mail Exchange, Parcels Division, Sri Chittampalam Gardiner Mawatha, Colombo 01. 2) Jayakody Arachchige Noyel Jayakody, 226A, Makewita, Ja-ela. Defendants-Respondents-Respondents
01/12/19	SC (F/R) No. 147/2017	1. Sunway International (Pvt) Ltd. ‘Sunway House’ No.25, Kimbulapitiya Road, Negombo. 2. Ramesh Dassanayake Managing Director Sunway International (Pvt) Ltd ‘Sunway House’ No.25, Kimbulapitiya Road, Negombo. Petitioners Vs. 1. Airport & Aviation Services (Sri Lanka) Limited Bandaranaike International Airport, Colombo, Katunayake. 2. Chairman, Airport & Aviation Services (Sri Lanka) Limited Bandaranaike International Airport, Colombo, Katunayake. 3. Ministry of Transport and Civil Aviation 7th Floor, Sethsiripaya, Stage II, Battaramulla. 4. Secretary, Ministry of Transport and Civil Aviation 7th Floor, Sethsiripaya, Stage II, Battaramulla. 5. Mr. R. W. L. B. Medawewa Chairman, Technical Evaluation Committee (TEC), Airport & Aviation Services (Sri Lanka) Limited, Bandaranaike International Airport, Colombo, Katunayake. 6. Mrs. K. D. Yamuna Chandani Member, Technical Evaluation Committee (TEC), Airport & Aviation Services (Sri Lanka) Limited, Bandaranaike International Airport, Colombo, Katunayake. 7. Mr. Eranda Gunathilaka Member, Technical Evaluation Committee (TEC), Airport & Aviation Services (Sri Lanka) Limited, Bandaranaike International Airport, Colombo, Katunayake. 8. Mr. R. M. S. Ratnayake Chairman, Ministerial Procurement Committee (MPC), Additional Secretary (Aviation), Ministry of Transport and Civil Aviation 7th Floor, Sethsiripaya, Stage II, Battaramulla. 9. Mr. S. S. Ediriweera Member, Ministerial Procurement Committee (MPC), Chairman, Airport & Aviation Services (Sri Lanka) Limited, Bandaranaike International Airport, Colombo, Katunayake. 10. Mr. E. M. N. R. Bandara Member, Ministerial Procurement Committee (MPC), Accountant, Department of the Registrar of Companies, No.400, D. R. Wijewardena Mawatha, Colombo 10. 11. Airport Tourist Drivers Association No. 1454, Colombo Road, Kurana, Katunayake. 12. Sunhill Group of Hotels No. 26, Palmyrah Avenue, Colombo 03. 13. Ancient Lanka Tours and Travels No. 530/8, 12th Lane, Deminigahawatta, Kimbulapitiya, Katunayake. 14. Hon. Attorney General Attorney General’s Department, Colombo 12. Respondents

27/11/19	SC/CHC/19/2007	Commercial Bank of Ceylon Limited alias Seemasahitha Lanka Vanija Bankuwa of No. 21, Bristol Street, Colombo 01 and having branch office and/or place of business at No. 343, Galle Road, Colombo 06. Plaintiff Vs 1. Samarathilaka Wijesingha Ekanayaka 2. Indra Iranganie Wijesingha Ekanayaka 3. Sujeewa Wijesingha Ekanayaka Carrying on business under the name style and firm of “Sahana Printers” at Dummaladeniya, Wennappuwa. Defendants And Commercial Bank of Ceylon Limited alias Seemasahitha Lanka Vanija Bankuwa of No. 21, Bristol Street, Colombo 01 and having branch office and/or place of business at No. 343, Galle Road, Colombo 06. Plaintiff-Appellant Vs 1. Samarathilaka Wijesingha Ekanayaka (Now deceased) 1A. Indra Iranganie Wijesingha Ekanayaka 1st Substituted Defendant-Respondent 2. Indra Iranganie Wijesingha Ekanayaka 2nd Defendant-Respondent 3. Sujeewa Wijesingha Ekanayaka Carrying on business under the name style and firm of “Sahana Printers” at Dummaladeniya, Wennappuwa. 3rd Defendant-Respondent
14/11/19	SC Appeal 126/2014	Dona Ahangama Anoma Kanthi Liyanage, Wijaya Mahal, Nikatenna, Galagedara. APPLICANT Vs Chandana Thilaka Karunapala,No. 250D, Kandekumbura, Galagedara. RESPONDENT AND BETWEEN Dona Ahangama Anoma Kanthi Liyanage, Wijaya Mahal, Nikatenna, Galagedara. APPLICANT-APELLANT Vs Chandana Thilaka Karunapala, No. 250D, Kandekumbura, Galagedara. RESPONDENT-RESPONDENT AND NOW BETWEEN Chandana Thilaka Karunapala, No. 250D, Kandekumbura, Galagedara. RESPONDENT-RESPONDENT- PETITIONER Vs Dona Ahangama Anoma Kanthi Liyanage, Wijaya Mahal, Nikatenna, Galagedara.

13/11/19	S.C. APPEAL NO.123/13	David Chandrasena Nanayakkara (deceased) No. 92, Sunanda Mawatha, Welegoda, Matara. Plaintiff Susantha Nanayakkara, No. 92, Sunanda Mawatha, Welegoda, Matara. Substituted Plaintiff 1. Mitiyala Kankanamage Jimona (Deceased) Epitawatta, Welegoda. 1A. Mallika Vidanaarachchige Gunaseeli Epitawatta, Welegoda. 2. Jayasinghe Arachchige Jayasinghe (Deceased) No.30, Sunanda Mawatha, Welegoda, Matara. 2A. Jayasinghe Arachchige Shantha Rohana, No. 1/30, Ananda Mawatha, Welegoda, Matara. 3. Jayasinghe Arachchige Edi (Deceased) No. 1/30, Welegoda, Matara. 3A. Chandralatha Panditharathna (Deceased) No. 1/30, Vidanearachchigewatta, Welegoda, Matara. 3B. Jayasinghe Arachchige Lakshmi No. 1/30, Vidanearachchigewatta, Welegoda, Matara. 4. Devundara Liyanage Sugathadasa. No. 1/30, Vidanearachchigewatta, Welegoda, Matara. 4A. Devundara Liyanage Nimal, Vidanearachchigewatta, Welegoda, Matara. 5. Jayasin Arachchgie Lakshmi No. 1/30, Vidanearachchigewatta, Welegoda, Matara. New: Sirisunanda Mawatha, Welgoda, Matara. 6. Mirissa Hewage Wijedasa, 7. Mirissa Hewage Bandusena, Both are at: No. 134, Abhaya Mawatha, Borupana Road, Rathmalana. 8. Parana Hewage Seetha Nona, Welegoda, Matara. 9. Bandula Nanayakkara, Perakoratuwa, Walgama, Matara. 10. Aruna Kumudu Nanayakkara, Perakoratuwa, Walgama, Matara. 11. Parana Hewage Susan Nona, 12. Ananda Nanayakkara, 13. Keerthi Nanayakkara, 14. Mahinda Nanayakkara, 15. Asoka Nanayakkara, All are at: No. 14, Market Side, Anuradhapura. 16. Hewa Manage Aminona. 17. Dharmapriya Nanayakkara, Both are at: No. 92, Welegoda, Matara. 18. Subawickrama Malika Vidana Arachchige Upul Nishantha. 19. Subawickrama Malika Vidana Arachchige Gunasiri. Both are at: No. 34/1, Epitawatta, Welegoda, Matara. Defendants And Susantha Nanayakkara, No. 92, Sunanda Mawatha, Welegoda, Matara. Substituted Plaintiff – Appellant Vs. 1A. Malika Vidanaarachchige Gunaseeli Epitawatta, Welegoda. 2A. Jayasinghe Arachchige Shantha Rohana. No. 1/30, Ananda Mawatha, Welegoda, Matara. 3B. Jayasinghe Arachchige Lakshmi No. 1/30, Vidanearachchigewatta, Welegoda, Matara. 4A. Devundara Liyanage Nimal, Vidanearachchigewatta, Welegoda, Matara. 5. Jayasin Arachchige Lakshmi No. 1/30, Vidanearachchigewatta, Welegoda, Matara. New: Siri Sunanda Mawatha, Welegoda, Matara. 6. Mirissa Hewage Wijedasa, 7. Mirissa Hewage Bandusena, Both are at: No. 134, Abhaya Mawatha, Borupana Road, Rathmalana. 8. Parana Hewage Seetha Nona, Welegoda, Matara. 9. Bandula Nanayakkara, Perakoratuwa, Walgama, Matara. 10. Aruna Kumudu Nanayakkara, Perakoratuwa, Walgama, Matara. 11. Parana Hewage Susan Nona, 12. Ananda Nanayakkara, 13. Keerthi Nanayakkara, 14. Mahinda Nanayakkara, 15. Asoka Nanayakkara, All are at: No. 14, Market Side, Anuradhapura. 16. Hewa Manage Aminona 17. Dharmapriya Nanayakkara, Both are at: No. 92, Welegoda, Matara. 18. Subawickrama Mallika Vidana Arachchige Upul Nishantha. 19. Subawickrama Malika Vidana Arachchige Gunasiri. Both are at: No. 34/1, Epitawatta, Welegoda, Matara. Defendant – Respondents And Now Between Susantha Nanayakkara, No. 92, Sunanda Mawatha, Welegoda, Matara. Substituted Plaintiff- Appellant- Petitioner Vs. 1A. Malika Vidanaarachchige Gunaseeli Epitawatta, Welegoda. 2A. Jayasinghe

12/11/19	SC APPEAL 85/2014.	The Officer-in-Charge, Fraud Bureau –Unit 06, No. 05, Dharmarama Road, Colombo 06. COMPLAINANT Vs. Warnakulasuriya Michael Angelo Fernando 'Eastern Spray', Ma-Eliya Watte, Ma-Eliya, Ja-Ela. ACCUSED AND BETWEEN, Warnakulasuriya Michael Angelo Fernando 'Eastern Spray', Ma-Eliya Watte, Ma-Eliya, Ja-Ela. ACCUSED -APPELLANT Vs. The Officer-in-Charge, Fraud Bureau – Unit 06, No. 05, Dharmarama Road, Colombo 06. COMPLAINANT -RESPONDENT The Hon. Attorney General, Attorney General's Department, Colombo 12. 2nd RESPONDENT AND NOW BETWEEN, Warnakulasuriya Michael Angelo Fernando 'Eastern Spray', Ma-Eliya Watte, Ma-Eliya, Ja-Ela. ACCUSED –APPELLANT –APPELLANT Vs. The Officer-in-Charge, Fraud Bureau –Unit 06, No. 05, Dharmarama Road, Colombo 06. COMPLAINANT –RESPONDENT –RESPONDENT The Hon. Attorney General, Attorney General's Department, Colombo 12.
12/11/19	SC/ FR Application 411/2012	Herath Mudiyanselage Indika Kanchana Hemantha. Unagaswewa, Nagollagama. PETITIONER. Vs. 1. Karunaratne Mudiyanselage Abeysinghe. Police Officer, Maho Police Station, Maho. 2. H.R. Samansiri Dharmapala. Police Officer, Maho Police Station, Maho. 3. Channa Abeyratne. Officer-in-Charge, Maho Police Station, Maho. 4. I. Ratnayake, Crime Branch Officer-in-Charge, Maho Police Station, Maho. 5. N.K. Illangakoon, Inspector General of Police, Police Head Quarters, Colombo 01. 6. Hon. Attorney General, Attorney General's Department, Colombo 12.
12/11/19	SC Appeal No: 178/2018	P. Chinthaka Lakdewa De Silva 01/162, Mulatiyana, Kapugoda. APPLICANT -VS- Linea Aqua (Pvt) Limited Thanahenpitiya Estate, Giridara, Kapugoda. RESPONDENT AND BETWEEN Linea Aqua (Pvt) Limited Thanahenpitiya Estate, Giridara, Kapugoda. RESPONDENT-APPELLANT -VS- P. Chinthaka Lakdewa De Silva 01/162, Mulatiyana, Kapugoda APPLICANT-RESPONDENT AND NOW BETWEEN Linea Aqua (Pvt) Limited Thanahenpitiya Estate, Giridara, Kapugoda.. RESPONDENT-APPELLANT-PETITIONER -VS- P. Chinthaka Lakdewa De Silva 01/162, Mulatiyana, Kapugoda APPLICANT-RESPONDENT-RESPONDENT
06/11/19	SC APPEAL NO. 42/2014	Officer In Charge, Police Station, Kosgoda. Complainant Vs, Meegastennage Prince Gunawardena, "Starlight", Warakamulla, Maha-Induruwa. Accused AND Meegastennage Prince Gunawardena, "Starlight", Warakamulla, Maha- Induruwa. Accused-Appellant Vs, The Attorney General of the Democratic Socialist Republic of Sri Lanka Complainant-Respondent AND NOW BETWEEN Meegastennage Prince Gunawardena, "Starlight", Warakamulla, Maha- Induruwa. Accused-Appellant-Appellant Vs, The Attorney General of the Democratic Socialist Republic of Sri Lanka Complainant-Respondent-Respondent

06/ 11/ 19	SC Appeal 33/2013	Rajamanthri Gedera Somalatha, Polwatta, Samapura, Hemmathagama Plaintiff Vs, Wajira Kanthi Rathnasinghe, Siriwardena Niwasa, Samapura, Hemmathagama Defendant And then between Wajira Kanthi Rathnasinghe, Siriwardena Niwasa, Samapura, Hemmathagama Defendant-Appellant Vs, Rajamanthri Gedera Somalatha, Polwatta, Samapura, Hemmathagama Plaintiff-Respondent And Now between Rajamanthri Gedera Somalatha, Polwatta, Samapura, Hemmathagama Plaintiff -Respondent-Petitioner Vs, Wajira Kanthi Rathnasinghe, Siriwardena Niwasa, Samapura, Hemmathagama Defendant-Appellant-Respondent
06/ 11/ 19	SC /FR/ Application No 28/2018	1. Deva Wisaru Damdhara Wijesiri No. 59/10, Mahayaya, Bogahawatte, Ambalangoda. 2. Dewarahandi Sabeetha De. Silva No. 59/10, Mahayaya, Bogahawatte, Ambalangoda. Petitioners Vs, 1. Hasitha Kesara Wettamuni, Principal, Dharmashoka College, Ambalangoda. Chairman, Interview and Administrations Board 2. Dhammika Kodikara, Secretary, Interview and Administrations Board 3. K. Janika Jayamali de. Silva, Head of Primary Member Interview and Administrations Board 4. Sarath Somathilake, School Development Society Representative Member Interview and Administrations Board 5. Ashoka Kumara Representative Past Pupils Associates Member Interview and Administrations Board Member of the Interview Board in relation to admission of students to Grade 1 of the Dharmashoka College, Ambalangoda for year 2018 6. K. K. K. Kodithuwakku, Chairman, Appeals and Objections Board 7. R. N. Mallawarachchi Secretary Appeals and Objections Board 8. S. K. S. D.de. Silva Member Appeals and Objections Board 9. Monaka Niranjana School Development Society Representative Member Appeals and Objections Board 10. Ravindra Assalaarachchi Representative Past Pupils Associates Member Appeals and Objections Board Members of the Appeals and Objections Board in relation to admission of students to Grade 01 of Dharmashoka College, Ambalangoda for years 2018 11. Secretary, Unit to admit students to Grade 1, Ministry of Education, “Isurupaya” Pelawatta, Battaramulla. 12. Secretary, Ministry of Education, “Isurupaya” Pelawatta, Battaramulla. 13. Director of National Schools, Ministry of Education, “Isurupaya” Pelawatta, Battaramulla. 14. Hon. Attorney General Attorney General’s Department, Colombo 12.

31/ 10/ 19	S C (F R) Applicati on No. 140/ 2019	1. Khalique Jauffer, 2. Mohamed Shaheem Khalique Jauffer, (Minor) Both of 562/16 (also referred to as 562/16 B), Lower Bagatalle Road, Colombo 03. PETITIONERS -Vs- 1. B A Abeyrathna, Principal, Royal College, Colombo 07. 2. Thushantha Amaratunga, 3. Uditha Malalasekara, 4. D K Wickramasinghe, 5. Lalith Ganewatte, 1st to 5th Respondents are all members of the Interview Board (on admission of children to Grade 1 - year 2019), C/O Royal College, Colombo 07. 6. Sanjeewa Tharanga Leelarathne, 7. D S P Kalubowila, 8. L M D Dharmasena, 9. Y I Liyanage, 10. Dilani Suriyarachchi 6th to 10th Respondents are all members of the Appeal and Objection Investigation Board (on admission of children to Grade 1 - year 2019), C/O Royal College, Colombo 07. 11. Jayantha Wickremanayake Director, National Schools, Ministry of Education, Isurupaya, Battaramulla. 12. Padmasiri Jayamanne Secretary to the Ministry of Education, Ministry of Education, Isurupaya, Battaramulla. 13. Akila Viraj Kariyawasam, Minister of Education, Ministry of Education, Isurupaya, Battaramulla. 14. Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12.
31/ 10/ 19	S C Appeal 86 / 2015	1. Jauffer Mohamed Nuhuman, ACCUSED - APPELLANT - APPELLANT 2. Hon. Attorney General, Attorney General's Department, Colombo 12. COMPLAINANT - RESPONDENT - RESPONDENT
31/ 10/ 19	SC FR Applicati on No. 113 / 2017	
31/ 10/ 19	SC APPEAL NO.26/2 013	Hennkachchi Gedara Rasika Kumara Prematilaka Bandara. No. 576, Kirimetiyawa, Galamuna. Plaintiff Vs. H.G. Gnanawathie, No. 245, Co-operative Junction, Kirimetiyawa, Galamuna. Defendant AND THEN, Hennkachchi Gedara Rasika Kumara Prematilaka Bandara. No. 576, Kirimetiyawa, Galamuna. Plaintiff-Appellant. Vs. H.G. Gnanawathie, No. 245, Co- operative Junction, Kirimetiyawa, Galamuna. Defendant-Respondent. AND NOW BETWEEN H.G. Gnanawathie, No. 245, Co-operative Junction, Kirimetiyawa, Galamuna. Defendant-Respondent-Appellant Vs. Hennkachchi Gedara Rasika Kumara Prematilaka Bandara. No. 576, Kirimetiyawa, Galamuna. Plaintiff-Appellant-Respondent

30/10/19	SC Appeal No. 158/2011	Kusum Shanthi Iddagoda, Divisional Secretary, Divisional Secretariat, Dodangoda. Plaintiff -Vs- 1. Land Reform Commission, No. C 82, Gregory's Avenue, Colombo 07. 2. Agalawatte Plantations Ltd, No.10, Gnanartha Pradeepa Mawatha, Colombo 08. Defendants AND BETWEEN 1. Land Reform Commission, No. C 82, Gregory's Avenue, Colombo 07. 1st Defendant-Petitioner Vs 1. Kusum Shanthi Iddagoda, Divisional Secretary, Divisional Secretariat, Dodangoda. Plaintiff-Respondent 2. Agalawatte Plantations Ltd, No.10, Gnanartha Pradeepa Mawatha, Colombo 08. 2nd Defendant-Respondent AND NOW BETWEEN 1. Land Reform Commission, No. C 82, Gregory's Avenue, Colombo 07. 1stDefendant-Petitioner-Petitioner Vs Kusum Shanthi Iddagoda, Divisional Secretary, Divisional Secretariat, Dodangoda. Plaintiff-Respondent-Respondent Agalawatte Plantations Ltd, No.10, Gnanartha Pradeepa Mawatha, Colombo 08. 2nd Defendant-Respondent- Respondent
29/10/19	S.C. (F/R) Application No. 192/2014 S.C. (F/R) Application No. 193/2014	Petitioners Adasuriya Mudiyanselage Dinuka Madushan Adasuriya, Pothuwela, Ganthiriyawa, Bamunukotuwa. (Petitioner S.C. (F/R) Application No. 192/2014) 1. Wijeyamunige Nadish Srinath Ranatunga, 'Kusum Nivasa', Horewila, Walasmulla. 2. Nuwan Buddhika Bandaranayake, 53/2/B, Ayurveda Road, Uda Aludeniya, Weligalla. 3. Hashan Dhananjaya Wijesinghe, 110/B, Battagala, Dambara, Meewanapalaana. 4. Gunasekara Liyanage Janith Kalana, 21/18, Ranasooriya Mawatha, Paniyana, Ambalangoda. 5. Athapattu Mudiyanselage Asanka Sanjeewa Athapaththu, Kalawanegama, Kohumola Road, Wariyapola. 6. Aarachchi Mudiyanselage Buddhika Dilshantha Bandara, Katamillagaswatte, Vellawela, Atampitiya. 7. Induwara Wedagedara Pathum Madushanka, 832/162, Hinnarandeniyawatte, Gampola. 8. Jasiri Liyanage Waruna Dhananjaya Ratnawansha, Liyanage Trade Centre, Yakdehiwatte, Niwithigala. 9. Bambagedara Priyantha Dinesh Somasiri, 45, Aanakatawa, Dambulu Halmilla Weva, Kekirawa. 10. Kannanagarage Don Chanaka Mihiran Wijekoon, 216/2, Kurana, Handapaangoda. 11. Palpolage Don Tharindu Sampath, Bollunna, Hadigalla Janapadaya, Baduraliya. 12. Warahena Liyanage Thushan Indika Sampath, Beligaswatte, Halla, Diwuldeniya. (Petitioners in S.C. (F/R) Application No. 193/2014) Vs Respondents 1. Chief Inspector Malin Perera, Officer-in-Charge, Police Station, Slave Island. 2. N. K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 3. Attorney General, Attorney General's Department, Colombo 12. (Respondents in S.C. (F/R) Application No. 192/2014 & No. 193/2014)

24/10/19	Application No. SC (FR) 137/2011	S.D.P.W. Waidyarathne Siri Wedamadura, 6th Mile Post, Mawathagama. Petitioner. Vs. 1. Provincial Commissioner Local Government, Provincial Council of the North Western Province (NWP), Kurunegala. 2. Chairman, Mawathagama Pradheshiya Sabha, Mawathagama. 3. Secretary, Mawathagama Pradheshiya Sabha, Mawathagama. 4. Hon. Governor, Provincial Council North Western Province, Kurunegala. 5. Dr. Uthpalani Herath, Provincial Commissioner of Ayurveda North Western Province, Kurunegala. 6. Dr. R.A. Chaminda Kumara, Public Health Medial Officer Mawathagama Pradheshiya Sabha, Mawathagama. 7. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
17/10/19	SC CHC Appeal No. 17/2010	The Attorney General, Attorney General's Department, Colombo 12. Plaintiff -Vs- Tisara Packaging Industries Ltd, No. 129, Dutugemunu Street, Dehiwala. Defendant AND NOW BETWEEN Tisara Packaging Industries Ltd, No. 129, Dutugemunu Street, Dehiwala. Defendant-Appellant The Attorney General, Attorney General's Department, Colombo 12. Plaintiff-Respondent
10/10/19	S C Appeal (CHC) No. 43/2012	1. Chandra Gunasekera, No. 29, Albert Crescent, Colombo 07. 2ND DEFENDANT - APPELLANT -Vs- People's Bank, No. 75, Sir Chiththampalam A Gardiner Mawatha, Colombo 02. PLAINTIFF - RESPONDENT Diyagama Mudiyanselage Duminda Gunasekera, No. 20, Albert Crescent, Colombo 07. Chandima Jayasanka Govinna, No. 46/4, 1st Lane, Nidharshana Mawatha, Galavilawatta, Homagama. DEFENDANT - RESP
08/10/19	SC FR Application: 292/2018	1. Shahul Majeed Mohomed Rizwan, No. 46/1, Humes Road, Osanagoda, Galle. 2. Mohomed Aaqif, No. 46/1, Humes Road, Osanagoda, Galle. Petitioners -Vs- 1. Sampath Weragoda. The Principal, Richmond Coolege, Galle. 2. K.T.Chandrawathie, The Zonal Director of Education, Galle, Zonal Education Office, Kalegana, Galle. 3. W.M. Jayantha Wickramanayake. The Director, National Schools, 'Isurupaya', Pelawatta, Battaramulla. 4. The Secretary, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla 5. Lanka Senanayake 6. Chandana Kumara 7. Akila Rathnayake 8. Renuka Narangoda (5th to 8th including the 1st Respondent, members of the Interview Board) 9. Kesara Wettamuny 10. Priyal De Silva 11. K.A.T. Kumari 12. Nilantha Haalpandeniya 13. Chinthaka Sanath (9th to 13th above, members of the Appeal Board) 14. The Attorney General, Attorney General's Department, Hultsdorp, Colombo 12.
08/10/19	SC/ Appeal No: 134/2018	Kekul Kotuwage Don Aruna Chaminda, No. 17/, Ethgala, Kochchikade. PLAINTIFF. Vs Janashakthi General Insurance Limited, No. 46, Muththaiya Road, Colombo. 2. And No. 55/72, Vaxhaul Street, Colombo 2. DEFENDANT AND NOW BETWEEN Kekul Kotuwage Don Aruna Chaminda, No. 17/, Ethgala, Kochchikade. PLAINTIFF – APPELLANT. Vs. Janashakthi General Insurance Limited, No. 46, Muththaiya Road, Colombo 2. And, No. 55/72, Vaxhaul Street, Colombo. 2. DEFENDANT – RESPONDENT.

03/ 10/ 19	SC (Spl) Appeal No. 07/2018	1. Rathnasingham Janushan No. 27/6, Thuraiyappa Road, Eechchamoddai, Chundikuli. 2. Benedict Wesley Abraham No. 399, Main Street Jaffna Accused-Appellant-Petitioners VS. The Officer In charge Headquarters Police Station Jaffna. Complainant-Respondent-Respondent 1. Pakyanaathan Antenistan or Dillu No. 442/07, Madam Road, Jaffna. 2. Aravinthan Alex No. 9, Temple Road, Jaffna. 3. Jegatheeshvaran Dineshkanth Thaavadi, South Thavadi, Kokkuvil. 4. Aanantharasa Senthooran Thaavadi, South Thavadi, 5. Thevarasa Karishan Champion Lane, Kokkuvil West. 6. Theiventhiran Anistan Or Eric No. 281/16, Kandy Road, Jaffna. Accused-Respondents-Respondents
24/ 09/ 19	S C (F R) Applicati on No. 109/ 2015	

10/09/19	SC APPEAL NO.142/2018	Kandiahpillai Shanmuganathan (Deceased) of 'Guildford', Halpe Mawatha, Kandana PETITIONER Joseph Sri Rogers Shanmuganathan, No.13 1/1, 55th Lane, Wellawatte, Colombo 06. Presently at No.24, St. Augustine's Avenue, Wembley, Middlesex, United Kingdom. SUBSTITUTED PETITIONER Vs 1. Kandiahpillai Vythilingam, No. 23, Rajasthan, Halpe Mawatha, Kandana. 2. Kandiahpillai Sivasubramaniam, Kandana. 3. Kandiahpillai Muthurajah, Karainagar. 4. Kandiahpillai Thambiyah alias Kandiahpillai Thangarajah, Karaiagar. 4a. Kandiahpillai Muthurajah, Karainagar. 5. Kandiahpillai Thanaluxmi, Karainagar. 6. Kandiahpillai Punithawathi, Karainagar. 7. Kandiahpillai Sundarambal, Karainagar. 8. Nesaratnam.(Deceased) (widow of Kanapathipillai Kandiahpillai), Kandana 9. Velupillai Aivapatham, Hunupitiya, Wattala. 10. Velupillai Paramasothi, Prince Street, Colombo. 11. Nallamma Vartharajah. Kandana. 12. Velupillai Nadarajah, Dik-Oya. RESPONDENTS AND Joseph Sri Rogers Shanmuganathan, No.13 1/1, 55th Lane, Wellawatte, Colombo 6. Presently at No.24, St. Augustine's Avenue, Wembley, Middlesex, United Kingdom. SUBSTITUTED PETITIONER –PETITIONER -VS- 1. Kandiahpillai Vythilingam, No. 23, Rajasthan, Halpe Mawatha, Kandana. 2. Kandiahpillai Sivasubramaniam, Kandana. 3. Kandiahpillai Muthurajah, (should read as Kandiahpillai Thambiyah) alias Kandiahpillai Thangarajah, Karainagar. 4. Kandiahpillai Thambiyah alias Kandiahpillai Thangarajah, Karaiagar. 4a. Kandiahpillai Muthurajah, Karainagar. 5. Kandiahpillai Thanaluxmi, Karainagar. 6. Kandiahpillai Punithawathi, Karainagar. 7. Kandiahpillai Sundarambal, Karainagar. 8. Nesaratnam (Deceased). Kandana. 9. Velupillai Aivapatham, Hunupitiya, Wattala. 10. Velupillai Paramasothi, Queen Street, Colombo. 11. Nallamma Vartharajah. Kandana. 12. Velupillai Nadarajah, Dik-Oya. RESPONDENTS- RESPONDENTS AND NOW BETWEEN, Velupillai Nadarajah, Formerly, Dik-Oya and presently at No.186/14, Karunathar Lane, Point Pedro Road, Jaffna. 12TH RESPONDENT-RESPONDENT-APPELLANT -VS- Joseph Sri Rogers Shanmuganathan, No.13 1/1, 55th Lane, Wellawatte, Colombo 6. Presently at No.24, St. Augustine's Avenue, Wembley, Middlesex, United Kingdom. SUBSTITUTED PETITIONER- PETITIONER-RESPONDENT 1. Kandiahpillai Vythilingam (Deceased), No. 23, Rajasthan, Halpe Mawatha, Kandana. 2. Kandiahpillai Sivasubramaniam (Deceased), Kandana. 3. Kandiahpillai Muthurajah, Now at No.20A, 3/1, Station Road, Colombo 06. 4. Kandiahpillai Thambiyah alias Kandiahpillai Thangarajah, Karaiagar. 4a. Kandiahpillai Muthurajah, Now at No.20A, 3/1, Station Road, Colombo 06. 5. Kandiahpillai Thanaluxmi, Now at No.26/9, Karuwapulam Lane, Kokuvil. 6. Kandiahpillai Punithawathi, Neelippanthanai, Karainagar. 7. Kandiahpillai Sundarambal, Neelippanthanai, Karainagar. 8. Nesaratnam (Deceased). Kandana. 9. Velupillai Aivapatham, Now at No.20A, 3/1, Station Road, Colombo 06. 10. Velupillai...Paramasothi (deceased), Queen Street, Colombo. 11. Nallamma Vartharajah . (deceased) Kandana. RESPONDENTS- RESPONDENTS-RESPONDENTS

08/09/19	SC Appeal No. 196/2011	Sampath Bank PLC No. 110, Sir James Peiris Mawatha, Colombo 02 and at No 19, Dalada Veediya, Kandy. Plaintiff -Vs- Kaluarachchi Sasitha Palitha Owner of 'Sunrise Biscuit Manufactures' at Industrial Zone, Pallekale. Defendant Kaluarachchi Sasitha Palitha Owner of 'Sunrise Biscuit Manufactures' at Industrial Zone Pallekale. Defendant-Appellant -Vs- Sampath Bank PLC No. 110, Sir James Peiris Mawatha, Colombo 02 and at No 19, Dalada Veediya, Kandy. Plaintiff-Respondent And Now Sampath Bank PLC No. 110, Sir James Peiris Mawatha, Colombo 02 and at No 19, Dalada Veediya, Kandy. Plaintiff-Respondent-Appellant -Vs- Kaluarachchi Sasitha Palitha Owner of 'Sunrise Biscuit Manufactures' at Industrial Zone, Pallekale. Defendant-Appellant-Respondent
05/09/19	SC /FR 241/2016	Mr. Ponnaiya Sivagnanam 15/103, Gunananda Mawatha, Colombo 13. PETITIONER -VS- 1. Hon K.C. Logeshwaran, Governor, Western Province, 109, 5th Floor, Rotunda Tower, Galle Road, Colombo 03 2. Mr. Ranjith Somawansa, Minister of Provincial Education, Western Provincial Council, 4th Floor, 89, Kaduwela road "Ranmagapaya" Battaramulla. 3. Mr S.G. Wijebandu, Secretary to the Ministry of Education – Western Province, 4th Floor, 89, Kaduwela Road, "Ranmagapaya" Battaramulla. 4. D.D.P.W.Gunarathna, Provincial Director of Education, Provincial Department of Education, No 76, Ananda Kumaraswami Mawatha, Colombo 07. 4(a) Mr. P. Srielal Nonis, Provincial Director of Education, Provincial Department of Education, No 76, Ananda Kumaraswami Mawatha, Colombo 07. 5. Mr. W.M. Jayantha Wickremanayaka, Zonal Director of Education, Zonal Education Office, Vithanage MAwatha, Colombo 02. 5(a) Mr. G.N. Silva Zonal Director of Education, Zonal Education Office, Vithanage MAwatha, Colombo 02. 6. Mr. H.M. Chandradasa, Deputy Zonal Director of Education, Zonal Education Office Vithanage MAwatha, Colombo 02. 7. P. Sathyendra, Principal, Kotahena Methodist Tamil Vidyalaya, Colombo 13 8. Mariyam Shanthana A.C. Principal, Mahawatta St. Anthony's College, Madampitiya, Colombo 15. 9. Provincial Public Service Commission - Western Province, 109, Main Street, Battaramulla. (a) Mr. K. Sarath Gunathilake, Hon Chairman, Provincial Public Service Commission – Western Province, 109, Main Street, Battaramulla. (b) Mr. A.W.C. Ariyadasa, Member, Provincial Public Service Commission – Western Province, 109, Main Street, Battaramulla (c) Mr. Sunil Fernando, Provincial Public Service Commission – Western Province, 109, Main Street, Battaramulla. (d) Mr. S.K. Liyanage, Provincial Public Service Commission – Western Province, 109, Main Street, Battaramulla. (e) Mr. K. Paramalingam, Provincial Public Service Commission – Western Province, 109, Main Street, Battaramulla. (f) Mr. J. Paranamana, Provincial Public Service Commission – Western Province, 109, Main Street, Battaramulla. 10. Hon Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS

03/09/19	SC Appeal 48/2013	Asan Kalenderlebbe, (deceased) Sinnaulla, Pottuvil. Plaintiff Ismail Fathima, Sinnaulla, Pottuvil. Substituted Plaintiff Vs, 1. Weeragoda Arachchige Pathmasiri Silva, No. 90/A/1, Rajapihilla Mawatha, Kandy 2. Srikathuge Sunantha Deepal Fernando, No. 43, Saranankara Street, Kandy 3. Srikathuge Wimalasurendra Fernando, Pasyala 4. Justin Chandrapala de. Silva, No. 102/1, Rajapihilla Mawatha, Kandy 5. Kalander Asiya Umma, Sinna Ulla, Arugambay, Pottuvil 6. Peter Goodman, (deceased) Star Dust Beach Hotel, Pottuvil 7. Mohomed Ismail Cadre Mohaideen, Pottuvil Defendants And between Mohideen Bawa Abdul Cassim, Pottuvil Petitioner Vs, 1. Weeragoda Arachchige Pathmasiri Silva, No. 90/A/1, Rajapihilla Mawatha, Kandy 2. Srikathuge Sunantha Deepal Fernando, No. 43, Saranankara Street, Kandy 3. Srikathuge Wimalasurendra Fernando, Pasyala 4. Justin Chandrapala de. Silva, No. 102/1, Rajapihilla Mawatha, Kandy 5. Kalander Asiya Umma, Sinna Ulla, Arugambay, Pottuvil 6. Peter Goodman, (deceased) Star Dust Beach Hotel, Pottuvil 7. Mohomed Ismail Cadre Mohaideen, Pottuvil Defendants-Respondents And between Kalander Asiya Umma, Sinna Ulla, Arugambay, Pottuvil 5th Defendants-Respondents-Appellant Vs, Mohideen Bawa Abdul Cassim, Pottuvil Petitioner-Respondent And now between Kalander Asiya Umma, Sinna Ulla, Arugambay, Pottuvil 5th Defendants-Respondents-Appellant-Petitioner Vs, Mohideen Bawa Abdul Cassim, Pottuvil Petitioner-Respondent-Respondent 1. Weeragoda Arachchige Pathmasiri Silva, No. 90/A/1, Rajapihilla Mawatha, Kandy 2. Srikathuge Sunantha Deepal Fernando, No. 43, Saranankara Street, Kandy 3. Srikathuge Wimalasurendra Fernando, Pasyala 4. Justin Chandrapala de. Silva, No. 102/1, Rajapihilla Mawatha, Kandy 5. Kalander Asiya Umma, Sinna Ulla, Arugambay, Pottuvil 6. Peter Goodman, (deceased) Star Dust Beach Hotel, Pottuvil 7. Mohomed Ismail Cadre Mohaideen, (deceased) Pottuvil Defendants-Respondents-Respondents 7A Abdul Jabbar Nona Jesmine Pottuvil 01 7B Farzan Mohideen Pottuvil 01 7C Fowzi Mohideen Pottuvil 01 7D Faizal Mohideen Pottuvil 01 7E Farzana Pottuvil 01 7F Firosa Pottuvil 01 Parties seeking substitution in place of the 7th Defendant-Respondent-Respondent

		1. P.D.W.K Chandrarathne, G/16, Field Force, Head Quarters, Colombo 05. 2. N.A. Amarasena, Welfare Division, Colombo 01. 3. U.J. Dangalle, 11/A, Bogodawaththe, Palugama, Dompe. 4. K.W.M. Chandrasiri, 18.1, Uruwala, Nedungamuwa. 5. A.M. Ranita Fernando, 521/28, Hibe Garden, Artigala Road, Meegoda. 6. N.G.G. Nikathanne, Crime Division, Police Headquarters, Colombo 01. 7. K.R.M. Menike, Children and Women Bureau, Colombo 01. 8. D.M. Gunarathne, 5/32, Sarammudali Mawatha, Weliweriya, Matara. 9. K.H.R. Kariyawasam, “Senasuma”Edandawila Watta, Wanala, Kananke. 10. L.K. Dharmasena, B221, 2nd Cross Street, Walpola Matara. 11. A.A.L. De. Alwis, 2B, Police Headquarters, Colombo 05. 12. M.W. Upali Ranjith, B10, Police Headquarters, Colombo 05. 13. N.P. Jayarathne, E10, Police Headquarters, Colombo 05. 14. M.E.M. Keerthirathne, G3, Police Headquarters, Colombo 05. 15. H.D.C.S. Satharasinghe, 232, Pallegama, Pepiliwala. 16. M.A.Laxman, Batuwita Watte, Batuwita, Thihagoda, Matara. 17. P.L.A.J. Gunawardena, P18, Police Quarters, Ampara. 18. N.D. Darmasiri, N1/10, Anderson Flats, Narahenpita. 19. S. Anura Lalith, 237/39, Moratwahena Road, Athurugiriya. 20. M. Ranathunga, 71, Sri Gnanarathana Mawatha, Peliyagoda 21. M. Karunathilake, 67, Lak Sewana, Kirigam Pamunuwa, Polgasovita. 22. W.G.Rupasinghe, 49/5B, Amunugoda, Imbulgoda. 23. K. A. Karunathilaka, 162, Raddalgoda, Kelaniya. 24. S.A.J.Suraweera, 120/1, Simbiragemulla, Nadungamuwa. 25. D.A.K. Jagathsiri, 309/1, Gammanawaththa, Raigama, Bandaragama. 26. G.J. Gunawadena, Thimbiriya, Kalapugama, Moronthuduwa. 27. W.P.L. Senevirathne, No. 1, Police Quarters, SLPC, Kaluthara. 28. B.G.R. Perera, 25, Welithuduwa, Waththala, Gamagoda Road, Kaluthara South. 29. R. Ariyarathne, G 4, Police Quarters, Maradana. 30. S.P. Thilakarathna, No. 13, Police Quarters, SLPC, Kaluthara. 31. P.K.C.R. Bodinagoda, Bodinagoda Awththa, Yalegama, Induruwa. 32. D.M.P.S. Bandaranayake, 555/3/2, Police Quarters, Negombo Road, Wattala 33. K.G.A. Gunawardena, SLPC, Kaluthara. 34. L.G. Sarath, H8, Police Quarters, Colombo 5. 35. H.P.S. Nanayakkara, Police Quarters, Kegalla. 36. A. Upali Jayathissa, G 15A, Galkotuwa Waththa, Amunugama, Kiriwadunna. 37. R.M. Dayapala, 513, Anwarama, Mawanella. 38. H.M.N. Herath, Ambasewana, Alkegama, Makemelwala, Mawanella. 39. K.P. Lal Thilakasiri, E 24, Kondagala, Nelundeniya. 40. J.C. Weerathunga, 120/2/A, Pinnawala Road, Madapatha, Piliyandala. 41. Piyaseeli Yahangoda, 267, Godagama Road, Athurugiriya. 42. K.W.Wijewardena, Ihalagama, Kannanthota. 43. D.G. Badugamahewa, “Sampatha” Berilwaththa, Halpathota, Baddegama. 44. E.M.S. Kumarasena, 16/2, Pahalaweediya waththa, Yakkala. 45. M.G. Thilaknanda, 2/1, Wekanda Road, Homagama. 46. A. Jayawardena, N 2/6 Anderson Flats, Narahenpita. 47. B.M.N. Hemachandra, 13, Police Quarters, Mihindu Mawatha, Colombo 12. 48. C.R.K.Deheragoda, 202D, Aluthgama, Bogamuwa, Yakkala. 49. S.M. Punchibanda, 510/C, Makola North, Makola. 50. U.L.S.N. Perera, 15/40, Weediyawatta, Udugampola. 51. L.U. Lakshmi, 56-1/4, Police Quarters, Modara, Colombo 15. 52. K.A.C. Damayanthi, Rerukana Road, Weedagama, Bandaragama. 53. R.K. Sisira, RP-966, Rajapaksa Pura, Seeduwa. 54. Y.R.J.C. Kumarasena, 16/3, Wijayaba Mawatha, Nawala Road, Nugegoda. 55. P.P. Yasawathi, 2/5, 2/1 Police Quarters, Cinnamon

01/09/19	SC. Appeal No. 70/13	Hewayalage Ranjani Hemalatha, Newsmire Pahala, Bulathkohupitiya. PLAINTIFF. Vs. Hewayalage Kanthi Kusumalatha Newsmire Pahala, Bulathkoupitiya. DEFENDANT. AND Hewayalage Kanthi Kusumalatha, Newsmire Pahala, Bulathkohupitiya. DEFENDANT – APPELLANT. Hewayalage Ranjani Hemalatha, Newsmire Pahala, Bulathkohupitiya. PLAINTIFF – RESPONDENT. AND NOW BETWEEN. Hewayalage Kanthi Kusumalatha, Newsmire Pahala, Bulathkohupitiya. DEFENDANT – APPELLANT – PETITIONER. Hewayalage Ranjani Hemalatha, Newsmire Pahala, Bulathkohupitiya. PLAINTIFF – RESPONDENT – RESPONDENT.
01/09/19	SC FR Application No. 15/2017	T.G.J.L. AMARASINGHE 87th Kilometer Post, Kanthattiya, Mihinthalaya. PETITIONER VS. 1. DR. N.C.D. ARIYARATNE Regional Director of Health Services, Office of the Regional Director of Health Services, Anuradhapura. 2. DR. W.M. PALITHA BANDARA Provincial Director of Health Services, Provincial Department of Health Services - North Central, Bandaranayake Mawatha, Anuradhapura. 3. G.D. KEERTHI GAMAGE Secretary, Ministry of Health, Provincial Administrative Building Complex, 3rd Floor, Harischandra Mawatha, Anuradhapura. 4. A.W.C. ARIYADASA Secretary to the Governor, Secretariat of the Governor, North Central Province, Anuradhapura. 5. R.B. ABEYSINGHA Chairman. 6. H.M.K. HERATH Member, 7. H.M.H.B. RATHNAYAKA Member, 5th to 7th Respondents, all of the North Central Provincial Public Service Commission, North Central Province, Anuradhapura. 8. HON. ATTORNEY GENERAL Attorney General’s Department, Colombo 12.
29/08/19	SC Writ Application No. 12/2018	1. KELEPOTHA VITHANAGE ARIYARATNE 368, Kiridola Road, Thalagaspe. 2. DEHIWELA LIYANAGE THILAK OPATHA 308, Indipalagoda, Pitigala. 3. ARIYAWANSHA DISSANAYAKE Secretary, Democratic United National Front, 47A, 1st Lane, Rawawathawatte, Moratuwa. PETITIONERS VS. 1. S.T.KODIKARA Returning Officer, District Secretariat, Galle. 2. MAHINDA DESHAPRIYA Chairman, 3. N.J.ABEYSEKERA,PC Member, 4. PROF. S.R.HOOLE Member, 2nd to 4th Respondents abovenamed are members of the Election Commission, Election Secretariat, P.O.Box 2,Sarana Mawatha, Rajagiriya. 5. M.B.I.DE SILVA Assistant Commissioner of Elections, Elections Office, Galle. 6. MAHINDA SAMARAWEERA Secretary, Eksath Janatha Nidahas Sandanaya, 301, T.B.Jayah Mawatha, Boralesgamuwa. 7. SAGARA KARIYAWASAM Secretary, Sri Lanka Podujana Peramuna, 8/11, Robert Alwis Mawatha, Boralesgamuwa. 8. KABEER HASHIM Secretary, United National Party, 400, Kotte Road, Pitakotte. 9. M.TILVIN SILVA Secretary, Janatha Vimukthi Peramuna, 464/20, Pannipitiya Road, Pelawatte, Battaramulla. 10. HON. ATTORNEY GENERAL Attorney General’s Department, Colombo 12. RESPONDENTS

26/ 08/ 19	S C (F R) Applicati on No. 81/ 2010	1. M S K Wickramanayake, Balapatthawa, Avissawella Road, Galigamuwa, Kegalle. 2. D C P Kumarasinghe, Perakuma Mawatha, Medalandawatta, Kurunegala. PETITIONERS -Vs- 1. Mahinda Balasooriya, Inspector General of Police, Police Head Quarters, Colombo 01. 1(a). N K Illangakoon, Inspector General of Police, Police Head Quarters, Colombo 01. 1(b). Pujitha Jayasundera, Inspector General of Police, Police Head Quarters, Colombo 01. 2. Secretary, Ministry of Defence Public Security, Law and Order, No 15/5, Baladaksha Mawatha, Colombo 03. 3. Vaas Gunawardena, Senior Superintendent of Police, Office of Senior Superintendent of Police, Kurunegala. 4. Ajith Wansanatha, Headquarters Inspector, Kurunegala Police Station, Kurunegala. Presently: Assistant Superintendent of Police, Office of the Assistant Superintendent of Police, Galgamuwa. 4. (a)(i) Prof. Siri Hettige - Chairman, National Police Commission. 4. (a) (ii) P H Manatunga - member 4. (a)(iii) Mrs Savithri Wijesekara - Member. 4. (a)(iv) Y L M Zawahir - Member. 4. (a)(v) Anton Jeyanandan - Member. 4. (a)(vi) Thilak Collure - Member. 4. (a)(vii)Frank de Silva - Member. 4. (a)(viii)N A Cooray - Secretary. 4(a)(i) to 4(a)(viii) all of them respectively the Chairman, members and the Secretary of the National Police Commission Block No 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07. 5. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS

08/08/19	S.C.F.R. Applications No: 149/2019, 145/2019	In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka. 1. Meragal Pelige Dinuka Namalee Dissanayake, No.24/A, Vajira Road, Bambalapitiya. 2. Jamuni Nipuni Nisansala Wimalarathna, No.16, Rathuwila Watta, Athurugiriya. 3. Niluka Viroshini Marasinghe, “Wimalasiri”, Pahala Walahapitiya, Natandiya. 4. Haputhanthrige Kalani Haputhanthri, No. 127, Balummahara, Mudungoda. 5. Ameer Hamza Mohamed Haares, No. 35B, Kurunduwatta, Chilaw. 6. Lorensu Hewage Sathishka Eranda, No.3, Kotuwa Road, Trincomalee. 7. Praveena Vianini Mary Andrew, No 103/18, Paramananda Vihara Mawatha, Colombo 13. 8. Annakkarage Lahiru Dulanja Peiris, No. 866/1, Station Road, Hunupitiya, Wattala. 9. Alahapperuma Arachchige Jayathri, “Amara Niwasa”, Pattiyawela, Nihiluwa, Beliatta. 10. Semasingha Mudiyansekage Sanjula Yashodara Semasingha, No. 825, Thammennapura, Thabuttegama, Anuradhapura. 11. Bandaranayaka Mudiyanselage Thilak Senarath Bandara, No. 19, Kukuloya Road, Narampanawa. 12. Ranmuni Chamila Indumali de Zoyza, No. 91, Elpitiya Road, Wathugedara. 13. Fairoos Mohamed Faizul Ihsan, No 174, “Jahan Manzil”, Kalpitiya Road, Puttalam. 14. Ponrasa Mauran, No. 56, Thirugnana Sampanther Street, Trincomalee. 15. Vivekanathan Renukanth, “Shirirangam”, Velupillai Street, Thirukovil (EP). 16. Samarakkodi Arachchige Dilini Priyangika Perera, No. 17, Samudragama, Bendiwewa, Polonnawara. 17. Lekamge Chalodya Thilini, Daladagama, Maho. 18. Ariyanagam Dikson, No. 145/4, Galle Road, Wellawatta, Colombo 06. 19. A.M.W.S.H.B. Karunarathna, No.79/4, Nagolla Road, Mihindu Mawatha, Matale. 20. Kankanam Kapuge Lakshika, “Yamunani”, Uluwitike, Galle. 21. P. Jebarasan, No.G-35, Torrington Flats, Torrington Avenue, Colombo 05. 22. Ramathas Nishnathan, Upatissa Road, Colombo 04. PETITIONERS (SC/FR/149/2019) 1. Subasinghe Arachchilage Appuhamy Isuru Dinuwan, No.58, Palangathure West, Kochchikade. 2. U.P.K Dissanayke. No.1297/7, ‘Ruchira’, Eksath Mawatha, Moragahakanda, Pannipitiya. PETITIONERS (SC/FR/145/2019) Vs 1. Sri Lanka Medical Council, No.31, Norris Canal Road, Colombo10. 2. Hon. Dr. Rajitha Senarathne, Minister of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 3. Dr. Anil Jayasinghe, Director General of Health Services, Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 4. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS

07/08/19	SC/FR/Application No.52/2018	In the matter of an application under and in terms of Article 17 and 126 of the Constitution. Sella Kapu Lilani Abeychandra, No.46/4,R.E.De Silva Avenue, Heppumulla, Ambalangoda. On behalf of Koonamge Omindu Dewmika Shriyanga, No.46/4, R.E.De Silva Avenue, Heppumulla, Ambalangoda. PETITIONER 1. Principal, Dharmasoka College, Galle Road, Ambalangoda. 2. K.K.K.Kodithuwakku, The Principal, Christ King College, Baddegama. 3. R.N Mallawarachchi, Principal, Southland College, Galle. 4. S.K.S.De Silva, Dharmosoka College, Galle Road, Ambalangoda. 5. Monaka Niranjana, SC/FR/ Application No.52/2018 Dharmosoka College, Galle Road, Ambalangoda. 6. Ravindra Assalarachchi, Dharmosoka College, Galle Road, Ambalangoda. 7. Sunil Hettiarachchi, Secretary, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 8. Akila Viraj Kariyawasam, Hon.Minister of Education. Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 9. Hon. Attorney General, Attorney General's Department, Colombp-12. RESPONDENTS
07/08/19	SC Appeal 121/2016	Ranepura Hewa ge Kusumawathi No. 33 Sobitha Mawatha Wadduw a . Plaintiff Vs 1. Bartleet Financial Services Ltd. 2 nd Floor, Bartleet House Colombo 2. Defendant BETWEEN Bart leet Fin ance PLC (formally known as Bartleet Financial Services Ltd.) 2 nd Floor, Bartleet House Colombo 2. Defendant Petitiner Vs Ranepura Hewage Kusumawathi No. 33 Sobitha Mawatha Wadduwa. Plaintiff Respondent PRESENTLY BETWEEN Bart leet Finance PLC (formally known as Bartleet Financial Services Ltd.) 2 nd Floor, Bartleet House Colombo 2. Defendant Petitioner Appellant Vs Ranepura Hewage Kusumawathi No. 33 Sobitha Mawatha Wadduwa. Plaintiff Respondent Respondent.
06/08/19	SC/APPEAL 194/2016.	K. Mahendran, Ward No.05, Gandhi Nagar, Kumburupiti, Trincomalee. APPLICANT -VS- Deutche Welle Radio and TV International, Colombo Office, No.92/1 D, D.S. Senanayake Mawatha, Colombo 08. RESPONDENT AND THEN BETWEEN, Deutche Welle Radio and TV International, Colombo Office, No.92/1 D, D.S. Senanayake Mawatha, Colombo 08. RESPONDENT-APPELLANT -VS- K. Mahendran, Ward No.05, Gandhi Nagar, Kumburupiti, Trincomalee. APPLICANT-RESPONDENT AND NOW BETWEEN K. Mahendran, Ward No.05, Gandhi Nagar, Kumburupiti, Trincomalee. APPLICANT-RESPONDENT-APPELLANT -VS- Deutche Welle Radio and TV International, Colombo Office, No.92/1 D, D.S. Senanayake Mawatha, Colombo 08. RESPONDENT-APPELLANT-RESPONDENT
29/07/19	S C Appeal No. 107/2016 SC/HCCA/LA No. 149/16	1. Balapu Waduge Sunil Mendis, No. 77/1, Kahapola, Madapatha. PLAINTIFF - RESPONDENT - APPELLANT Vs- 2. Kathtagoda Widanelage Douglas Fernando, No. 108, Kahapola, Madapatha. DEFENDANT - APPELLANT – RESPONDENT

29/ 07/ 19	SC FR Application No. 54 / 2019	01 S M Halpe, No 117/10, Hendala Road, Hendala, Wattala. 02 D T Panduwawela, No 4, Chitra Lane, Gampaha. 03 K P K Marapana, No. 75/17, Sirinanda Jotikarama Road, Kalalgoda, Pannipitiya. PETITIONERS -Vs- 01 Dr. Anil Jayasinghe, Director General of Health Services, Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 02 Director General of Health Services (acting), Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 03 Hon. Dr. Rajitha Senarathne, Minister of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 04 Secretary to the Ministry of Health, Nutrition and Indigenous Medicine, Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10. 05 Sri Lanka Medical Council, No. 31, Norris Canal Road, Colombo 10. 06 Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS Ten others who intervened as respondents, 1ST TO 10TH ADDED RESPONDENTS Fifty Seven others who intervened as respondents, 11TH TO 68TH ADDED RESPONDENTS Nine others who intervened as respondents, 69TH TO 78TH ADDED RESPONDENTS

1. M.R.C.C. ARIYARATHNE No. 27/55, 1st Lane, Colombo Road, Ratnapura. 2. H.K.B. JAYARUWAN „Issuru", Karambaketiya, Beliatta. 3. N.U.S. ARIYARATHNE Galkadagodawaththa, Horawala, Welipenna. 4. W.H.M.A.G.S. BANDARA Wijethunga Niwasa, Ihalagama, Millawana, Matale. 5. J.K.S.F. PERERA No. 25/2, Asoka Mawatha, Dandagamuwa, Kuliyapitiya. 6. U.P. ABEYWICKRAMA No. 26A, Diyawana, Kirindiwella. 7. N. WANIGASEKARA No. 512/C, Near the Milk Board, Dikhenapura, Munagama, Horana. 8. D.M.M.C. DISSANAYAKE, Boraluwa, Kalugalla, Molagoda, Kegalle. 9. R.W. DAYARATHNE No. 49, Gurudeniya Road, Ampitiya. 10. B.L.A. HEMANTHA No. 429/2, Walawwa Road, Homagama. 11. G.L. CHAMINDA No. 156/1, Kirinda, Puhulwella. 12. C.Y. ABEYWARDENA No. 154/5/C, Uduwana, Homagama. 13. U.G. WEERASINGHENirigahahena, Galagama-North, Nakulugamuwa 14. D.M.C.C.K. DISANAYAKE No. 34/A, Getamanna Road, Beliatta. 15. K.D.D.T. KARUNARATHTHNE Ranga Nivasa, Terungama, Agunakolapelassa. 16. P.R. WARNAKULA „Jayamini", Thalapekumbura, Alapaladeniya, Morawaka. 17. G.G.P.B. GAMAGE No. 339/10, Wakwella Road, Galle. 18. H.G.N. DHARSHANI No. 34/8, Malgalla, Tangalle. 19. K.G.B. THUSHANTHI No. 08, Nadun Uyana, Andugoda, Dikkumbura. 20. W.G. SUNIL No. 82/A, Hakwadunna, Nittambuwa. 21. J.T.L. FERNANDO No. 37, Yatiyana, Minuwangoda, Gampaha. 22. I.G. ABHAYATHILAKA No. 319/12, Rajamahavihara Road, Mirihana,Kotte. 23. A.N. JAYAWEERA No. 77, Rajyasevaka Gammanaya, Devurumpitiya, Getaheththa. 24. A.I.C. JAYASEKARA No. 416, Uda Ellepola, Balangoda. 25. K.M.P. BANDUJEEWA „Ashoka Nivasa", Rilpola, Badulla 26. N.K.L. PRIYANGIKA Mahagangoda, Ambalangoda Road, Aluthwala. 27. U.G.J.S. KUMARA C/O Namal Stores, Niyampaluwa, Godamuna, Pitigala. 28. S.A.D.N. MANORI Kendaduwa Waththa, Galthuduwa, Gonagalapura, Bentota. 29. D.M.G.P.M. SHAMALEE Delgaha Badda Road, Kirimatiya, Batapola. 30. A.M.S ATHTHANAYAKE No. 27, Sarasavigama, Mahakanda, Hindagala. 31. J.A. SOMAWEERA No. 55/A, Aluthapola, Wegowwa, Gampaha. 32. S.D.J. NIROSHANA Haldola Road, Bellana, Agalawatta. 33. S.P.K. WIJESINGHE No. 244, Sri Sobitha Road, Nagoda, Kalutara. 34. A.V.P. AJITH SHANTHA No. 100/1, Gamunu Mawatha, Panapitiya, Kalutara. 35. Y.N. ARIYASIRI Pelawatte, Bombuwala, Kalutara South. 36. M.A.J. THUSHARA No. 290, Omaththa Road, Agalawatta. 37. E.L.M.K. ELVITIGALA No. 133, Madulgoda, Pannipitiya. 38. B.V.J. PRIYANTHA Paniyawala Janapadaya, Pareigama. 39. C.L.I.M.T.S. CHANDRASEKARA Dostara Watte, Dadagamuwa, Kuliyapitiya. 40. D.M.H.G.D.P.K. TILAKARATHTHNE No. 22/36, Weerapuran Appu Place, Matale. 41. M.G.L.S. JAYASINGHE Hakirillagoda, Walagedara, Wattappala, Pilimatalawa. 42. R.M. RANMULLA No. 30, Ranmulla, Udispattuwa, Kandy. 43. T.D.G.C.S. JAYAWARDANE „Namal", Madagoda, Galagedhara, Kandy. 44. R.M.I.K. RATHNAYAKE No. 2/29, Kohombiliwala, Matale. 45. S.K.W.M.K. SENEVIRATHTHNE No. 30/07, Patum Uyana, Naranwala, Gampaha. 46. D. CHANDRALATHA No. 264, Quila 04, Kottukachchiya. 47. R.M. PIYATHISSA No. 533/04/A, Janatha Mawatha, Eldeniya, Kadawata. 48. A JAYASURIYA No. 116/02, Pahalabiyanwala, Kadawata. 49. M.A.W. PUSHPAKUMARA No.114/19, Mihindu Mawatha, Wattegedhara Road, Maharagama. 50. M.S.P.K.

25/07/19	SC/ FR Application No. 285/2012	1. R.D.M.K.K. Wimalachandra. “Isuru Sevana”, Bandarawela Road, Dambawinna, Welimaa. 2. K.A. Mallawarachchi. No.197, Koskandawela, Yakkala. 3. D.P.K. Yapa. “Kumarawasa”, Atale, Kegalle. 4. P.W.U.B. Palipana. 37/34, Eragoda, Gampola. 5. D.L.G. Tillakaratne. Panawela, Eheliyagoda. 6. D.D. Weerakoon. Udugalkanda, Bulathsinghala. 7. G.I.K. Zoysa. No.40, Mulgampola Road, Peradeniya. 8. H.L.K. Liyanage. Temple Road, Kowdawatta, Kurunegala. 9. W.M.K.A. Wickramasinghe. A, Muththettuwa Watta, Kuliyapitiya. 10. M.A.W. Malkanthi. 363/1, Udupila North, Delgoda. 11. A.R.M.N. Rathnayake. 135, Doragamua, Waththegama. 12. K.C. Wasalathanthri. No.23, Saddhammawasa Mawatha, Kaluthara South. 13. S.H.N. Jayawickrema. No. 42/19, East Lane, Kiriwella, Kadawatha. 14. N.M.G.D.N. Menika. Sirikotha, Kawudupelella, Matale. 15. P.K.D. Nilmini Deepika. No.89, Kirinda, Hondiyadeniya, Gampaha. 16. D.M.M.C.K. Nawarathne. 113A, Moladanda, Kiribathkumbura. 17. L.H.D. Kulathunga. Othanapitiya, Nelumdeniya. 18. G.A. Ariyasena. “Uthuru Sevana”, Girambe, Nugathalawa. 19. G.L.S.N. Liyanage. 515/2, Ranmuthugala, Kadawatha. 20. R.M. Sarath. Rohana Nivasa, Badulla Road, Welimada. 21. S.M.C.P. Siriwardena. “Sanduni”, Udanaluwela, Balangoda. 22. K.P.K.K. Pathirana. 126/3, Panawela, Nittambuwa. 23. All island Agriculture Monitoring Officers Union. Of Regional Agriculture Research and Development Centre, Diyathalawa Road, Bandarawela. PETITIONERS. V. 1. Mahinda Yapa Abeywardena. Minister of Agriculture, “Govijana Mandiraya”, 80/5, Rajamalwatte Lane, Battaramulla. 1A. Hon. Duminda Dissanayake. Minister of Agriculture, Ministry of Agriculture, “Govijana Mandiraya”, 80/5, Rajamalwatte Lane, Battaramulla. 1B. Hon. P. Harrison, Minister of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries & Aquatic Resources Development, Ministry of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries & Aquatic Resources Development, No.288, Sri Jayawardhanapura Mawatha, Rajagiriya. 2. W. Sakalasooriya. Secretary, Ministry of Agriculture, “Govijana Mandiraya”, 80/5, Rajamalwatte Lane, Battaramulla. 2A. B. Wijayarathne. Secretary, Ministry of Agriculture, “Govijana Mandiraya”, 80/5, Rajamalwatte Lane, Battaramulla. 2B. Mr. K.D.S. Ruwanchandra, Secretary, Ministry of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries & Aquatic Resources Development, No.288, Sri Jayawardhanapura Mawatha, Rajagiriya. 3. K.G. Sriyapala. Director General of Agriculture, Department of Agriculture, Sarasaviya Mawatha, Peradeniya. 3A. Dr. Rohan Wijekoon. Director General of Agriculture, Department of Agriculture, Sarasaviya Mawatha, Peradeniya. 3B. Dr. W.M.W. Weerakoon. Director General of Agriculture, Department of Agriculture, Sarasaviya Mawatha, Peradeniya. 4. D.P.S. Abeygunaratne. Director General of Combined Services, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7. 4A. K.V.P.M.J. Gamage. Director General of Combined Services, Ministry of Public Administration and Management, Independence Square, Colombo 7. 5. Saliya Mathew. Chairman, National Salaries and Cadre Commission, Room No.2G 10, BMICH, Bauddhaloka Mawatha, Colombo 7. 5A. D.H.N. Piyadigama. Co-Chairman, National Pay Commission, Room No.2G 10, BMICH, Bauddhaloka Mawatha, Colombo 7. 5B. S.

25/ 07/ 19	SC APPEAL NO.146/ 2016	B. Nanda Sulochana Perera No. 32/2, Abeysinghapura, Periyamulla, Negombo. Petitioner Vs. 1. D.D. Upul Shantha de Alwis Commissioner of Co-operative Development and Registrar of Co-operative Societies, Western Province. P.O.Box 444, Duke Street, Colombo 01. 2. Negombo Multi-Purpose Cooperative Society Ltd. No. 358, Main Street, Negombo. Respondents AND THEN, B. Nanda Sulochana Perera No. 32/2, Abeysinghapura, Periyamulla, Negombo. Petitioner-Appellant Vs. 1. Commissioner of Co-operative Development and Registrar of Co-operative Societies, (Western Province). P.O.Box 444, Duke Street, Colombo 01. 2. Negombo Multi-Purpose Co-operative Society Ltd. No. 358, Main Street, Negombo. Respondents-Respondents AND NOW BETWEEN B. Nanda Sulochana Perera No. 32/2, Abeysinghapura, Periyamulla, Negombo. Petitioner-Appellant-Petitioner Vs. 1. Commissioner of Co-operative Development and Registrar of Co-operative Societies, (Western Province). P.O.Box 444, Duke Street, Colombo 01. 2. Negombo Multi-Purpose Co-operative Society Ltd. No. 358, Main Street, Negombo. Respondents-Respondents- Respondents
24/ 07/ 19	SC Appeal 88/2016	Wimala Rubasinghe, No. 69/1, Peradeniya Road, Kandy Plaintiff Vs, 1. Lazarus Peter George, No. P6 Housing Scheme, Suduhumpola, Kandy 2. Chandra Gunasekara, No. D7, Aruppola Flats, Kandy Defendants And between Chandra Gunasekara, No. D7, Aruppola Flats, Kandy 2nd Defendant- Appellant Vs, Wimala Rubasinghe, No. 69/1, Peradeniya Road, Kandy Plaintiff- Respondent Lazarus Peter George, No. P6 Housing Scheme, Suduhumpola, Kandy 1st Defendant- Respondent And Now Between Wimala Rubasinghe, No. 69/1, Peradeniya Road, Kandy Plaintiff- Respondent -Appellant Vs, Chandra Gunasekara, No. D7, Aruppola Flats, Kandy 2nd Defendant- Appellant-Respondent Lazarus Peter George, No. P6 Housing Scheme, Suduhumpola, Kandy 1st Defendant- Respondent- Respondent
24/ 07/ 19	SC. Appeal No. 90/2013	In the matter of an Application for Special Leave to Appeal Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Vs. Sabrudeen Kamrudeen, 1249/C, Ananda Mawatha, Hunupitiya, Wattala. Accused And between Sabrudeen Kamrudeen, 1249/C, Ananda Mawatha, Hunupitiya, Wattala. Accused-Appellant Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant-Respondent And now between Sabrudeen Kamrudeen, 1249/C, Ananda Mawatha, Hunupitiya, Wattala. Accused-Appellant-Appellant Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant-Respondent-Respondent

24/07/19	SC/SPL/LA 290/2008 SC/SPL/LA 293/2008	Democratic Socialist Republic of Sri Lanka Complainant Vs, 1. Wasantha Basnayake 2. John Cyril Nimal Fernando 3. Veerappan Murugan Kandiah 4. Arthur Patrick St' John Jackson 5. Thangeshwary Sundaramoorthy Accused And 1. Wasantha Basnayake 2. John Cyril Nimal Fernando 3. Veerappan Murugan Kandiah 4. Arthur Patrick St' John Jackson 5. Thangeshwary Sundaramoorthy Accused-Appellants Vs, Hon Attorney General, - Attorney General's Department, Colombo 12. Complainant –Respondent And now between 4. Arthur Patrick St' John Jackson 5. Thangeshwary Sundaramoorthy 4th and 5th Accused-Appellant-Appellant Vs, Attorney General, Attorney General's Department, Colombo 12. Respondent- Respondent
22/07/19	S.C. F.R. Application No: SC/FR/119/2019	S.F. Zamrath, 554/6E, Peradeniya Road, Kandy. PETITIONER Vs. 1) Sri Lanka Medical Council, No. 31, Norris Canal Road, Colombo 10 2) Hon. Dr. Rajitha Senarathne, Minister of Health Nutrition and Indigenous Medicine, Ministry of Health Nutrition and Indigenous Medicine, Suwasiripaya, Colombo 10. 3) Wasantha Perera, Secretary to the Ministry of Health Nutrition and Indigenous Medicine, Ministry of Health Nutrition and Indigenous Medicine, Suwasiripaya, Colombo 10. 4) Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
16/07/19	SC Appeal 130/2016	The Democratic Socialist Republic of Sri Lanka. Complainant. Vs. Kathaluwa Weligamage Amararathne. Accused. AND Thisantha Mahendra Vittachchi, No. 302/71, Gangewatta, Mahara, Gampola. Petitioner. Vs. 1. Kathaluwa Weligamage Amararathne. 2. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents. AND NOW BETWEEN Kathaluwa Weligamage Amararathne, No. 113, Angammana, Gampola. Accused 1st Respondent Petitioner. Vs. 1. Thisantha Mahendra Vittachchi, No. 302/71, Gangewatta, Mahara, Gampola. Petitioner-Respondent. 2. Hon. Attorney General, Attorney General's Department, Colombo 12. 2nd Respondent Respondent
08/07/19	SC APPEAL NO. 170/2010	Lanka Banku Sevaka Sangamaya, (On behalf of T Jagath Chandrakumara) No. 20, Temple Road, Maradana, Colombo 10. APPLICANT V. People's Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. RESPONDENT AND BETWEEN, Lanka Banku Sevaka Sangamaya, (On behalf of T Jagath Chandrakumara) No. 20, Temple Road, Maradana, Colombo 10. APPLICANT -APPELLANT V. People's Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. RESPONDENT -RESPONDENT AND NOW BETWEEN, People's Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. RESPONDENT –RESPONDENT –APPELLANT V. Lanka Banku Sevaka Sangamaya, (On behalf of T Jagath Chandrakumara) No. 20, Temple Road, Maradana, Colombo 10. APPLICANT –APPELLANT –RESPONDENT
01/07/19	SC. Appeal No. 39/2016	Uwa Development Bank, No.26, Bank Road, Badulla. Respondent Appellant Petitioner. Vs Ceylon Bank Employees Union, on behalf of W.K.Vusudigam, No. 20, Temple Road, Maradana. Applicant Respondent Respondent

27/ 06/ 19	SC Appeal 09/2014	P.S. Kodithu wakkuarachchi No.615/1, Peradeniya Road Kandy . Plaintiff Vs Dr. Hema Bandara Jayasinghe No 23/4, Dalada Veediya, Kandy. Presently of No.72/32, Sri Pushpadana Road, Kandy. Defendants AND THEN BETWEEN P.S. Kodithuwakkuarachchi No.615/1, P eradeniya Road Kandy . Plaintiff Appellant Vs Dr. Hema Bandara Jayasinghe No 23/4, Dalada Veediya, Kandy. Presently of No.72/ 32, Sri Pushpadana Road, Kandy. Defendant Respondent AND NOW BETWEEN Dr. Hema Bandara Jayasinghe No 2 3/4, Dalada Veediya, Kandy. Presently of No.72/32, Sri Pushpadana Road, Kandy. Defendant Respondent Appellant Vs P.S. Kodithuwakkuarachchi No.615/1, Peradeniya Road, Kandy. Plaintiff Appellant Respondent[Deceased] 1A . Pandith Sekera Arachchige Premawathi 1B. Latha Kodithuwakku Arachchi 1C. Gamini Kodithuwakku Arachchi 1D. Ubahaya Kodithuwakku Arachchi 1E. Ramani Kodithuwakku Arachchi 1F. Sarath Kodithuwakku Arachchi
20/ 06/ 19	SC/ HCCA/ LA No. 47/16	W. L. M. N. De Alwis, No 2A, Abeywickrema Avenue, Mount Lavinia. Plaintiff Vs 1. Malwatte Valley Plantations Limited, No. 280. Dam Street, Colombo 12. 2. L. R. Anthony Perera, Royal Gardens, No. 288/12, Sri Jayawardenapura Mawatha, Kotte. Defendants And W. L. M. N. De Alwis, No 2A, Abeywickrema Avenue, Mount Lavinia. Plaintiff-Appellant Vs 1. Malwatte Valley Plantations Limited, No. 280, Dam Street, Colombo 12. 2. L. R. Anthony Perera, Royal Gardens, No. 288/12, Sri Jayawardenapura Mawatha, Kotte. Defendant-Respondents Now (By and between) W. L. M. N. De Alwis, No 2A, Abeywickrema Avenue, Mount Lavinia. Plaintiff-Appellant-Petitioner Vs 1. Malwatte Valley Plantations Limited, No. 280. Dam Street, Colombo 12. 2. L. R. Anthony Perera, Royal Gardens, No. 288/12, Sri Jayawardenapura Mawatha, Kotte. Defendant-Respondent-Respondents And Now Between In the matter of an Application for substitution of the heirs of W. L. M. N. De Alwis (Deceased), No 2A, Abeywickrema Avenue, Mount Lavinia. Plaintiff-Appellant-Petitioner a. Usha Amala De Alwis b. W. Ravini Padmangi De Alwis Karunaratne c. W. Sanjaya Ruwan De Alwis All of No.2B, Abeywickrama Avenue Mt-Lavinia Petitioners Vs 1. Malwatte Valley Plantations Limited, No. 280. Dam Street, Colombo 12. 2. L. R. Anthony Perera, Royal Gardens, No. 288/12, Sri Jayawardenapura Mawatha, Kotte. Defendant-Respondent-Respondent-Respondents

18/06/19	SC/ Appeal 43/2013	1. Dayanthi Dias Kaluarachchi, Hitiyawatta, Kodagoda, Imaduwa. And 03 others Petitioners -Vs- 1. Ceylon Petroleum Corporation, No:109, Rotunda Tower Galle Road, Colombo 03. And 64 Others Respondents AND NOW BETWEEN 1. Ceylon Petroleum Corporation, No: 109, Rotunda Tower, Galle Road, Colombo 03. 2. Chairman, Ceylon Petroleum Corporation No: 109, Rotunda Tower, Galle Road, Colombo 03. 3. Senior Legal Officer, Ceylon Petroleum Corporation, No: 109, Rotunda Tower, Galle Road, Colombo 03. 4. Deputy General Manager (Finance), Ceylon Petroleum Corporation, No: 109, Rotunda Tower, Galle Road, Colombo 03. 5. Deputy General Manager, (Administration), Ceylon Petroleum Corporation, No: 109, Rotunda Tower, Galle Road, Colombo 03. Respondents-Petitioners -Vs- 1. Dayanthi Dias Kaluarachchi, Hitiyawatta, Kodagoda, Imaduwa. (Deceased) 1A. Sunethra Dias Kaluarachchi, Pussewatta, Kodagoda, Imaduwa. 1B. Ranjith Dias Kaluarachchi, 45/19, Neligama, Meerigama. 1C. Manel Dias Kalurachchi, Pussewatta, Kodagoda, Imaduwa. 1D. Sujatha Dias Kaluarachchi 27, Madawalamulla, New Road, Galle. Substituted Petitioner-Respondents 2. Don Nalaka Rasika Sarath Hettiarachchi, Samagi, Gelioya. 3. Sunil Rajapaksha, 103/95, Dharmaraja Mawatha, Kandy. 4. Herath Mudiyanselage Abeykoon, 29A, Godagandeniya, Peredeniya. Petitioners-Respondents S.N.T. Palihena, Member of the Board of Directors, Ceylon Petroleum Corporation No: 109, Rotunda Tower, Galle Road, Colombo 03. And 59 Others Respondents-Respondents
11/06/19	SC (FR) Application No. 677/2012	1. Landage Ishara Anjali (Minor) Prosecutes this Application through her Next Friend, 2. Wijesinghe Chulangani, Both of, Nilmenikgama, Deegala, Marambha, Akuressa PETITIONERS Vs. 1. Waruni Bogahawatte, Matara Police Station, Matara 2. Officer-in-charge, Matara Police Station, Matara. 3. Inspector General of Police, Police Headquarters, Colombo 01. 4. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS
11/06/19	S C Appeal No. 171/2015	Sri Lanka Savings Bank Ltd, No. 265, Ward Place, Colombo 07. PLAINTIFF - APPELLANT 1. Global Tea Lanka (Pvt) Ltd, No. 56/1/2A, Gemunu Mawatha, Hunupitiya, Wattala. 2. Narayana Mudiyanselage Manjula Narayana, No. 18/B, Alfred Place, Colombo 03. 3. Narayana Mudiyanselage Indra Padmakanthi, No. 18/B, Alfred Place, Colombo 03.

10/ 06/ 19	SC Appeal 45/2010	Dadallage Mer vin Silva No.239/1, Wijewardana Mawatha, Pasyala Road , Meerigama . Plaintiff Vs 1. Dadallage Anil Shantha Samarasinghe Walawwatte, Meerigama 2. Moham ed Rosaid Misthihar No.5, Masjid Mawatha,Kaleliya Defendants AND Dadallage Anil Shantha Samarasinghe Wala wwatte, Meerigama 1 st Defendant Appellant Vs Dadallage Mervin Silva No.239/1, Wijewardana Mawatha, Pas yala Road , Meerigama Plaintiff Respondent Mohamed Rosaid Misthihar No.5, Masjid Mawatha,Kaleliya 2 nd Defendant Respondent AND BETWEEN Dadal lage Anil Shantha Samarasinghe Walawwatte, Meerigama. 1 st Defen dant Appellant Appellant Vs Dadallage Mervin Silva No.239/1, Wijewardana Mawatha, Pasyala Road, Meerigama. Plaintiff Respondent Respondent Mohamed Rosaid Misthihar No.5, Masjid Mawatha,Kaleliya 2 nd Defendant Respo ndent Respondent
06/ 06/ 19	S C Appeal 86 / 2010	1. Ramasamy Mayalagu, Nagoda Watta, Nagoda, Galle. 1ST ACCUSED - APPELLANT - APPELLANT 2. Mayalagu Tangaraja, Nagoda Watta, Nagoda, Galle. 3RD ACCUSED - APPELLANT - APPELLANT -Vs- Hon. Attorney General, Attorney General’s Department, Colombo 12. COMPLAINANT - RESPONDENT - RESPONDENT

06/06/19	SC (F/R) Application No. 642/2012.	1. D.C.P. Kaluarachchi, No. 442/3, Neelammahara Road, Maharagama. 2. J.D.D.L. Gunasekera, No.10A, Thalgaspe, Elpitiya.. 3. K.A. Sugath, No.1/155, Halathota, Kalutara. 4. S. Ranjan, No.28, Futimagiri Mawatha, Batticaloa. 5. K.D.S. Chandra Kumara, No.45/17, Chandraloka Mawatha, Thalapathpitiya, Nugegoda. 6. T.H.M. Sumith Sisira Herath, No. 47/53, Sir Kuda Rathwatte Mawatha, Kandy. 7. A.A. Roshan Perera, No.836/5, Kurusawala, Thumpeliya, Ja-Ela. 8. M.B. Wijeratne, No.584/2, Halmillaketiya, Thunkama, Embilipitiya. 9. I.J.A. Perera, No. 843/1, Daham Mawatha, Thalangama North, Malabe. 10. A.L.A. Herbert Priyantha Liyanage, No. 7/G, Station Road, Khahalla, Katugastota. PETITIONERS. -VS- 1. Prof. Dayasiri Fernando. Former Chairman, 2. Srima Wijeratne, Former Member, 3. Palitha Kumarasinghe, Former member, 4. S.C. Mannapperuma, Former Member, 5. Ananda Seneviratne, Former Member, 6. N.H. Pathirana, Former Member, 7. S. Thillanadarajah, Former Member, 8. M.D.W. Ariyawansa, Former Member, 9. A. Mohamed Nahiya, Former Member, All of the Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5. 10. D.G.M.V. Hapuarachchi, Former Commissioner General of Excise, Excise Department of Sri Lanka, No.34, W.A.D. Ramanayaka Mawatha, Colombo 2. 10 A. L.K.G. Gunawardena, Former Commissioner General of Excise, Excise Department of Sri Lanka, No.34, W.A.D. Ramanayaka Mawatha, Colombo 2. 10B. K.H.A. Meegasmulla, Commissioner General of Excise, Excise Department of Sri Lanka, No.34, W.A.D. Ramanayaka Mawatha, Colombo 2. 11. P.B. Jayasundara, Former the Secretary, Ministry of Finance and Planning, The Secretariat, Colombo 1. 11A. R.H.S. Samarathunga, The Secretary, Ministry of Finance and Planning, The Secretariat, Colombo 1. W.M.N.J. Pushpakumara, Commissioner General of Examinations, Department of Examinations, P.O. Box 1503, Colombo. 12. S.M.J. Ariyakumara, Excise Inspector, 13. K.S.M.G.M. Bandara, Excise Inspector, 14. C.P.J. Otupitarachchi, Excise Inspector, 15. B.P.A.M. Asela Fernando, Excise Inspector, 16. A.A. Sunil Gunathunga, Excise Inspector, 17. I.N.R.W. Ilangakone, Excise Inspector, 18. E.B.B.H. Kumara, Excise Inspector, 19. G.N. Kumarage, Excise Inspector, 20. T.L.D. Mendis, Excise Inspector, 21. S.S.B. Perera, Excise Inspector, 22. K.L.D.T.A. Regies, Excise Inspector, 23. G. Vineetha Rathnapala, Excise Inspector, 24. R.A.D.P.K. Senaratne, Excise Inspector, 25. M. Jayantha Silva, Excise Inspector, 26. C.H. Sirimanna, Excise Inspector, 27. T.C. Wijewardena, Excise Inspector, 28. H.K. Meththasinghe, Excise Inspector, 29. Y.A.S.P. Yapa, Excise Inspector, 30. T.D.J. Dissanayaka, Excise Inspector, 31. Kalarasike Wijesinghe, Excise Inspector, 32. Dileep Nirosha Jayakody, Excise Inspector, 33. A.W.M. Majeed, Excise Inspector, 34. U.B. Marasinghe, Excise Inspector, 35. D.M.C.P. Jayawardena, Excise Inspector, 36. M.D. Welagedara, Excise Inspector, 37. D.H.K. Aruna, Excise Inspector, 38. M.A. Nimal Shantha, Excise Inspector, 39. Ravindra Panveriya. Excise Inspector, 40. W.T.R. Samantha, Excise Inspector, 41. H.G.P. Ranaweera, Excise Inspector, 42. I.M.D. Tennakoon, Excise Inspector, 43. D.J.P. Udayakumara, Excise Inspector, All c/o Excise Department of Sri Lanka, No.34, W.A.D. Ramanayaka Mawatha, Colombo 2. 44. Attorney General, Attorney General's Department, Colombo 12. 45. Sathya Hettige, Former

06/06/19	SC (F/R) Application No. 275/2013	Rubasin Gamage Indika Athula Priyantha, No.19/9, Wewalwala Road, Bataganvilla, Galle. Petitioner. Vs. 1. The Inspector General of Police. Police Headquarters, Colombo 1. 2. Mr. K.E.L. Perera, Deputy Inspector General, Personnel Division, Police Headquarters, Colombo 1. 3. W.K. Jayalath, Senior Superintendent of Police, Director Recruitment, Sri Lanka Police, No.375, Sri Sambuddajayanthi Mawatha, Colombo 8. 4. Dr. Dayasiri Fernando, (Chairman), Public Service Commission. 4(A). Rtd Hon Justice Sathya Hettige. (Chairman), Public Service Commission. 4(B). Mr. S.C. Mannapperuma, Member, Public Service Commission. 4(C). Mr. Ananda Seneviratne, Member, Public Service Commission. 4(D). Mr. N.H. Pathirana, Member, Public Service Commission. 4(E). Mr. S. Thillianadarajah, Member, Public Service Commission. 4(F). Mr. A. Mohamed Nahiya, Member, Public Service Commission. 4(G). Mrs. Kanthi Wijethunge, Member, Public Service Commission. 4(H). Mr. Sunil S. Sirisena, Member, Public Service Commission. 4(I). I.M. De Soysa Gunasekera. Member, Public Service Commission. 4(A)(A). Prof. Siri Hettige. Chairman, National Police Commission. 4(A)(B). Mr. P.H. Manathunga. Member, National Police Commission. 4(A)(C). Mrs. Savithree Wijesekara, Member, National Police Commission. 4(A)(D). Mr. Y.L.M. Zawahir, Member, National Police Commission. 4(A)(E). Mr. Anton Jeyanadan, Member, National Police Commission. 4(A)(F). Mr. Tilak Collure, Member, National Police Commission. 4(A)(G). Mr. Frande Silva, Member, National Police Commission. 4(A)(H). Mr. N. Ariyadasa, Secretary, National Police Commission. All C/O The National Police Commission, Block No.3, B.M.I.C.H. Premises, Bauddhaloka Mawatha, Colombo 7. 5. Mr. Palitha M. Kumarasinghe P.C., Member, Public Service Commission. 6. Mrs. Sirimavo A. Wijeratne, Member, Public Service Commission. 7. Mr. S.C. Mannapperuma, Member, Public Service Commission. 8. Mr. Ananda Seneviratne, Member, Public Service Commission. 9. Mr. N.H. Pathirana, Member, Public Service Commission. 10. Mr. S. Thillanadarajah, Member, Public Service Commission. 11. Mr. M.D.W. Ariyawansa, Member, Public Service Commission. 12. Mr. A. Mohamed Nahiya, Member, Public Service Commission. All C/O the Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5. 13. The Secretary, The Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5. 13A. Major General (Rtd) Nanda Mallawarachchi, Secretary to the Ministry of Law and Order, Ministry of Law and Order, Chatham Street, Colombo 1. 13B. Dr. Mahinda Balasuriya, The Secretary, Ministry of Law and Order, Floor 13, Sethsiripaya[Stage II], Battaramulla. 13C. Mr. Jagath Wijeweera. The Secretary, Ministry of Law and Order, Floor 13, Sethsiripaya[Stage II], Battaramulla. 14. The Secretary, Ministry of Defence and Urban Development, No. 15/5, Baladaksha Mawatha, Colombo 02. 15. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

06/06/19	SC APPEAL NO.69/2011	Lanka Banku Sewaka Sangamaya. (on behalf of E.A. Sugathapala) No.20, Temple Raod, Maradana, Colombo 10. APPLICANT -VS- People's Bank. Head Office, Sir Chittampalam A Gardiner Mawatha, Colombo 02. RESPONDENT AND, People's Bank. Head Office, Sir Chittampalam A Gardiner Mawatha, Colombo 02. RESPONDENT-APPELLANT -VS- Lanka Banku Sewaka Sangamaya. (on behalf of E.A. Sugathapala) No.20, Temple Raod, Maradana, Colombo 10. APPLICANT-RESPONDENT AND NOW BETWEEN Lanka Banku Sewaka Sangamaya. (on behalf of E.A. Sugathapala) No.20, Temple Raod, Maradana, Colombo 10. APPLICANT-RESPONDENT-PETITIONER -VS- People's Bank. Head Office, Sir Chittampalam A Gardiner Mawatha, Colombo 02. RESPONDENT-APPELLANT-RESPONDENT
05/06/19	SC. FR Application No. 495/2011	U.G. Chandima Priyadeva No.64, Kandy Road Kiribathgoda, Kelaniya Petitioner Vs. 1A. Director General, Director General's Office of Merchant Shipping, Ministry of Ports & Highways, 1st Floor, Bristol Building No. 43-89, York Street Colombo1. 1. Shantha Weerakoon, Former Director General, Director General's Office of Merchant Shipping, Ministry of Ports & Highways, 1st Floor, Bristol Building No. 43-89, York Street Colombo1 2. Rathna Bharathi, Acting Shipping Officer, Director General's Office of Merchant Shipping, Ministry of Ports & Highways, 1st Floor, Bristol Building No. 43-89, York Street Colombo1 3. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents
29/05/19	S C (F R) Application No. 96/ 2012	1. A H Nethum Prabodha Ranawaka, 43/15, R E De Silva Mawatha, Heppumulla, Ambalangoda. 2. A H Nadeeka Malkanthi, 43/15, R E De Silva Mawatha, Heppumulla, Ambalangoda. PETITIONERS -Vs- 1. M G O P Panditharathna Principal, Drarmashoka Vidyalaya, Ambalangoda. 2. Director, National Schools, Isurupaya, Battaramulla. 3. Secretary, Ministry of Education, Isurupaya, Battaramulla. 4. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
29/05/19	SC Appeal No. SC/CHC/37/2013	CENTRAL FINANCE COMPANY PLC No. 84, Raja Veediya, Kandy. PLAINTIFF VS. 1. SAPPANI CHANDRASEKERA No. 22-E, Quarry Road, Colombo 12. 2. SITTAMBARAM PILLEI SHANMUGAM No. 23, Abdul Jabbar Mawatha, Colombo12. DEFENDANTS AND CENTRAL FINANCE COMPANY PLC No. 84, Raja Veediya, Kandy. PLAINTIFF-APPELLANT VS. 1. SAPPANI CHANDRASEKERA No. 22-E, Quarry Road, Colombo 12. 2. SITTAMBARAM PILLEI SHANMUGAM No. 23, Abdul Jabbar Mawatha, Colombo12. DEFENDANTS-RESPONDENTS

27/ 05/ 19	Applicati on No. SC/FR/ 30/18.	1. S.M.N.S. Thilakarathne, 10/2, Baduwatta Lane, Dharmashoka Mawatha, Lewella, Kandy. 1a. Sajana Sathmina Gunarathne (minor) 10/2, Baduwatta Lane, Dharmashoka Mawatha, Lewella, Kandy Petitioners 1. M.W.D.T.P. Wanasinghe The Principal and the Chairman of the Interview Board, Dharmaraja College, Kandy. 2. W.M. Wijerathna, The Zonal Director of Education, Zonal Education Office, Kandy. 3. W.M. Jayantha Wickaramanayake, Director of National Schools Branch, Ministry of Education, “Isurupaya” Battaramulla. 4. Sunil Hettiarachchi, The Secretary, Ministry of Education, “Isurupaya” Battaramulla. 5. Herathmudiyanselage Kanishka Hemindra Hearth, 5a. H.M.C.D. Hearath (minor) Both are at: 29/58, Nuwarawela, Ampitiya Road, Kandy. 6. T.B.G. Bulumulla, 6a. T.B.G.U.E. Bulumulla (minor) Both are at: 96/39A, Rajapheela Mawatha, Kandy. 7. Hon. Attorney General, Attorney General’s Department, Hultsdorp, Colombo 12. Respondents.
22/ 05/ 19	S C (F R) Applicati on No. 660/ 2012	Christopher Mariyadas Nevis, 29 / 2, St. Sebastian Street, Paasaioor, Jaffna. PETITIONER Mariyadas Nevis Delrokson, Son of the Petitioner DECEASED VICTIM - Vs - 1. Superintendent, Vavuniya Prison, Vavuniya. 2. Superintendent, Anuradhapura Prison, Anuradhapura. 3. Superintendent, Mahara Prison, Mahara. 4. Commissioner General of Prisons, Prisons Head Quarters, Colombo 08. 5. Director, Criminal Investigations Department, Colombo 01. 6. Director, Ragama Teaching Hospital, Ragama. 7. Director, Special Task Force, Colombo 01. 8. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS
22/ 05/ 19	S C (F R) Applicati on No. 660/ 2012	

20/05/19	SC Appeal No. 02/2015	WARNASURIYA PATABANDIGE KAMANI INDUMATHIE RATNAPALA 36/3, “Primrose Uyana”, George De Silva Mawatha, Kandy PLAINTIFF VS. 1. POLWATTAGE ANURA LAKSHMAN WEERASURIYA No. 101, Gangoda Road, Postal Area of Kurunegala. 2. POLWATTAGE ANIL WASANTHA WEERASURIYA 39/15, Biyagama Road, Naranwala Sub Postal Area, Gampaha. DEFENDANTS AND 1. POLWATTAGE ANURA LAKSHMAN WEERASURIYA No. 101, Gangoda Road, Postal Area of Kurunegala 1st DEFENDANT-APPELLANT VS. WARNASURIYA PATABANDIGE KAMANI INDUMATHIE RATNAPALA 36/3, “Primrose Uyana”, George De Silva Mawatha, Kandy PLAINTIFF-RESPONDENT 2. POLWATTAGE ANIL WASANTHA WEERASURIYA 39/15, Biyagama Road, Naranwala Sub Postal Area, Gampaha. 2nd DEFENDANT-RESPONDENT AND NOW BETWEEN POLWATTAGE ANURA LAKSHMAN WEERASURIYA No. 101, Gangoda Road, Postal Area of Kurunegala. Appearing by his Power of Attorney holder Ramani Wijesuriya of No. 101, Gangoda Road, Postal Area of Kurunegala. 1st DEFENDANT-APPELLANT- PETITIONER/APPELLANT VS. WARNASURIYA PATABANDIGE KAMANI INDUMATHIE RATNAPALA 36/3, “Primrose Uyana”, George De Silva Mawatha, Kandy. PLAINTIFF-RESPONDENT- RESPONDENT POLWATTAGE ANIL WASANTHA WEERASURIYA 39/15, Biyagama Road, Naranwala Sub Postal Area, Gampaha. 2nd DEFENDANT-RESPONDENT- RESPONDENT ((deceased)) 1. THALANGAMA APPUHAMYLAGE DONA SHRIYALATHA IRANGANIE 2. PAVITHRA DIGAASHINI WEERASURIYA 3. NAVODYA THATHSARANI WEERASURIYA All of No. 90/B, Naranwala, Gampaha. SUBSTITUTED 2ND DEFENDANTS-RESPONDENTS-RESPONDENTS

24/ 04/ 19	SC Appeal No.120/ 2010	Prof. Desmond Mallikarachchi, No.118, Nivana, Kurundugahagoda, Pilimathalawa. Petitioner Vs 1. University of Peradeniya 2. Prof. H. Abeygunawardena, The Vice Chancellor, 3. Prof. A. Wickramasinghe, 4. Prof. P. W. M. B. B. Marambe, 5. Prof. K. Tuder Silva, 6. Prof. E. A. P. D. Amaratunge, 7. Prof. S. B. S. Abeyakoon, 8. Dr. W. I. Amarasinghe, 9. Prof. S. H. P. P. Karunaratne, 10. Prof. (Mrs.) P. Abeynayake, 11. Prof. K. N. O. Dharmadasa, 12. Prof. B. Hewavitharana, 13. Prof. (Mrs.) M. S. Chandrasekera, 14. Prof. A. D. P. Kalanasuriya, 15. Dr. S. D. Pathirana, 16. Dr. D. B. Wickramaratne, 17. Dr. P. Ramanujam, 18. Dr. Dushantha Madagedara, 19. Dr. Kapila Gunawardena, 20. Mr. D. Mathy Yogarajah, 21. Mr. W. L. L. Perera, 22. Mr. Mohan Samaranayake, 23. Dr. A. Kahandaliyanage, 24. Mr. Lionel Ekanayake, 25. Dr. S. B. Ekanayake, 26. Mr. L. B. Samarakoon, 1st to 26th Respondents of University of Peradeniya, Peradeniya. 27. S. K. Liyanage, 12/1A, Andarawatta, Polhengoda, Colombo 5. Respondents AND NOW IN APPEAL BEFORE YOUR LORDSHIPS' COURT 1. University of Peradeniya 2. Prof. H. Abeygunawardena, The Former Vice Chancellor, 3. Prof. A. Wickramasinghe, 4. Prof. P. W. M. B. B. Marambe, 5. Prof. K. Tuder Silva, 6. Prof. E. A. P. D. Amaratunge, 7. Prof. S. B. S. Abeyakoon, 8. Dr. W. I. Amarasinghe, 9. Prof. S. H. P. P. Karunaratne, 10. Prof. (Mrs.) P. Abeynayake, 11. Prof. K. N. O. Dharmadasa, 12. Prof. B. Hewavitharana, 13. Prof. (Mrs.) M. S. Chandrasekera, 14. Prof. A. D. P. Kalanasuriya, 15. Dr. S. D. Pathirana, 16. Dr. D. B. Wickramaratne, 17. Dr. P. Ramanujam, 18. Dr. Dushantha Madagedara, 19. Dr. Kapila Gunawardena, 20. Mr. D. Mathy Yogarajah, 21. Mr. W. L. L. Perera, 22. Mr. Mohan Samaranayake, 23. Dr. A. Kahandaliyanage, 24. Mr. Lionel Ekanayake, 25. Dr. S. B. Ekanayake, 26. Mr. L. B. Samarakoon, 1st to 26th Respondents-Petitioners of University of Peradeniya, Peradeniya. Respondents-Petitioners Vs. Prof. Desmond Mallikarachchi, No.118, Nivana, Kurundugahagoda, Pilimathalawa. Petitioner-Respondent 27. S. K. Liyanage, 12/1A, Andarawatta, Polhengoda, Colombo 5. Respondent-Respondent
24/ 04/ 19	SC TAB 01/2016	Rathnayake Mudiyanselage Sunil Ratnayake. (Presently at Welikada Prison) 1st Accused-Appellant Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent
24/ 04/ 19	S.C. Appeal 19/2013	The Commission to Investigate Allegations of Bribery or Corruption Complainant -Vs- J.L. Epa Seneviratne Accused AND BETWEEN J.L. Epa Seneviratne Accused-Appellant -Vs- Director General, The Commission to Investigate Allegations of Bribery or Corruption. Complainant- Respondent AND NOW BETWEEN J.L. Epa Seneviratne Accused-Appellant-Appellant -Vs- Director General, The Commission to Investigate Allegations of Bribery or Corruption. Complainant- Respondent- Respondent

17/04/19	SC FR Application No. 273/2018	DR. AJITH C.S. PERERA Chief Executive/Secretary General, “IDIRIYA”, No. 18/1, Arthur‟s Place, Dehiwala. PETITIONER VS. 1. HON. DAYA GAMAGE Minister of Social Services and Social Welfare and the Chairman of the National Council for Persons with Disabilities, 80/5, Govijana Mandiraya, Rajamalwatta Avenue, Battaramulla. 2. HON. FAISER MUSTHAPA Minister of Provincial Councils, Local Government and Sports, No. 330, Dr. Colvin R. de Silva Mawatha, Colombo 02. 3. HON. SAJITH PREMADASA Minister of Housing and Construction, 2nd Floor, “Sethsiripaya”, Battaramulla. 4. HON. PATALI CHAMPIKA RANAWAKA Minister of Megapolis and Western Development, 17th and 18th Floors, “Suhurupaya”. Subhuthipura Road, Battaramulla. 5. HON. AKILA VIRAJ KARIYAWASAM Minister of Education, “Isurupaya”, Pelawatta, Battaramulla. 6. HON. (MRS.) THALATHA ATUKORALA Minister of Justice and Prison Reform, Superior Courts Complex, Colombo 12. 7. SRI LANKA TOURISM DEVELOPMENT AUTHORITY No. 80, Galle Road, Colombo 03. 8. THE URBAN DEVELOPMENT AUTHORITY 6th and 7th Floors, “Sethsiripaya”, Battaramulla. 9. HON. ATTORNEY GENERAL Attorney General‟s Department, Colombo 12. RESPONDENTS
04/04/19	SC Appeal 93/2012	04. Galabada Kandaamage Kumarapala of Iddagoda Road, Matugama DEFENDANT-RESPONDENT- APPELLANT Vs Halpanadeniya Hewage Sepala alias Sepala Wijesundara of Iddagoda Road, Matugama PLAINTIFF-APPELLANT-RESPONDENT
04/04/19	S.C. Appeal No.31/2013,	Dona Premawathie Kodithuwakkurachchi, ‘Seedevi’, Narawala, Poddala. Plaintiff Vs. 1. Kuragodage Sujitha Gunawathie 2. Piyasena Annatta Pathirana alias A.P. Gunadasa both of Post Office Quarters, Poddala. Defendants Dona Premawathi Kodithuwakkuarachchi, ‘Seedevi’, Narawala, Poddala. Plaintiff -Appellant Vs. 1. Kuragodage Sujitha Gunawathie 2. Piyasena Annatta Pathirana alias A.P. Gunadasa both of Post Office Quarters, Poddala. Defendant –Respondent And Now Between 1. Kuragodage Sujitha Gunawathie 2. Piyasena Annatta Pathirana alias A.P. Gunadasa both of Post Office Quarters, Poddala. Defendant-Appellant-Petitioner Vs. Dona Premawathi Kodithuwakkuarachchi, ‘Seedevi’, Narawala, Poddala. Plaintiff-Appellant-Respondent

04/04/19	SC Appeal No. 113/2014	LANKA ORIX LEASING COMPANY LIMITED. Presently of No. 100/1, Sri Jayawardenapura Mawatha, Rajagiriya. PETITIONER VS. WEERATUNGE ARACHCHIGE PIYADASA Carrying on business as Sole Proprietor under the name, style, and firm “Weeratunge Textile”, of No. 12, Super Market, Hakmana. RESPONDENT (DECEASED) ELLEGODA GAMAGE KAMALA RANI WEERATUNGE No. 12, Main Street, Hakmana. SUBSTITUTED RESPONDENT AND NOW BETWEEN LANKA ORIX LEASING COMPANY LIMITED. Presently of No. 100/1, Sri Jayawardenapura Mawatha, Rajagiriya. PETITIONER/ APPELLANT VS. WEERATUNGE ARACHCHIGE PIYADASA Carrying on business as Sole Proprietor under the name, style, and firm “Weeratunge Textile”, of No. 12, Super Market, Hakmana. RESPONDENT-RESPONDENT (DECEASED) ELLEGODA GAMAGE KAMALA RANI WEERATUNGE No. 12, Main Street, Hakmana. SUBSTITUTED RESPONDENT- RESPONDENT

04/04/19	SC (F/R) Application No. 276/2016.	1. Palipana Walawwe Udaya Bandara, Palipana, 37/34, Eragoda, Gampola. 2. Kuruppu Arachchilage Champa Nalinie Senevirathne. 22, Vijirarama Mawatha, Primrose Garden, Kandy. 3. Nadeeka Prashanthi Thenna Gunawardena, 348/1, Kumbure Gedara Road, Haloluwa. 4. Ahangama Gamage Sunil, 082 B1, Sirimavo Bandaranayake Mawatha, Peradeniya. 5. Merangnage Gayani Fonseka, 126B, Yapa Mawatha, Gannoruwa, Peradeniya. 6. Herath Mudiyanselage Indrani Herath, 237, Meddegoda, Yatiwawala, Katugastota. 7. Marappulige Uthpalawanna Ranasinghe, Ihalagama, Tholangamuwa. 8. Anusha Nishanthi Nanayakkara, 214/8, Colombo Road, Gampaha. 9. Rajamuni Devage Donil Kularathne, Dikwatte Gedara, Sevanagama, Mahaulpotha, Bandarawela. 10. Ekanayake Mudiyanselage Sumith Ekanayake, 5/12, Gamunu Mawatha, Hanthana Pedesa, Kandy. 11. Halpawaththage Madhuri Padmakumari Pieris. “Iresha”, Rohal Patumaga, Tangalle Road, Weeraketiya. 12. Rankette Gedara Sagara Priyantha Piyasena. 108, Doolwala, Halloluwa, Kandy. Petitioners. Vs. 1. K.N. Yapa. Director General, Department of National Botanic Gardens, P.O. Box 14, Peradeniya. 2. R.M.D.B. Meegasmulla, Secretary, Ministry of Sustainable Development and Wildlife, 9th Floor, “Sethsiripaya”, Stage 1, Battaramulla. 3. Gamini Jayawickrema Perera, Minister, Ministry of Sustainable Development and Wildlife, 9th Floor, “Sethsiripaya”, Stage 1, Battaramulla. 4. R.M.N.E.K. Ranasinghe, Director, Sri Lanka Scientific Service Board, C/O, Ministry of Public Administration and Management, Independence Square, Colombo 07. 5. Ms. M.F.R. Safra, Assistant Director, Sri Lanka Scientific Service Board, C/O, Ministry of Public Administration and Management, Independence Square, Colombo 07. 6. Mr. Dharmasena Dissanayake, Chairman 7. Justice A. Salam Abdul Waid, Member 8. Mr. D.S. Wijayatilaka, Member 9. Dr. Prathap Ramanujan, Member 10. Mrs. V. Jegarasasingam, Member 11. Mr. S.N. Seneviratne, Member 12. Mr. S. Ranugge, Member 13. Mr. D.L. Mendis, Member 14. Mr. Sarath Jayathilaka, Member The 6th to 14th Respondents all of, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 15. Hon. Attorney General, Attorney General’s Department, Colombo 12. 16. E.J.S. De Soysa, No. 105/A, Mariyawatta, Gampola. 17. J.K.P.T.P. Jayaweera, Anoma, Diviyagahawela, Karandeniya. 18. H.K.K.D. Pathirana, Weragama, Ude Niriella, Ratnapura. 19. H.S. Wijethunge, No.69/C, Giridara, Kapugoda. 20. B.H.D.S. Sampath, Sri Bodhiramaya, Samanalagama, Pathakada, Pelmadulla. 21. P.A.A.P.K. Senanayake, No. 1/21, Kehelgolla, Uduwa, Kandy. 22. M.C.L. Aththanayake, ‘Sandun Sewana’, Ambalakanda Road, Pondape, Aranayake. 23. H.S. Punchihewa, No.144, Stage IV, Tissa Mawatha, Uyandana, Kurunegala. 24. M.M.L.I.W. Bandara, Indipitiya Wattha, Sumangala Mawatha, Wariyapola. 25. K.M.S. Deshaprema, No.17, Circular Road, Makuluwala, Galle. 26. H.M.I.N.K. Haluwana, No. 15/A/A, Kulugammana, Kandy. Respondents

04/04/19	SC APPEAL NO.39/2013	W. Justin Fernando. (Deceased) Thambarawila, Waikkala. (Plaintiff) K. Mary Margaret Fernando. Thambarawila, Waikkawala. Substituted Plaintiff Vs. W.M. Seneviratne, No. 402, Eliya Diwulwewa, Eppawala. Defendant And then, W.M. Seneviratne, No. 402, Eliya Diwulwewa, Eppawala. Defendant-Appellant. Vs. K. Mary Margaret Fernando. Thambarawila, Waikkawala. Substituted Plaintiff-Respondent. AND NOW BETWEEN, K. Mary Margaret Fernando. Thambarawila, Waikkawala. Substituted Plaintiff-Respondent-Petitioner Vs. W.M. Seneviratne, No. 402, Eliya Diwulwewa, Eppawala. Defendant-Appellant-Respondent
04/04/19	SC FR 265 - 274/2011 and 346-348/2011	Petitioners H. M. M. Sampath Kumara, Mamunugama, Moragollagama. (Petitioner S.C. (F/R) Application No. 265/2011) A. Rohitha Amarasinghe, Aluth-Ala Road,Paluwa, Galgamuwa. (Petitioner S.C. (F/R) Application No. 266/2011) C. A. H. M. O. Buddhika Atapattu, 147/1, Mapitigama, Ambanpola. (Petitioner S.C. (F/R) Application No. 267/2011) R. R. M. Dhanushka Sanjeewa, 8/10, Amandoluwa, Seeduwa. (Petitioner S.C. (F/R) Application No. 268/2011) Anesh Imalka Fernando, Paalasola, Madurankuliya. (Petitioner S.C. (F/R) Application No. 269/2011) N. L. T. Iresha, 134/2, Japalawatte, Minuwangoda. (Petitioner S.C. (F/R) Application No. 270/2011) Nisshanka Wanigasekera, 13 Post, Bandaragama, Pemaduwa. (Petitioner S.C. (F/R) Application No. 271/2011) R. A. H. M. Jayatissa Rajakaruna, 230/4, Sarath Mawatha, Katunayake. (Petitioner S.C. (F/R) Application No. 272/2011) S. P. L. Ranjan Lasantha Perera, 19, St. Xavier Mawatha, Kimbulapitiya Road, Akkara 50. (Petitioner S.C. (F/R) Application No. 273/2011) H. M. Lalinda Herath, No 21/09, Yatiyana, Minuwangoda. (Petitioner S.C. (F/R) Application No. 274/2011) M. Pradeep Kumara Priyadarshana Jambolagahamulla, Dippitiya, Mahapallegama. (Petitioner S.C. (F/R) Application No. 346/2011) U. G. Nalin Sanjaya Jayatileke, 625/1, Aluthgama, Nabata, Malsiripura. (Petitioner S.C. (F/R) Application No. 347/2011) M. H. A. Sameera Sandaruwan Hettiarachchi, Welimada, Daragala, Dumkola Watta, Sameera-Sewana. (Petitioner S.C. (F/R) Application No. 348/2011) Vs. Respondents 1. Officer-in-Charge, Police Station, Katunayake. 2. Officer-in-Charge, Police Station, Seeduwa. 3. Deputy Inspector General of Police, Negombo DIG Office, Negombo. 4. Mahinda Balasooriya, Former Inspector General of Police, C/O Police Headquarters, Colombo 01. 5. N. K. Illangakoon, Former Inspector General of Police, Police Headquarters, Colombo 01. 5A. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 6. Board of Investment of Sri Lanka, West Tower-World Trade Centre, Echelon Square, Colombo 01. 7. Lt. Gen. Jagath Jayasooriya, Commander- Sri Lanka Army, Army Headquarters, Colombo 03. 8. Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. (Respondents in all cases) 9. Gamini Lokuge MP Hon. Minister of Labour, Ministry of Labour & Labour Relations, Labour Secretariat, Narahenpita, Colombo 05. (8th Respondent in S.C. (F/R) Application No. 346/2011)

03/04/19	S C Appeal No. 234/2014	L Ajith Thilakarathne De Silva, Senevirathne Road, Madampe. DEFENDANT - PETITIONER - APPELLANT Warnakulasuri Josep Victor Daberera, Anita Magrat House, Mepals Road, Uhitiyawa, Wennapuwa. PLAINTIFF - RESPONDENT - RESPONDENT
03/04/19	SC FR Application No. 141/2015	RAVINDRA GUNAWARDENA KARIYAWASAM Chairman, Centre for Environment and Nature Studies, No. 1149, Old Kotte Road, Rajagiriya. PETITIONER VS. 1. CENTRAL ENVIRONMENT AUTHORITY No. 104,Denzil Kobbekaduwa Road, Battaramulla. 2. CHAIRMAN, CENTRAL ENVIRONMENT AUTHORITY No. 104, Denzil Kobbekaduwa Road, Battaramulla. 3. SRI LANKA ELECTRICITY BOARD P.O. Box 540, Colombo 2. 4. CHAIRMAN, SRI LANKA ELECTRICITY BOARD P.O. Box 540, Colombo 02. 5. CHIEF MINISTER, NORTHERN PROVINCE No. 26, Somasundaram Avenue, Chundukuli, Jaffna. 6. PONNUTHURAI AYNGARANESAN, MINISTER OF ENVIRONMENT, NORTHERN PROVINCE No. 295, Kandy Road, Ariyalai, Jaffna. 7. CHAIRMAN, VALIKAMAM SOUTH PRADESHIYA SABHA Valikamam. 8. NORTHERN POWER COMPANY (PVT) LTD. No. 29, Castle Street, Colombo 10. 9. HON. ATTORNEY GENERAL Attorney General‟s Department, Colombo 12. 10. BOARD OF INVESTMENT OF SRI LANKA Level 26, West Tower, World Trade Center, Colombo 1. 11. NATIONAL WATER SUPPLY AND DRAINAGE BOARD P.O. Box 14, Galle Road, Mt. Lavinia. RESPONDENTS 1. DR. RAJALINGAM SIVASANGAR Chunnakam East, Chunnakam. 2. SINNATHURAI SIVAMAINTHAN Chunnakam East, Chunnakam. 3. SIVASAKTHIVEL SIVARATHEES Chunnakam East, Chunnakam. ADDED RESPONDENTS
03/04/19	S C Appeal (CHC) No. 20/2007	1. Pesumal Bulchand Chandiramani, 2. Jayashree Pesumal Chandiramani, Both of No. 18, Murugan Place, Colombo 06. PLAINTIFF - APPELLANTS -Vs- 1. Chandru Lakshimal Sadhwani, No 50, Nelson Place, Colombo 06. 2. Seylan Bank Ltd, Ceylinco Seylan Towers, No. 90, Galle Road, Colombo 03. DEFENDANT - RESPONDENTS

02/04/19	SC/FR 621/2010	1. Daya Chandrasiri Jayanetti 2. Dandeniyage Nandalal Gamini de Silva 3. Ranasinghe Arachchige Anuruddha Roshana Silva 4. Piyadasa Madarasinghe 5. Ananda Deepthi Edussuriya 6. Pullipu Widana Cyril Dayaratne 7. Ananda de Silva 8. Rohana Ranaweera 9. Ravi Roshan Madarasinghe 10. Cyril Gunasekara 11. Marina Hiranthi Seneviratne 12. Rajasinghe Pathirage Anusha Shyamali 13. Kottage Osman Perera 14. Chandani Edussuriya 15. Lintan Nalawansa 16. Dandeniya Chandralal Amarasiri de Silva Petitioners Vs 1. Urban Development Authority 2. Municipal Council Sri Jayawardenapura Kotte 3. RM Swarna Silva The Mayor Municipal Council Sri Jayawardenapura Kotte 4. Director General, Urban Development Authority 5. Shantha P Liyanage, The Municipal Commissioner Sri Jayawardenapura Kotte 6. MR Siriwardene, Director Enforcement Urban Development Authority 7. Lalithasiri Gunawansa Secretary, No.1 D.R.Wijewardene Mawatha Colombo 10. 8. Mahinda Balasuriya The Inspector General of Police 9. Royal Institute, No.10, Chapel Lane, Nugegoda 10. GT Bandara No.191 Havelock Road, Colombo 5 11. General Manager Railways 12. Hon.Attorney General. 13. R.A.D. Janaka Ranawaka The Mayor, Municipal Council, Sri Jayawardenapura Kotte, Rajagiriya 14. Pujith Jayasundara. The Inspector General of Police Police Head Quarters, Colombo 1 15. Wasanthi Ratnapala (for 5th Respondent) The Municipal Commissioner Sri Jayawardenapura Kotte, Rajagiriya. 16. M.P. Ranathunga (for 6th Respondent) Director Enforcement Urban Development Authority Sethsiripaya, Battaramulla. 17. G.S. Withanage (for 7th Respondent) Secretary, Ministry of Transport Secretary, No.1 D.R.Wijewardene Mawatha Colombo 10. 18. Wasanthi Ratnapala. (for 13th Respondent) Municipal Commissioner, Municipal Council, Sri Jayawardenapura Kotte, Rajagiriya Respondents
02/04/19	SC Appeal12/2018	1. Jagath Priyantha Epa 2. Deepika Lakmali Kalansooriya No.S.G. 12B Gemunupura, Ampara Petitioners Vs 1. Ahingsa Sathsarani Epa No.3A/1 Samudra,Paragahakele Ampara. 2. Janaka Pushpakumara Kalansooriya 3. Wijesinghe Arachchige Wasana Malkanthi No.3A/1 Samudra,Paragahakele Ampara. 4. Probation Officer Probation Office, Ampara. Respondents AND BETWEEN 1. Jagath Priyantha Epa 2. Deepika Lakmali Kalansooriya No.S.G. 12B Gemunupura, Ampara Petitioner-Appellants Vs 1. Ahingsa Sathsarani Epa No.3A/1 Samudra,Paragahakele Ampara. 2. Janaka Pushpakumara Kalansooriya 3. Wijesinghe Arachchige Wasana Malkanthi No.3A/1 Samudra,Paragahakele Ampara. 4. Probation Officer Probation Office, Ampara. Respondent-Respondents AND NOW BETWEEN 1. Janaka Pushpakumara Kalansooriya 2. Wijesinghe Arachchige Wasana Malkanthi No.3A/1 Samudra,Paragahakele Ampara. 2nd and 3rd Respondent-Respondent- Petitioner-Appellants Vs 1. Jagath Priyantha Epa 2. Deepika Lakmali Kalansooriya No.S.G. 12B Gemunupura, Ampara Petitioner-Appellant- Respondent-Respondents Ahingsa Sathsarani Epa No.3A/1 Samudra,Paragahakele Ampara. 1st Respondent-Respondent- Respondent-Respondent. Probation Officer Probation Office, Ampara. 4th Respondent-Respondent- Respondent-Respondent

02/04/19	SC Appeal 110/2018	
02/04/19	SC Appeal100/2016	Athukoralage Mary Nona Mahena, Horana. (Deceased) Plaintiff. Millawage Samarasinghe Wickramaarachchi No. 197, Nandana, Mahena, Horana. Substituted Plaintiff. Vs 1. Jayapala Athukorala 2. Chandrasiri Athukorala 3. Kulapala Athukorala all of Mahena, Horana. Defendants AND BETWEEN Millawage Samarasinghe Wickramaarachchi No.197, Nandana, Mahena, Horana. Substituted Plaintiff-Appellant Vs 1. Jayapala Athukorala 2. Chandrasiri Athukorala 3. Kulapala Athukorala all of Mahena, Horana. Defendant-Respondents AND NOW BETWEEN Millawage Samarasinghe Wickramaarachchi No.197, Nandana, Mahena, Horana. Substituted Plaintiff-Appellant-Petitioner-Appellant Vs 1. Jayapala Athukorala 2. Chandrasiri Athukorala 3. Kulapala Athukorala all of Mahena, Horana Defendant-Respondent-Respondent-Respondents

02/04/19	SC. FR Application No. 584/2008	Munugoa Hewage Muditha Sagarie Methsiri Lane, Weraniyawela Baddegama. Petitioner Vs. 1. Secretary Ministry of Public Administration and Internal Affairs, Independence Square, Colombo7. 2. Mrs.Indika Samarasinghe Additional Secretary, Ministry of Public Administration and Internal Affairs, Independence Square, Colombo7. 3. G.D.Anura Piyabandu, Senior Additional Secretary, Ministry of Public Administration and Internal Affairs, Independence Square, Colombo7. 4. P.B.K Guruge Hammaliwala Watte Akuratiya, Baddegama 5. S.P.Weerasekara “Manel”,Weraniyawala, Ampegama 6. H.H.B.Chandani Bemmula Watta, Gurusinghegoda. 7. K.H.D.R. de Silva “Asiri”, Nabara Atta, Athkandura. 8. N.M.B. Kariyawasam, “Gamini”, Nugethota, Athkandura. 9. T.G.D.A. Kariyawasam “Hishan” Waduwelipitiya North, Kahaduwa. 10. Commissioner General of Examinations Department of Examinations, Isurupaya, Paleewatta. 11. Justice Priyantha Perera Chairman, Public Service Commission, No.356/B, Karlwil Place, Galle Road, Colombo 3. 12. Professor Dayasiri Fernando Member, Public Service Commission. 13. Professor M.Rohanadeera, Member, Public Service Commission. 14. Palitha Kumarasinghe Member, Public Service Commission. 15. W.P.S. Jayawardena Member, Public Service Commission. 16. Gunapala Wickramaratne, Member, Public Service Commission. 17. S.A.Wijeratne. Member, Public Service Commission. 18. Prof.Bernad Soyza. Member, Public Service Commission. 19. Secretary,Public Service Commission. 11A. Justice Sathyaa Hettige PC Chairman, Member, Public Service Commission. 12A. S.C.Mannapperuma Member,Public Service Commission. 13A. Ananda Seneviratne Member, Public Service Commission. 14A. N.H.Pathirana Member, Public Service Commission. 15A. S.Thillanadarajah Member, Public Service Commission. 16A. A. Mohamed Nahiya Member, Public Service Commission. 17A. Mrs. Kanthi Wijetunga Member, Public Service Commission. 18A. Sunil S. Sirisena Member, Public Service Commission. 19A. Secretary, Public Service Commission All of No.177,Nawala Road,Narahenpita Colombo 5. 20. Hon. Attorney General, Department of Attorney General, Colombo 12. Respondents
01/04/19	SC Appeal 89/2016	Shanthi Sagara Gunawardena, ‘Sea Sand’, Habakkala, Induruwa. Appellant Vs, 1. Ranjith Kumudusena Gunawardena 2. Indika Gunawardena 3. Nirosha Gunawardena All of 8D 17, National Housing Scheme, Raddolugama Respondents And between Ranjith Kumudusena Gunawardena 8D 17, National Housing Scheme, Raddolugama 1st Respondent -Appellant Vs, Shanthi Sagara Gunawardena, ‘Sea Sand’, Habakkala, Induruwa Applicant-Respondent 2. Indika Gunawardena 3. Nirosha Gunawardena Both of 8D 17, National Housing Scheme, Raddolugama Respondents-Respondents And now between Shanthi Sagara Gunawardena, ‘Sea Sand’, Habakkala, Induruwa Applicant-Respondent- Appellant Ranjith Kumudusena Gunawardena 8D 17, National Housing Scheme, Raddolugama 1st Respondent -Appellant-Respondent 2. Indika Gunawardena 3. Nirosha Gunawardena Both of 8D 17, National Housing Scheme, Raddolugama Respondents-Respondents-Respondents

24/ 03/ 19	SC /FR/ Application No 58/2018	1. J.M.H. Chandani Jayasundara, No. 19/8, Guilford Crescent, Colombo 07. 2. B.P. Niyadandupola, No. 19/8, Guilford Crescent, Colombo 07. 3. Nulara Piyaji Niyadandupola, No. 19/8, Guilford Crescent, Colombo 07. Petitioners Vs, 1. Ms. S.S.K Aviruppola, Principal, Vishaka Vidyalaya, Colombo 05. 2. Ms. Kalani Sooriyapperuma, Deputy Principal (Administration) Vishaka Vidyalaya, Colombo 05. 3. Ms. Sumudu Weerasinghe, Deputy Principal (Education & Development) Vishaka Vidyalaya, Colombo 05. 4. Ms. Jeevana Ariyaratne, Deputy Principal (Co-Curricular & Extra- Curricular) Vishaka Vidyalaya, Colombo 05. 5. Ms. Pushparani Samarasinghe, Sectional Head (Primary), Vishaka Vidyalaya, Colombo 05. 6. L.M.D. Dharmasena, Chairman, Admissions Appeal Board, Vishaka Vidyalaya, Colombo 05. 7. Ms. Rukmali Kariyawasam, Member, Admissions Appeal Board, Vishaka Vidyalaya, Colombo 05. 8. Sunil Hettiarachchi, Secretary, Ministry of Education, “Isurupaya”, Battaramulla. 9. G.N. Silva, Zonal Director of Education, Colombo District, Zonal Education Office, Vidatha Mawatha, Colombo 02. 10. P. Sirilal Nonis, Provincial Director of Education, Western Province Provincial Ministry of Education, Provincial Department of Education, No.76, Ananda Kumaraswamy Mawatha, Colombo 07. 11. Hon. the Attorney General, Attorney General’s Department, Colombo 12. Respondents
24/ 03/ 19	SC /FR/ Application No 387/2013	1. Hewa Munumullage Ajith, No. 416/1, Desawalagodella, Koleidanda, Weligama. 2. Hewa Munumullage Akila, “Akila Iron Works” Koleidanda, Weligama. Petitioners Vs, 1. Kalinga de. Silva, Head Quarters Inspector, Police Station, Weligama 2. M.A.M. Faslan, No. 392/2, Arusiya Mawatha, Aluth Weediya, Weligama. 3. Inspector General of Police, Police Head Quarters, Colombo 01. 4. Hon. the Attorney General, Attorney General’s Department, Colombo 12. Respondents
21/ 03/ 19	SC (CHC) 05/2009	Seylan Bank PLC, Registration No.PQ9 Ceylinco Seylan Towers, 90, Galle Road, Colombo 3. Plaintiff Vs. Premier Marketing Ltd, 456, Galle Road, Colombo 3 Defendant AND NOW Premier Marketing Ltd, 456, Galle Road, Colombo 3 Defendant –Appellant Vs. Seylan Bank PLC, Registration No.PQ9, Ceylinco Seylan Towers, 90, Galle Road, Colombo 3. Plaintiff-Responden
21/ 03/ 19	SC/ APPEAL / 212/2016 SC/ APPEAL / 213/2016	Christopher W.J. Silva, 18, Skelton Road, Colombo 05. Applicant -Vs- Sri Lankan Airlines Limited, Level 19-22 East Tower, World Trade Centre, Echelon Square, Colombo 01. Respondent AND BETWEEN Christopher W. J. Silva, 18, Skelton Road, Colombo 05. Applicant-Appellant -Vs- Sri Lankan Airlines Limited, Level 19-22 East Tower, World Trade Centre, Echelon Square, Colombo 01. Respondent-Respondent AND NOW BETWEEN Christopher W. J. Silva, 18, Skelton Road, Colombo 05. Applicant-Appellant-Petitioner -Vs- Sri Lankan Airlines Limited, Level 19-22 East Tower, World Trade Centre, Echelon Square, Colombo 01. Respondent-Respondent-Respondent
17/ 03/ 19	SC/ Rule/ 01/2016	Justice Vijith Malalgoda Judge in the Supreme Court Complainant Nagananda Kodituwakku Attorney-at-Law 99,Subadrarama Road, Nugegoda Respondent

13/ 03/ 19	Case No. SC.FR 139/2016	Galgana Mesthrige Priyanthi Perera ‘Aluthgedara’, Wilhara, Labbala PETITIONER 1. Rubber Research Institute 2. N. V. T. A. Weragoda, Chairman, Rubber Research Institute. 3. W. M. Gamini Seneviratne, Director, Rubber Research Institute. 4. A. H. Kularatne, Acting Deputy Director Administration, Rubber Research Institute All of Rubber Research Institute, Telawala Road, Ratmalana. 5. Upali Marasinghe, Secretary to the Ministry of Plantation Industries 6. Hon. Naveen Dissanayake, Minister of Plantation Industries. Both of Sethsiripaya, 11th Floor, 2nd Stage, Battaramulla. 7. Professor M. Thilakasiri, Sri Lanka Institute of Development Administration, No.28/10, Malalasekara Mawatha, Colombo 7. 8. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS
06/ 03/ 19	SC Appeal No. CHC 22/11	1. Union Bank of Colombo Ltd, No. 15A, Alfred Place, Colombo 03. Plaintiff -Vs- 1. Emm Chem (Pvt) Ltd No. 16, Flower Terrace, Colombo 07. 2. Kodduru Arachchige Don Adrin Lakshman Perera, No. 25/4A, Jayapura Mawatha, Baddegana, Kotte South, Pitakotte. 3. Mailwaganam Surendran, No. 53A, Maradana Road, Hendala, Wattala. Defendants AND NOW In the matter of an Appeal to the Supreme Court from the judgment of the High Court of the Western Province Holden in Colombo (exercising Civil/Commercial Jurisdiction dated 01/06/2011) in terms of the provisions of the High Court of Provinces (Special Provisions) Act No.10 of 1996 1. Kodduru Arachchige Don Adrin Lakshman Perera, No. 25/4A, Jayapura Mawatha, Baddegana, Kotte South, Pitakotte. (2nd Defendant-Appellant) -Vs- 1. Union Bank of Colombo Ltd, No. 15A, Alfred Palce, Colombo 03. (Plaintiff-Respondent) 2. Emm Chem (Pvt) Ltd No. 16, Flower Terrace, Colombo 07. 3. Mailwaganam Surendran, No. 53A, Maradana Road, Hendala, Wattala. (Defendant – Respondents)
06/ 03/ 19	S.C. (FR) Application No. 598/2011	Samaraweera Arachchige Wasantha Niroshan, Tharuna Seva Mawatha, Moronthuduwa, Milleniya. PETITIONER -Vs- 1. Police Constable, 82255, Police Station, Moronthuduwa. 2. Police Constable, 82306, Police Station, Moronthuduwa. 3. Police Constable, 83934, Police Station, Moronthuduwa. 4. Nandana, Police Sergeant, Police Station, Moronthuduwa. 5. Liyanarachchi, Officer in Charge, Police Station, Moronthuduwa. 6. Abeyratne Dissanayake, Assistant Superintendent of Police II, Office of the Assistant Superintendent of Police, Panadura. 7. Sumith Edirisinghe, Senior Superintendent of Police, Office of the Senior Superintendent of Police, Panadura. 8. N. K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 9. Hon. Attorney General, Attorney General’s Department, Hulftsdorp, Colombo 12. RESPONDENTS

05/ 03/ 19	SC. FR Application No. 208/2012	N.A Nimal Ranjith No.752, Navodagama, Sevanagala Petitioner Vs. 1. N.Bandara Officer-in-Charge, Sevanagala Police Station. Sevanagala 2. Edirisinghe Sergeant, Sevanagala Police Station. Sevanagala 3. Dr. C Vithana Medical Officer-in-Charge, Divisional Hospital, Sevanagala. 4. N.K. Illangakoon Inspector General of Police, Police Head Quarters, Colombo1 5. Hon. Attorney General Attorney General's Department Colombo12. Respondents
05/ 03/ 19	SC/CHC/ Appeal7/20 12	Dynamic Steel (Private) Ltd., 484, Annanagar West Exten, Chennai, 600-101, India. Plaintiff Vs 1. Kara Steel Mills (Private) Limited, 633, Srimavo Bandaranayake Mawatha, Colombo 14. 2. Faiz-ur Rahaman, Kara Steel Mills (Private) Limited, 633, Srimavo Bandaranayake Mawatha, Colombo 14. Defendants NOW 1. Kara Steel Mills (Private) Limited, 633, Srimavo Bandaranayake Mawatha, Colombo 14. 2. Faiz-ur Rahaman, Kara Steel Mills (Private) Limited, 633, Srimavo Bandaranayake Mawatha, Colombo 14. Defendant-Appellants Vs Dynamic Steel (Private) Ltd., 484, Annanagar West Exten, Chennai, 600-101, India. Plaintiff-Respondent
05/ 03/ 19	SC Appeal 5/2014	Seevali Jeyshta Bandara Arrawwawala, New Town, Udaspaththuwa. Applicant Vs 1. Agarapathana Plantations Limited. No.53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 1 2. Lanka Tea and Rubber Plantations (Pvt) Ltd. No.53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 1 Respondents AND 1. Agarapathana Plantations Limited. No.53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 1 2. Lanka Tea and Rubber Plantations (Pvt) Ltd. No.53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 1 Respondent-Appellants Vs Seevali Jeyshta Bandara Arrawwawala, New Town, Udaspaththuwa. Applicant-Respondent Vs AND NOW BETWEEN 1. Agarapathana Plantations Limited. No.53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 1 2. Lanka Tea and Rubber Plantations (Pvt) Ltd. No.53-1/1, Sir Baron Jayatilleke Mawatha, Colombo 1 Respondents-Appellant-Appellants Vs Seevali Jeyshta Bandara Arrawwawala, New Town, Udaspaththuwa. Applicant-Respondent-Respondent

05/ 03/ 19	SC Appeal 146/2010	Jayakody Arachchige Chandramali, Kahatagahamulla, Dodangaslanda. Plaintiff Vs 1. Meerayadeen Mohamed Riyaldeen, No.15/2, Castle Street, Colombo 4. 2. Solamon John Vincent, No.28/2, Bishop Road, Wattala. Defendants AND BETWEEN Jayakody Arachchige Chandramali, Kahatagahamulla, Dodangaslanda. Appearing by her power of Attorney holder Liyanage Don Marcus Stanly Nanayakkara, Newtown Dodangaslanda Plaintiff-Appellant Vs 1. Meerayadeen Mohamed Riyaldeen, No.15/2, Castle Street, Colombo 4. 2. Solamon John Vincent, No.28/2, Bishop Road, Wattala. Defendant-Respondents AND NOW BETWEEN Jayakody Arachchige Chandramali, Kahatagahamulla, Dodangaslanda. Appearing by her power of Attorney holder Liyanage Don Marcus Stanly Nanayakkara, Newtown Dodangaslanda Plaintiff-Appellant-Petitioner-Appellant Vs 1. Meerayadeen Mohamed Riyaldeen, (Deceased) No.15/2, Castle Street, Colombo 4. 1(a). Shima Rushana Shararaff No.24, 40th Lane Wellawatta. Substituted 1a Defendant-Respondent-Respondent-Respondent 2. Solamon John Vincent, No.28/2, Bishop Road, Wattala. Defendant-Respondent-Respondent-Respondent
05/ 03/ 19	SC. FR Application No. 430/2017	Halgamuwa Gamage Ashan Kaveesha (Minor) Apearing by his Next friend Guardian ad litem Halgamuwa Gamage Saman Kumara, Both of No. 11/A/01, Gallamulla, Akuressa Road, Yakkalamulla. Petitioner Vs. 1. Mr.Sampath Weragoda, The Principal, Richmond College, Galle. 2. Director National Schools, Ministry of Education, Isurupaya, Battaramulla. 3. The Secretary, Ministry of Education, Isurupaya, Battaramulla. 4. L.B.B. Theekshana, Guardian and Father LBN Enuka No.14, 1st lane, Madapathala, Eliot Road, Galle. 5. The Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents
05/ 03/ 19	SC. FR Application No. 422/2017	Jothirathna Nanayakkarage Oshem Shelumiyal Nanayakkara (Minor) Apearing by his Next friend Guardian ad litem Jothirathna Nanayakkara Lathik Suranga, Both of No. 470/11 B, Colombo Road, Gintota, Kosgahawatta, Galle. Petitioner Vs. 1. Mr.Sampath Weragoda, The Principal, Richmond College, Galle. 2. Director National Schools, Ministry of Education, Isurupaya, Battaramulla. 3. The Secretary, Ministry of Education, Isurupaya, Battaramulla. 4. L.B.B. Theekshana, Guardian and Father LBN Enuka No.14, 1st lane, Madapathala, Eliot Road, Galle. 5. The Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents
05/ 03/ 19	SC. FR Application No. 54/2018	K. Nishanthika Pushpa Kumari No. 23/F/I/3. E.D Dabare Mawatha Naraheinpita. For and on behalf of, Samarasinghe Arachchige Hirundi Udanya. Petitioner Vs. 1. R.A.M.R.Herath, Principal, Sirimavo Bandaranaike Vidyalaya, Colombo 7. 2. Sunil Hettiarachchi, Secretary Ministry of Education, Isurupaya, Battaramulla. 3. Premasiri Epa, 4. Chintha Kanthi 5. Kalyani Samarakoon, 6. Amali Gunasekara, 7. Kapila Prasanna All of 3rd to 7th Respondents, C/o Principal, Sirimavo Bandaranaike Vidyalaya, Colombo 7. Hon. Attorney General Attorney General’s Department, Colombo 12. Respondents

04/ 03/ 19	SC (FR) Application No.502/2010	1. P.S.R. Premalal No.2, First Lane, Vidyala Mawatha, Anuradhapura. 2. W.G. Karunaratne, Neelavila, Suruwirugama, Sooriyawewa. 3. W.M.A.C. Dissanayake, 'Jeewana', Kamburupitiya. 4. R.S.K. Mallawaarachchi, 61d, Feeldvive Terrace, Kandy Road, Wewaldeniya. 5. K.L.Mahinda No. 34, Mawarala Watta, Mawarala, Matara. 6. S.P. Mallawaarachchi, No.83, Anuradhapura Road, Kahatagasdiliya. 7. P.K.W.Kalutota, Palugaswala, Lunama, Ambalantota. 8. R.W.G.D.P. Munasinghe, No.42, Jana Udana House Scheme, Talawa. 9. J.K.D.S.Samadara, 'Manjula', Kalahe, Mandawala, Galle. 10. W.D.S.Fernando, No.32, East Moratumulla, Moratuwa. 11. G.G.G. Rejikumara, Palugampala Road, Sannasgama, Lellopitiya. 12. V.A.N. Premarathna, Gurugewatta Road, Wendesiwatta, Ballapana, Galigamuwa. 13. W.G.N. Pathmini, 256/5, Flower Gardens, Weligama, Matara. 14. E.A. Anushka Kumari, No.20, Andagala Road, Matugama. 15. S.K. Samarasinghe, H 11, Nila Niwasa, Penideniya, Peradeniya. 16. P.H.Walpita, 'Dahampaya', Talagala, Gonapola Junction. 17. H.I.M.Kulathunga, No.52,'Nawakala',Kiwldeniya, Kulugammana. 18. K.C. Dasanayake, Meewewa, Sub Post Office, Narammala. 19. G.P.A.L.Pathirana, No.193/1, Ibigala Road, Katugastota. 20. I.M.S.K.M.Idisooriya, No.163/3, M.C. Nilaniwasa, Hatton House Mawatha, Hatton. 21. Y.S.P.P. Gunarathna. No 401/ A/2, Dagonna, Negambo. 22. H.K.G Niroshana, No. 671, Perakum Pedesa, Kaduruwela, Polannaruwa. 23. A.M.Anura Thissa, No.2/2, 3rd Lane, Kanupelella, Badulla. 24. U.P. Dahanayake, No.206/B/2, Halgala Road, Alapaladeniya. 25. H.J. Piyasena, 'Jayanthi', uthuru uduwa, Kuda Uduwa, Horana. 26. R.A.T.C.Weerasekara, No.71,Railwayquarters, Moratuwa. 27. Y.M. Soma Kumuduni, No.223, Badabedda Watta, Pannala. 28. S.P. Kusumawathie, No.44/16, Sri Bodigaya Road, Gampaha. 29. P.B. Wickremasinghe, No.156, Dikkanda, Waturugama. 30. P.H.C. Pushpakumara, No.601/66, Thammennakulama. Anuradhapura. 31. W.M.U.S. Weerakoon, No128, 'Banadara', Puliyankulama, Anuradhapura. 32. D. Deepani Perera. No.208, Aluthgama, Bogamuwa, Yakkala PETITIONERS Vs. 1. (A) Wasala Mudiyanselage Nimal Jayantha Pushpakumara Commissioner of Examinations, Pelawatte, Battaramulla. 2. (B) Jawigodage Jayadeva Ratnasiri Secretary, Ministry of Public Administration and Local Government and Democratic Governance, Independence Square, Colombo 7. 3. M.W. Jagath Kumara 4. M.G.I.Mhawatta 5. L.U.J.Perera 6. H.K.M.D.K.Kavisekara 7. B.D.Y.S.Wimalarathna. 8. N.P. Samarawickrema. 9. N.Y.Kohowala. 10. H.M.V.S.Jayawardena 11. S.P.Sirimanna 12. J.H.P.Samarasena 13. K.H. Somalatha 14. L.P.M.S.Pathirana 15. W.T.N.Silva 16. D.R. Jaysinghe 17. R.A.Wijayawickrema 18. T.K.J.T.Kumari 19. J.M. Chandralatha 20. P.N.P.K Karunarathna 21. H.I.R.Hathurusinghe 22. N.M.Y.Thushari 23. W.R.R.P.Wije Rupa 24. K.P.Chaminda 25. M. Wanigasekara 26. H.D.Satharasinghe 27. Vaantha Kumari 28. R.P.M.S.Rajapaksha 29. K.H. Pushpa Jennet 30. S.D.S.A. Rupasinghe 31. N.K.U.Kumari 32. H. Thilakawardena. 33. M.M.N.S.Kumara 34. K.D.S.Sanjeewana 35. W.D.N.Sirimanna 36. U.K.B.L. Priyadarshana The 3rd to 36th Respondents C/O Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7. 37.(A) Wasantha

27/02/19	SC Appeal No. 29/2016	Kaluthanthrige Dona Jayaseeli No. 352, Rajasingha Mawatha, Hewagama, Kaduwela. Plaintiff Vs. 1. Kaluthanthirige Dona Dayawathi No. 2/6, Pannawala, Delgoda. 2. Kaluthanthirige Dona Karunawathi No. 47, Pegiriwatta Road, Gangodawila, Nugegoda. 3. Kaluthanthirige Don Karunadasa No. 159, Hewagama, Kaduwela. 3A. U.A. Chandrawathie No. 159, Hewagama, Kaduwela. 4. Kaluthanthirige Dona Gunaseeli residence unknown 5. Liyana Arachchige Podisingho No. 185, Hewagama, Kaduwela. 5A. Liyana Arachchige Dona Leelawathie No. 185, Hewagama, Kaduwela. 6. Kaluthanthirige Dona Rupawathi No. 152/1, Hewagama, Kaduwela. 7. Weligama Arachchige Somadasa Perera 152/5, Hewagama, Kaduwela. Defendants AND Kaluthanthrige Dona Jayaseeli No. 352, Rajasingha Mawatha, Hewagama, Kaduwela. Plaintiff – Petitioner Vs. 1. Kaluthanthirige Dona Dayawathi No. 2/6, Pannawala, Delgoda. 2. Kaluthanthirige Dona Karunawathi No. 47, Pegiriwatta Road, Gangodawila, Nugegoda. 3. Kaluthanthirige Don Karunadasa No. 159, Hewagama, Kaduwela. 3A. U.A. Chandrawathie No. 159, Hewagama, Kaduwela. 4. Kaluthanthirige Dona Gunaseeli residence unknown 5. Liyana Arachchige Podisingho No. 185, Hewagama, Kaduwela. 5A. Liyana Arachchige Dona Leelawathie No. 185, Hewagama, Kaduwela. 6. Kaluthanthirige Dona Rupawathi No. 152/1, Hewagama, Kaduwela. 7. Weligama Arachchige Somadasa Perera 152/5, Hewagama, Kaduwela. Defendants – Respondents AND BETWEEN Kaluthanthrige Dona Jayaseeli No. 352, Rajasingha Mawatha, Hewagama, Kaduwela. Presently at; No. 343/14, Rajasingha Mawatha, Hewagama, Kaduwela Plaintiff – Petitioner – Petitioner Vs. 1. Kaluthanthirige Dona Dayawathi No. 2/6, Pannawala, Delgoda. 2. Kaluthanthirige Dona Karunawathi No. 47, Pegiriwatta Road, Gangodawila, Nugegoda. 3A. U.A. Chandrawathie No. 159, Hewagama, Kaduwela. 4. Kaluthanthirige Dona Gunaseeli residence unknown 5A. Liyana Arachchige Dona Leelawathie No. 185, Hewagama, Kaduwela. 6. Kaluthanthirige Dona Rupawathi No. 152/1, Hewagama, Kaduwela. 7. Weligama Arachchige Somadasa Perera 152/5, Hewagama, Kaduwela. Defendants – Respondents – Respondents AND NOW BETWEEN Kaluthanthrige Dona Jayaseeli No. 352, Rajasingha Mawatha, Hewagama, Kaduwela. Presently at; No. 343/14, Rajasingha Mawatha, Hewagama, Kaduwela Plaintiff – Petitioner – Petitioner – Appellant Vs. 1. Kaluthanthirige Dona Dayawathi No. 2/6, Pannawala, Delgoda. 2. Kaluthanthirige Dona Karunawathi No. 47, Pegiriwatta Road, Gangodawila, Nugegoda. 3A. U.A. Chandrawathie No. 159, Hewagama, Kaduwela. 4. Kaluthanthirige Dona Gunaseeli Residence unknown 5A. Liyana Arachchige Dona Leelawathie No. 185, Hewagama, Kaduwela. 6. Kaluthanthirige Dona Rupawathi No. 152/1, Hewagama, Kaduwela. 7. Weligama Arachchige Somadasa Perera 152/5, Hewagama, Kaduwela. Defendants – Respondents – Respondents - Respondents

27/ 02/ 19	SC (FR) Application No. 307/2017	1. Gabbala Ralalage Kirula Hastha Bandara 2. Gabbala Ralalage Kasun Manaram Bandara both of, No. 528/14 D, 2nd Division, Maradana, Colombo 10. Petitioners Vs. 1. Mr. S. M. Keerthirathna The Principal Ananda College, P. de S. Kularatne Mawatha, Colombo 10. 2. Mr. T. A. D. Dhammika T. Perera Member of Interview Board Ananda College, P. de S. Kularatne Mawatha, Colombo 10. 3. Mr. K. Bimal P. Wijesinghe Member of Interview Board Ananda College, P. de S. Kularatne Mawatha, Colombo 10. 4. Mr. R. M. D. D. C. Randeniya Member of Interview Board Ananda College, P. de S. Kularatne Mawatha, Colombo 10. (The 2nd – 4th Respondents are members of the panel of Interview for Admission of students to Grade 1 for 2018 to Ananda College, Colombo 10) 5. Mr. Sunil Hettiarachchi Secretary, Ministry of Education, Isurupaya, Battaramulla 6. Director of National Schools Ministry of Education, Isurupaya, Battaramulla 7. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents
26/ 02/ 19	SC.Appeal No.203/16	Deniyadura Stephen De Silva No.307, Muthuwella Mawatha, Modera, Colombo 15. Plaintiff-Respondent-Petitioner Vs. Reginet Anthony No.97/9A, St James Street, Colombo 15. Defendant-Appellant-Respondent
21/ 02/ 19	SC No: SC FR 244/2017	1. Ranasinghe Arachchige Nadeesha Seuwandi Ranasinghe, No. 130D, "Saman" Walpola Road, Ragama. 2. Mohamed Huwais Mohamed Naleef, No.7, Salawatta Lane, Wellampitiya. PETITIONERS Vs 1. Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa. 2. Chairman, Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa. 3. Managing Director, Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa. 4. P.D.P.Dharmawansa, Deputy General Manager (HR and Admin), Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa 5. W.V.S.A. Fonseka, Chief Accountant, Ministry of Petroleum Resources Development, No. 80, Sir Ernest de Silva Mawatha, Colombo 07. 6. D.M.H.B.Dasanayake, Manager (Internal Audit), Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa. 7. K.M.N.A.C.Perera, Human Resource Manager, Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa. 8. Manoj Siriwardene, Senior Deputy Manager (Finance), Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa 9. R.M.S.K. Rathnayake (11536) 10. R.M.S.M.T. Mahanama (14104) 11. D.R.C.S.Thennakoon (14629) 12. E.G.C.B.Ellagama (16096) 9th to 12th Respondents all of and to be served through the Manager (Internal Audit), Ceylon Petroleum Storage Terminals Limited, Oil Installation, Kolonnawa. 13. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS

21/ 02/ 19	S.C. (F/R) Application No: 198/2011	Tuduge Achalanka Srilal Perera, ‘Isura’, Wellarawa, Wellarawa. Petitioner Vs. (1) Police Sergeant Ananda, Police Station, Madampe. (2) Inspector of Police Indrajith, Officer-in-Charge, Police Station, Madampe. (3) Inspector-General of Police, Police Headquarters, Colombo 01. (4) Hon. Attorney-General, Attorney-General’s Department, Colombo 12. Respondents
17/ 02/ 19	S.C.F.R.No : 21/2015	1. D.K.Karandawela No.211/1Ihalakaragahamuuna, Genemulla Road, Kadawatha 2. U.S.Kariyawasam No.43, Foster Cross Lane, Colombo.10 3. H.A.S.Perera C21, Matha Road, Colombo.08 4. S.S.Wasanthasena No. 64, Ketakalapitiya, Debahera, Nittambuwa 5. A.T.D.De Silva No.59, Koswatte Road, Nawala, Rajagiriya 6. J.A.S.Rajapakse No.83/29/C/01 St’ Katherine Waththa Road, Hokandara East, Hokandara 7. C.D.K.Weeraman No.385 1/1, Rajagiriya Road, Rajagiriya 8. R.P.Rajika No.160/1/B, Dewala Road, Makola North, Makola 9. K.S.J.Shantha No.16/3A,Chetnoll Road, Thumbagoda, Balangoda PETITIONERS Vs 1. Justice Sathya Hettige PC, Chairman 1A. Dharmasena Dissanayake, Chairman 2. S.C.Mannapperuma, Member 2A. A.Salam Abdul Waid, Member 3. Ananda Seneviratne, Member 3A. D.Shirantha Wijayatilaka, Member 4. N.H.Pathirana, Member 4A. Prathap Ramanujam, Member 5. Kanthi Wijetunge, Member 5A. V.Jegarasasingam, Member 6. Sunil S. Sirisena, Member 6A. Santi Nihal Seneviratne, Member 7. S.Thillanadarajah, Member 7A. S.Ranugge, Member 8. A. Mohamed Nahiya, Member 8A. D.L.Mendis, Member 9. I.M.Zoysa Gunasekara, Member 9A. Sarath Jayathilaka, Member 1st to 9th All of public service commission, No.177, Nawala Road, Narahenpita, Colombo.05 10. T.M.L.C.Senaratne Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo.05 10A. H.M.G.Senevirathne Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo.05 11. U.Marasinghe Secretary, Minsitry of Education, Isurupaya, Battaramulla 12. Hon. Attorney General Attorney General’s Department, Colombo.12 RESPONDENTS

17/02/19	SC Appeal No.90/2016	1. Mapalagama Manage Nishantha Viraj, ‘Nihathamanee’, Niyagama, Thalgaswala. (Minor) Plaintiff By his next friend Mapolagama Pathmini Sriyalatha, ‘Nihathamanee’, Niyagama, Thalgaswala. Vs. 1. Thenuwara Acharige Sardhasena, ‘Nihathamanee’, Niyagama, Thalgaswala. 2. L.P.Chandrasena Karunathilake, Gurugodella Estate, Niyagama, Thalgaswela. 3. Lokugamage Rupasena Karunathilake, Benthara Road, Elpitiya. 4. Sadini Maithree de Silva Dikwella Stores, Thalgaswela. Defendants AND Mahagama Vidanalage Chandradasa, ‘Rathna Radio Service’ Thalgaswala. Petitioner Vs. Mapalagama Manage Nishantha Viraj, ‘Nihathamanee’, Niyagama, Thalgaswala. Plaintiff-Respondent 1. Thenuwara Acharige Sardhasena, ‘Nihathamanee’, Niyagama, Thalgaswala. 2. L.P.Chandrasena Karunathilake, Gurugodella Estate, Niyagama, Thalgaswela. 3. Lokugamage Rupasena Karunathilake, Benthara Road, Elpitiya. 4. Sadini Maithree de Silva Dikwella Stores, Thalgaswela Petitioner-Petitioner Vs. Mapalagama Manage Nishantha Viraj, ‘Nihathamanee’, Niyagama, Thalgaswala. Plaintiff-Respondent-Respondent 1. Thenuwara Acharige Sardhasena, ‘Nihathamanee’, Niyagama, Thalgaswala. 2. L.P.Chandrasena Karunathilake, Gurugodella Estate, Niyagama, Thalgaswela. 3. Lokugamage Rupasena Karunathilake, Benthara Road, Elpitiya. 4. Sadini Maithree de Silva Dikwella Stores, Thalgaswela 1st to 4th Defendants-Respondent-Respondent AND NOW BETWEEN Mahagama Vidanalage Chandradasa, ‘Rathna Radio Service’ Thalgaswala. Petitioner-Petitioner-Petitioner Vs. Mapalagama Manage Nishantha Viraj, ‘Nihathamanee’, Niyagama, Thalgaswala. Plaintiff-Respondent- Respondent-Respondent 1. Thenuwara Acharige Sardhasena, ‘Nihathamanee’, Niyagama, Thalgaswala. 2. L.P.Chandrasena Karunathilake, Gurugodella Estate, Niyagama, Thalgaswela. 3. Lokugamage Rupasena Karunathilake, Benthara Road, Elpitiya. 4. Sadini Maithree de Silva Dikwella Stores, Thalgaswela 1st to 4th Defendants-Respondents-Respondent - Respondent

17/ 02/ 19	SC Appeal 211/2017	DFFCC Bank PLC No. 73/5, Galle Road, Colombo 03. Plaintiff Vs, 1. Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan 2. Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan Both of No.01, Charles Circus, Colombo 03 Presently of No. 30/1/3, Glen Arber Place, Colombo 03 Defendants And then between 1. Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan 2. Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan Both of No.01, Charles Circus, Colombo 03 Presently of No. 30/1/3, Glen Arber Place, Colombo 03 Defendant-Petitioners Vs, DFFCC Bank PLC No. 73/5, Galle Road, Colombo 03. Plaintiff-Respondent And between 1. Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan 2. Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan Both of No.01, Charles Circus, Colombo 03 Presently of No. 30/1/3, Glen Arber Place, Colombo 03 Defendant-Petitioner-Petitioners Vs, DFFCC Bank PLC No. 73/5, Galle Road, Colombo 03. Plaintiff-Respondent-Respondent And now between 1. Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan 2. Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan Both of No.01, Charles Circus, Colombo 03 Presently of No. 30/1/3, Glen Arber Place, Colombo 03 Defendant-Petitioner-Petitioner-Petitioners Vs, DFFCC Bank PLC No. 73/5, Galle Road, Colombo 03. Plaintiff-Respondent-Respondent-Respondent

14/02/19	SC Appeal No. 174/2013	ELAYATHAMBY NADESAMOORTHY Udayar Road, Karaitivu. PETITIONER VS. 1. T. ASOKA PEIRIS Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla. 2. JAYALATH DISSANAYAKE Former Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, C/O Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla. 3. S.M.W. FERNANDO Surveyor General, Surveyor General's Office, Survey Department of Sri Lanka, PO Box 506, No. 150, Kirula Road, Narahenpita, Colombo 05. 4. H.D.L. GUNAWARDENE Secretary, Public Service Commission, No. 356B, Carlwil Place, Galle Road, Colombo 3. RESPONDENTS AND NOW BETWEEN ELAYATHAMBY NADESAMOORTHY Udayar Road, Karaitivu. PETITIONER-PETITIONER/ APPELLANT 1. T. ASOKA PEIRIS Former Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya,80/5, Rajamalwatte Avenue, Battaramulla. 1A.DR. I.H.K. MAHANAMA Ministry of Lands, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla. 2. JAYALATH DISSANAYAKE Former Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, C/O Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla. 3. S.M.W. FERNANDO Former Surveyor General, Surveyor General's Office, Survey Department of Sri Lanka, PO Box 506,No. 150, Kirula Road, Narahenpita, Colombo 05. 3A. P.M.P. UDAYAKANTHA Surveyor General, Surveyor General's Office, Survey Depa rtment of Sri Lanka, PO Box 506, No. 150, Kirula Road, Narahenpita, Colombo 05. 4. H.D.L. GUNAWARDENE Former Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. 4A. GAMINI SENEVIRATNE Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. RESPONDENTS-RESPONDENTS 5. K. THAVALINGAM Former Surveyor General, Surveyor General's Office, Survey Department of Sri Lanka, PO Box 506, No. 150, Kirula Road, Narahenpita, Colombo 05. 6. T.M.L.C. SENEVIRATNE Former Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. 7. DHARMASENA DISSANAYAKE Chairman. 8. A. SALAM A. WAHID Member. 9. D. SHIRANTHA WIJAYATILAKA Member. 10. DR. PRATHAP RAMANUJAN Member. 11. V. JEGARAJASINGHAM Member. 12. SANTI NIHAL SENEVIRATNE Member. 13. S. RANNUGE Member. 14. D. L. MENDIS Member. 15. SARATH JAYATHILAKA Member. All of the Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5.

11/ 02/ 19	SC Appeal 76/2018	Office-in-Charge, Police Station, Kollupitiya. Complainant Vs, Thusith Thilina Malagoda, No. 35, Ransive Lane, Colombo 06. Accused And Paleketiyage Samanthi Manohari Paleketiya, No. 49, Mahawa Road, Nikawaratiya. Appellant Vs, Office-in-Charge, Police Station, Kollupitiya. Complainant –Respondent Thusith Thilina Malagoda, No. 35, Ransive Lane, Colombo 06. Accused–Respondent Attorney General, Attorney General's Department, Colombo 12. Respondent And now between Thusith Thilina Malagoda, No. 35, Ransive Lane, Colombo 06. Accused-Respondent-Appellant Vs, Paleketiyage Samanthi Manohari Paleketiya, No. 49, Mahawa Road, Nikawaratiya. Appellant-Respondent Office-in-Charge, Police Station, Kollupitiya. Complainant –Respondent-Respondent Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent

06/ 02/ 19	SC /FR/ Application No 153/2016	1. Rajapakashage Nishanthi Karunanayaka, No. 68, Katuwasgoda, Veyangoda. 2. Irosha Niwanthi De Silva, No. 01, 9th Lane, Colombo 03. 3. Hettikankanamalage Don Ayesha Harshani Mali Perera, No. 21, Middle Class National Housing Scheme, Mailagashandiya, Anuradhapura. 4. Pathirana Mudiyanselage Kalyani Kusumalatha, No. 31/K, Pollebedda, Mahaoya. 5. Attanayaka Mudiyanselage Renuka Kumari Wijerathna, Polwatta, Pollebedda, Mahaoya. 6. Dissanayaka Mudiyanselage Duleeka Rukshani Thilakarathne, No. 273, Airport Road, Anuradhapura. 7. Harshani Dilrukshi Wanninayaka, No. 810/B, Dharmapala Mawatha, Wijayapura, Anuradhapura. 8. Kuruppu Arachchige Chathuri Niroshika, No. 304/27/3, Pinnagollawatta, Nittambuwa. 9. Thise Appuhamilage Dilka Nishani Siriwardana, No. 30/79, Mayadunna, Gonagolla, Ampara. 10. Mercy Thanuja Kumari Balaharuwa, Palugaswewa, Eppawala. 11. Kariyawasam Majuwana Gamage Sachee Rangana, Wagoda, Bogaha Handiya, Elpitiya. 12. Konara Mudiyanselage Dushmanthi Thilakasiri, Irrigation Quarters, Monaragala 13. Robol Lenora Imalka Sewwandi, No. 173/7A, Mihindu Mawatha, Dehiwala. 14. Kahandage Manjula Prabodini, Kodamawatta, Kurukudegama, Pattiyagedara, Bandarawela. 15. Yaddehi Kandage Shirani Pushpa, No. 96, Diwulpitiya, Boralesgamuwa. 16. Kumarawanni Mudiyanselage Chathurangika Damayanthi, C/O K.W.M. Seneviratne, Bedirukka, Mahaoya. 17. Rajapaksha Mudiyanselage Chathurika Nishanthi Perera, M42, Kandy Road, Mahaoya. 18. Hewawasam Ederage Heshani Mashenka, No. 66, Dambadeniya, Mahaoya. 19. Wattegedara Dinusha Kumuduni Bandara, 1st Canal Road, New Town, Padawiya. 20. Rathnayake Mudiyanselage Jeewantha Kumara Jayasinghe, Rajina Junction, Thambuttegama. 21. Gulawita Purandarage Samanthi Deepika, No. 84E, Batuwita Road, Olaboduwa, Gonapala Junction. 22. Kottege Lathika Dulanjali, Road behind the Hospital, Padawiya. Petitioners Vs, 1. Y. Abdul Majeed, Director General of Irrigation, Department of Irrigation, No. 230, P.O. Box 1138, Bauddhaloka Mawatha, Colombo 07. 1A. S. S. L. Weerasinghe, Director General of Irrigation, Department of Irrigation, No. 230, P.O. Box 1138, Bauddhaloka Mawatha, Colombo 07. 1B. M. Thuraisingham, Director General of Irrigation, Department of Irrigation, No. 230, P.O. Box 1138, Bauddhaloka Mawatha, Colombo 07. 1C. S. Mohanarajah, Director General of Irrigation, Department of Irrigation, No. 230, P.O. Box 1138, Bauddhaloka Mawatha, Colombo 07. 2. Secretary, Ministry of Irrigation and Water Resource Management, No. 11, Jawatta Road, Colombo 05. 3. Secretary, Ministry of Public Administration and Management, Independence Square, Colombo 07. 4. Dharmasena Dissanayaka, Chairman, 5. A.Salam Abdul Waid, Member, 5A. Prof. Hussain Ismail, Member, 6. D. Shirantha Wijayatilaka, Member, 7. Prathap Ramanujam, Member, 8. V. Jegarasasingam, Member, 9. Santi Nihal Seneviratne, Member, 10. S. Ranugge, Member, 11. D.L. Mendis, Member, 12. Sarath Jayathilaka, Member, The 4th to 12th Respondents of all; Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 13. Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 14. Director Establishment, Ministry of Public Administration and Management, Independence Square

06/ 02/ 19	SC Appeal 125/2013	Rajamany Widow of Ramasamy Oppilamany Ganeshanathan Kandar Madam, Vannar Ponnai, Jaffna. Presently of 110/1, 5th Lane, Colombo 03. Appearing by her Attorney, Thurairajah Sukumar of Madagal Road, Pandetteruppu, Jaffna. Plaintiff Vs, Vairamuthu Kovindapillai No. 62, Palam Road, Kandar Madam, Jaffna. Defendant And between Vairamuthu Kovindapillai No. 62, Palam Road, Kandar Madam, Jaffna. Defendant-Appellant Vs, Rajamany Widow of Ramasamy Oppilamany Ganeshanathan Kandar Madam, Vannar Ponnai, Jaffna. Presently of 110/1, 5th Lane, Colombo 03. Appearing by her Attorney, Thurairajah Sukumar of Madagal Road, Pandetteruppu, Jaffna. Plaintiff –Respondent And now between Vairamuthu Kovindapillai No. 62, Palam Road, Kandar Madam, Jaffna. Defendant-Appellant-Appellant Vs, Rajamany Widow of Ramasamy Oppilamany Ganeshanathan Kandar Madam, Vannar Ponnai, Jaffna. Presently of 110/1, 5th Lane, Colombo 03. Appearing by her Attorney, Thurairajah Sukumar of Madagal Road, Pandetteruppu, Jaffna. Plaintiff-Respondent-Respondent
05/ 02/ 19	SC Appeal No. 105/2018	
23/ 01/ 19	SC.FR.NO. 413/2017	B.A. Nulara Nethumi 5 ½ , Gomes Path, De Fonseka Road, Colombo 05. Appearing by, B.A. J. Indrathilaka 5 ½ , Gomes Path, De Fonseka Road, Colombo 05. Petitioner Vs. 1. S.S.K. Awiruppola The Principal, Vishaka Vidyalaya, Vajira Road, Colombo 05. 2. Sunil Hettiarachchi Secretary to the Ministry of Education, Isurupaya, Pelawatte, Battaramulla. 3. Attorney General Attorney General's Department, Colombo 12. Respondents
23/ 01/ 19	SC.FR.NO. 414/2017	Binudi Yehansa Manage No.141/3B, Vajira Road, Colombo 05. Appearing by, Kumarasiri Manage No.141/3B, Vajira Road, Colombo 05. Petitioner Vs. 1. S.S.K. Awiruppola The Principal, Vishaka Vidyalaya, Vajira Road, Colombo 05. 2. Sunil Hettiarachchi Secretary to the Ministry of Education, Isurupaya, Pelawatte, Battaramulla. 3. Attorney General Attorney General's Department, Colombo 12. Respondents
21/ 01/ 19	SC. Appeal No. 232/2017	1. M. L. M. Ameen 2. Mahmud Riad Ameen Both of No. 01, Col. T. G. Jayawardana Mawatha, Colombo 03. Plaintiff-Respondent-Petitioners Vs. Ammavasi Ramu alias Ramaiah South Wanarajah Estate, Dikoya. Defendant-Appellant- Respondent
21/ 01/ 19	SC. Appeal No. 48/2011	National Housing Development Authority P.O. Box 1826, 5th Floor, Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant-Appellant-Petitioner Vs. D. S. Paranayapa No. 263A (1), Devala Road, Koswatte, Battaramulla. Plaintiff-Respondent-Respondent
02/ 01/ 19	SC/Appeal 154/2010	The State Complainant -Vs- Devunderage Nihal Accused - AND BETWEENDevunderage Nihal Accused-Appellant -Vs- The Attorney General Complainant-Respondent -AND NOW BETWEENThe Attorney-General Complainant-Respondent-Petitioner -Vs- Devunderage Nihal Accused-Appellant-Respondent

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against a judgment pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

S C Appeal (CHC) No. 43/2012

HC Colombo (Civil) 276/2007/ MR

1. Chandra Gunasekera,
   No. 29,
   Albert Crescent,
   Colombo 07.

2ND DEFENDANT - APPELLANT

-Vs-

People's Bank,
No. 75,
Sir Chiththampalam A Gardiner Mawatha,
Colombo 02.

PLAINTIFF - RESPONDENT

Diyagama Mudiyanselage Duminda
Gunasekera,
No. 20,
Albert Crescent,
Colombo 07.

Chandima Jayasanka Govinna,
No. 46/4,
1st Lane,
Nidharshana Mawatha,
Galavilawatta,
Homagama.

DEFENDANT - RESPONDENTS

Before: **Buwaneka Aluwihare PC J**

Prasanna Jayawardena PC J

P. Padman Surasena J

Counsel: Harsha Soza PC with Rajindh Perera for the 2nd Defendant - Appellant.

Kushan D' Alwis PC with Kaushalya Nawarathne and Gihini Yapa for the Plaintiff - Respondent.

Argued on: 26 - 03 - 2019

Decided on: 11 - 10 - 2019

P Padman Surasena J

The Plaintiff - Respondent (hereinafter sometimes referred to as the Plaintiff) filed the plaint relevant to this case in the Provincial High Court of the Western Province against three Defendants who are the 2nd Defendant - Appellant (hereinafter sometimes referred to as the Appellant or the 2nd Defendant), and the Defendant - Respondents (hereinafter sometimes referred to as the 1st Defendant and the 3rd Defendant respectively).

The said plaint has been filed on the basis that a cause of action has arisen against the said Defendants to recover a sum of Rs. 10, 000,000 (Ten million Rupees) from them together with interest thereon. It is the position of the Plaintiff that the Defendants are obliged in law to pay the said sum of money upon a guarantee bond dated 29-11-1994 produced marked **P 5**. The said guarantee bond is a personal guarantee executed by the Defendants in favour of the Plaintiff for the money due to the Plaintiff bank from Wang Lanka Apparels (Pvt) Ltd.

The Plaintiff has taken steps to recover this money from the Defendants as the said Wang Lanka Apparels (Pvt) Ltd has defaulted the amount of money payable by it to the Plaintiff.

After the conclusion of the trial, learned Provincial High Court Judge had held[1] that the Plaintiff bank is entitled to the judgment against the 2nd Defendant as prayed for in paragraphs (a) and (b) of the prayer to plaint.

[1] By his judgment dated 26th April 2012.

Arguments advanced by the learned President's Counsel for the 2nd Defendant - Appellant are twofold. In essence, they are as follows.

I. The learned High Court Judge has erred when he failed to appreciate the position of the Appellant that no money whatsoever is due to the plaintiff Bank from the Defendants on the guarantee bond referred to above (**P 5**). It was the position of the Appellant that she has paid Rs. 19,400,000 (19.4 million) to the Plaintiff as a full and final settlement of all claims of the Plaintiff bank.

II. The learned High Court Judge had erred when he had accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from the said Wang Lanka Apparels (Pvt) Ltd. The learned President's Counsel for the Appellant based this argument on the strength of the judgment in the case of Agostinu Vs Kumaraswamy[2].

At the outset, it must be stated here that the Appellant at no stage has disputed either the execution of the guarantee bond (**P 5**) or her signing as a guarantor in favour of the bank for a total liability of Rs. 10, 000,000. Indeed the Appellant has recorded this fact as an admission in the trial.

The Appellant has also not disputed the fact that the Plaintiff bank had granted among other facilities a block loan[3] of Rs. 5,000,000. It is the outstanding unsettled amount of this loan that the Plaintiff has sought to recover in this proceeding.

[2] 59 LLR 132.
[3] Item No. 2 in the letter dated 29-08-1994 produced marked **P 7**.

The Appellant while admitting that there were several credit facilities granted in favour of the borrowing company, has taken up the position in the trial that all monies due to the Plaintiff bank from the said borrowing company Wang Lanka Apparels (Pvt) Ltd have been settled consequent to a settlement reached between the said parties. It is therefore the position of the Appellant that she was not liable to pay any further sum to the Plaintiff bank upon the guarantee bond (**P 5**).

Although the Appellant had relied on many documents, none of those documents point to the fact that the Plaintiff Bank had agreed with the Appellant to include the credit facility of the block loan of Rs. 5000,000/= (which is the subject matter of this case), in the settlement relied upon by the Appellant. Thus, it would suffice for this Court to consider the document produced from the file maintained by the Plaintiff Bank marked **2 V 6**. It would be relevant to note that it was the learned Counsel who appeared for the Defendants who had caused it to be produced when the officer of the Plaintiff Bank was being cross-examined. Closer look at the said document (**2 V 6**) shows clearly;

i. that the personal guarantee of the directors was in respect of the block loan of Rs. 5000,000/= which is the first facility referred to in the table thereof,
ii. that the Appellant's endeavor was to get the mortgaged property situated at Ottery estate at Dickoya released out of her personal funds,
iii. that the Appellant had agreed to settle the aforesaid block loan of Rs. 5,000,000/= in monthly instalments,

iv. that there was a recommendation for the Plaintiff Bank to accept Rs. 19,388,499.42 as a full and final settlement of the overdraft facility.

Moreover, it is to be noted that the Appellant in the course of answering the questions in cross-examination has stated as follows.

ප්‍ර : මහත්මියට තිබෙනවද එකම ලේඛනයක් හෝ ගරු අධිකරණයට ඉදිරිපත් කරන්න ඔය මිලියන 19.4 ගෙව්වේ ඔය වැන් ලංකා සමාගමෙන් අය විය යුතු සියලුම පහසුකම් සම්බන්ධයෙන් කියලා පෙන්වන්න එක ලේඛනයක් තිබෙනවද ?

උ : ලේඛනයක් නෑ. බැංකුවෙන් කිව්වා.

It could therefore be seen that the repayment of the block loan relevant to this case continued to be outstanding even after the settlement of Rs. 19, 400,000 (19.4 million) by the Appellant. It is to be further observed that it is only to discharge the mortgage bonds produced marked **2V 1** and **2V 2** that the plaintiff has agreed to accept the said payment from the Appellant. Further, it could also be seen that the Plaintiff Bank has requested the Appellant to submit a viable repayment program through the document produced marked **P 12** for the re payment of the balance debt of Wang Lanka Apparels (Pvt) Ltd.

Therefore, it is clear that the plaintiff bank had never agreed to accept the said settlement of 19.4 million by the Appellant as a settlement of the sum of money sought to be recovered upon the block loan relevant to the instant case upon the guarantee bond (**P 5**).

I would now turn to the second argument advanced by the Appellant. It is the argument that the learned Provincial High Court Judge had erroneously accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from the said Wang Lanka Apparels (Pvt) Ltd. In advancing this argument, the learned President's Counsel for the Appellant relied on the judgment in the case of Agostinu Vs Kumaraswamy.[4]

Their Lordships in that case has held that 'the only way of proving entries in a banker's book is by either producing the original or certified copies of the entries therein as prescribed by section 90 C' of the Evidence Ordinance.

In evaluating the above argument, it would be necessary to first identify the document, which must be proved in the instant case. The certificate found at the bottom of the document admitted as evidence (**P 9(a)**) would be useful for the identification of the said document. The said certificate states that it 'is a true extract of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd, as appearing in the books of the People's Bank'.

Thus, the original document which must be proved in the instant case could be identified as 'relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., as appearing in the books of the People's Bank contained in ordinary books of the Bank made in the usual and ordinary course of business kept in the custody of the Bank'.[5]

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[4] Supra.
[5] Vide certificate provided at the bottom of **P 9(a)**.

It would be pertinent at this juncture to refer to some of the provisions contained in the Evidence Ordinance regarding proof of documents.

Section 61 of the Evidence Ordinance provides that 'the contents of documents may be proved either by primary or by secondary evidence'.

Therefore, the above-mentioned document in the instant case may also be proved either by primary or secondary evidence.

Section 62 states that 'primary evidence means the document itself produced for the inspection of the Court.'

In the instant case, the document admitted as evidence (**P 9(a)**) is not the original document itself as reflected in the certificate found at the bottom of it. (Said certificate states that it 'is a true extract of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd, as appearing in the books of the People's Bank'). As the document (**P 9(a)**) is not the original document itself, it is clear in the instant case that the original document itself as per section 62 has not been produced.

Section 64 of the Evidence Ordinance states thus "documents must be proved by primary evidence, except in the cases hereinafter mentioned".

As no primary evidence has been adduced to prove the document relevant to the instant case, the question I must focus on next is whether the relevant document in the instant case, could be proved by secondary evidence.

In the run up to the above exercise it is important to note that some such exceptions referred to in section 64 are found in section 65 of the Evidence Ordinance. For the purpose of the case at hand, section 65(7) would be relevant; it is as follows.

Section 65

"Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :-

1) ……
2) ……
3) ……..
4) ……..
5) ……
6) ……
7) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection."

It is interesting to note that section 65 has specifically provided that in case (7) above, evidence could be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.[6]

It must be borne in mind that the block loan of Rs. 5,000,000/= has been released to the borrower in November 1994 and the plaint in this case has been filed in the year 2007. This means that the entries pertaining to this loan account is recorded in the books maintained by the Plaintiff Bank

[6] Last paragraph of section 65.

over the period commencing from year 1994 to year 2007. If the trial Court has to embark on any exercise of calculation of the remaining current balance (sometimes with varying interest rates) of such complex loan account spanning for such a long period, it would no doubt cause serious inconvenience to Court. This Court has to underscore the cumbersome nature of any such exercise by a trial Court. Such an exercise would clearly be a situation described in section 65(7) of the Evidence Ordinance.

Therefore, I am of the view that it is exactly to cater to that kind of situation that section 65(7) has provided that evidence could be given by any person who has examined such documents as to the general result of such documents. Thus, I take the view that the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., as appearing in the books of the People's Bank contained in ordinary books of the Bank made in the usual and ordinary course of business kept in the custody of the Bank could be proved by secondary evidence.

In the backdrop of the above conclusion, I must next embark on examining the question whether the Plaintiff has proved the aforementioned original document by secondary evidence as per the relevant provisions of the Evidence Ordinance.

Section 63(1) of the Evidence Ordinance states as follows;

"Secondary evidence means and includes -

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

As has been stated above, it is the statement of accounts produced marked (**P 9(a)**) which has been produced in Court to prove the original document which could be described as 'relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., as appearing in the books of the People's Bank contained in ordinary books of the Bank made in the usual and ordinary course of business kept in the custody of the Bank'.[7]

Therefore, I would first consider whether the said statement of accounts (**P 9(a)**) is a 'copy made from or compared with the original' document to be proved in this case within the meaning of section 63(3).

Section 63(3) of the Evidence Ordinance states that a copy made from or compared with the original would be secondary evidence.

The Evidence Ordinance itself has provided several illustrations to explain further as to how section 63 must be put to use. The illustration (c) under that section would be relevant to understand the underlying meaning of the provision in section 63(3). It is as follows.

[7] Vide certificate provided at the bottom of **P 9(a)**.

Illustration (c)

"A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original".

When scrutinizing the above illustration in the light of the provision in section 63(3) of the Evidence Ordinance, it could clearly be seen that a copy transcribed from and compared with the original would be secondary evidence within the meaning of section 63(3).

The Chief Manager of the Special Assets Unit of the Plaintiff bank Uttumalebbe Ali Mohomed testifying before the Provincial High Court has confirmed in his evidence that the document marked **P 9(a)** was prepared by him from the entries contained in the ordinary ledgers maintained and kept in the custody of the Bank. It was on that basis that the said witness has certified that the document marked **P 9(a)** is a statement containing true extracts of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd, as appearing in the books of the People's Bank and that such entries are contained in the ordinary books maintained in the usual and ordinary course of business kept in the custody of the Bank.

On the above basis, it is not difficult to conclude that the document **P 9(a)** is a 'copy made from or compared with the original' document to be proved in this case as **P 9(a)** clearly falls within the meaning of section 63(3) of the Evidence Ordinance. Such copy falls under the category of secondary evidence (as per section 63) and hence is admissible under section 65(7) of the Evidence ordinance.

Although the above conclusion is sufficient to hold that the learned Provincial High Court Judge is correct when he accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from Wang Lanka Apparels (Pvt) Ltd, I would proceed to consider whether the document (**P 9(a)**) is also admissible as secondary evidence under section 63(1).

Section 63(1) states thus 'certified copies given under the provisions hereinafter contained'. Section 90 C being a section appearing in the Evidence Ordinance after section 63, would fall within the meaning of the phrase "provisions hereinafter contained" appearing in section 63(1).

Section 90 C states as follows.

"*Subject to the provisions of this Chapter a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.*"

Before applying the provisions of the above section to decide on the admissibility of a document under that section, one must be mindful of the fact that the term "certified copy" referred to in this section has been defined in the same chapter (chapter VI). It is as follows.

"Certified copy" means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry; that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of

business; and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title."

In the light of the above provisions, I must now examine whether the document **P 9(a)** falls under the above definition of *"Certified copy"*.

It must be observed that the following certificate has been provided in the document (**P 9(a)**) by the Chief Manager of the Special Assets Unit of the Plaintiff bank.

"I, Uttumalebbe Ali Mohomed, Chief Manager - Special Assets Unit do hereby certify that the foregoing statement is a true extract of the relevant entries relating to the current account No. 205002 of Wang Lanka Apparels (Pvt) Ltd., No. 86, Sea Beach Road, Colombo 11 as appearing in the books of the People's Bank and that such entries are contained in one of the ordinary books of the Bank and were made in the usual and ordinary course of business and that such books are still in the custody of the Bank."

The Defendants at no stage have challenged the skills of the Chief Manager of the Special Assets Unit of the Plaintiff bank who has certified to Court that the document (**P 9(a)**) is a document showing the general result of all the entries in the originals consisting of numerous accounts.

Thus, I observe that the document (**P 9(a)**) certified as above by the Chief Manager of the Special Assets Unit of the Plaintiff bank clearly is a certified copy within the meaning of the term "certified copy" referred to in section 90C as defined in chapter VI of the Evidence Ordinance.

Therefore, I am of the opinion that the document (**P 9(a)**) is also a 'certified copy' within the meaning of section 63(1) of the Evidence ordinance and hence becomes secondary evidence which is admissible under section 65(7) of the Evidence ordinance.

For the foregoing reasons, I am of the opinion that the remaining current balance of the loan account pertaining to the case at hand could be proved by the document **P 9(a)** as secondary evidence of the ledgers maintained by the Plaintiff Bank with regard to the loan relevant to this case, both as a certified copy falling under section 63(1) and as a copy falling under section 63(3).

Thus, I am of the opinion that the learned Provincial High Court Judge is correct when he accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from the said Wang Lanka Apparels (Pvt) Ltd.

The judgment in the case of Agostinu vs Kumaraswamy,[8] is silent about the definition of the term "certified copy" referred to in section 90C appearing in chapter VI of the Evidence Ordinance. Although the said judgment states, "The document produced is not a certified copy of the entries in the bankers book; but a statement prepared with the aid of those entries certified by the accountant of the bank", it is not clear as to the exact nature of the document produced in that case. Further, the said judgment is not a judgment where the application of section 63(3) and section 65(7) of the Evidence Ordinance has been considered. In those circumstances, I am of the view that this Court should not incline to accept the argument of the learned President's Counsel for the Appellant on the

[8] Supra.

strength of the said judgment that it was erroneous for the learned Provincial High Court Judge to have accepted the statement of accounts produced marked **P 9(a)** as proof of the fact that a sum of money was due to the plaintiff from Wang Lanka Apparels (Pvt) Ltd.

Thus, on the balance of probability of the evidence led in this case, I am of the view that the learned Provincial High Court Judge is correct when he had granted the Plaintiff the relief claimed by him in prayers (a) and (b) of the plaint by his judgment dated 26th April 2012.

In these circumstances, I affirm the judgment of the Provincial High Court dated 26th April 2012 and proceeds to dismiss this appeal with costs.

JUDGE OF THE SUPREME COURT

Aluwihare PC J

I had the benefit of reading the judgment of his Lordship, Justice Padman Surasena. Although I am in agreement with the final conclusion reached by his Lordship, with all due deference, I wish to disagree with the views expressed by his Lordship regarding the admissibility of the document marked P9 (a) and would like to set down my reasons for so doing.

The document marked and produced as P9(a), that was relied upon by the Plaintiff Bank, sets out entries relating to the current account

maintained by the Plaintiff Bank, of Wang Lanka Apparels (Pvt) Ltd during the period stated therein. Being a statement of accounts relevant to the impugned loan transaction, the Plaintiff produced P9 (a) in terms of Section 90C of the Evidence Ordinance (under the Chapter "Banker's Books").

At the hearing of the appeal, the Learned President's Counsel on behalf of the Appellant contended that the Learned Judge of the Commercial High Court misdirected himself regarding the admissibility of P9(a) and his contention being that the said document could not be admitted under the provision of Section 90C. The Learned President's Counsel further contended that the Learned High Court Judge failed to apply the principle laid down in the case of ***Agostinu v. Kumaraswamy*** **59 NLR 132**, regarding the proof of entries in bankers' books.

I shall deal with the applicability of that case later in my judgment. I wish to, however, at the outset address the circumstances under which documents, that come within the definition of the term "banker's books" as defined in Section 90A, could become admissible.

The "bankers' books" in terms of Section 90A of the Evidence Ordinance (as amended) include, ledgers, day books, cash books, account books and **all other books used in the ordinary business of a bank** and also includes data stored by electronic, magnetic, optical or other means in an information system in the ordinary course of business of a bank.

His Lordship Justice Surasena in considering the admissibility of P9 (a) has referred to the general provisions relating to the admissibility of documents under the Evidence Ordinance, namely Sections 61, 63 and

Section 65 and has held that the document could be admitted as secondary evidence under Section 65 (7) of the Evidence Ordinance.

Analysis of the Evidence Ordinance reveals, that the evidentiary provisions in Chapter VI, ("Banker's Books") are stand-alone provisions relating to documents dealing with bank transactions. Chapter VI is a subject-specific evidentiary regime, which a party to a case can safely rely on to produce documents falling within the meaning of "Banker's books" in section 90A without having to invoke the general provisions contained in the Evidence Ordinance relating to documentary evidence, in particular Sections 61, 63 and 65.

It would, in my view, be pertinent to refer to the historical background of these provisions, so that any ambiguity as to the application of the provisions in Chapter VI could be eliminated. In the scheme of the Evidence Ordinance, the general rule is that the original document must be produced to prove the contents of such document. The Evidence Ordinance, however, provides certain exceptions to that rule. One such exception is 'public documents' and the other is 'banker's books'. The significance in the latter is that unlike public documents, banker's books are private documents. **E.R.S.R. Coomaraswamy** (**Law of Evidence, Vol II book I, at page 156**) states;

> *"[N]evertheless, certain cogent, practical reasons have induced the legislature to equate those private documents to the exceptional position of public documents in the matter of their proof in the Courts and to confer a limited immunity on the bankers*."

The immunity conferred on banker's books is embodied in subsection 3 of Section 130 of the Evidence Ordinance. Although not directly relevant to

the present issue, for the sake of completeness, the provision is reproduced below:

> 130 (3) - "No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party, except as provided by section 90D".

The effect of this provision is that an original of a document, which falls within the meaning of "banker's books" can be produced under Section 90 D; effectively shutting out the mandatory application of the general provisions. The rationale behind this provision is that any document which falls within the meaning of "banker's books" can be proved by producing a **certified copy** as stipulated in Section 90C of the Evidence Ordinance.

The "stand-alone nature" of these provisions can be further gleaned from the wording in Section 90C; which reads,

> "Subject to the provisions of this Chapter, **'a certified copy'** of any entry in a banker's book **shall in all legal proceedings be received as prima facie evidence** of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, **the original entry itself** is now by law admissible, but not further or otherwise." (emphasis added)

Thus, a "**certified copy**" of a document (banker's books) in terms of Section 90C,

a) Constitutes **prima facie evidence** of the existence of such entry, and
b) Shall **be admitted as evidence** of the matters stated, **as the original** entry itself.

Furthermore, sub-section (6) of Section 65 which deals with the *"cases in which secondary evidence relating to documents may be given"* removes any conflict between the general provisions relating to admission of documentary evidence and the special provisions referred earlier, affecting the same matter.

Section 65 (6) reads thus;

> Secondary evidence may be given [...]
>
> (6) "When the original is a document of which **a certified copy is permitted by this Ordinance** or by any other law in force in Sri Lanka to be given in evidence.

Chapter VI, has its roots in the English Bankers' Books Evidence Act of 1879. Explaining the purpose of the said Act, Bankes LJ in **Waterhouse *v. Wilson Baker* (1924) AER at 775** stated that the Act was passed in the interest of bankers in order to prevent the interference with their business and needless exposure and trouble, and to facilitate the giving in evidence of relevant material contained in their books. In the case of ***Parnell v. Wood* (1892) 66 L.T. 670**, Lindley LJ stated that the Act was passed mainly for the relief of bankers and to **avoid inconvenience to them by having to produce books in constant use in their business** (emphasis added).

It is a very likely that Sir Fitzjames Stephen when drafting the Evidence Ordinance for India and then Ceylon was mindful of the provisions of the Bankers' Books Evidence Act of England and decided to incorporate parallel provisions of the said Act in our Evidence Ordinance for; such provisions were lacking, in our jurisdiction at the time.

In his 'commentary on the provisions of the Evidence Ordinance', explaining the evidentiary provisions relating to documentary evidence (page 174-175) Sir Stephen comments "*The provisions in the Act are all made in order to* ***meet real difficulties which arose in practice in England,*** *and which must of necessity arise over and over again, and give occasion to litigation unless they are specifically provided for beforehand.*"

These comments taken alongside the provisions in the Evidence Ordinance, clearly fortifies the argument that the provisions in the Banker's Books Chapter of the Evidence Ordinance operate independently of the general provisions contained in the Evidence Ordinance relating to proof of documents, in particular, Sections 63 and 65.

Argument on behalf of the Appellant with regard to the admission of the document marked, P9 (a):

It was the contention of the Learned President's Counsel that the impugned document P9(a), was admitted in violation of the principle laid down in the case of ***Agostinu v. Kumaraswamy (supra).***

The only question that arose in that case was, whether entries in the books of a banker have been proved in the manner prescribed in Section 90C of the Evidence Ordinance.

In a brief judgement, Basnayake C.J. held that, "Section 90C does not apply to the '**statements produced'. The only way of proving entries in a banker's book** is by either producing the original or **certified copies of the entries therein as prescribed by Section 90C"** (emphasis added).

What was produced in Court in the case of ***Agostinu*** was a bare statement, without **any certification,** and based on some entries which had been certified by the accountant of the bank. It appears, then, that although the original entries of the bank had been certified by the accountant, the transcription of those entries that was produced in Court carried no certification. Basnayake C.J. correctly held that the statement was inadmissible in as much as it is a mandatory requirement under Section 90C, that what is produced in Court should be certified as stipulated in Section 90A of the Evidence Ordinance.

For clarity, the position in the case of ***Agostinu*** is reproduced below:

> "The **document produced is not a certified copy** of the entries in the banker's book; **but a statement** prepared with the aid of those entries **certified by the accountant** of the bank."

In the instant case, however, as opposed to the facts of the case of ***Agostinu,*** the document marked P9(a) carries a certification to the effect:

> "I, Uttumalebbe Ali Mohamed, Chief Manager-Special Assets Unit do hereby certify that the foregoing statement is a true extract of the relevant entries relating to the current account

> No. 205002 of Wang Lanka Apparels (Pvt) Ltd., No. 86, Sea Beach Road, Colombo 11 as appearing in the books of the People's bank and that such entries are contained in one of the ordinary books of the Bank and were made in the usual or ordinary course of business and that such books are still in the custody of the Bank."

Initially, P9 was marked subject to proof (proceedings of 08.03.2010). Subsequently, however, U. Ali Mohamed, the very officer who placed the certification at the foot of the document P9(a) had given evidence.

According to witness Mohamed, it was he who had the prepared documents P9 and P9(a) with the aid of entries in the ledgers maintained by the Bank. (Proceedings of 5.10.2010)

The above in my view is sufficient compliance with the certification prescribed in Section 90A of the Evidence Ordinance and as such the principle laid down in the case of ***Agostinu*** is not applicable to the instant case.

I also must point out that the Appellant raised no objection when the document was sought to be admitted in evidence by the Plaintiff Bank, when witness Mohamed testified. Furthermore, every party if it is so desired is afforded an opportunity to have the originals inspected, in terms of Section 90E of the Evidence Ordinance, which right the Appellant could have exercised before the trial Judge.

I am also of the view that this is a fit instance to apply the principle laid down in the case of ***L. Edrick De Silva v L. Chandradasa De Silva, 7*****0**

NLR 169. In the said case (at page 174) Chief Justice H.N.G Fernando held:

> "*But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted*."

When a party is afforded an opportunity to challenge any evidence produced in Court, and does not exercise that right, it would be reasonable for the Court to infer that the party did not do so, because the party was not capable of challenging the same.

In conclusion, therefore, it is my considered view that P9(a) being a document falling within the meaning of "Banker's books" in Chapter VI, need not be admitted as secondary evidence under any of the instances in section 65 of the Evidence Ordinance, save for subsection (6) of that section. Section 65 is exhaustive and secondary evidence can only be produced in the instances referred to under that section. However, these general provisions stand excluded by section 65 (6) which must be interpreted as cross referring to special regimes within the Ordinance namely, Chapter VI (Banker's Books) and the provisions relating to public documents (Section 74 and Section 78 of the Evidence Ordinance). The reason being, on grounds of evidentiary policy, such documents are elevated to the level of an original.

For the reasons set out above, I reject the contention of the Learned President's Counsel for the Appellant that the document marked and produced as P9(a) was wrongly admitted.

Apart from the foregoing, I agree with the conclusions reached by His Lordship Justice Surasena that the Appeal should be dismissed with costs.

JUDGE OF THE SUPREME COURT

Prasanna Jayawardena, PC, J.

I have had the benefit of reading the draft judgments prepared by my brothers, Surasena J and Aluwihare, PC, J.

I am in respectful agreement with reasoning applied by Surasena J when he held that the sum of Rs.19,400,000/- paid by the defendant-appellant to the plaintiff-respondent bank was only a part-settlement of the amounts due then to the plaintiff-appellant bank from the defendant-appellant and that the plaintiff-respondent bank was entitled to have and maintain this action for the recovery of the balance monies which remained due and owing from the defendant-appellant after the sum of Rs.19,4000,000/- was paid. Accordingly, I am in respectful agreement with Surasena J's conclusion that the judgment of the High Court must be affirmed and this appeal be dismissed.

However, I state with the great respect that I am unable to agree with the manner in which Surasena J has analysed the provisions of the law which relate to the admissibility of the document marked"P9(a)".

It appears to me that this document was produced in evidence by the plaintiff-respondent bank as a certified copy of entries in a bankers' book

under and in terms of the provisions of Chapter VI of the Evidence Ordinance, which deal with "Bankers' Books".

In his separate judgment, Aluwihare,PC, J has admirably dealt with the principles applicable to the production of bankers' books and certified copies of bankers' books, under and in terms of the Evidence Ordinance. I am in respectful agreement with the views expressed by Aluwihare J on that subject.

In any event, as determined by both Surasena J and Aluwihare,PC, J, the learned High Court Judge correctly admitted the document marked "P9(a)" in evidence and regarded it as cogent evidence in support of the plaintiff-respondent's cause of action seeking to recover the sum prayed for in the action from the defendant-appellant.

For the reasons set out above, I concur with my brothers that this appeal is to be dismissed, with costs.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. F.R. Application

No: SC/FR/119/2019

S.F. Zamrath,

554/6E, Peradeniya Road,

Kandy.

PETITIONER

Vs.

1) Sri Lanka Medical Council,
   No. 31, Norris Canal Road,
   Colombo 10

2) Hon. Dr. Rajitha Senarathne,
   Minister of Health Nutrition and Indigenous Medicine,
   Ministry of Health Nutrition and Indigenous Medicine,
   Suwasiripaya,
   Colombo 10.

3) Wasantha Perera,

Secretary to the Ministry of Health Nutrition and Indigenous Medicine,
Ministry of Health Nutrition and Indigenous Medicine, Suwasiripaya,
Colombo 10.

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

RESPONDENTS

Before: Prasanna Jayawardena, PC, J.
L.T.B. Dehideniya, J
Murdu N.B. Fernando, PC, J.

Counsel: Romesh de Silva, PC, with Sugath Caldera and Niran Anketell
Instructed by Sanjay Fonseka for the Petitioner.
Canishka Vitharana for the 1st Respondent.
Suren Gnaraja, SSC, for the 2nd, 3rd and 4th Respondents.

Argued on: 18. 06.2019.
Decided on: 23.07.2019

L.T.B Dehideniya J,

The parties in FR 119/2019, 121/2019, 122/2019, 123/2019, 124/2019, 125/2019, 126/2019, 127/2019, 128/2019, 129/2019, 130/2019, 132/2019, 133/2019, 134/2019, 137/2019 agreed to abide by this judgement. Therefore, this judgement has the binding effect in all the said cases.

The Petitioner invoked the jurisdiction of this court, alleging the violation of her fundamental rights guaranteed under the Articles 12(1) and 14(1) (g) of the Constitution. Further, the Petitioner alleged that, the acts, omissions and decisions of the 1st, 2nd and 3rd Respondents are

ultra vires to the provisions of the Medical Ordinance, and that such acts and omissions are arbitrary, irrational, unreasonable and amount to a violation of the principles of reasonableness, fairness, proportionality, legitimate expectation and natural justice.

The Petitioner is a graduate of the Odessa National Medical University, Ukraine which has been recognized by the Sri Lanka Medical Council for the purposes of provisional registration under the Medical Ordinance. She made an application to the Sri Lanka Medical Council (Hereinafter sometimes called as the 1st Respondent) for approval to sit for the Examination for Registration to practise Medicine (Hereinafter sometimes called as the 'EPRM').The approval was granted on 30th September 2016 and the Petitioner passed the examination. The Petitioner's contention is that, the 1st Respondent has initially recognized that she has all the required qualifications to sit the EPRM. The Petitioner has passed all the stages of the EPRM and is placed 51st on the foreign graduates' merit list and 128th on the common merit list. Her attempts to obtain a copy of the common merit list were of no avail and unsuccessful. The Petitioner states that, she has applied for provisional registration under Section 29 (2) of the Medical Ordinance and the issue of the EPRM completion certificate. As per the petition, The 1st Respondent has not taken steps to provisionally register the Petitioner citing the purported ground that she has not fulfilled a pre-entry qualification relating to Advanced Level results said to have been imposed by the document marked 1R imposed by the former. Subsequently, the Petitioner has made an application for the internship, but it was rejected by the Ministry of Health on the basis that, there is no provisional registration number granted by the Sri Lanka Medical Council. On 6th of February 2019, the Registrar of the Sri Lanka Medical Council has informed the Petitioner that, no decision has been taken to register her provisionally. The Petitioner's contention is that, being a citizen of Sri Lanka she bears a good character and holds a degree in Medicine which has been recognized by the 1st Respondent, and there is an obligation on the part of the 1St Respondent to provisionally register her as a medical practitioner under and in terms of Section 29 (2) of the Medical Ordinance.

The 1st Respondent's contention is that, it has the sole authority and power to decide on the criteria for the recognition of universities or medical schools of any country by considering the standard of medical education of such universities or medical schools, and has the authority to introduce changes to such criteria and / or subjecting previously imposed criteria to additional qualifications at a subsequent stage. As per the contention of the 1st Respondent, it considers the standards in relation to the recognition, as at the date of submission of the application for

provisional registration under Section 29 (2) by any person. The pre entry qualification said to have been imposed by the 1st Respondent and set out in the Document marked in 1R specifies that, the medical students admitted to the medical schools shall have three passes in Biology, Chemistry and Physics / Mathematics with at least two credit passes in those subjects at the G.C.E. A/L or an equivalent examination approved by the Sri Lanka Medical Council prior the entry to the Medical school. The 1st Respondent further states that, pre-entry qualification requirement is stated in a document made available to the public. However, the Petitioner entered the Odessa University before 1R1 came into force. Before the newly imposed pre entry qualification set out in the circular, the minimum qualification to register at any recognized foreign university was the same as the minimum A/L qualification required for the admission to any other state university of Sri Lanka and does not require the credit passes. As per the contention of the 1st Respondent, it has acted within its powers and scrutinized the A/L qualifications of the Petitioner. The 1st Respondent further states that, the Petitioner has failed to promptly disclose her alleged pre entry disqualification and taken an inordinate period to complete the degree and pass the EPRM and thereby breached the standards of intelligence and enthusiasm necessary for the medical profession.

The Medical Ordinance, by its Section 29 describes the Registration of Medical Practitioners. The Section 29 (1) (a) and Section 29 (1) (b) (ii) of the Medical Ordinance read as follows:

> *A person shall, upon application made in that behalf to the Medical Council, be registered as a medical practitioner,*
>
> *a) If he is of good character: and*
> *b) If he*
> *(i) .....*
> *(ii) Not being qualified to be registered under paragraph (i)*
>
> *(aa) is a citizen of Sri Lanka,*
>
> *(bb) holds a degree of Bachelor of Medicine or equivalent qualifications of any university or medical school of any country other than Sri Lanka, which is recognized by the, Medical Council for the purposes of this section having regard to the standard of medical education of such university or medical school.*

cc) has passed the Special examination prescribed in that behalf by the Medical Council.

dd) holds a certificate granted by the Medical Council under section 32.

The Section 29 (2) (b) (iii) (i) (cc) states as follows,

(2) For the purposes only of enabling the acquirement of such experiences as is required for obtaining from the Medical Council. a certificate under Section 32, a person shall, upon application made in that behalf to the Medical Council, be registered provisionally as a, medical practitioner,

(a) if he is of good character,

(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 General Sir John Kotelawala Defence University: or

ii) has passed the examination necessary for obtaining a degree of Bachelor of Medicine of the University of Ceylon or a corresponding university or of a Degree Awarding Institute, but has not obtained that degree owing to a delay on the part of the university or the Degree Awarding Institute or General Sir John Kotelawala Defence University in conferring that degree on him,

(iii) not being qualified to be registered under any of the preceding sub-paragraphs.

(aa) is a citizen of Sri Lanka;

(bb)

(i) holds a degree of Bachelor of Medicine or an equivalent qualification of any university or, medical school of any country other than Sri Lanka, which is recognised by the, Medical council for the purposes of this section having regard to the standard of medical education of such university or medical school or,

(ii) has passed the examination necessary for obtaining a degree of Bachelor of Medicine or an equivalent qualification of any university or medical school of any country other than Sri Lanka which is recognized by the Medical Council for the purposes of this section, having regard to the standard of medical education at such university or medical school but has not obtained that degree owing to the fact that, he has not completed the period of internship required for obtaining that degree and the Director – General of Health Service has permitted him to compete that period of internship in Sri Lanka,

(cc) has passed the special examination prescribed in that behalf by the Medical Council.

Upon a perusal of the law applicable to the case, it is clear that, in the case of the Petitioners the provisional registration as a medical practitioner in Sri Lanka under Section 29 (2) of the Medical Ordinance is grounded on two basic requirements namely:

1) The relevant person applying for provisional registration must possess a Bachelor's Degree in Medicine from any recognized university or medical school of a country other than Sri Lanka. The university must be a recognized university by the Medical Council of Sri Lanka having regard to the standard of medical education.
2) That person should have passed the special examination provided by the SLMC.

In the case of the Petitioner, it is evident that the university she attended is a foreign university which has been recognized by the 1st Respondent and that she has passed the EPRM. The conduct of the 1st Respondent of recognizing the University of the Petitioner itself is a fact which shows that, the 1st Respondent cannot deny the entitlement of the Petitioner for provisional registration. The 1st Respondent has recognized the aforesaid university as an institution which provides a standard medical education, which would entitle a graduate to be

recognized as a medical practitioner in Sri Lanka. I see that, the 1st Respondent is estopped from imposing a different and unjustifiable pre requirement subsequently.

The Medical Ordinance is a "law enacted by the Parliament". A law enacted by the Parliament is of significant value, for two reasons. In one perspective, a law enacted by the parliament has a power to organize the society and in the other way, it protects the citizens. The sanctity of a law enacted by the Parliament is at the zenith. The 1st Respondent is not empowered to and impose rules, which override an enactment which has been passed by the Parliament.

Under section 29 (2) of the Medical Ordinance, a citizen of Sri Lanka who is of a good character and has a degree in medical education from a university recognized by the Medical Counsel is entitle to sit for the EPRM and on obtaining pass marks, become entitled to provisional registration. Pre entry requirement to the university is not a qualification specified by the Parliament as a pre requisite for provisional registration. Therefore, any other authority, like Medical Council, cannot bring in such a requirement, it can only recognize or not recognize a foreign university or medical school. It is overriding the power or authority of the Legislature.

If the Parliament says that certain requirements are necessary to do a certain thing, other administrative authorities are expected to follow the rule.

Kandiah v.Abeykoon (Sri Skantha Law Reports Volume IV, pg 96,

> *'Upon the construction of a statute as a whole, the forms of notice, application and affidavit had to be in strict compliance with those which the legislature has thought important enough to set out in the schedules before the jurisdiction of the magistrate to eject the person in possession or occupation could be exercised'.*

This court upholds compliance with the law enacted by the Parliament and the 1st Respondent has acted arbitrarily by subsequently imposing a pre entry qualification as a requirement for the provisional registration. John Quincy Adams, An American Lawyer has stated that, *'Nip the shoots of arbitrary power in the bud, is the only maxim that protect the liberties of any people'.* ('Companion to the cantos of Erza Pound', by Caroll F.Terrell Pg.314).

This court being the apex court of the country upholds the tenets of rule of law. The court accepts the absolute predominance of the ordinary law of the land. A law enacted by the Parliament as the supreme Legislative organ cannot be overridden by a regulation which has been arbitrarily made by a subordinate authority. Such a regulation which has arbitrarily been enacted shall not have a retrospective effect. I hereby quote and uphold the view of Thomas Hardiman, as a judge in the United States. ('A look at Thomas Hardiman, Possible Trump Scotus Nominee', by Mitchelle Gorman).

> *'In the legislative branch, you make the laws....and our role as judges is to interpret the law, not to inject our own policy preferences. So our task is to give an honest construction to what laws are passed by the Legislature.*'

The recognition of a university or a medical school is entirely within the purview of the Medical Council of Sri Lanka. If the 1st Respondent is of the view that a university or a medical school is giving admission to persons who are not qualified to study a medicine, it is for the Medical Council to re consider the recognition of the said university. The entry qualification to the university is a matter for the said university.

The Medical Ordinance, being the statutory law has not imposed a restriction on the Petitioner following a degree in Medicine of her choice with a view to qualifying as a medical practitioner subject to the requirement that the 1st Respondent must have recognized the said university. The university that the Petitioner studied medicine was a university recognized by the 1st Respondent. It has been mentioned in the list of universities that it had been recognized without any condition or limitation. Relying on that assurance, the Petitioner entered in the said university and obtained a degree of medicine.

The 1st Respondent's subsequent imposition of an alleged pre entry qualification to the university is now held out by the 1st Respondent as the alleged reason for denying the Petitioner provisional registration. The 1st Respondent has attempted to act in contrary to the existing law enacted by the Parliament. Thus, it is clear that, the 1st Respondent has exceeded the powers within its purview. The 1st Respondent is authorized to make rules in the instances where necessary, but no authority has been granted power to override a law enacted by the Parliament. Further, the 1st Respondent cannot expect that, the rules imposed by it can operate retrospectively to thrust a burden on the Petitioner whose qualifications for provisional registration met with the existing law at the time of entering the university prior to the arbitrarily imposition of the alleged pre entry qualification.

This court sees that there is a legitimate expectation on the side of the Petitioner, to have recognition as a qualified person to be entitled to the provisional registration (subject to obtaining pass marks in EPRM). The Petitioner had the expectation that, she is stepping in to a university, which is recognized by the 1st Respondent and afterwards, the 1st Respondent himself imposes a pre entry qualification which ultimately left the Petitioner with utmost desperation as to her future.

The doctrine of legitimate expectation is basically aimed at the prevention of administrative authorities from abusing their discretionary powers against the legitimate expectations of individuals, which have been engineered by the prior conduct of the authorities. The Petitioner has studied in a university which has been duly recognized by the 1st Respondent. It is evident that, the 1st Respondent's act of recognizing the university has engineered a legitimate expectation of the Petitioner. The legitimate expectation of a person ensures that, the administrative authorities are bound by their undertakings and assurances unless there are compelling reasons to change the policy subsequently. It further ensures legal certainty which is imperative as the people ought to plan their lives, secure in the knowledge of the consequences of their actions. The perception of legal certainty deserves protection, as a basic tenet of the rule of law which this court attempts to uphold as the apex court of the country. The public perception of legal certainty becomes negative when the authorities by their own undertakings and assurances have generated legitimate expectations of people and subsequently by their own conduct, infringe the so generated expectations.

Lord Denning has stated that, (in "Recent Development in the Doctrine of consideration'') 'A man should keep his words. All the more so when promise is not a bare promise but is made with the intention that the other party should act upon it'. The principle of legitimate expectation is connected with an administrative authority and an individual. It emerges in an instance where an administrative authority affects a person by depriving him of some benefit or an advantage which he had been in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue. Thus as an essence, administrative authority must respect the expectations.

There are essential ingredients of legitimate expectation. Some are:

a) The doctrine imposes a duty on the administrative body to afford an opportunity of hearing to the affected party, before acting contrary to the latter's legitimate expectation.

b) The doctrine extends the protection of natural justice or fairness to the exercise of non statutory administrative powers where the interest affected is only an expectation, a privilege or a benefit.
c) The doctrine applies to make a public authority's decision making process fair.
d) A person may derive the legitimate expectation of receiving a benefit or privilege as a matter of public law even where that person has no legal right to it.
e) An individual can claim a benefit or privilege under the doctrine of legitimate expectation only when such expectation is reasonable.
f) The doctrine extends to the exercise of non statutory powers.
g) The doctrine of legitimate expectation would arise from an express promise or existence of a regular practice.

In Wickremaratne v. Jayarathne [2001] 3 Sri L R 161, Justice Gunawardena held that,

> *"The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing before some right or expectation was affected, but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertakings and assurances. Simon Brown LJ explained this aspect in R. v. Devon Country Council, ex parts Baker and another in which the concept of legitimate expectation was used to refer to the fair procedure itself i.e. that the applicant claims to have a legitimate expectation that public authority will act fairly towards him. It is not procedurally fair for the State to have promised the petitioner an extent of land 2RR 21 PP in extent upon his surrendering the balance land and then proceed to acquire the whole of the land without the petitioner being given any opportunity to make representations."*

As De Smith elaborated in 'Judicial Review of Administrative Action' 5th Edition:

> *'The protection of legitimate expectations is at the root of the constitutional principle of rule of the law, which requires regularity, predictability, and certainty in government's dealing with the public'*

The administrative authorities are empowered to meet the challenging needs of the society. It is appropriate to quote the perception of Justice C.G.Weeramantry, in his work 'An Invitation to Law' at page 139,

> *"No legal system achieves greatness unless it has within it a built in mechanism for adapting that legal system to change. Society is ever changing and as new circumstances arise, attitudes and moral standards change as well. If the legal system remains frozen and unalterable, there will sooner or later be a wild gulf between this system and the needs of the society''*

As the apex court of the country, this court encourages the flexibility and adaptability of the administrative authorities in making policies and taking decisions, but still, insists on the fact that such conduct should not be used unfair and arbitrary. As the 1st Respondent states, it has powers to impose requirements on the subject of the recognition of foreign universities and medical schools. However, such powers should not be unfair and arbitrarily to deprive ones' rights. The main function of this court in this type of case is to strike a balance between ensuring an administrative authority's ability to change its policies when required, and make sure that in doing so they do not defeat the legitimate expectations of individuals by acting unfairly and arbitrarily.

Justice Sedley held in R v. MAFF (ex) P. Hamble (Offshore fisheries) 1995 2 All ER 714, that,

> *"Legitimacy in this sense is not an absolute. It's a function of expectations induced by government and of policy considerations which militate against their fulfilment. The balance must in the first instance, be for the policy maker to strike; but if the outcome is challenged by way of a judicial review, I do not consider that the court's criterion is the bare rationality of the policy maker's conclusion. While policy is for the policy maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course the lawfulness of the policy). ..... The court's task is to recognize the constitutional importance of ministerial freedom to formulate and reformulate the policy, but it is equally the court's duty, to protect the interest of those individuals whose expectation of different treatment has legitimacy in which in fairness out tops policy choice which threatens to frustrate it.''*

The same view which the Justice Sedley observed was held by Justice A.R.B Amarasinghe, in Dayarathne and Others v. Minister of Health and Indigenous Medicine and Others [1999] 1 Sri L R 393,

> *"Evidently, there had been a change of policy. In my view, although the executive ought not in the exercise of its discretion, to be restricted so as to hamper or prevent the change of policy, yet it is not entirely free to overlook the existence of a legitimate expectation. Each case must depend on its circumstances, but eventually it seems to me, that the court's delicate and sensitive task is one of weighing genuine public interest against private interests and deciding on the legitimacy of an expectation, having regard to the weight it carries, in the face of the need for a policy change''.*

It is clear that, the legitimacy of an expectation emerges when it is lawful and proper. The Petitioner is a graduate who has sacrificed a considerable period of her lifetime for the medical education and it is evident that, she has a significant anticipation for her future as a medical practitioner. This court sees the dedication on the part of the Petitioner.

The legitimate or reasonable expectation arises from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. This court decides that, the expectation which is defined in the domain of this doctrine is not merely an anticipation. It is not just a wish, desire, hope, a claim or any kind of a demand. The legitimacy of an expectation can be inferred, if it is founded on the sanction of a law or custom or assurance or an established procedure by a public authority. It was stated in Union of India v. Hindustan Development Corporation (1993) SCC 499 at 540, that,

> *'Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.'*

It is evident from the circumstances of the case, that the Petitioner had a legitimate and protectable expectation to be provisionally registered under Section 29 (2). Medical Education is a sacrifice of 5 or more years in the life of a person which cannot be replaced and will be wasted if the legitimate expectation of being provisionally registered as a medical practitioner is not realized. In this instance I bring forth a quote from Jean Piaget, a psychologist on the concept of Education ('conquering criticism' by Pravin Bhatia at pg. 143) said.

'The goal of education is not to increase the amount of knowledge but to create the possibilities for a child to invent and discover, to create men who are capable of doing new things.'

This perception can be applied to the instance of 'Medical Education' as well. The purpose of medical education is not the mere increase of knowledge and the skills of the respective students, but it is to apply such knowledge for the betterment of the field. The Petitioner, who has been denied provisional registration, has knowledge but he/she is being deprived of opportunity to put her talent, capacity and knowledge in to practice. Prior to the conclusion of the case, I quote a statement by Lord Hodge on the constitutional basis of the doctrine of legitimate expectation, in Rainbow Insurance Company Ltd v. Financial Services Commission (Mauritius) [2015]UKPC 15,

'The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities.'

This court cannot reject the legitimate expectation on the part of the Petitioner, which is protectable. The 1st Respondent has exceeded its authority and has acted unfairly and arbitrarily and thereby infringed the Petitioner's fundamental rights guaranteed under the Articles 12(1) and 14 (1) (g) of the Constitution. The 2nd and 3rd Respondents have similarly violated the aforesaid fundamental rights of the Petitioner by their acts and conduct.

Considering the above circumstances, this court decides that, the Petitioner's fundamental rights guaranteed under the Article 12 (1) and 14(1) (g) of the Constitution have been infringed by the 1st, 2nd and 3rd Respondents. The court directs the 1st Respondent to provisionally register the Petitioner under the provisions of the Section 29 (2) of the Medical Ordinance, as prayed for in prayer (g) of the petition. Further, the Court makes Order in terms of prayer (h) of the petition, which is to be implemented if the 1st Respondent fail to grant provisional registration under Section 29 (2) of the Medical Ordinance to Petitioner within 30 days of this judgement.

The Petitioners in the cases mentioned at the beginning of this judgment are also entitled to the same relief. The Petitioners who were denied the provisional registration and those who were not allowed to complete the ERPM due to the fact that, they are not having the

subsequently imposed pre entry requirement prior to entering the recognized universities, shall be given provisional registration or be allowed to sit for the ERPM respectively.

Judge of the Supreme Court

Prasanna 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 appeal to the Supreme Court in terms of section 09 of the High Court of the Provinces (Special Provisions) Act No. 90 of 1990 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Office-in-Charge,
Police Station,
Kollupitiya.

Complainant

SC Appeal 76/2018
SC/SPL/LA 55/2016
HC/MCA 140 /2013
MC Case No. 89640/11

Vs,

Thusith Thilina Malagoda,
No. 35, Ransive Lane,
Colombo 06.

Accused

And

Paleketiyage Samanthi Manohari Paleketiya,
No. 49, Mahawa Road,
Nikawaratiya.

Appellant

Vs,

Office-in-Charge,
Police Station,
Kollupitiya.

Complainant –Respondent

Thusith Thilina Malagoda,
No. 35, Ransive Lane,
Colombo 06.

Accused–Respondent

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

Respondent

And now between

Thusith Thilina Malagoda,
No. 35, Ransive Lane,
Colombo 06.

Accused-Respondent-Appellant

Vs,

Paleketiyage Samanthi Manohari Paleketiya,
No. 49, Mahawa Road,
Nikawaratiya.

Appellant-Respondent

Office-in-Charge,
Police Station,
Kollupitiya.

Complainant –Respondent-Respondent

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

Respondent-Respondent

Before: **Hon. Justice Buwaneka Aluwihare PC**
Hon. Justice Vijith K. Malalgoda PC
Hon. Justice Murdu N.B. Fernando PC

Counsel: Anil Silva PC with Nandana Perera for the Accused-Respondent-Appellant

Migara Doss with Ms. Lakmali Hemachandra for the Appellant- Respondent

Malik Aziz, SC for the Hon. Attorney General

Argued on: 12.12.2018
Decided on: 12.02.2019

Vijith K. Malalgoda PC J

The Accused-Respondent-Appellant (herein after referred to as the Appellant) namely Thusith Thilina Malagoda was charged before the Magistrate Fort on a charge under Section 345 of the Panel Code which reads as follows;

> "On or about 28.03.2011 at Mahanama Vidyalaya, R.A. de. Mel Mawatha, Colombo 03 within the jurisdiction of this court did entre the workplace of Samanthi Manohari Palaketiya of Mahawa Road, Nikaweratiya and kissed her face without her consent and with the intention of outraging the modesty, and thereby committed an offence punishable under section 345 of Penal Code as amended by Penal Code (amendment) Act No 22 of 1995."

When the above charges were readout to the Appellant above named before the Learned Magistrate, the Appellant pleaded not guilty to the said charge and the trial against him proceeded before the said Magistrate's Court. During the trial, the prosecution relied on the evidence of;

i) Palaketiyage Samanthi Manohari Palaketiya

ii) Sadarathdura Cyril Silva

iii) Chathura Ranjith Nissanka and

iv) Yakupitiyage Nandapala

When the learned Magistrate called for the defence, the Appellant gave evidence on oath and the learned Magistrate on 27.06.2013 delivered the judgment acquitting the Appellant.

Being aggrieved by the said acquittal, the Complainant-Appellant-Respondent (hereinafter referred to as the Respondent) or the victim before the Magistrate's Court namely Palaketiyage Samantha Manohari Palaketiya preferred an appeal to the High Court of the Western Province, holden in Colombo with the sanction obtained from the Hon. Attorney General under the provisions of the Code of Criminal Procedure Act No. 15 of 1979.

The leaned High Court Judge, by his judgment dated 18.03.2016 allowed the appeal preferred by the Respondent and convicted the Appellant (accused before the Magistrate's Court) of the above charge and referred the case back to the Magistrate's Court for identification and sentence.

Being aggrieved by the said judgment of the learned High Court Judge, the Appellant had preferred a Special Leave to Appeal application before the Supreme Court and when this matter was supported before this court on 21.05.2018 for Special Leave, Court granted Special Leave on the following questions of Law.

a) Is the judgment contrary to Law and against the weight of evidence led at the trial?

c) Did the learned High Court Judge fail to consider the propensity of the Complainant to make allegations of improper sexual conduct and that therefore it was likely that the Complainant may have falsely fabricated a case against the Petitioner?

d) Did the Learned High Court Judge fail to consider that the belatedness of making a complaint considering the circumstances of this case which matter was rightly considered by the learned Magistrate when acquitted the Petitioner?

As observed by me, the Appellant whilst challenging the judgment of the learned High Court Judge had raised several grounds and some of those grounds can be summarized as follows;

i. Belated statement made to police

ii. Failure to complain the incident to the Principle of Mahanama College

iii. Complainant's propensity to make false allegations of sexual harassment to absolve herself from her own wrongdoings

iv. The complainant never wanted an inquiry into the incident

v. Can the Appellant be convicted based on sole unreliable testimony of the Complainant

When considering the appeal before this court, it is important to note that the present appeal is lodged against the reversal of the findings of the trial Judge by the learned High Court Judge, and it is an accepted legal principle that the Appellate Courts are reluctant to interfere with the findings of the trial court unless the said decision is against the weight of the evidence led before the trial judge.

This position was considered by G.P.S. de. Silva (J) in the case of ***Alwis Vs. Piyasena Fernando (1993) 1 Sri LR 120 at 122*** as follows;

> "It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal"

The main reason as to why the Appellate Courts are reluctant to interfere with the findings of the trial court, is the advantage of the Trial Judge of seeing the lay witnesses who testify before the trial court and the fact that the trial judge is possessed with the demeanor and deportment of the witness in deciding the trial before him. However as revealed before us, the learned Magistrate before whom the evidence for the prosecution case was led had been transferred and the case for the defence was taken up before the new Magistrate after adopting the evidence for the prosecution case.

In the said circumstances, the learned State Counsel who represented the Hon. Attorney General submitted that the learned Magistrate who delivered the judgment in the trial court was deprived

with the demeanor and deportment of the prosecution witnesses including the main witness for the prosecution, the Respondent before this court, Palaketiyage Samanthi Manohari Palaketiya.

As observed by me, the learned High Court Judge was mindful of the above legal requirement and had referred to the role of an Appellate Judge in an appeal as follows;

“අල්විස් එදිරිව පියසේන ප්‍රනාන්දු (1993 (1) ශ්‍රී ලංකා නීති වාර්ථා 119) හා ප්‍රකාශයට පත් නඩු තීන්දු ගනනාවක් මගින් තහවුරු වූ නෛතික තත්වය නම් සිද්ධිමය කරුණු සම්බන්ධයෙන් තීරණය කරනු වස් අභියාචනාධිකරණයකට වඩා මුල් අවස්ථා අධිකරණය වඩාත් යෝග්‍ය තත්වයක සිටින බවත්, මුල් අවස්ථා අධිකරණ තීන්දුවක සිද්ධිමය කරුණු සම්බන්ධයෙන් එළඹෙන ලද තීරණ අභියාචනයේදී වෙනස් කරනු ලබන්නේ නම් එය ඉතා සැලකිල්ලෙන් හා ප්‍රවේශමෙන් කළයුතු බවත්ය. එසේ වුවද මෙම අභියාචනයට අදාල කොටුව මහේස්ත්‍රාත් අධිකරණයේ 89640/11 දරන නඩුව සලකා බැලීමේදී, එම නඩුවේ පැමිණිල්ලේ සියළුම සාක්ෂි එක් මහේස්ත්‍රාත්වරයෙක් ඉදිරියේ ද, ඉන් අනතුරුව විත්තියේ නඩුව පමණක්, තීන්දුව ප්‍රකාශයට පත් කිරීමට යෙදුන මහේස්ත්‍රාත්වරයා ඉදිරියේ දී මෙහෙයවා ඇති බැව් පෙනී යයි. ඒ අනුව තීන්දුව ප්‍රකාශයට පත් කිරීමට යෙදුන මහේස්ත්‍රාත්වරයා හට පැමිණිල්ලේ සාක්ෂි දුන් ස්වභාවය සහ විලාශය නිරීක්ෂණය කිරීමේ අවකාශයක් ලැබී නොමැති අතර, හුදෙක් වර්තා ගත සටහන් අනුව පමණක් එම නිගමනයට එළඹී ඇත. ඒ අනුව සලකා බලන කල මෙම අධිකරණයට වඩා සිද්ධිමය කරුණු සම්බන්ධයෙන් වඩාත් හොඳින් තීරණය කිරීමේ තත්වයක් මෙම නඩුවේ මහේස්ත්‍රාත්වරයා වෙත තිබී නොමැති බව පෙනී යයි. ඊට යටත්ව මෙම නඩුවේ කරුණ මම සලකා බලමි ”

In the above circumstances, I can’t find fault with the decision of the learned High Court Judge to interfere with the findings of the learned Magistrate if he had observed that the impugned decision before the High Court was against the evidence led before the trial court.

In the said circumstance this court too has a duty to analyze the evidence and consider whether the learned High Court Judge is correct in reversing the findings of the learned Magistrate.

As observed earlier in this judgment, the main grounds on which the Appellant challenged the High Court findings, also needs this court to analyze the evidence led before the trial court.

Therefore it is important to consider the evidence given by the Complainant before the Magistrate's Court proceedings, namely Palaketiyage Samanthi Manohari Palaketiya, before considering the specific issues raised by the Appellant.

The Complainant who was a music teacher at Mahanama College, Colombo 03 had complained of an incident that took place during the school hours between 8.45-9.30 a.m. The Appellant too was a teacher at the same school. According to the Complainant, the Appellant had walked in to her class room when nobody was in and had made certain indecent proposals to which she did not agree and requested him to leave. The Appellant who left the class room on her request had come back to the class room again and had kissed her face. He once again left the class room when the Respondent shouted at him. The Respondent immediately complained the said incident to one Cyril Silva who was the Master-in-Charge of discipline at Mahanama College, over the phone. Said Cyril Silva had requested the Respondent, not to complain the incident to anybody and to leave the school obtaining half days leave. He further undertook to look into the matter internally to avoid any adverse publicity to the school.

According to the Respondent, she had remained silent until 25th of April. The school holidays too had intervened during this period. Around the 25th an officer from the Kollupitiya Police Station visited the school on an anonymous complaint, questioned the Respondent about the incident that took place on 28th March. The Respondent did not make a complaint to the police even on that day but, finally decided to lodge a complaint with police on 11th May 2011 when pressure was brought on her by several parties including the Old Boys Association and the Appellant himself, to settle the matter. By this time an inquiry conducted by the Education Ministry, was also proceeding against the Appellant.

The above position taken up by the Respondent was confirmed by witness Cyril Silva who received the complaint on 28th Morning.

As revealed before us, the learned Magistrate who considered the above evidence had given his mind to the delay in making the statement with the police and the failure by the Respondent to complain the above incident to the Principle in the following manner.

> "තවද පැමිණිල්ලේ සාක්ෂි අනුව මෙම සිදුවීම සිදුවී ඇත්තේ 2011.03.28 වන දිනයේදීය. එහෙත් පැ.සා 01 සහ පැ.සා 04 සාක්ෂිකරුවන්ගේ සාක්ෂිවලින් අනාවරණය වූයේ මීට අදාල පැමිණිල්ල පොලිස් ස්ථානය වෙත කර ඇත්තේ 2011.05.11 වන දිනයේදීය. එනම් මාස 02කට ආසන්න කාලයක් ගත වීමෙන් පසුවය. මෙවැනි සිද්ධියක් සිදුවූයේ නම් ඒ පිළිබඳව අප්‍රමාදව පොලීසියට පැමිණිල්ලක් කිරීමට අසමත් වූයේ ඇයිද යන සැකය මතුවේ. පැ.සා 01 සාක්ෂිකාරිය ප්‍රකාශ කර සිටියේ එම සිද්ධිය තමන් විසින් පැ.සා 03 සාක්ෂිකරුට එම දිනයේම දන්වා සිටි බවයි. පැ.සා 03 සාක්ෂිකරු ද සාක්ෂි දෙමින් එම කරුණු තහවුරු කරන ලදී. එහෙත් නඩු විභාගයේදී අනාවරණය වූයේ පැ.සා 03 සාක්ෂිකරු එදින නිවාඩු දමා නිවසේ සිටි තැනැත්තකු බවයි. පැ.සා 01 සාක්ෂිකාරිය මෙම අතවර සිද්ධිය, නිවාඩු ලබා නිවසේ සිටි පැ.සා 03 සාක්ෂිකරුට සිදුවූ දිනයේම දැනුම් දීමට ක්‍රියා කල ද එම අවස්ථාව වන විට පාසලේ රැඳී සිටි විදුහල්පතිවරයාට හෝ වෙනත් බලධාරියකු හට මේ පිළිබඳව පැමිණිල්ලක් සිදු කර නොමැත. එම අවස්ථාවේදී පාසලේ නොසිටි පුද්ගලයකුට එම දිනයේම දැනුම් දීම සිදු කරනවාට වඩා පාසලේ සිටි විදුහල්පතිවරයාට මේ සම්බන්ධයෙන් දැනුම් දීමක් කළ හැකිව තිබුණි. එසේ නොකිරීම තුලින් ද පැමිණිල්ලේ නඩුව කෙරෙහි යම් සැකයක් ඇතිවේ. "

However the above issues were put before the Respondent when she was giving evidence before the Magistrate and she had explained them in her evidence as follows;

> "මෙම සිද්ධියෙන් පස්සේ මම පාසලෙන් වරුවක් නිවාඩු දාලා ගියා. මේ සම්බන්ධයෙන් පොලිසියට පැමිණිල්ලක් කලේ නැහැ. සිරිල් සර් මට කිව්වා නිවාඩු දාලා යන්න වෙන කිසි දෙයක් කරන්න එපා කියලා. සිරිල් සර් පොලිසියට යන්න එපා කියපු නිසා පැමිණිල්ලක් කලේ නැහැ..... මෙම සිද්ධිය එලියට යන්න දෙන්න එපා මහානාම විද්‍යාලයට කැලලක් කියලා. එහෙත් දෙපාර්ශවය අතර විමර්ශනයක් සිදුකලේ නැහැ. ඊට

පසු අප්‍රේල් මාසයේ නිවාඩුවෙන් පස්සේ එක් දිනයක කොල්ලුපිටිය පොලිසියෙන් පාසලට ආවා. මට සිරිල් සර් ඇවිල්ලා කිව්වා මම කිසිදෙයක් කරන්න එපා කියලත් ඇයි පොලිසියට පැමිණිලි කරලා නේද ඇහුවා. මම කිව්වා මම පැමිණිල්ලක් කලේ නැහැ කියලා. පොලිසියේ නිලධාරීන් විසින් මාව වෙන් කරවාගෙන මගෙන් කටඋත්තරයක් ගත්තා. මට විදුහලෙන් බලපෑම් ආවා මෙහෙම සිද්ධියක් වුනේ නැහැ කියලා පොලිසියට කියන්න කියලා..... ඔවුන් අප්‍රේල් 26 වන දින මගෙන් කටඋත්තරයක් ගත්තා. මම කිව්වාමට අවශ්‍ය වුවිට පැමිණිල්ලක් කරනවා කියලා. ඒ අනුව මට පාසලෙන් එල්ල වූ චෝදනාවල් වලට මුහුණ දෙන්න නොහැකි තැන මම පොලිසියට ගිහිල්ලා පැමිණිල්ලක් කලා. ඒ 2011 මැයි 11 වෙනිදා. සිද්ධිය වූ වෙලාවේ පැමිණිල්ලක් නොකලේ පාසලේ නමට කැලලක් සිදුවනවා කියලා ඉල්ලීමක් කරපු නිසා..... ”

Cross Examination (Page 48)

ප්‍රඃ එම පැමිණිල්ල ඉදිපත් කිරීමට පළමුව තමුන්ට රාජකාරී කටයුතු අතරෙ සිදු වුනාය කියන මෙම සිද්ධිය සම්බන්ධයෙන් තමන් විදුහල්පතිතුමාට පැමිණිල්ලක් ඉදිපත් කලාද නැද්ද?

උඃ විදුහල්පතිතුමාට කිවුව් නැහැ

(Page 59)

ප්‍රඃ ඒ අවස්ථාව වන විට තමන් ඒ හාෆ් ඩේ ගත්තේ තමන් පුද්ගලික වශයෙන් ගන්න තියෙන නිසාද? හේතුවක් නිසාද?

උඃ විනයභාර ගුරුවරයා සිරිල් සිල්වා කියපු නිසා

ප්‍රඃ සිරිල් සිල්වා කියපු නිසා ගියා කියලා තමයි කියන්නේ.

සාක්ෂිකාරිය මේ සිදුවීම සම්බන්ධයෙන් විදුහල්පතිට දැනුම්දීමක් කලේ නැහැ

උඃ ඔව්

ප්‍රඃ විදුහල්පති සමඟ තමන් යම්කිසි අමනාපයක් තිබුණද?

උඃ මගේ තිබුනේ නැහැ විදුහල්පතිගේ තිබුණා

ප්‍රඃ විදුහල්පතිගේ අමනාපයක් තිබුණ නිසා තමන් කියන්න ඉදිරිපත් වුනේ නැහැ

උ: ඔව්

Re Examination (Page 65)

"විත්තියේ නීතීඥ මහත්මයා හරස් ප්‍රශ්න අසනවිට මගෙන් ඇහුවා එම සිද්ධිය සිදුවන අවස්ථාවේ පැමිණිල්ල කලේ විනයභාර ගුරුවරයාට කියා. විදුහල්පතිතුමාට පැමිණිල්ලක් කලේ නැද්ද කියා. විදුහල්පතිතුමාත් එවැනි යෝජනාවක් ගෙනාවා. මේ වගේ ප්‍රශ්න වෙලාවට විදුහල්පතිතුමාත් ගන්නේ මාලගොඩ සර්ගේ පැත්ත නිසා විදුහල්පතිතුමාට කියා කිසිම අවශ්‍ය (වැඩක්) නැහැ"

Even though the learned Magistrate had failed to consider the above evidence, the learned High Court Judge had correctly considered the above evidence in his judgment.

In addition to the two main points referred to above, several other issues raised on behalf of the Appellant including the Respondent's propensity to make a false allegation against the Appellant was well considered by the learned High Court Judge in his judgment. As further observed by the learned High Court Judge the Respondent was subject to severe cross examination on behalf of the Appellant but the Appellant had failed to establish any contradictions or omissions in her evidence.

Even though the learned President's Counsel who represented the Appellant had taken up the position that the Respondent is not a credible witness mainly due to the delay in making the statement to police, coloured with the other deficiencies and therefore it is unsafe to act on her evidence, I see no merit in the above argument and do agree with the findings of the learned High Court Judge that, it is safe to act on the testimony of the Respondent.

When considering the matters referred to above, I observe that the decision of the learned High Court Judge to interfere with the findings of the Magistrate by quashing the acquittal and convicting the Appellant was a well-considered decision since the evidence led before the learned Magistrate

was contrary to the findings of the learned Magistrate. In the said circumstance I answer the questions of law raised in the present appeal in negative and dismiss the appeal with costs.

Judge of the Supreme Court

Justice Buwaneka Aluwihare PC

I agree,

Judge of the Supreme Court

Justice Murdu N.B. 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 Appeal with Leave to Appeal obtained from this Court.

WARNASURIYA PATABANDIGE KAMANI INDUMATHIE RATNAPALA
36/3, "Primrose Uyana", George De Silva Mawatha, Kandy

PLAINTIFF

SC Appeal No. 02/2015
NWP/HCCA/KUR No. 90/2007(F)
D.C. Kurunegala Case No. 5281/L

VS.

1. **POLWATTAGE ANURA LAKSHMAN WEERASURIYA**
   No. 101, Gangoda Road,
   Postal Area of Kurunegala.

2. **POLWATTAGE ANIL WASANTHA WEERASURIYA**
   39/15, Biyagama Road,
   Naranwala Sub Postal Area,
   Gampaha.

DEFENDANTS

AND

1. **POLWATTAGE ANURA LAKSHMAN WEERASURIYA**
   No. 101, Gangoda Road,
   Postal Area of Kurunegala

1st DEFENDANT-APPELLANT

VS.

WARNASURIYA PATABANDIGE KAMANI INDUMATHIE RATNAPALA
36/3, "Primrose Uyana", George De Silva Mawatha, Kandy

PLAINTIFF-RESPONDENT

2. **POLWATTAGE ANIL WASANTHA WEERASURIYA**
   39/15, Biyagama Road,
   Naranwala Sub Postal Area,
   Gampaha.
   2nd DEFENDANT-RESPONDENT

AND NOW BETWEEN

POLWATTAGE ANURA LAKSHMAN WEERASURIYA
No. 101, Gangoda Road, Postal Area of Kurunegala.
Appearing by his Power of Attorney holder Ramani Wijesuriya of
No. 101, Gangoda Road,
Postal Area of Kurunegala.

1st DEFENDANT-APPELLANT-PETITIONER/APPELLANT

VS.

WARNASURIYA PATABANDIGE KAMANI INDUMATHIE RATNAPALA
36/3, "Primrose Uyana", George De Silva Mawatha, Kandy.

PLAINTIFF-RESPONDENT-RESPONDENT

POLWATTAGE ANIL WASANTHA WEERASURIYA
39/15, Biyagama Road, Naranwala Sub Postal Area, Gampaha.

2nd DEFENDANT-RESPONDENT-RESPONDENT ((deceased))

1. **THALANGAMA APPUHAMYLAGE DONA SHRIYALATHA IRANGANIE**
2. **PAVITHRA DIGAASHINI WEERASURIYA**

3. NAVODYA THATHSARANI WEERASURIYA
All of No. 90/B, Naranwala,
Gampaha.

SUBSTITUTED 2ND DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE:	Buwaneka Aluwihare, PC, J Priyantha Jayawardena, PC, J Prasanna Jayawardena, PC, J
COUNSEL:	Chandana Wijesooriya with Ms. Wathsala Dulanjani for the 1st Defendant-Appellant-Petitioner/Appellant. Jacob Joseph for the Plaintiff-Respondent-Respondent.
ARGUED ON:	05th November 2018.
WRITTEN SUBMISSIONS FILED:	By the 1st Defendant-Appellant-Petitioner/Appellant on 16th June 2015 and 14th December 2018. By the Plaintiff-Respondent-Respondent on 07th July 2015 and 25th January 2019.
DECIDED ON:	21st May 2019.

Prasanna Jayawardena, PC, J.

The Plaintiff-Respondent-Respondent ["the plaintiff"] instituted this action in the District Court of Kurunegala against the 1st Defendant-Appellant-Petitioner/Appellant ["the 1st defendant"] and the 2nd Defendant-Respondent-Respondent ["the 2nd defendant"]. The plaintiff prayed for a declaration of title to the allotment of land which is the subject matter of the action, the ejectment of the 1st and 2nd defendants from that land and for damages. The District Court delivered judgment in the plaintiff's favour and granted the declaration of title and ejectment of the defendants from the property. The District Court also directed the defendants to execute a deed of transfer conveying the land to the plaintiff and, if they fail to do so, directed the Registrar of the District Court to execute such a deed of transfer.

The 1st defendant appealed to the High Court of Civil Appeal holden in Kurunegala. That appeal was dismissed by the High Court. The 1st defendant made an application to this Court seeking leave to appeal and was granted leave to appeal on six questions of law which are set out later in this judgment.

The parties and the disputed land

The plaintiff is the daughter of one W. P. Punnyadasa De Silva [hereinafter referred to as "De Silva"]. De Silva's sister was married to one G. P. D. Amarapala De Silva Weerasuriya [hereinafter referred to as "Weerasuriya"]. Thus, De Silva [*ie:* the plaintiff's father] and Weerasuriya were brothers-in-law and Weerasuriya's wife was the plaintiff's paternal aunt. Weerasuriya had two sons, who are the 1st and 2nd defendants. They are the plaintiff's cousins.

At the times material to this action, De Silva resided and worked in Batticaloa. His daughter, the plaintiff, was born in the year 1957 and resided with him in Batticaloa. She later moved to Kandy in 1981 and has resided in Kandy since then. At the times material to this action, Weerasuriya resided and worked in Kurunegala. His sons, the 1st and 2nd defendants, have also had residences in Kurunegala.

Having described the *dramatis personae* in this appeal - who are all relatives, I should describe the *corpus* which is the subject matter of this action. It is an allotment of land which is A:0 R:0 P:39 in extent situated in Wilgoda, Kurunegala. Earlier, it was part of an allotment of land depicted as Lot no. 20 in Plan no. 20 dated 24th May 1953 made by S. Gunasekera, Notary Public and containing in extent A:0 R:3 P:35. Lot no. 20 was owned by one E.F. Daniels.

It is common ground that, E.F. Daniels executed deed of transfer no. 2883 dated 06th April 1955 transferring Lot no. 20 to one C.S. Jayawickrama, who, from then on, had title to Lot no. 20. Jayawickrama had Lot no. 20 divided into four allotments of land depicted as Lot no. 1, Lot no.2, Lot no.3 and Lot no. 4 in Plan no. 1705 dated 13th November 1958 prepared by J. Vincent Perera, Licensed Surveyor. That Plan no. 1705 was produced at the trial marked "1ඊ2".

On 16th November 1958, Jayawickrama had these four lots sold by public auction. The plaintiff says that her father [De Silva, who resided in Batticaloa] asked his brother-in-law [Weerasuriya, who resided in Kurunegala] to attend the auction and bid for one of these lots on De Silva's behalf.

It is common ground that Weerasuriya attended that public auction. The plaintiff says Weerasuriya acted on De Silva's behalf and placed a bid of Rs.3,400/- for Lot no. 4 depicted in the aforesaid Plan no. 1705 marked "1වි2". The bid was successful and Jayawickrama agreed to sell and transfer Lot no. 4 for a sale price of Rs.3,400/-. In pursuance of the successful bid, Jayawickrama and Weerasuriya entered into an agreement no. 3334 dated 16th November 1958 attested by D.A.B. Ratnayake, Notary Public, which set out the applicable Conditions of Sale.

Seven months after the public auction, Jayawickrama executed deed of transfer no. 3374 dated 15th May 1959 attested by D.A.B. Ratnayake, Notary Public, which was produced at the trial marked "පැ 11" by the plaintiff and "1 වි3" by the 1st defendant.

This deed of transfer marked "පැ 11" states, by way of a recital, *inter alia*:

"TO ALL TO WHOM THESE PRESENTS SHALL COME I, Choppu Suddrikku Jayawickrama of Assedumma, Kurunegala (hereinafter called and referred to as the ***Vendor****).*

SEND GREETINGS:

Whereas I the said vendor am seised and possessed of or otherwise well and truly entitled to ALL THAT THOSE THE PREMISES IN THIS SCHEDULE more fully described under and by virtue of deed No. 2883 dated 6th April 1955 attested by D.A.B. Ratnayake, Notary Public.

And Whereas the sadi [sic] premises were put up for sale by public auction on the 16th November 1958 by Tennekoon Banda Amunugama of Kurunegala, Licensed Auctioneer in [sic] instructions given by me and at my request and with my authority thereto given.

And Whereas at the said sale by Public auction Gintota Polwattage Don Amarapala de Silva Weerasuriya of C.G.R. Kurunegala was the highest bidder and became the purchaser thereof at or for the price of Rupees Three Thousand Four Hundred (Rs.3400/-) lawful currency of Ceylon.

And Whereas the said ***Gintota Polwattage Don Amarapala de Silva Weerasuriya of C.G.R. Kurunegala stats [sic] that he made the above purchase for and on behalf of WARNASURIYA PATABENDIGE PUNNYADASA DE SILVA*** *No. 20, Gnanasuriyan Square Batticaloa and has paid the sum of Rupees Three Thousand Four Hundred (Rs. 3400/-) in full and has* ***called upon me the said Vendor to execute a deed of Trnasfer [sic] of the said premises conveying and transferring the same unto him the said WARNASURIYA PATABENDIGE PUNNYADASA DE SILVA*** *(hereinafter called and referred to as the* ***Vendee****).* [emphasis added].

And Whereas the [sic] ***in Testimony of his request and of his consent to the conveyance and transfer of the said premises unto him the said Vendee, the said Gintota Polwattage***

Don Amarapala de Silva Weerasuriya C.G.R. Kurunegala has agreed to be a party to this instrument.”. [emphasis added]

Having recited the aforesaid background and facts, the deed of transfer marked “ඇ 11” goes on to state:

“Now Know Ye and These Presents Witness that for and in consideration of the above premises and more particularly for and in consideration of the said sum of Rupees Three Thousand Four Hundred (Rs.3400/-) lawful currency of Ceylon well and truly paid to me the vendor and the receipt whereof I do hereby admit and acknowledge I do hereby sell grant convey transfer set over assure unto him the said ***vendee*** *his heirs executors administrators and assigns all that and those the premises* ***in the schedule hereto fully described*** *….. To have and to hold the said premises hereby sold conveyed or intended so as to be with all the said rights and appurtenances unto him the said vendee and his aforewritten ABSOLUTELY AND FOR EVER.”*. [emphasis added]

The aforesaid schedule to the deed marked “ඇ 11” describes Lot no. 4 depicted in Plan no. 1705 and containing in extent A: 0 R: 0 P 39 - *ie:* the subject matter of this action.

Further, it is stated on the face of “ඇ 11” that Weerasuriya placed a bid for Rs. 3,400/- on De Silva’s behalf to purchase Lot no. 4 *“for and on behalf of”* De Silva and that Weerasuriya later paid the agreed sale price of Rs.3,400/- to Jayawickrama and called on Jayawickrama to convey and transfer Lot no.4 to De Silva. Further, the deed marked “ඇ 11” states that Weerasuriya agreed to be a party to this deed of transfer to manifest his agreement that Lot no. 4 was being conveyed and transferred to De Silva. Thus, “ඇ 11”, states:

“And I the said Gintota Polwattage Don Amarapala De Silva Weerasuriya do hereby ***declare that I have requested the vendor to convey and transfer to the said vendee*** *the said premises and I consent to the said conveyance and transfer and that I absolve the vendor from all obligations arising from the condition of sale executed between me and the said vendor at the sale by public auction and bearing no. 3334 dated 16th November 1958 attested by .D.A.B. Ratnayake, Notary Public.* [emphasis added].

IN WITNESS WHEREOF I the said Vendor and Gintota Polwattage Don Amarapala de Silva Weerasuriya do hereunto and to two others of the same tenor and date as these presents set our hands at Kurnegala [*sic*] *on this Fifteenth day of May One Thousand Nine Hundred and Fifty Nine.”*.

The attestation by the Notary Public states that:

“the consideration was acknowledged to have been received earlier.”.

It is clear from the aforesaid contents of the deed of transfer no. 3374 marked ඇ 11" that it is an instrument by which Jayawickrama [as the ***"vendor"*** named in the deed] **sold and transferred Lot no. 4 depicted in Plan no. 1705 to De Silva** [who is the ***"vendee"*** named in the deed] and, thereby, **De Silva obtained title to Lot no. 4**. It is also clear that Weerasuriya acted on behalf of De Silva at the public auction and attended to the formalities of placing a bid on behalf of De Silva and entering into an agreement recording the Conditions of Sale. Further, Weerasuriya has signed "ඇ 11" to express his acknowledgement of the fact that De Silva obtained title to Lot no. 4 by operation of that instrument. Thus, Weerasuriya's role was that of an agent acting on behalf of De Silva at the public auction and the subsequent formalities.

This deed of transfer no. 3374 marked "ඇ 11" was registered at the Kurunegala Land Registry on 15th June 1959. A certified extract of the folio was produced marked "ඇ 10" by the plaintiff. As set out therein, when "ඇ 11" was first registered, Weerasuriya's name has been entered in column three of the folio which states details of the *"Grantees (Names in full and residence)"*. That has been later corrected by the entry dated 01st September 1995 made by the Registrar of Land in the last column of the same folio, which provides for *"REMARKS"*. That entry states *"The grantee's name in column 3 of this entry is corrected by substitution of the words 'Warnasuriya Patabendige Punnyadasa de Silva of No: 20 Gnanasuriyan Square, Batticaloa' in place of the words 'Gintota Polwattage Don Amarapala de Silva of C.G.R.Kurunegala' with Registrar General's authority after taking action under Section 35 of the Registration of Documents Ordinance."* .

It is common ground that, at the same public auction held on 16th November 1958, Weerasuriya also purchased, in his own name, Lot no. 2 and Lot no. 3 depicted in Plan no. 1705 marked "1 ඒ2".

The dispute and related facts

De Silva transferred Lot no. 4 to his daughter, the plaintiff, by deed of gift no. 1618 dated 01st July 1985 attested by G.P. Patrick, Notary Public of Batticaloa. At that time, the plaintiff would have been 28 years of age. On the face of it, this deed of gift has been executed by De Silva and signed by the plaintiff to signify her acceptance of the donation, before the Notary Public and two witnesses and this Notary Public has attested the deed of gift. Subsequently, this deed of gift has been registered at the Kurunegala Land Registry on 16th August 1985, as set out in the folios marked "ඇ 10".

The plaintiff produced this deed of gift marked "ඇ 3". She testified that both she and her father [De Silva] signed "ඇ 3" before the Notary Public and the two witnesses. She said

that the Notary Public and one of the witnesses had since emigrated and the other witness had since died. An officer of the Batticaloa Land Registry gave evidence and confirmed that the protocol of the deed of gift marked "පැ 3" had been tendered to the Land Registry by the Notary Public. The learned District Judge took the view that the aforesaid evidence was sufficient to prove "පැ 3" and the High Court agreed. I see no reason to differ and will proceed on the basis that "පැ 3" was proved.

About four years after the deed of gift marked "පැ 3" transferring title to Lot no. 4 to the plaintiff was executed and registered at the Land Registry, Weerasuriya has executed a deed of transfer no. 2937 dated 16th May 1989 attested by M.B. Wijekoon, Notary Public. By this deed of transfer no. 2937, Weerasuriya has stated that he possesses and has title to Lot no. 4 and that he is selling and transferring Lot no. 4 to the 1st and 2nd defendants for payment of a consideration of Rs.20,000/-. This deed of transfer no. 2937 was produced by the 1st defendant at the trial, marked "1 වි4".

It should be mentioned that "1 වි4" does not state the manner in which Weerasuriya claims he has title to Lot no. 4. Further, the aforesaid Notary Public who attested "1 වි4" has made a specific endorsement thereon that Weerasuriya gave him instructions to dispense with a search at the Land Registry before the deed of transfer was prepared and attested. Thus, at the time of the execution and attestation of this deed of transfer no. 2937 marked "1 වි4" on 16th May 1989, the Notary Public could have been unaware of the existence of the previous deed of transfer no. 3374 marked "පැ 11" by which title to Lot no. 4 was transferred to De Silva in 1959 and deed of gift no. 1681 marked "පැ 3" by which De Silva transferred title to Lot no. 4 to the plaintiff in 1985.

A little more than three years later, the 1st defendant filed Partition Case no. 3896/P in the District Court of Kurunegala naming only his brother, the 2nd defendant as a defendant. In his plaint, the 1st defendant pleaded that his father - *ie:* Weerasuriya - had sole title to Lot no. 4 under and in terms of deed of transfer no. 3374 marked "පැ 11" and that his father had transferred Lot no. 4 to the 1st and 2nd defendants by deed of transfer no.2937 marked "1 වි4". On that basis, the 1st defendant prayed that Lot no. 4 should be partitioned between the 1st and 2nd defendants, in equal shares.

The Declaration filed in this partition action by the 1st defendant's Registered Attorney-at-Law under and in terms of section 12 of the Partition Act, declares that he inspected the records at the Land Registry on 09th February 1993 and that he ascertained that there were no other persons who should be included as parties to the partition action.

That inspection by the 1st defendant's Registered Attorney-at-Law could not have failed to reveal that the plaintiff had a claim to Lot no. 4 under and in terms of deed of gift no.

1681 marked "ఒ 3" which had been registered in the Land Registry on 16th August 1985; and that the plaintiff had to be made a party to the partition action in terms of section 5 of the Partition Act. However, the 1st defendant's Registered Attorney-at-Law has made a false Declaration and suppressed the fact that the plaintiff had a claim to the *corpus* of the partition action. The inference is that the Attorney-at-Law did so at the behest of the 1st defendant. It follows that the 1st defendant and his Registered Attorney-at-Law have misled the District Court in Partition Case no. 3896/P and have suppressed the fact that the plaintiff was entitled to be made a party to that action. It should also be mentioned here that the plaintiff resided in Kandy and may have been unaware of any public notice affixed on Lot no. 4 or of a survey of Lot no. 4 by the Court Commissioner.

When the trial in this partition action was taken up on 18th May 1994, the 2nd defendant gave evidence stating that he and the 1st defendant had joint title to Lot no. 4 under deed of transfer no. 3374 marked "ఒ 11" and deed of transfer no. 2937 marked "1වි4" and moved that judgment be entered partitioning Lot no. 4 between the 1st and 2nd defendants. The District Court acted on that evidence and entered an interlocutory decree and a final decree, partitioning Lot no. 4 between the 1st and 2nd defendants.

The plaintiff states that she first became aware of this Partition Case no. 3896/P only in the month of May 1995 and that, thereupon, she filed Revision Application no. 535/1995 in the Court of Appeal pleading that the 1st and 2nd defendants had collusively and fraudulently obtained the interlocutory decree and final decree in Partition Case no. 3896/P. The plaintiff prayed that the Court of Appeal act in revision and set aside the interlocutory decree and final decree entered in Partition Case no. 3896/P.

The plaintiff and the 1st and 2nd defendants were represented by learned counsel in the Court of Appeal. On 12th May 1997, the Court of Appeal delivered judgment holding that *"a fraud had been practiced on the Court"* by the 1st and 2nd defendants and observing that *"the Attorney-at-Law who appeared for them appears to have been a party to this."*. The Court of Appeal held that Weerasuriya [the father of the 1st and 2nd defendants] had no title to Lot no. 4 and that, therefore, the 1st and 2nd defendants had no title to Lot no. 4 either. On that basis, the Court of Appeal acted in revision and set aside the interlocutory decree and final decree entered in Partition Case no. 3896/P. I should mention that the record in Court of Appeal Revision Application no. 535/1995 [which included the case record in Partition Case no. 3896/P] was produced at the trial in the present case.

Thereafter, as mentioned at the outset, the plaintiff instituted the present action in the District Court of Kurunegala on 03rd October 1997. The plaintiff's case, as pleaded in the plaint, was that the plaintiff had title to Lot no. 4 under and in terms of deed of

transfer no. 3374 marked "ඇ 11" and deed of gift no. 1681 marked "ඇ 3". Since she resided in Kandy, she relied on her aunt [Weerasuriya's wife and the mother of the 1st and 2nd defendants] to look after Lot no. 4 and the plaintiff's interests in that property. In January 1993, the plaintiff became aware that some person had commenced constructing a building on Lot no.4. She made a complaint to the Police and the construction work stopped. She later became aware that the 1st defendant had commenced construction work on Lot no. 4 in May 1995. When she made further inquiries, she also became aware of the aforesaid Partition Case no. 3896/P. The plaintiff immediately filed the aforesaid Revision Application and the Court of Appeal set aside the interlocutory decree and final decree entered in the Partition Case. On this basis, the plaintiff prayed for the reliefs referred to earlier.

The 1st defendant and 2nd defendant filed separate answers pleading that, although Lot no. 4 had been purchased in De Silva's name as set out in deed of transfer no. 3374 marked "ඇ 11", Weerasuriya [their father] had provided the consideration and De Silva had not repaid Weerasuriya. The defendants pleaded that neither De Silva nor the plaintiff have had possession of Lot no. 4 at any point in time and that, from 1959 onwards, Weerasuriya had exclusive possession of Lot no. 4 together with Lot no. 2 and Lot no. 3 [which two Lots had been purchased by him in his own name]. They pleaded that Weerasuriya had paid the Municipal Rates for Lot no. 4. On that basis, they claimed that Weerasuriya obtained prescriptive title to Lot no. 4 and later transferred his title to the defendants by deed of transfer no. 2937 marked "1 වි4" and that, accordingly, they have prescriptive title to Lot no. 4. Thus, the 1st defendant and 2nd defendant prayed that the plaintiff's action be dismissed and a declaration of title be entered in their favour on the basis of their prescriptive title to Lot no. 4. The defendants also claimed compensation for improvements made to Lot. No. 4.

At the trial, the plaintiff gave evidence and led the evidence of official witnesses from the Batticaloa Land Registry, the Kurunegala Municipal Council, the Registry of the Court of Appeal and the Kurunegala Land Registry. Thereafter, the 1st defendant gave evidence. He also led the evidence of a witness who had worked for his father [Weerasuriya] and the evidence of a witness to deed of transfer no. 2937 marked "1 වි4".

At the commencement of the trial, the parties framed no less than 42 issues based on their pleadings. As evident from the plaint, the plaintiff's case was in the nature of a *rei vindicatio* and her issues were on the basis that: De Silva [her father] obtained title to Lot no. 4 by deed of transfer no. 3374 marked "ඇ 11" and transferred title to her by deed of gift no. 1618 marked "ඇ 3"; the plaintiff requested the defendants [and her aunt, the defendant's mother] to 'look after' Lot no. 4 for the plaintiff; and the 1st and 2nd defendants were in unlawful occupation of Lot no. 4. The defendants relied on their

claim of prescriptive title and their issues were on the basis that Weerasuriya [their father] had possessed Lot No. 4 adverse to and independent of De Silva and all others from 1959 onwards and thereby acquired prescriptive title to Lot no. 4 and had thereafter transferred that title to the defendants by deed of transfer no. 2937 marked "1 වි4". The defendants also framed issues on their claim for compensation.

Thus, no party claimed in their pleadings that a constructive trust existed in relation to Lot no. 4 and no issue was framed by the parties on whether a constructive trust existed.

Nevertheless, in his judgment, the learned trial judge, having first listed the 42 issues framed by the parties, mentioned that Lot no. 4 had been transferred to *Weerasuriya* by deed of transfer no. 3374 marked "ඵ 11". He went on to say that the correct determination of this action rested on the following issues - *ie:* firstly, whether Weerasuriya held Lot no. 4 subject to a constructive trust in favour of De Silva and the plaintiff; and secondly, whether the 1st and 2nd defendants had prescriptive title to Lot no. 4. Thereafter, the trial judge expressed his view that Weerasuriya and later the defendants held Lot no. 4 subject to a constructive trust in favour of De Silva and the plaintiff. He further stated that Weerasuriya and the defendants were aware that the plaintiff had title to Lot no. 4 but, nevertheless, Weerasuriya fraudulently executed deed of transfer no. 2937 marked "1 වි4" in favour of the defendants and that the defendants were parties to that fraud. The learned trial judge also held that Partition Case no. 3896/P was a fraudulent and collusive exercise by the defendants.

With regard to the defendant's claim of prescriptive title, the learned trial judge appears to have accepted the plaintiff's evidence that De Silva [her father] had fenced Lot no. 1 sometime after purchasing that property under and in terms of deed of transfer no. 3374 marked "ඵ 11", and that, since the plaintiff resided in Kandy, she had asked her aunt [Weerasuriya's wife] who lived on the adjoining property, to look after Lot no. 4 for the plaintiff and relied on her aunt to fulfil that duty. The learned trial judge emphatically stated that he believed the plaintiff's testimony that Weerasuriya regularly sent produce from Lot no. 4 [in the form of coconuts sent via the train service] to De Silva, in Batticaloa and, thereby, acknowledged De Silva's title to Lot no. 4. The learned judge rejected the 1st defendant's denial that his father [Weerasuriya] sent produce from Lot no. 4 to De Silva. The trial judge also noted that De Silva and his daughter, the plaintiff on the one hand, and Weerasuriya and his wife and the defendants [the plaintiff's uncle, aunt and cousins] on the other, were all close relatives who had amicable relationships with each other until the litigation commenced.

A perusal of the judgment makes it clear that the learned trial judge was of the view that the defendants had failed to establish that their father [Weerasuriya] or the defendants had possessed Lot no. 4 adverse to and independent of De Silva and the plaintiff. Accordingly, the District Court rejected the claim of prescriptive title relied on by the 1st and 2nd defendants.

Thereafter, the learned trial judge dealt with the 1st defendant's claim that he had constructed a house on Lot No. 4 incurring expenditure of Rs. 1,000,000/- and that he was entitled to compensation for that improvement and a *jus retentionis* until that compensation was paid to him. The learned judge held that the 1st defendant was aware that the plaintiff had title to Lot No. 4 but, nevertheless, constructed the house while knowing that it was being built on the plaintiff's land. The District Court held that, in these circumstances, the 1st defendant could not claim to be a *bona fide* possessor and that he was not entitled to compensation for the cost of the house.

Finally, the learned District Judge held that the plaintiff was entitled to recover damages in a sum of Rs. 10,000/- per month on account of deprivation of the income the plaintiff could have earned from Lot no. 4 during the pendency of the action. However, the learned judge held that these damages should be fully set off against the value of the house which would accrue to the plaintiff and that, therefore, the plaintiff was not entitled to recover any monetary damages from the 1st and 2nd defendants.

In appeal, the learned High Court Judges observed that deed of transfer no. 3374 marked "පැ 11" established a transfer of Lot no. 4 to De Silva and that the trial judge erred when he took the view that Weerasuriya obtained title under "පැ 11" and held Lot no. 4 was subject to a constructive trust in favour of De Silva. The High Court was of the view that De Silva held title to Lot. No. 4 by operation of "පැ 11". The High Court upheld the trial judge's rejection of the defence of prescriptive title claimed by the defendants. The High Court also affirmed the District Court's determination with regard to the compensation for improvements claimed by the 1st defendant and the plaintiff's claim for damages. Accordingly, the appeal was dismissed, as mentioned earlier.

The questions of law

The six questions of law on which the 1st defendant has been granted leave to appeal are reproduced *verbatim*:

(i) Whether the learned High Court Judges erred in law by upholding the finding of the learned trial Judge regarding the existence of a constructive trust, whereas that was not the case for the Plaintiff or

Defendants and the District Court decided this action on matters that were not put in issue in this action and thereby caused a miscarriage of justice ?

(ii) Whether the learned High Court Judges erred in law in holding that the Defendants are not entitled to claim title on the basis of prescriptive possession ?

(iii) Whether the learned High Court Judges erred in law by placing undue weight on the finding of the Court of Appeal in the Revision Application No. 535/95 that the Defendants had acted fraudulently when they instituted the earlier partition action No. 3896/P without making the present Plaintiff a party to such action ?

(iv) Whether learned High Court Judges erred by placing undue weight on the fact that in the earlier partition action the Defendants who instituted it had omitted to plead in the plaint a title by prescriptive possession ?

(v) Whether the learned High Court Judges erred by granting reliefs not prayed by the Plaintiff ?

(vi) Whether the learned High Court Judges erred by setting off compensation for improvements by the Defendants against the damages granted to the Plaintiff ?

With regard to question of law no. (i), as set out earlier, deed of transfer no. 3374 marked "පැ 11" is the instrument by which De Silva obtained sole title to Lot no. 4. In fact, the 1st defendant admitted this in cross examination. Thus, when he was shown "පැ 11" and asked *"මේ ඔප්පුවේ ගැනුම්කරු පුනාදාස ද සිල්වා?"*, he replied *"ඔව්."*.

However, the District Judge misread and misunderstood "පැ 11" and expressed his view that "පැ 11" was a transfer of title to Weerasuriya, who then held Lot no. 1 subject to a constructive trust in favour of De Silva.

The learned High Court Judges have observed in their judgment that the written submissions of the 1st defendant in the High Court admit that the deed of transfer marked "පැ 11" *"has been written in the name of Punyadasa De Silva* [De Silva] *as vendee"* and that the 1st defendant's case is that his father [Weerasuriya] *"continued to be in possession of the property as his own and acquired a prescriptive title."*. The learned High Court Judges have further stated that *"The Appellant's written submissions*

reiterate that the transferee was Punyadasa de Silva [De Silva] *and this is not a case where provisions in section 84 of the Trusts Ordinance applies …..".]*. They have gone on to observe that *"As the Appellant has stated and also seen from the case record neither party has suggested any issue on a constructive trust."*. The judgment of the High Court also states that *"Therefore, it is common ground that P.01* ["පැ 11"] *is in the name of Punyadasa* [De Silva] *and he is the vendee."*.

Thus, a reading of the judgment of the High Court establishes that the learned High Court Judges decided that the District Judge had erred when he held that the deed of transfer marked "පැ 11" was a transfer of title to Weerasuriya, who then held Lot no. 4 subject to a constructive trust in favour of De Silva. The fact that this was the view of the learned High Court Judges can be deduced from several statements and observations in the judgment of the High Court. Regrettably, the judgment of the High Court fails to make a specific statement to that effect. It would have been much better if the learned High Court Judges had set out their determination with more clarity.

Accordingly, question of law no. (i) has to be answered in the negative.

Before moving on to the other questions of law, it should be mentioned that it is evident from the judgment of the District Court that, despite the learned District Judge having erred when he expressed a view that a constructive trust existed, he eventually decided the action by answering the 42 issues framed by the parties based on their pleadings - *ie:* (i) the plaintiff's issues framed on the basis of a *rei vindicatio*; and (ii) the issues framed by the 1st and 2nd defendants based on the defence of prescriptive title.

The question of a constructive trust did not figure in any of these 42 issues framed by the parties and answered by the learned District Judge and based on which the District Court entered its judgment. Thus, the learned District Judge's aforesaid error in expressing a view that Weerasuriya had title to Lot no. 4 and held the property subject to a constructive trust in favour of De Silva, did not play a part in the eventual determination of the action as set out in the judgment of the District Court. For that reason, it is unnecessary to make a determination as to whether the District Judge erred when he framed new issues at the stage of writing the judgment without first giving the parties notice of the proposed new issues - *vide:* HAMEED vs. CASSIM [1996 2 SLR 30] and the more recent judgment in SEYLAN BANK PLC vs. EPASINGHE [SC CHC Appeal no. 36/2006 decided on 01st August 2017].

A perusal of the judgment of the High Court establishes that the learned Judges recognised that the trial Judge's mistaken idea of a constructive trust and the new issues he referred to in his judgment, played no part in the eventual determination of the

action in the District Court. Thus, the High Court Judges have observed in their judgment that *"The parties have presented their respective cases and the court had accepted the points on which they are at variance without any reference to a constructive trust."*. This is undoubtedly a reference to the fact that, although the trial judge was initially distracted by a mistaken idea of the existence of a constructive trust, he eventually 'got back on track' as it were, and decided the case by answering the issues framed by the parties as set out in their pleadings.

Next, questions of law no.s (ii), (iii) and (iv) can be considered together as they all deal with the High Court's decision to uphold the District Court's rejection of the 1st defendant's plea that he and the 2nd defendant had prescriptive title to Lot no. 4.

In this connection, and as mentioned earlier, it is evident on the face of the deed of transfer marked "ළෙ 11" itself that Weerasuriya acted as De Silva's agent and bid on De Silva's behalf to purchase Lot no. 4 at the public auction. Thereafter, Weerasuriya has acted on behalf of De Silva when he entered into the agreement setting out the Conditions of Sale and later delivered payment of the consideration to the seller [Jayawickrama] prior to the execution of the deed of transfer marked "ළෙ 11" by which De Silva obtained title to Lot no. 4. Further, as stated earlier, Weerasuriya has placed his signature on "ළෙ 11" to acknowledge that he acted on behalf of De Silva and as De Silva's agent in this entire transaction.

These circumstances add substance to the plaintiff's assertion that, after her father [De Silva] purchased Lot no. 4, his brother-in-law, Weerasuriya continued to act on behalf of De Silva and 'looked after' Lot no.4 on behalf of De Silva. The existence of such a relationship between De Silva and Weerasuriya with regard to Lot no. 4 is made likely by the fact that both parties admit that there were amicable relations between them as family members, and that Weerasuriya resided in Kurunegala while De Silva resided in Batticaloa and could not `look after' Lot no. 4 on his own. It also has to be kept in mind that Weerasuriya had purchased the neighbouring Lot no. 2 and Lot no. 3 in his own name at the public auction and later constructed his residence on these two Lots which adjoined Lot no. 4. Thus, Weerasuriya was well placed to conveniently `keep an eye' on Lot no. 4 on behalf of his brother-in-law, De Silva.

The plaintiff has testified that, after she obtained title to Lot no. 4, she asked her aunt [Weerasuriya's wife and the defendants' mother] to `look after' that property for the plaintiff. That evidence is plausible since the plaintiff resided in Kandy and it is likely that she would ask her aunt, who resided in the neighbouring Lot no. 2 and Lot no. 3, to `look after' Lot no. 4 for the plaintiff.

In these circumstances, the inference is that Weerasuriya and his sons, the 1st and 2nd defendants, were in a position of agents of De Silva and the plaintiff and in a position of trust *vis-à-vis* Lot no. 4 and the plaintiff's rights to Lot no. 4. In such circumstances, the 1st defendant cannot succeed in a claim that he and his father [Weerasuriya] possessed Lot no. 4 adverse to the rights of the plaintiff and her father [De Silva] unless there is clear evidence of an unmistakeable act of ouster of the rights of the plaintiff and De Silva or there has been exclusive possession of Lot no. 4 by Weerasuriya and the 1st defendant for a long period of time in circumstances which give rise to a presumption of ouster in their favour. Thus, 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. On the same lines, 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]. Similar views were expressed by Bertram CJ in TILLEKERATNE vs. BASTIAN [21 NLR 12 at p. 19] and by Weeramantry J In JAYANERIS vs. SOMAWATHIE [76 NLR 206 at p. 207-208].

Accordingly, the evidence has to be examined to ascertain whether there has been such an act of ouster committed by Weerasuriya and the 1st defendant or whether the evidence justifies drawing a presumption of ouster in their favour.

The 1st defendant placed great store on the evidence that his father [Weerasuriya] had paid the Municipal Rates for Lot no. 4 for many years. However, it is a well-known principle that the payment of Municipal Rates will not, by itself, establish a claim of prescriptive title since any person, especially persons occupying a property in a subordinate capacity such as an agent, tenant, or licensee, can tender payment of Municipal Rates - *vide:* Basnayake CJ in HASSAN vs. ROMANSIHAMY [66 CLW 112 at p. 112] and De Silva CJ in SIRAJUDDIN vs. ABBAS [1994 2 SLR 365 at p. 370].

Next, the plaintiff testified that sometime after Lot no. 4 was purchased by her father [De Silva], he erected a fence to demarcate Lot no. 4. The 1st defendant made no claim that he or his father [Weerasuriya] had erected a fence to demarcate Lot no. 4.

When the Court Commissioner surveyed Lot no. 4 on 08th July 1993 in pursuance of the Commission issued to him in the aforesaid D.C. Kurunegala Partition Case no. 3896/P, he has reported that the Northern boundary of Lot no. 4 [which adjoined Gangoda Road] was demarcated by a fence; the Eastern boundary [which adjoined the land of a third party] was demarcated by a fence and a wall; the Southern boundary [which

adjoined Lot no. 3 depicted in Plan no. 1705 marked "1 ඒ2" to which Weerasuriya had title] was demarcated by a row of concrete posts which are usually used for fencing; and the Western boundary [which adjoined Lot no. 2 depicted in Plan no. 1705 marked "1 ඒ2" to which Weerasuriya had title and Lot no. 1 on the same Plan which was owned by a third party] was demarcated by a similar row of concrete posts and a wall.

This independent and reliable evidence corroborates the plaintiff's testimony that her father had erected a fence to demarcate the boundaries of Lot no. 4, especially since the 1st defendant made no claim that he or his father had erected a fence. It also comes to mind that, if Weerasuriya and his sons [the 1st and 2nd defendants] had possessed Lot no. 4 in their own right as they claimed, there would have been little reason for them to fence it off from their adjoining Lot no. 2 and Lot no. 3 and, thereby, lose the opportunity of having a contiguous area of land which consisted of Lot no. 2, Lot no. 3 and Lot no. 4 with an aggregate extent of A:0 R:03 P:02. Therefore, the existence of concrete posts demarcating Lot no. 4 suggests that Weerasuriya and his sons [the 1st and 2nd defendants] were not in possession of Lot no. 4.

The Court Commissioner has also reported that when he surveyed Lot no. 4 on 08th July 1993, there were 08 coconut trees which were about 60/70 years old. This tallies closely with the plaintiff's evidence that there were about ten coconut trees on Lot no. 4 when her father purchased it in 1959.

This leads to the plaintiff's evidence that Weerasuriya sent coconuts plucked from Lot no. 4 to De Silva, by train, once in every three months. The plaintiff's position was that Weerasuriya did this in acknowledgment of De Silva's title to Lot no. 4 and De Silva's right to the produce from the land. The 1st defendant denied that his father, Weerasuriya sent coconuts to Weerasuriya. It is to be noted that the 1st defendant did not suggest that Weerasuriya even occasionally sent coconuts to De Silva as gifts out of affection for his brother-in-law who resided Batticaloa.

In these circumstances, the question of whether Weerasuriya regularly sent coconuts plucked from Lot no. 4 to De Silva in acknowledgement that De Silva had title to Lot no. 4 and was entitled to the produce from the land, assumes importance in deciding the defence of prescription claimed by the 1st defendant. In this regard it has to be kept in mind that since the 1st defendant did not offer an explanation that Weerasuriya occasionally sent coconuts to De Silva by way of a gift and, instead, denied that Weerasuriya sent coconuts to De Silva at any time, evidence that Weerasuriya did regularly send coconuts to De Silva can only mean that he did so in acknowledgement that De Silva had title to Lot no. 4 and was entitled to the produce from the land.

The learned trial judge has emphatically stated that he accepted the plaintiff's evidence that Weerasuriya regularly sent coconuts plucked from Lot no. 4 to De Silva, by train. He described the plaintiff's testimony on this matter as clear and unshaken [*"පැහැදිලිව, නොපැකිලිව"*]. He did not accept the 1st defendant's denial that his father sent coconuts to De Silva. The High Court has taken the view that the plaintiff's evidence that Weerasuriya regularly sent coconuts plucked from Lot no. 4 to De Silva, was more probable than the 1st defendant's denial and has stated *"The above, as it appears to this court, show that the evidence of the Respondent that Amarapala* [Weerasuriya] *used to send coconuts from trees in this land to Punyadasa* [De Silva] *who was in Batticaloa by train is more probable and the Appellant or his brother does not have any right or title whatsoever by prescription or otherwise to the land in question."*.

An appellate court will be mindful of the fact that a trial judge has had the benefit of seeing and hearing the witnesses and of assessing their demeanour and credibility. In view of this practical reality, an appellate court is usually loth to set aside findings of fact arrived at by a trial judge, especially findings based upon a trial judge's assessment of the credibility of witnesses, unless the appellate court is convinced the trial judge has made a mistake by overlooking evidence or misinterpreting evidence which led to his determination or has acted unreasonably or perversely.

Thus, in MUNASINGHE vs. VIDANAGE [69 NLR 97 at p.109], Lord Pearson in the Privy Council cited Viscount Simon in THOMAS vs. THOMAS [1947 A. C. 484 at pp. 485-6] who had observed *"If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion been arrived on conflicting testimony by a tribunal which saw and heard the witnesses the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."* Similarly, in COLLETTES vs. BANK OF CEYLON [1984 2 SLR 253 at p.264], Sharvananda J, as he then was, stated *"Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the*

conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings" - *vide:* also FALALLOON vs. CASSIM [20 NLR 332 at p.335-336]. In ALWIS vs. FERNANDO [1993 1 SLR 119 at p.122] De Silva CJ observed *"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.".*

There is no reason for us to think that the learned trial judge made a mistake when, after hearing the evidence of both the plaintiff and the 1st defendant and observing their demeanour, he decided to accept the plaintiff's evidence that Weerasuriya regularly sent coconuts plucked from Lot no. 4 to De Silva, and to reject the 1st defendant's denial.

This evidence before the District Court that Weerasuriya acknowledged De Silva had title to Lot no. 4 and that De Silva was entitled to the produce from Lot no. 4 cuts across the 1st defendant's claim that Weerasuriya possessed Lot no. 4 adverse to the rights of De Silva from 1959 onwards and acquired prescriptive title.

Further, the fact that the 1st defendant instructed that a false Declaration under section 12 of the Partition Act be tendered to the District Court in Partition Case No. 3896/P and suppressed from the District Court the fact that the plaintiff was entitled to be made a party to the partition action, establishes a lack of *bona fides* and credibility on the part of the 1st defendant. As correctly observed by the learned High Court Judges, the fact that the 1st and 2nd defendants sought to dishonestly exclude the plaintiff from Partition Case No. 3896/P suggests that the 1st and 2nd defendants knew they had neither paper title nor prescriptive title to Lot no. 4. It hardly needs to be said that, if the 1st and 2nd defendants were confident that they held prescriptive title to Lot no. 4 acquired as a result of undisturbed and uninterrupted possession from 1959 onwards adverse to the rights of De Silva and the plaintiff, they would have no reason to dishonestly suppress the fact that the plaintiff claimed title under the deed of gift marked "ළ 3" and was entitled to be made a party to the partition action. It should also be mentioned that, as correctly observed by the learned High Court Judges, a perusal of the 1st defendant's plaint in Partition Case No. 3896/P, shows that 1st defendant has relied on his claim to paper title under deed of transfer no. 2937 marked "1 වි4" and has not pleaded a substantive claim of prescriptive title on the basis of undisturbed and uninterrupted possession from 1959 onwards adverse to the rights of all other persons. This too suggests that the 1st defendant knew he had no claim to prescriptive title to Lot no. 4.

Thus, for the reasons set out above, it is evident that the District Court and High Court correctly held that that 1st and 2nd defendants failed to establish their claim of

prescriptive title. Therefore, questions of law no.s (ii), (iii), and (iv) are answered in the negative.

With regard to question of law no. (v), consequent to the learned District Judge expressing the mistaken view that the deed of transfer no. 3374 marked "පැ 11" granted *Weerasuriya* title to Lot no. 4 subject to a constructive trust in De Silva's favour, the learned Judge went on to direct the 1st and 2nd defendants execute a deed of transfer conveying Lot no. 4 to the plaintiff and directed the Registrar of the Court to execute a deed of transfer if the 1st and 2nd defendants failed to comply with that Order.

That Order was unnecessary and irrelevant since Weerasuriya has never had title to Lot no. 4, as set out earlier in this judgment. In any event, the learned District Judge himself has held that the plaintiff has title to Lot no. 4 and is entitled to an order for ejectment of the 1st and 2nd defendants from Lot no. 4 [*"ඒ අනුව පමිනිලිකාරිය මෙම නඩුවට අදාල ඉඩමේ අයිතිකාරිය බව තීරණය කරන අතර අදාල 1,2 විත්තිකරුවන් සහ අනිකුත් අය මෙම නඩුවට අදාල ඉඩමෙන් නෙරපීමට නියෝග කරමි."*]. Thereafter, the learned judge has entered judgment as prayed for in the plaint, which would include the issue of a declaration of title in favour of the plaintiff. Thus, the learned trial judge's Order that Lot no. 4 be transferred by the 1st and 2nd defendant to the plaintiff is a *non sequitur* and a nullity. Accordingly, that part of the judgment of the District Court which refers to an Order directing the 1st and 2nd defendants to execute a deed of transfer conveying Lot no. 4 to the plaintiff, should be *pro forma* set aside.

Accordingly, question of law no. (v) is answered as set out above.

Finally, with regard to question of law no. (vi), the District Court held that the plaintiff incurred damages in the sum of Rs. 10,000/- per month as a result of being deprived of earning an income from Lot no. 4 during the pendency of the action. Lot no. 4 is 39 perches in extent and is situated in the heart of the city of Kurunegala. There is no reason to think that the learned trial judge erred when he decided on that quantum of damages. Thereafter, the District Court has held that the 1st defendant is not entitled to be paid compensation for the house he constructed on Lot no. 4 because he did so knowing that the plaintiff had title to Lot no. 4. On that basis, the learned trial judge held that the 1st defendant was not a *bona fide* possessor and was not entitled to compensation for improvements and a *jus retentionis*.

This decision is in accordance with the rule that, in the absence of special circumstances, a *mala fide* possessor who does not have *possessio civilis* and occupies land which he knows belongs to another, cannot recover compensation for useful improvements [*ie:* for *impensae utiles* or, as is sometimes said, *utiles impensae*] and cannot exercise a *jus retentionis*. Thus, in THE GENERAL CEYLON TEA ESTATES COMPANY LTD vs. PULLE [9 NLR 98 at p.103-104], Middleton J held *"My own view is*

that a mala fide possessor being in effect an intentional wrongdoer ought not to complain, if the utiles impensae incurred by him should enrich the real owner of the property at his, the spoliator's, expense. This would appear also to be the views of Moncreiff J. [Endorissa v. Andorissa], and Pereira A.P.J. [D. C, Kandy, 16,147].I would hold therefore that a mala fide possessor is not entitled to utiles impensae except in cases where the owner of the property stood by and allowed the building or planting to proceed without notice of his own claim. In such a case I would put the mala fide possessor in the same position as a bona fide possessor and give him the same rights of retention.". In WANIGARATNE vs. WANIGARATNE [1997 2 SLR 267 at p.275], Senanayake J held that *"…. A mala fide possessor is not entitled to utiles impensa except in cases where the owner of the property stood by and allowed the building or planting to proceed without notice of his claim."*.

The learned trial judge went on to hold that, since the restoration of the plaintiff to possession of Lot no. 4 resulted in her gaining the house constructed by the 1st defendant at a cost of Rs. 1,000,000/- [based on the 1st defendant's evidence of the sum he expended], it was equitable to set off the monetary damages due to the plaintiff [arising from deprivation of possession of Lot no. 4] against the value of the house. Accordingly, the District Court did not direct the payment of monetary damages by the 1st defendant to the plaintiff. This line of reasoning taken by the learned Judge is eminently reasonable and the High Court has, correctly, affirmed the determination of the District Court.

Accordingly, I answer question of law no. (vi) in the negative.

For the reasons set out earlier, I set aside those parts of the judgment of the District Court which refers to the issue of an Order directing the 1st and 2nd defendants to execute a deed of transfer conveying Lot no. 4 to the plaintiff and directing the Registrar of the Court to execute a deed of transfer if the 1st and 2nd defendants failed to comply. Further, I also hold that those parts of the judgment of the District Court which refer to the learned District Judge's view that Weerasuriya obtained title to Lot no. 4 under deed of transfer no. 3374 marked "ඊ 11" and held Lot no. 4 subject to a constructive trust in favour of De Silva, are incorrect. Subject to the aforesaid, the judgments of the District Court and High Court are affirmed.

For purposes of clarity, it is stated that the only reliefs granted in terms of the judgments of the District Court and High Court will be the issuance of a Declaration of Title in favour of the Plaintiff-Respondent-Respondent, an Order for ejectment of the 1st Defendant-Appellant-Petitioner/Appellant and 2nd Defendant-Respondent-Respondent from Lot no. 4 and an Order for recovery of costs by the Plaintiff-Respondent-Respondent, as prayed for in prayers (ඒ), (ඓ) and (ඒඑ) of the plaint. The District Court is directed to accordingly amend the Decree entered in this case. The 1st Defendant-

Appellant-Petitioner/Appellant will also pay the Plaintiff-Respondent-Respondent the costs of this appeal.

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 appeal

Seevali Jeyshta Bandara Arrawwawala,
New Town, Udaspaththuwa.

Applicant

SC Appeal 5/2014
SC/(Spl) LA/ 284/2013
High Court Nuwara Eliya No.
HC/NE/13/12 LT Appeal
LT/37/47/2010

Vs

1. Agarapathana Plantations Limited.
   No.53-1/1, Sir Baron Jayatilleke Mawatha,
   Colombo 1

2. Lanka Tea and Rubber
   Plantations (Pvt) Ltd.
   No.53-1/1, Sir Baron Jayatilleke Mawatha,
   Colombo 1

Respondents

AND

1. Agarapathana Plantations Limited.
   No.53-1/1, Sir Baron Jayatilleke Mawatha,
   Colombo 1

2. Lanka Tea and Rubber
   Plantations (Pvt) Ltd.
   No.53-1/1, Sir Baron Jayatilleke Mawatha,
   Colombo 1

Respondent-Appellants

Vs

Seevali Jeyshta Bandara Arrawwawala,
New Town, Udaspaththuwa.

Applicant-Respondent

Vs

AND NOW BETWEEN

1. Agarapathana Plantations Limited.
   No.53-1/1, Sir Baron Jayatilleke Mawatha,
   Colombo 1

2. Lanka Tea and Rubber
   Plantations (Pvt) Ltd.
   No.53-1/1, Sir Baron Jayatilleke Mawatha,
   Colombo 1

Respondents-Appellant-Appellants
Vs
Seevali Jeyshta Bandara Arrawwawala,
New Town, Udaspaththuwa.

Applicant-Respondent-Respondent

Before : Sisira J de Abrew J
Prasanna Jayawardena PC J
Murdu Fernando PC J

Counsel : Uditha Egalahewa PC with Damitha Karunaratne and
NK Ashokbharan for the Respondent-Appellant-Appellants
Lal Wijenayake for the Applicant-Respondent-Respondent

Argued on : 7.11.2018

Written Submission
Tendered on : 17.3.2014 by the Respondent-Appellant-Appellants

16.2.2017, 19.11.2018 by the Applicant-Respondent-Respondent

Decided on : 6.3.2019

Sisira J de Abrew J

This is an appeal against the judgment of the learned High Court Judge dated 1/10/2013 wherein he affirmed the order of the learned President of the Labour Tribunal dated 30.9.2011. This court by its order dated 20.1.2014 granted leave to appeal on questions of law stated in paragraphs 14(b),(d),(e) of the Petition of Appeal dated 6.11.2013 which are set out below.

1. Did the Honourable Judge of the High Court misdirect himself, whilst correctly holding that the Respondent is a probationer, but thereafter failing to apply the law applicable to the probationers?

2. Did the Honourable Judge of the High Court misdirect himself on the pivotal question of burden of proof with regard to allegations of malice on the part of the Petitioners?

3. Did the Honourable Judge of the High Court misdirect himself on the question of who should start the case?

Learned President of the Labour Tribunal by the said order dated 30.9.2011 directed the Respondent-Appellant-Appellant (hereinafter referred to as the Employer-Appellant) to reinstate the Applicant-Respondent-Respondent (hereinafter referred to as the Applicant-Respondent) and to transfer the Applicant-Respondent to a different estate controlled by the Employer-Appellant.

The Applicant-Respondent was appointed on 1.7.2009 as an Assistant Manager of an estate owned by the Employer-Appellant. He was placed on probation for a

period of six months from1.7.2009. By letter dated 28.1.2010 his probation period was extended for a further period of three months from 1.1.2010 to 31.3.2010. By letter dated 17.3.2010 his services were terminated with effect from 1.4.2010 as his performance had not been improved during the period of probation. The Employer-Appellant admitted that the services of the Applicant-Respondent were terminated whilst he was on probation. The learned President of the Labour Tribunal made an order that the Employer-Appellant should begin the case as the Employer-Appellant has admitted the termination of the Applicant-Respondent. Learned President's Counsel for the Employer-Appellant contended that the said order of the learned President of the Labour Tribunal was wrong since the termination of services took place whilst the Applicant-Respondent was on probation. Therefore, one of the important questions that must be decided in this case is whether the Applicant-Respondent was on probation when his services were terminated. Learned counsel for the Applicant-Respondent tried to advance an argument to the effect that when the period of probation of the Applicant-Respondent was extended on 28.1.2010, his period of probation had already come to an end since he had been placed on six months period of probation at the initial stage of his appointment and that this period of probation had come to an end on 31/12/2009. I now advert to this question. In order to find an answer to this question it is necessary to consider the clauses relating to probation in the letter of appointment. They are as follows.

1. Your appointment will be subject to a probationary period of six (06) months commencing from date of your appointment, but we reserve to ourselves the right to extend your probationary period if we deem it necessary.

2. During the period of probation or extended probation, either party may terminate this contract without notice and without pay in lieu of notice and without assigning any reason for such termination.

3. Confirmation of your appointment shall be in writing and at our sole discretion. You will continue to be on probation until you are confirmed.

Thus, according to above clauses in in the letter of appointment, the Employer-Appellant has the right to extend the period of probation. By letter marked R4 dated 26.1.2010, his period of probation has been extended with effect from 1.1.2010. Further, clause 3 of his letter of appointment, says that the Applicant-Respondent will be on probation until he is confirmed in service. The Applicant-Respondent has not been confirmed in service at any stage. For the above reasons, I hold that the Applicant-Respondent was on probation when his services were terminated.

The next question that must be decided is whether the learned President of the Labour Tribunal was correct when he ordered the Employer-Appellant to commence the case. To find an answer to this question it is important to consider the judicial decision in the case of Anderson Vs Husny [2001] 1 SLR 168 wherein His Lordship Justice Fernando held as follows.

> *"Upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a prima facie case of mala fide before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."*

In the present case, I have earlier held that the services of the Applicant-Respondent were terminated whilst he was on probation. When the learned President of the Labour Tribunal made an order that the Employer-Appellant should commence the case, his order was contrary to the principles enunciated in the above judicial decision. Applying the principles laid down in the above judicial decision, I hold that when an employer of an employee admitted that the services of an employee were terminated whilst he was on probation, it is the employee who should commence the case in the Labour Tribunal and not the employer. For the above reasons, I hold that the learned President of the Labour Tribunal was wrong when he ordered the Employer-Appellant to commence the case in Labour Tribunal. I further hold that in the present case, the burden is on the Applicant-Respondent to establish unjustifiable termination and that the Applicant-Respondent must establish a prima facie case of mala fides before the Employer-Appellant was called upon to adduce evidence with regard to the termination. In the present case the Employer-Appellant was first asked to adduce his reasons for termination.

For the above reasons I hold that the order of the learned President of the Labour Tribunal dated 30.9.2011 was wrong and cannot be permitted to stand.

The learned High Court Judge whilst holding that the period of probation of the Applicant-Respondent was lawfully extended affirmed the order of the learned President of the Labour Tribunal. For the above reasons, I hold that the learned High Court Judge was also wrong when he affirmed the order of the learned President of the Labour Tribunal 30.9.2011.

For the aforementioned reasons, I answer the 1st and 3rd questions of law in the affirmative. The 2nd question of law does not arise for consideration.

For the above reasons, I set aside the order of the learned President of the Labour Tribunal dated 30.9.2011 and the judgment of the learned High Court Judge dated 1.10.2013 and order a retrial. The learned President of the Labour Tribunal is directed to conclude this case without any delay.

Appeal allowed.

Judge of the Supreme Court.

Prasanna 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 application for Special Leave to Appeal in terms of Articles 128 and 154P(3)(b) of the Constitution read with the proviso to Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC (Spl) Appeal No. 07/2018
SC (Special) LA/296/2017
High Court Jaffna Case No. 2136/17
M.C. Jaffna case No. MC. 27153

1. Rathnasingham Janushan
   No. 27/6, Thuraiyappa Road,
   Eechchamoddai, Chundikuli.

2. Benedict Wesley Abraham
   No. 399, Main Street
   Jaffna.

Accused-Appellant-Petitioners

VS.

The Officer In charge
Headquarters Police
Station
Jaffna.

Complainant-Respondent-Respondent

1. Pakyanaathan Antenistan or Dillu
   No. 442/07, Madam Road,
   Jaffna.

2. Aravinthan Alex
   No. 9, Temple Road,
   Jaffna.

3. Jegatheeshvaran Dineshkanth
   Thaavadi, South Thavadi,
   Kokkuvil.

4. Aanantharasa Senthooran
   Thaavadi, South Thavadi,

5. Thevarasa Karishan
   Champion Lane,
   Kokkuvil West.

6. Theiventhiran Anistan Or Eric
   No. 281/16, Kandy Road,
   Jaffna.

Accused-Respondents-Respondents

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. Priyantha Jayawardena, PC, J &
Hon. Murdu N.B. Fernando, PC, J.

Counsel : M.A. Sumanthiran, PC with J. Arulanantham and D. Mascarange for the Accused-Appellant-Petitioners.
P. Kumararatnam, SDSG for Hon. Attorney General.

Argued on : 11.06.2019 and 19.06.2019.

Decided on : 04.10.2019

Jayantha Jayasuriya, PC.CJ.

The two Accused-Appellant-Petitioners (hereinafter called Appellants) were charged along with six others in the Magistrate's Court of Jaffna. They were charged for "Joining an Unlawful Assembly armed with any deadly weapon", an offence punishable under section 141 of the Penal Code, "Voluntarily Causing Grievous Hurt by dangerous weapons or means" while being members of an unlawful assembly an offence punishable under section 317 read with section 146 of the Penal Code and "Voluntarily Causing Grievous Hurt by dangerous weapons or means" punishable under section 317 read with section 32 of the Penal Code. The Learned Magistrate convicted all eight accused for the first two counts, after trial. Three of those accused were sentenced to one-year rigorous imprisonment on count one and the same three accused were sentenced to two years rigorous imprisonment on count two. The remaining five accused including the two appellants were sentenced to six months rigorous imprisonment on count one and the same term of imprisonment was imposed on them for count two as well. All sentences of imprisonment were ordered to run consecutively. In addition, each accused was ordered to pay Fifty Thousand Rupees as compensation with a default term of one-year imprisonment.

The two appellants being aggrieved with the conviction and the sentence, appealed to the High Court of Jaffna. The Learned High Court Judge having affirmed the conviction and sentence, imposed on each accused a fine of One Thousand Five Hundred Rupees on the Second Count with a default term of one-month simple imprisonment.

The two appellants out of the eight convicted accused, sought special leave to appeal from this Court. On 1st February 2018, this Court granted Special Leave to Appeal to the two accused-appellants on the following three questions of law:

(1). Has the Learned Judge of the High Court of Jaffna erred and / or misdirected himself in law in finding the 1st and 2nd Petitioners guilty, contrary to

the clear and unrefuted evidence of the 1st and 2nd Petitioners before the learned Magistrate of Jaffna ?

(2). Has the Learned Judge of the High Court of Jaffna erred and / or misdirected himself in law in sentencing the 1st and 2nd petitioners to varying sentences from the other accused, in finding them guilty of the same offences ?

(3). Has the Learned High Court Judge of Jaffna erred and / or misdirected himself in law in not evaluating the several important questions of law raised at the hearing of the Appeal, particularly with regard to:

(i) Liability of several persons for unlawful assembly;

(ii) Dock identification, in this case, lack of even dock identification

(iii) The occasions when an *alibi* is necessary?

The Learned Counsel of the Appellants at the hearing of this Appeal submitted that he would not pursue the second question mentioned above. His main focus was on question of law raised in 3(ii) above. Therefore, first I will address this issue namely whether there is sufficient evidence to establish the identity of the two appellants and whether the learned Magistrate and the High Court Judge have erred and / or misdirected themselves in resolving this issue.

The prosecution case is, that the victim Vimalarajan Vicknarajah who was around thirty years of age was surrounded and attacked by a group of persons armed with swords causing injuries to him. The alleged incident took place around noon on 05th June 2012. On behalf of the prosecution several witnesses including the victim, an elder sister of the victim, a person living in close proximity to the place of incident and the investigating officer testified. Several swords recovered by the investigation officer were marked P1a, P1b, P1c, P1d, P2a, P2b, P3a, P3b, P4a, P4b, P5a, P5b, P6a and P6b and produced in Court. The Medico-Legal Report relating

to the injured-victim was marked P7 and produced as evidence through the Court Interpreter.

The 1st and the 2nd Appellants stood trial as the 3rd and the 6th accused, respectively.

According to the evidence of the investigating officer, second to the seventh accused, were arrested by him. The 1st accused – Dillu had surrendered to police. This witness testified that he recovered two swords from the 3rd accused-appellant at the time of his arrest. Those two swords were produced marked as P2a and P2b and other swords were recovered from 2nd, 4th and 5th accused. According to his evidence these accused were arrested around 6.45 pm on 05th June 2012 and a group of about eight police officers took part in the arrest. This witness said that the first appellant was in possession of two swords at the time of the arrest. However he is unable to say as to which police officer made the arrest of the first appellant. Through the cross-examination of this witness defence challenged his evidence on the alleged recovery of swords. Counsel for the two accused-appellants drew the attention of this court to a specific question and the answer, which is reproduced below, in this regard.

> "Q - I further put it to you that you have recovered the thirteen swords in some other place, and out of which you have taken two swords and give false evidence that it was recovered from the Third Accused ?"
>
> "A - I admit"

However, in the re-examination the witness had said

"There is no necessity for me to arrest the said suspects and to produce the productions against them"

In the defence case, first accused made a dock statement and all other accused including the two appellants testified from the witness-box.

The first appellant in his evidence said that he along with the 5th accused went to the esplanade and at that point a team of police officers came and arrested them. Further there had been about three others also arrested by the police. Thereafter they were loaded to the jeep and the productions were also loaded. He claims that he is unaware as to who brought swords and further claims that there is no connection whatsoever to him and the sword. He had further said that he does not know the 2nd, 4th, 7th and 8th accused.

The second appellant in his evidence said that he along with the 3rd Accused (first appellant) went to the esplanade and that a team of police officers arrested them, at that point. He claims that the two of them were taken in a jeep. They saw 4th, 5th and 7th accused too in the jeep. He denied the recovery of a sword from him. He further claims that he did not know Dillu or Alex prior to the arrest.

Main evidence pertaining to the identity of the assailants comes from the prosecution witness Vimalarajan Vicknarajah who was subjected to a brutal attack. According to him a group of about 15 persons who came on five motor cycles surrounded and attacked him with swords. Initially this witness at the examination-in-chief identified two of the assailants by name. "Dillu" who was from the same village was identified as the 1st accused and "Alex" was identified as the 2nd accused. Later in the cross-examination and in the re-examination the witness said that he knew one more person by name and identified the 8th accused as "Eric". His position at the examination in chief is that he "knew the others" and he could identify the persons who cut him with the swords, if seen again. Further, he said that he did not know from which place they are from.

The main issue raised before this Court, is whether there is evidence of identification against the two appellants. The learned Presidents Counsel for the appellants submitted that there was not even a proper "dock identification"

relating to the two appellants in this case. The learned Presidents Counsel relied upon a series of judicial pronouncements in support of his contention.

There is no dispute that neither the victim nor any other witness in this case knew the two appellants (who stood trial as 3rd and 6th accused) by name. However, the victim identified, the 1st, 2nd and 8th accused by name. The victim in his testimony made a sweeping statement that he "knew the others" and further said that *"All those who are in the accused dock in this court came and cut me"* (emphasis added).

In *Dayananda Lokugalappaththi and eight others v The State* [2003] 3 S.L.R 362 at 388, the Court of Appeal citing with approval E.R.S.R. Coomaraswamy's "Law of Evidence" Vol.1 page 256 observed "If the witness did not know the accused earlier and in the absence of an identification parade, the identification in court becomes a "first time" identification in court or a dock identification".

However, to the contrary, the process of identification of a person who is known to a witness by name or otherwise is described as "recognition" as opposed to "identification". Situations of "recognition" are considered more satisfactory than instances of identification. However, even in situations of "recognition" the court should analyse the evidence of the witness who claims that the accused is a known person and examine whether the evidence is satisfactory to bring home a conviction. In *K. Don Anton Gratien v The Attorney-General*, C.A 226/2007 decided on 01.07.2010, the Court of Appeal analysed the evidence of the sole eye witness who claimed that he knew the accused, and arrived at the conclusion that the evidence was unsatisfactory. Therefore, the court held that the evidence is not sufficient to establish the identity of the appellant to the required standard namely, beyond reasonable doubt.

To establish the identity of an accused, it is not mandatory the witness should have known him by his name or otherwise, prior to the incident. Even in a situation where a witness had seen a person at an incident for the first time, his evidence in court identifying the accused in the dock as the person whom he saw at the

incident should not be rejected merely because the witness had neither seen him before nor had known his name prior to the incident. A "Dock Identification" is a valid form of identification. However, time and again courts have ben mindful of the dangers in convicting an accused solely based on a 'dock identification'. At page 256 in Volume 1 "The Law of Evidence" by E.R.S.R. Coomaraswamy, in the context of "dock identification", it is observed, "This practice is undesirable and unsafe and should be avoided, if possible". Court of Appeal in *Munirathne & Others v The State*, [2001] 2 SLR 382 observed the undesirability of conviction based on dock identification and in *K.M.Premachandra & others v The Attorney-General*, C.A. 39-41/97, decided on 13.10.1996, set aside the conviction of one accused whose conviction was based on a dock identification. In *Roshan v The Attorney-General*, [2011] 1 SLR 364 at 377, held, ".. in the backdrop of an acknowledged disparity in the complexion and appearance of the accused at the trial stage, the assailant being a total stranger to the complainant who had a mere 04 hour visual contact with the assailant, the evidence of subsequent dock identification several years later would not eliminate the generation of a reasonable and justifiable doubt as to the veracity and genuiness of the identification, unless there are other supervening and compelling reasons to justify".

Section 9 of the Evidence Ordinance recognizes the relevancy of "facts necessary to explain or introduce relevant facts". Said section provides *inter alia* that, facts which establish the identity of any person whose identity is relevant, as a "relevant fact".

Facts leading to assess the quality of evidence of visual identification are important facts a court needs to take into account in deciding on the identity of an accused. What matters is the quality of the evidence. In such situations the evidence of the witness should demonstrate that there was sufficient opportunity for the witness to have seen the person concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in court.

Factors such as, the duration of the interaction between the witness and the suspect, distance between them, the nature of light under which the witness observed, whether there are any special reasons to remember the suspect such as presence of unique physical features, existence of any factors impeding the opportunity for clear and uninterrupted observation, whether the witness had seen the suspect before and if so the number of occasions and whether the suspect was known by name or not, are relevant to determine the quality of visual identification evidence. *Dayananda Lokugalappaththi and eight others v The State*, [2003] 3 SLR 362 at 390, *R v Turnbull (C.A.)*, [1977] 1 Q.B. 224 at 228. This list of factors is not exhaustive, but could vary according to the facts and circumstances of each case.

These factors are equally relevant and important in situations of both "identification" and "recognition".

In *Turnbull*, guidelines were laid down in regard to evidence of visual identification in situations of "fleeting glance" or "identification in difficult circumstances" and subsequent jurisprudence clarified, that such guidelines need not be adopted in each and every case of visual identification. *R v Courtnell* [1990] Cr. Law Review 115, *R v Oakwell*, 66 Cr. App. R. 174, *R v Curry and Keeble* [1983] Crim. L.R. 737, *Keerthi Bandara v AG* [2000] 2 SLR 245.

However, in *R v Bowden* [1993] Crim. L. R. 379 and *Beckford and others v R*, 97 Cr. App. R. 409 at 415, the importance of *Turnbull Guidelines* in cases of visual identification was re-emphasized.

A trial court in determining the guilt or innocence of an accused need to examine and analyse the evidence of "visual identification" of any witness, bearing in mind the factors discussed hereinbefore and make an assessment on the quality of evidence and decide whether the identity of the accused had been proved or not.

It is significant to note, that the examination in chief of the main witness in this case had been conducted without giving an opportunity to identify each accused

in the dock separately, other than the 1st, 2nd and the 8th accused. Nor an opportunity was given to the witness to describe the circumstances under which the identification was made. In the cross examination the witness was asked in reference to the two appellants (3rd & 6th accused) and three other accused (5th, 6th and 7th accused) as to how many times he has seen them during his life time. The witness answered "I only know Dillu, the first accused, the second accused and Eric the 8th Accused who is standing last. *I do not know any of the others*". Answering the next question "If so, you have only identified these three accused at the time of the incident?" witness said "As I already knew these three persons, I identified them".

The Learned Magistrate in deciding the guilt of the appellants in this case has not only failed to analyse the evidence of the principle witness and consider the quality of visual identification evidence taking into account all aspects of the testimony of the witness. The Learned Magistrate erred, when he failed to consider all these facts before reaching the decision. The Learned High Court Judge failed to consider these errors in the judgment of the original court, when affirmed the conviction while exercising appellate jurisdiction.

One other important item of evidence that had escaped the attention of the learned Magistrate and the Learned High Court judge emanates from the evidence of two other lay witnesses. Witness Suresh Pragaspathy, an elder cousin of the victim who rushed to the scene has witnessed the attack. Her description of the incident is transcribed in the following way:

"Brother Vicnarajah was cut by sword by Dillu and his people. Dillu is standing in the first place in the accused dock. When the said incident occurred, 15 persons came in the motorcycles. I cannot identify all the persons. They were wearing helmets"

Witness Thirunavukkarasu Thevika, near whose house the incident took place in the examination in chief said "When I ran after hearing the noise, Dillu raised the sword to me. At that place in about 6 or 7 motorcycles they were riding. I saw only

Dillu and Eric. They were having swords and clubs". In the cross examination answering a question as to in which appearance the assailants came the witness said "They came in the motor cycles wearing helmets and covering their faces". The further question "Did they come in the motor cycles wearing helmets and covering their faces?" was answered in the affirmative.

A careful consideration of these items of evidence together with the evidence of the victim, should have played a vital aspect in the analysis of evidence of "visual identification" in this case. It is unfortunate both the trial judge as well as the judge of the High Court who exercised appellate jurisdiction, failed to adopt such process. This error in my view has a serious impact in the final outcome of the case, adversely affecting the two appellants.

In view of these findings, this court will not proceed to examine the other questions of law raised in this appeal.

Maintaining law and order, bringing in perpetrators to justice, convicting accused whose guilt is proved according to law and subsequent sentencing are important stages that has to be preserved and protected to ensure that members of the society enjoy rule of law and democracy. The victim in this case has been subjected to a gruesome attack by a group of people. The manner in which this attack was carried out in broad daylight could have had a serious impact on the society. There is no doubt that the brutal attack the victim was subjected to in this case cannot be condoned, but should be subjected to strong condemnation.

However, a heavy responsibility lies on the court to ensure that an accused who is brought to trial, is convicted according to established legal principles irrespective of the seriousness and the gravity of the incident.

When all these factors are taken together with the evidence of this case I am of the view, that the evidence is unsatisfactory, and it is unsafe to affirm the conviction of the two appellants. Hence the appeals of the two appellants are allowed and the conviction and the sentence of the two appellants (3rd Accused-Appellant and

the 6th Accused Appellant) on both counts are set aside. Accordingly, the two Appellants are acquitted from count one and count two.

Following the best traditions and highest standards, the learned Senior Deputy Solicitor General who represented the Attorney-General in this case, drew our attention to various aspects of the evidence discussed herein before and, assisted this court to make its determination.

Appeals of the two Appellants allowed.

Chief Justice

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 Appeal

P.S. Kodithuwakkuarachchi
No.615/1, Peradeniya Road,
Kandy.

Plaintiff

SC Appeal 09/2014
SC/HC/CALA 60/2010
CP/HCCA/867/2002
DC Kandy No.19479/L

Vs-

Dr. Hema Bandara Jayasinghe
No 23/4, Dalada Veediya,
Kandy.
Presently of
No.72/32, Sri Pushpadana Road,
Kandy.

Defendants

AND THEN BETWEEN
P.S. Kodithuwakkuarachchi
No.615/1, Peradeniya Road,
Kandy.

Plaintiff-Appellant

Vs

Dr. Hema Bandara Jayasinghe
No 23/4, Dalada Veediya,
Kandy.
Presently of
No.72/32, Sri Pushpadana Road,
Kandy.

Defendant-Respondent

AND NOW BETWEEN

Dr. Hema Bandara Jayasinghe
No 23/4, Dalada Veediya,
Kandy.
Presently of
No.72/32, Sri Pushpadana Road,
Kandy.

Defendant-Respondent-Appellant

Vs

P.S. Kodithuwakkuarachchi
No.615/1, Peradeniya Road,
Kandy.

Plaintiff-Appellant-Respondent[Deceased]

1A. Pandith Sekera Arachchige Premawathi
1B. Latha Kodithuwakku Arachchi
1C. Gamini Kodithuwakku Arachchi
1D. Ubahaya Kodithuwakku Arachchi
1E. Ramani Kodithuwakku Arachchi
1F. Sarath Kodithuwakku Arachchi

Before: Sisira J de Abrew J
Murdu Fernando PC, J &
P.Padman Surasena J

Counsel: Nihal Jayamanne PC with Noorani Amarasinghe for the Defendant-Respondent-Appellant
Kamran Aziz with Ershan Ariaratnam for the Substituted Plaintiff-Appellant-Respondent

Written submission
tendered on : 10.6.2019 and 24.2.2014 by the Defendant-Respondent-Appellant
3.6.2019 by the Plaintiff-Appellant-Respondent

Argued on : 27.5.2019

Decided on: 28.6.2019

Sisira J. de Abrew, J
The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action in the District Court of Kandy against the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant) seeking a declaration that he is the owner of the property in dispute. The learned District Judge by his order dated 8.3.2002 decided the case on issues No.16 to 21 raised by the Defendant-Appellant and dismissed the case of the Plaintiff-Respondent without recording any evidence. Being aggrieved by the said order of the learned District Judge the Plaintiff-Respondent appealed to the Civil Appellate High Court and the learned Judges of Civil Appellate High Court by judgment dated 28.1.2010, set aside the said order of the learned District Judge and directed the learned District Judge to hear the case from the beginning. Being aggrieved by be said judgment of the Civil Appellate High Court, the Defendant-Appellant has

appealed to this court. This court by its order dated 27.1.2014 granted leave to appeal on questions of law set out in paragraphs 13 (a),(b),(c),(d),(e),(f),(g),(h),(i) of the petition of appeal dated 10.3.2010 which are set out below.

1. Did the Honourable High Court of Kandy fail to take into consaideration the admissions recorded on behalf of the parties in the District Court of Kandy?

2. Did the Honourable High Court of Kandy fail to consider the fact that the order made by the District Court under Section 328 of the Civil Procedure Code in DC Kandy Case No.2315/RE and confirmed by the order of the Court of Appeal and by the order of the Supreme Court is res-judicata and/or binding between the parties in respect of the finding of facts and of law?

3. Did the Honourable High Court of Kandy fail to take into consideration the fact that there is a finding in the order referred to above that the owner of the premises is the Municipal Council of Kandy and that the Plaintiff-Respondent was aware of the said fact?

4. Did the Honourable High Court misdirect itself in concluding that the Defendant-Petitioner was holding under Dr. Rajendra the Defendant in Case No.2315/RE which in fact the order given in respect of Section 328 inquiry by the District Court, the Court of Appeal and the Supreme Court had come to the definite finding that the Defendant-Petitioner was not liable to be ejected in the execution of writ as he was not a person bound by the decree and he was not a person holding under the Judgment-Debtor (Dr.Rajendra-the Defendant in case No.2315/RE)?

5. Did the Honourable High Court of Kandy fail to take into consideration the finding of the District Court, the Court of Appeal and the Supreme Court the

orders made in respect of the 328 inquiry that the premises belong to the Municipal Council Kandy and that the Defendant-Petitioner was the lawful tenant of the premises under the lawful owner the Kandy Municipal Council?

6. Did the Honourable High Court of Kandy fail to consider the fact that the Plaintiff-Respondent's action is an action for declaration of title (rei vindicatio action) and ejectment and admittedly Municipal Council Kandy is the lawful owner and that the Plaintiff-Respondent has admittedly no title and that Plaintiff had deliberately failed to disclose the fact and make the Municipal Council Kandy a party?

7. Did the Honourable High Court of Kandy fail to consider the fact that the Plaintiff-Respondent had sought only a declaration of title to the 2nd Schedule to the Plaint whereas the title pleaded is to the 1st Schedule and no determination of title was sought in respect of the land described in the 1st Schedule?

8. Did the Honourable High Court of Kandy fail to consider the fact that the Plaintiff-Respondent could not have and maintain this action without a declaration of title to the land described in the 1st Schedule?

9. Did the Honourable High Court of Kandy come to a wrong finding in setting aside the judgment of the learned District Judge in the teeth of the admitted factual and legal positions relating to this action established and determined by the order of the District Judge in the 328 inquiry in case No.2315/RE and in view of the orders of the Court of Appeal and the Supreme Court confirming the conclusions of the District Judge?

The facts of this case may be briefly summarized as follows.

The Plaintiff-Respondent filed a case bearing Number 2315/RE in the District Court of Kandy against one Dr.Rajendra who was his tenant and after trial the learned District Judge decided the case in favour of the Plaintiff-Respondent. The Plaintiff-Respondent executed the writ against Dr.Rajendra. As a result of the execution of the said writ Dr. Jayasinghe who is the Defendant-Appellant in the present case too was ejected. The Plaintiff-Respondent alleged that Dr.Rajendra had sub-let the premises to Dr. Jayasinghe. Later Dr. Jayasinghe who is the the Defendant-Appellant in the present case filed a petition in the District Court under Section 328 of the Civil Procedure Code (CPC) moving that he be restored in possession of the premises in suit. After an inquiry the learned District Judge restored Dr.Jaysinghe, the Defendant-Appellant in the present case in possession of the property in suit. The appeal (CA 555/98-DC Kandy 2315/RE) filed by the Plaintiff-Respondent against the said order was dismissed by the Court of Appeal by its judgment dated 7.9.1998 and this court refused to grant leave to appeal against the judgment. The Court of Appeal in the said judgment (CA 555/98-DC Kandy 2315/RE) has stated that the Municipal Council Kandy is the owner of the property in dispute. However the Plaintiff-Respondent filed the present case [case No. 19479/L] against Dr. Jayasinghe seeking a declaration that he is the owner of the property in dispute. In the present case [case No. 19479/L] the learned District Judge by order dated 8.3.2002 dismissed the case of the Plaintiff-Respondent on the basis that the Court of Appeal in case No. CA 555/98-DC Kandy 2315/RE had stated that the owner of the property in dispute was Municipal Council Kandy.

Learned President's Counsel for the Defendant-Appellant contended that the Plaintiff-Respondent could not maintain the present case as the Court of Appeal in

case No. CA 555/98-DC Kandy 2315/RE had decided that the owner of the property was Municipal Council Kandy. I now advert to this contention.

It has to be noted here that the learned District Judge in DC Kandy 2315/RE case restored Dr. Jayasinghe who is the Defendant-Appellant in the present case in possession on an application made under Section 328 of the CPC. The Court of Appeal stated that the owner the property in dispute was the Municipal Council Kandy in an appeal filed against the said order of the learned District Judge. In an inquiry under Section 328 of the CPC, can the court declare that a party or any other person is the owner of the property? It has to be noted here that the Municipal Council Kandy was not even a party in the inquiry under Section 328 of the CPC. At this stage it is necessary to consider Section 328 of the CPC which reads as follows.

> *Where any person other than the 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 this connection it is important to consider the judgment of Bonser CJ in the case of Rosahamy Vs Diago 3 NLR 203 wherein His Lordship held as follows.

"The investigation on an application numbered and registered as a plaint under section 328 of the Civil Procedure Code should be limited to the question as to whether the applicant is entitled to be restored to possession of the property claimed by him. The question of title to the property should not be gone into.

The final order on such application should not be in the form of a decree in a regular suit, but one merely directing that the applicant be restored to possession."

In the case of Pathirana Vs Ahangama [1982] 1 SLR 392 Court of Appeal held as follows.

"in an action under Section 328 of Civil Procedure Code the only question that arises is that of possession and not title."

After studying Section 328 of the CPC, I hold that in an inquiry under Section 328 of the CPC, court cannot declare that a party or any other person is the owner of the property; and that the court cannot make a declaration regarding the title of the property in suit. I further hold that in an inquiry under Section 328 of the Civil Procedure Code there is no title investigation regarding the ownership of the property; and that it is an inquiry on the question whether or not the claimant should be restored in possession of the property in suit.

Considering all the above matters, I hold that an order made in an inquiry under Section 328 of the CPC cannot operate as res-judicata in a case of declaration of title. This view is supported by the judicial decision in the case of Ponnampalam Vs Murugasar 4 NLR 296 wherein Bonser CJ held as follows.

"M., being a decree-holder in D. C. case No. 24,475 against G., caused a certain land to be seized in execution as the property of G. P. claimed the land. On the District Judge rejecting his claim, he sued M. and G. to have it declared that the land Was not liable to be seized by M., and that it may be declared P.'s property.

M. pleaded the judgment in D. C. case No. 288 as ret judicata, Whereby P.'s claim to part of the same land, upon a seizure made by another judgment-creditor of G., was rejected.

Held, that such judgment was not res judicata, though it may serve as evidence against P."

Considering all the above matters, I hold that when the learned District Judge decided to dismiss the action of the Plaintiff-Respondent on the basis of the findings of the inquiry under Section 328 of the CPC, he was wrong and that the said decision cannot be permitted to stand.

It was also submitted that the Plaintiff-Respondent could not maintain this action since he had failed to make Municipal Council Kandy a party. When considering this contention it is important to consider section 17 of the CPC which reads as follows.

"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

If the consent of anyone who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint."

In the case of Dingiri Appuhamy Vs Talakolawewa Pangananda Thero 67 NLR 89 His Lordship Justice Abeysundera at page 90 held as follows.

"There is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action. It was improper for the learned District Judge to have dismissed the action of the plaintiffs on the ground of misjoinder of defendants and causes of action without giving an opportunity to the plaintiffs to amend their plaint.

When I consider Section 17 of the CPC and the above legal literature, I hold that

no action can be dismissed by the District Court on the ground of non-joinder or misjoinder of parties without giving an opportunity for the plaintiff to amend the plaint.

The learned Judges of the Civil Appellate High Court by judgment dated 28.1.2010, have set aside the order of the learned District Judge dated 8.3.2002. For the above reasons, I hold that the learned Judges of the Civil Appellate High Court were correct when they set aside the above order of the learned District Judge. In view of the conclusion reached above, I answer the above questions of law in the negative.

For the above reasons, I affirm the judgment of the Civil Appellate High Court and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

P.Padman Surasena J

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. Jagath Priyantha Epa
2. Deepika Lakmali Kalansooriya
   No.S.G. 12B Gemunupura,
   Ampara

Petitioners

SC Appeal12/2018
SC (Leave to Appeal) Application No: SC/HCCA/232/17/LA
HCCA(Civil Appeal) Ampara:EP/HCCA/AMP/300/2016
DC Ampara: 374/SPL

Vs

1. Ahingsa Sathsarani Epa
   No.3A/1 Samudra,Paragahakele
   Ampara.
2. Janaka Pushpakumara Kalansooriya
3. Wijesinghe Arachchige Wasana Malkanthi
   No.3A/1 Samudra,Paragahakele
   Ampara.

4. Probation Officer
   Probation Office,
   Ampara.

Respondents

AND BETWEEN

1. Jagath Priyantha Epa
2. Deepika Lakmali Kalansooriya
   No.S.G. 12B Gemunupura,
   Ampara

Petitioner-Appellants

Vs

1. Ahingsa Sathsarani Epa
   No.3A/1 Samudra,Paragahakele
   Ampara.
2. Janaka Pushpakumara Kalansooriya
3. Wijesinghe Arachchige Wasana Malkanthi
   No.3A/1 Samudra,Paragahakele
   Ampara.
4. Probation Officer
   Probation Office,
   Ampara.

Respondent-Respondents

AND NOW BETWEEN

1. Janaka Pushpakumara Kalansooriya
2. Wijesinghe Arachchige Wasana Malkanthi
   No.3A/1 Samudra,Paragahakele
   Ampara.

2nd and 3rd Respondent-Respondent-Petitioner-Appellants

Vs

1. Jagath Priyantha Epa
2. Deepika Lakmali Kalansooriya
   No.S.G. 12B Gemunupura,
   Ampara

Petitioner-Appellant-Respondent-Respondents

Ahingsa Sathsarani Epa
No.3A/1 Samudra,Paragahakele
Ampara.

1st Respondent-Respondent-Respondent-Respondent.

Probation Officer

Probation Office,
Ampara.
4th Respondent-Respondent-Respondent-Respondent

Before : Sisira J de Abrew J
Vijith Malalgoda PC J
P.Padman Surasena J

Counsel : M.U.M. Ali Sabry PC with Shamith Fernando and Shehani Alwis for the 2nd and 3rd Respondent-Respondent-Petitioner-Appellants
Anura Gunaratne for the Petitioner-Appellant-Respondent-Respondents

Argued on : 6.3.2019

Written Submission
Tendered on :27.9.2018 by the Petitioner-Appellant-Respondent-Respondents
4.9.2018 by the2nd and 3rd Respondent-Respondent-Petitioner-Appellants

Decided on : 3.4.2019

Sisira J de Abrew J

The Petitioner-Appellant-Respondent-Respondents whose names are Jagath Priyantha Epa and Deepika Lakmali Kalansooriya (hereinafter referred to as the Petitioner-Respondents) filed action in the District Court of Ampara (case No.374/Spl) against the 2nd and 3rd Respondent-Respondent-Petitioner-Appellants whose names are Janaka Pushpa Kumara Kalansooriya and Wijesinghr Arachchige Wasana Malkanthi (hereinafter referred to as the 2nd and 3rd Respondent-Appellants)

praying, inter alia, for a declaration that the Petitioner-Respondents are entitled to the legal and physical custody of their daughter the 1st Respondent-Respondent-Respondent-Respondent in this case (hereinafter referred to as the 1st Respondent-Respondent) whose name is Ahingsha Sathsarani Epa; to give them the legal and physical custody of their daughter, the 1st Respondent- Respondent; and to return the 1st Respondent-Respondent to the Petitioner-Respondents.

The learned District Judge, by his order dated 15.12.2015 dismissing the case of the Petitioner-Respondents, gave the legal and physical custody of the 1st Respondent-Respondent to the 2nd and 3rd Respondent-Appellants. He made further order directing the Registrar General to amend the birth certificate of the 1st Respondent-Respondent by entering the names of the 2nd and 3rd Respondent-Appellants as parents' names. I have to note here that there was no application before the learned District Judge to change names of the parents in the birth certificate. Being aggrieved by the said order of the learned District Judge, the Petitioner-Respondents appealed to the Civil Appellate High Court and the said court by its order dated 6.4.2017, set aside the order of the learned District Judge and allowed the appeal of the Petitioner-Respondents. Being aggrieved by the said order of the Civil Appellate High Court, the 2nd and 3rd Respondent-Appellants have appealed to this court. This court by its order dated 7.2.2018 granted leave to appeal on questions of law stated in paragraphs 24(i) to 24(vi) of the petition of appeal dated 28.4.2017 which are set out below.

1. The said Judgment is contrary to the law and evidence placed before court.
2. Their Lordships of the High Court have failed to understand the nature of the case, and the true scope of the action presented to the District Court.

3. Their Lordships of the High Court have erred in law in failing to understand that the court should decide a case on the basis of 'child's welfare is paramount' when the custody of a minor child is involved.

4. Their Lordships of the High Court have completely disregarded the principle that the best interests the child was paramount.

5. Their Lordships of the High Court have failed to appreciate the analytical order of the learned Additional District Judge in relation to the custody of the 1st respondent minor child.

6. Their Lordships of the High Court have failed to appreciate that the right of the parent may be superseded by consideration of the welfare of the child though the child had not been adopted under the provisions of the Adoption of Children Ordinance by the Petitioners.

Learned President's Counsel for the 2nd and 3rd Respondent-Appellants contended that the learned Judgers of the Civil Appellate High Court in their judgment have failed to consider the welfare of the child (the 1st Respondent- Respondent) which is the most important factor in this case. He therefore submitted that the judgment of the Civil Appellate High Court be set aside. Therefore the most important question that must be considered in this case is whether welfare of the child (the 1st Respondent- Respondent) would be affected if the custody of the child is given to the Petitioner-Respondents who are the natural parents of the child. Deepika Lakmali Kalansooriya (the 2nd Petitioner-Respondent) who is the natural mother of the child is the sister of the 2nd Respondent-Appellant (Janaka Pushpakumara Kalansooriya). The natural mother of the child gave the child to the 2nd and 3rd Respondent-Appellants when the child was about 51/2 months old as she had

problems with her husband. Later when the child was about two years and one month old, the Petitioner-Respondents who are the natural parents of the child filed the present case in the District Court of Ampara seeking the custody of the child. However before this case was filed in the District Court of Ampara, the 2nd and 3rd Respondent-Appellants filed an adoption case in the District Court of Ampara seeking an order to adopt the child when the child was about one year and five months old. But they withdrew the adoption case when the natural parents objected to it.

As I pointed out earlier, the most important question that must be considered in this case is whether welfare of the child (the 1st Respondent- Respondent) would be affected if the custody of the child is given to the Petitioner-Respondents who are the natural parents of the child. Where is the evidence to support this contention? I now advert to this question. When I consider this question it is important to consider the Probation Officer's report. The Probation Officer in his report made observation to the following effect.

"Although the child has not got used to the atmosphere of the natural parents, the natural parents have the capacity and want to look after the child. This observation has been made after conducting a field investigation. The Probation Officer has recommended giving the child to the natural parents. In order for the child to get used to the atmosphere of the natural parents, he has recommended to keep the child at the Child Protection Home Ampara for two weeks; allow the natural parents to be with the child and not to allow the 2nd and 3rd Respondent-Appellants to visit the child." This was the recommendation of the Probation Officer. When the above recommendation of the Probation Officer is considered how can one argue that welfare of the child would be affected if the child is given to the natural parents.

The 2nd Respondent-Appellant admitted in his evidence that he has a maintenance case in the Magistrate Court of Ampara for not paying maintenance to a child. The case has been filed by the mother of the child as he was not maintaining the child. As a result of relationship that he (the 2nd Respondent-Appellant) had with a woman, a child was born and it is this woman who filed the maintenance case in the Magistrate Court of Ampara. The 2nd Respondent-Appellant denied the paternity of the child but the DNA test proved that he is the father of the child. This was the evidence of the 2nd Respondent-Appellant in this case. Thus it is seen that the 2nd Respondent-Appellant failed to maintain his own child and the mother of the child had to invoke jurisdiction of court to get money to maintain the child. If the 2nd Respondent-Appellant did not maintain his own child, would he maintain a child of another woman who is the1st Respondent-Respondent in this case? I doubt. Is it safe to give custody of a female child to the 2nd and 3rd Respondent-Appellants when the 2nd Respondent-Appellant enjoys this type of reputation? In this connection it is relevant to consider the judicial decision in the case of M.Jeyaraman Vs T.Jeyaraman [1999] 1 SLR 113 wherin Thilakawardena J at page 116 (judgment of the Court of Appeal) observed as follows.

> *"In 1968, in the decision of Fernando (70 NLR 534) the Supreme Court held that both the modern Roman Dutch law and English law were agreed on the principle that the interests of the child were paramount. The court declared that the modern Roman Dutch law had moved away from rules directed at penalising the guilty spouse, towards the recognition of the predominant interest of the child.*

> *Applying the principle that the interests of the child are paramount consideration, the court ruled that the custody of very young children would ordinarily be given to the mother."*

In Precla W Fernnado Vs Dudley W Fernnado 70 NLR 534 Weramanthry J held as follows.

> *In all questions of custody of children the interests of the children stand paramount. Questions of matrimonial guilt or innocence of a parent would not therefore be the sole determining factors in questions of custody, though they are not factors which will be ignored. The interests of the children being paramount, the rule that the custody of very young children ought ordinarily to be given to their mother ought not to be lightly departed from.*

According to the principles laid down in the above judicial decisions, custody of very young children ought to be given to their mother. If that is so, how can this court give custody of the child (the 1st Respondent-Respondent) to a couple who are not the natural parents of the child?

In Fernando Vs Fernando 58 NLR 262 at page 263 this court observed as follows.

> *"I need hardly state any reasons for forming the opinion that it would be detrimental to the life and health and even of the morals of such a young child if that child is forcefully separated from her mother and compelled to live, not even in her father's custody, but under the care of an elderly relative to whom she is not bound by any natural ties. So long as the mother is shown to be fit to care for the child, it is a natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously."*

Mother's love to her child is something that can be explained by words even by the mother. Thus no court would lightly deprive the mother of such love. In the present case, the 2nd Petitioner-Respondent is the mother of four children. Her 4th child is the 1st Respondent- Respondent. According to her evidence, she looks after her three children well. One child has sat for the scholarship examination and the other child will be sitting for the scholarship examination in the coming year. Thus it shows that the natural mother of the child is a fit person to look after her children. In the present case both the natural mother and the natural father request the custody of the child.

Learned President's Counsel for the 2nd and 3rd Respondent-Appellants highly relied on the judicial decision in the case of G. Premawathi Vs A. Kudalugoda 75 NLR 398 Wherein Weeramanthry J observed as follows.

> *Where the law governing the right to the custody of an illegitimate child is the Roman-Dutch law, the mother of the child is the natural guardian and is entitled as such to the custody of the child as against a stranger. If, however, the interests of the child would be gravely affected by an interference with its present custody, the claim of the stranger to custody would be preferred to the claim by the mother.*

It has to be noted here that the child in the above case was an illegitimate child. In the present case the child is a legitimate child and that both natural parents are asking the custody of the child. In my view, the facts of the above case are different from the facts of the present case. Therefore I hold that the judicial decision in G. Premawathi Vs A. Kudalugoda (supra) has no application to the present case.

In Ran Menika Vs Paynter 34 NLR 127 Drieberg J held as follows.

> *The Supreme Court will not deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given to another. The Court must be satisfied that it is essential to its safety or welfare that the rights of the parent should be superseded or interfered with.*

In the case of D Endoris Vs D Kiripetta 73 NLR 20 de Kretser J held as follows.

> *"Acourt will not deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given over to another. It is for the person seeking to displace the natural right of the father to the custody of his child, to make out his case that consideration for the welfare of the child demands it."*

de Kretser J at page 21 further held as follows.

> *The mere delivery of a child by its natural parent to a third party does not invest the transaction with legal consequences. If the parent has the right to hand over custody of a child then that parent would also have the undoubted right to resume the custody himself, as the authority of the parent must prevail in the latter instance as much as in the former.*

In the case of D. Endoris Vs D. Kiripetta (supra), the mother of the child died when the child was one month old. Father of the child gave the child to his sister and her husband to look after the infant child as he had no one else. When the child was eight years old, the father made an application to court for return of the custody of the child. The Magistrate refused the application of the father. In appeal de Kretser J setting aside the order of the Magistrate gave custody of the child to the father. de Kretser at page 22 observed as follows.

> *"It is true that the child would be deprived of the love and care of the first and second respondents but I do not think that at the age of 8 years the emotional upset of being away from them is something that he cannot get over. It may be that if left with the respondents the child would be brought up with more loving care but that is no reason to deprive the father of his rights to this child."*

From the evidence of the present case, it cannot be concluded that the child's (the 1st Respondent-Respondent) welfare would be affected if the custody of the child is given to her natural parents. There is also no evidence to suggest that the child would be brought up better and would have a better chance in life if she is given to the 2nd and 3rd Respondent-Respondent. Assuming without conceding that the child would be brought up better if the custody of the child is given to the 2nd and 3rd Respondent-Appellants, court cannot, applying the principles laid down in above legal literature, deprive natural parents of the custody of the child. At this juncture I am mindful of the fact that I would be giving the custody of the 1st Respondent-Respondent who is a girl to the 2nd and 3rd Respondent-Respondent if I affirm the order of the learned District Judge.

When I consider all the above matters, I hold that the welfare of the child would not be affected if the custody of the child is given to the natural parents and that the child would be brought up better if the custody of the child is given to the 2nd and 3rd Respondent-Appellants.

The Petitioner-Respondents are the natural parents of the child. Thus they have the legal right to keep the child in their custody. No argument can be brought forward to deprive the said legal right of the natural parents. The 2nd and 3rd Respondent-Appellants do not have any adoption order issued by a court. The adoption case filed by them was withdrawn when the natural parents objected to the said adoption case.

Thus their (the 2nd and 3rd Respondent-Appellants) custody of the child is not legal. They cannot take up the position that since the natural mother handed over the child to them, they have the lawful custody of the child. The principle that is to say that 'mere delivery of a child by its natural parent to a third party does not invest the transaction with legal consequences and that if the parent has the right to hand over custody of a child then that parent would also have the undoubted right to resume the custody himself, as the authority of the parent must prevail in the latter instance as much as in the former' enunciated by de Kretser J in the case of D Endoris Vs D Kiripetta (supra) operates against such contention.

For all the aforementioned reasons, I hold that learned Judges of the Civil Appellate High Court were right when they set aside the order of the learned District Judge and allowed the appeal of the Petitioner-Respondents. For the above reasons I answer the above questions of law in the negative.

For all the aforementioned reasons, I affirm the judgment of the Civil Appellate High Court dated 6.4.2017 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

V.K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

P. Padman Surasena

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

S.C. Appeal 19/2013
SC(SPL)LA No: 234/2012
HC Colombo
Case No: HCMCA 119/2007
MC Colombo
Case No: 29621/5

The Commission to Investigate Allegations of Bribery or Corruption.

Complainant
-Vs-

J.L. Epa Seneviratne

Accused

AND BETWEEN

J.L. Epa Seneviratne

Accused-Appellant

-Vs-
Director General,
The Commission to Investigate Allegations of Bribery or Corruption.

Complainant- Respondent

AND NOW BETWEEN

J.L. Epa Seneviratne

Accused-Appellant-Appellant

-Vs-

Director General,
The Commission to Investigate Allegations of Bribery or Corruption.

Complainant-Respondent- Respondent

Before: Nalin Perera, J.,
L.T.B.Dehideniya, J. and
Murdu N.B.Fernando, PC. J.

Counsel: Rienzie Arsecularatne PC with Thejitha Koralage, Namal Karunaratne, Udara Muhandirange, Ganesh Premkumar and Shevindri Manuel for Accused-Appellant-Appellant
Ms. Sunethra Jayasinghe Deputy Director General,Bribery Commission For Complainant-Respondent-Respondent

Argued on: 28.09.2018

Decided on: 25.04.2019

Murdu N.B. Fernando, PC. J.

The Accused-Appellant-Appellant ("the appellant") came before this Court being aggrieved by the Judgment of the High Court of Colombo ("the High Court") wherein the conviction and the sentence of the appellant of a bribery charge by the Magistrate Court of Colombo was upheld. The appellant moved this Court to set aside the Judgment of the High Court and the Magistrate Court and to acquit the appellant.

This Court on 24-01-2013 granted Special Leave to Appeal on the following questions of law.

i) Did the Learned High Court Judge fail to consider whether the Learned Trial Judge had applied the Standard of Proof applicable in a criminal case.

ii) Did the Learned High Court Judge fail to consider whether the Learned Trial Judge erred in law and facts by failing to evaluate the infirmities of the Prosecution's Case.

iii) Did the Learned High Court Judge fail to consider whether the Learned Trial Judge erred in law by allowing uncertified copies of Identification Parade notes to be led in evidence when there was material before Courts that the originals record is misplaced.

iv) Did the Learned High Court Judge fail to consider whether the Learned Trial Judge delivered the Judgment according to Law?

v) Did the Learned High Court Judge fail to consider whether the Learned Trial Judge erred in law by failing to appreciate that it is sufficient for the defence to create a reasonable doubt in the prosecution case to secure an acquittal.

vi) Did the Learned High Court Judge error in law by allowing evidence of bad character of the accused to be led in evidence.

The appellant in this case was a forest officer attached to the Southern Provincial Office of the Forest Department and was charged in the Magistrate Court of Colombo by the Commission to Investigate allegations of Bribery or Corruption ("the respondent") for two offences namely,

i) Being a public officer soliciting sum of Rs 2000/= from Gunasoma Mohotti Wanigasekara ('the complainant") on 06-08-1996 at Gintota and thereby committing an offence punishable under Section 19 (c) of the Bribery Act as amended ("the Act"); and

ii) At the same time and place and during the course of the same transaction accepting a sum of Rs 2000/= from the complainant and thereby committing an offence punishable under section 19(c) of the Bribery Act.

After trial, on 23-08-2007 the learned Magistrate convicted the appellant and imposed a sentence of 6 months rigorous imprisonment for each count and suspended the total of 12 months for a period of 5 years and also imposed a fine of Rs 5000/= on each count.

The appellant went before the High Court against the said Judgment and the learned High Court Judge after hearing submissions on behalf of the appellant and the respondent affirmed the judgment and the sentence of the Magistrate Court. The appellant is now before this Court being aggrieved of the said Judgment of the High Court.

Let me now advert to the facts, as narrated by the complainant.

- On the day in question, the complainant, the owner of Nandana Tea Factory Akurassa came to Colombo in a hired lorry with his carpenter Ariyadasa to purchase timber, from the Orugodawatta Depot of the State Timber Corporation for construction of a house.

- After purchasing and loading the timber, they left for Akurassa in the afternoon of the same date, as the time duration to transport the timber was given in the relevant receipts ("the permit") as 2.30 pm to 6.00pm.

- On the way to Akurassa at Gintota the lorry in which the timber was transported and the complainant was in, was intercepted by a double cab at around 5.45pm.

- The occupants of the double cab identified themselves as members of the flying squad of the Timber Corporation and examined the permit and the timber for 20-25 minutes.

A few minutes after 6.00pm when the validity of the permit lapsed, the complainant was informed that the time has lapsed and the conditions of the permit pertaining to transportation of timber were breached and the timber will have to be seized. At that point of time one of the occupants of the cab solicited the sum of Rs 2000/= to release the lorry and the load of timber and the complainant gave Rs 2000/= to the said person and they were permitted to proceed.

- Thereafter a complaint was made to the respondent.

Let me now advert to the trial albeit briefly.

The charges before the Magistrate Court were filed on 21-01-2001 and the trial began on 14-06-2002 six years after the incident. For the prosecution the evidence of the complainant, the carpenter Ariyadasa, the lorry driver Piyasena (the three persons who travelled in the lorry), the evidence of an Assistant Conservator of Forests, the Registrar of the Galle Magistrate Court and the Investigation Officer of the CIABOC were led. For the defense the appellant, the driver of the cab attached to the flying squad and two others attached to the Forest Office (a clerk and a peon) gave evidence.

The Investigation Officer in his evidence stated that upon receipt of the complaint, investigations were conducted by him, statements recorded from the three persons who travelled in the lorry and from others at the Forest Department and in October 1996 two persons attached to the Forest Office flying squad were arrested and presented at an Identification Parade at which one was identified. In November 1996, the appellant was arrested and presented for a second Identification Parade and the parade reports indicate that the appellant was identified by the complainant and the 2nd witness for the prosecution, the carpenter, as the person who examined the timber and solicited and accepted the sum of Rs 2000/=. The Investigation Officer in his evidence further said that the appellant could not be apprehended and produced at the first identification parade as the appellant was not in office during the investigation period and was supposed to have been on sick leave. Investigation Officer marked and produced the copies of the parade reports available with him at the trial without any objection. It is observed that the Investigation Officer in his evidence categorically stated that he was not present nor witnessed the Identification Parade and was giving evidence from the parade reports he had with him.

The Registrar of the Galle Magistrate Court in his evidence admitted that two Identification Parades were held but that the Records were not available at the Galle Magistrate Court as the parade reports had been forwarded to the Colombo Magistrate Court in November 1998.

Prior to delving further in to the trial and the evidence led, let me come back to the questions of law that this Court is called upon to answer in this Appeal. All six questions of law on which leave was granted by this Court, relates to the alleged failure of the learned Trial Judge to evaluate the facts and law correctly in coming to the finding that the appellant was guilty of the offence charged, namely soliciting and accepting a gratification under Section 19(c) of the Bribery Act as amended.

The said section reads as follows;
"A person-

a) ….

b) ….

c) Who, being a public servant solicits or accepts any gratification,

shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees."

Admittedly the appellant is a public officer, a forest officer attached to a flying squad. Did the appellant solicited and/or accept the gratification? This is the question that the trial judge ought to have decided. Did the prosecution prove beyond reasonable doubt, that the appellant solicited and accepted the gratification in order for the trial court to find the appellant guilty for the offence stated above.

Though leave was granted by this Court on six questions of law, the main argument of the learned President's Counsel for the appellant before this Court was with regard to the veracity of the complainant's evidence and the failure of the complainant to identify the appellant.

The learned President's Counsel placed much reliance on the Magistrate Court proceedings of day one, when the complainant in his evidence said that 'it is difficult now to identify the appellant' whereas on day two he positively identified the appellant as the person who solicited and accepted the sum of Rs 2000/=. Much emphasis was also placed by the learned President's Counsel on the proceedings at the end of the first day when the prosecution moved to consider whether the complainant should be treated as an adverse witness but on the second day continued with the evidence of the complainant without any reference to the last day's proceedings. The respondent in its written submissions before this Court suggests that since the trial began 6 years after the incident, that the complainant would not have been able to identify the appellant at once as he would have been confused and overwhelmed by the atmosphere of the court but on the second day, he would have been more settled and focused enough to identify the appellant clearly after

having refreshed his memory. However, this position was never put to the complainant by the respondent's legal officer when evidence of the complainant was led on the second day before the trial court.

The learned President's Counsel also relied on the fact that the original Identification Parade reports were not available at the trial and only uncertified copies were marked and produced by the Investigation Officer and on that basis challenged the identification of the appellant at the Identification Parade. It is observed that two Identification Parades had been held by the Magistrate of the Galle Magistrate Court in October and November 1996 and according to the evidence of the Registrar of the Galle Magistrate Court, the original parade reports had been forwarded to the Magistrate Court of Colombo in November 1998. A note made in the Colombo trial record indicates that the original parade reports had been misplaced. It is also observed that the trial proceeded on a sub-file. The respondent has not shed any light before this Court as to why the evidence of the Magistrate who conducted the parades were not led or as to why the prosecution did not move to obtain the original parade notes forwarded to the Colombo Magistrate Court. Thus, it is abundantly clear that the trial judge conducted the trial without recourse to the original Identification Parade reports though in the judgement emphasis is placed on the Identification Parade notes.

The 3rd question of law raised before this Court pertains to Identification Parade notes and this is an opportune moment to answer the said question of law. Hence, I answer the said question in the affirmative for the reasons stated above, and holds that the learned High Court Judge failed to consider that the trial judge erred in law by allowing uncertified copies of identification parade notes to be led in evidence when there was material before court that the originals had been misplaced.

Let me come back to the main contention of the appellant, the veracity of the complaint and the identity of the appellant.

According to the evidence of the complainant who was the 1st witness for the prosecution, the lorry was intercepted by a double cab in which three persons travelled and he identified one at the 1st Identification Parade and the appellant at the 2nd Identification Parade as the persons who examined the timber.

The complainant in his evidence further said the appellant and the other person identified by him, got down from the double cab at Gintota at around 5.45 pm when there was sufficient daylight and examined the permit and the length and width of the timber and counted the timber

for 20-25 minutes, until past 6pm and then informed the complainant that the timber and the lorry will have to be seized as the permitted time for transportation had passed.

Witness also said in his evidence, at first, he begged from the persons who examined the timber to be permitted to proceed as the timber was lawfully purchased and transported and when the said persons were insisting that action will have to be filed, told them to proceed and take legal action. Thereafter the complainant was given the three receipts/permits requesting the complainant to write in all the receipts, the time at which the timber was seized and signed. The complainant then borrowed a pen from the persons who examined the timber and kept the receipts on the bonnet of the double cab and was about to write on the receipts when he was stopped by one of them and told that the value of the load of timber is about Rs 60,000/= and without resorting to court procedure "to do something" and moved away. (මේකට වෙන මොකක් හරි කරන්න) Witness also said that the carpenter and the driver of the hired lorry came near the witness and said, that they are also now in trouble and do as they want. (අපිත් අමාරුවෙ වැටිලා ඉන්නේ, මහත්තුරු කියන විදියට කරන්න) The complainant then said, that one of them returned to where he was, between the lorry and the double cab and asked for Rs 2000/= and he gave it to him. Although the complainant could not make a dock identification of the appellant, in cross-examination, the witness positively identified the appellant as the person who solicited and accepted the gratification.

The learned President's Counsel for the appellant strenuously argued before us, that no reliance can be placed on this witness as the witness on the 1st day of trial indicated that it is difficult to identify the appellant but on the 2nd day of trial clearly identified the appellant. The appellant in his written submissions has taken up the position that the 180-degree turnaround of the complainant was necessitated in order to overcome him being considered an adverse witness and punished for a charge of perjury. Its noted that the respondent has failed to justify or give any reason as to why the prosecution went back on its application made on day one to consider the complainant, as an adverse witness. This brings us back to the main contention of the appellant, was the appellant properly identified? This Court has already come to a finding that the Trial Judge has erred in law in permitting Identification Parade notes to be led in evidence and placing reliance on same. Thus, in the absence of such evidence only the belated dock identification is available to pin responsibility on the appellant.

The next line of cross examination of the complainant at the trial had been that the soliciting and acceptance never took place but there was only an altercation (බහින් බස් වීමක්) between the appellant and the complainant and the appellant has alleged to have said that I will put you in trouble (මම තමුසෙව අමාරුවෙ දානවා) to the complainant which proposition the complainant categorically denied. Complainant when cross examined had taken the position that his house was

10 minutes away and if not for the interception and lengthy examination of timber that he could have easily gone home before 6 pm. Further the complainant when cross examined specifically stated that there was sufficient daylight to identify the appellant and that the complainant had never met the appellant earlier and the 1st interaction was the day of the incident, the 2nd at the Identification Parade and the 3rd at the trial. It is noted that during the cross examination of the complainant the appellant has not taken up the plea of alibi nor a suggestion made that the appellant was not in the vicinity which appears to be the defense put forward by the appellant when giving evidence at the trial.

The 2nd witness for the prosecution Ariyadasa the carpenter categorically identified the appellant at the trial as the person who solicited and accepted the gratification. It appears that at the Identification Parade too this witness has identified the appellant. However as held earlier no reliance can be placed on the Identification parade notes. This witness also referred to the appellant's statement prior to soliciting the gratification, that 'if action is filed the fine will be Rs 3000/= and the timber will perish by the time the case is concluded. There are three of us, so give us Rs 2000/= and you will not have any problems. (අපි තුන්දෙනෙක් ඉන්නවා, ඔයාට කරදරයක් නැතිවෙන්න රු.2000.00/= දෙන්න)

The 3rd witness Piyasena the driver of the hired lorry was specific in his evidence with regard to the incident but did not identify the appellant. It's observed that the appellant has not taken up the plea of alibi when cross examining the 2nd and 3rd witness.

Though it appears that the veracity of the complaint is genuine, the fundamental flow in this appeal is that the prosecution has failed to establish beyond reasonable doubt, the identity of the person who solicited and accepted the gratification from among the three members of the flying squad who stopped and examined the lorry load of timber at Gintota especially in the light of the complainant's belated dock identification. It is significant that only one person was charged but the prosecution failed to identify clearly and beyond reasonable doubt that it was the appellant who solicited and accepted the gratification. The learned Magistrate and the learned High Court Judge also failed to evaluate and analysis this significant piece of evidence regarding the identity of the appellant, especially in a scenario where the Identification Parade notes as held earlier, could not be relied upon either as substantive or corroborative evidence.

The 1st and 2nd questions of law raised before this Court pertains to the failure of the Learned High Court Judge to consider whether the learned trial judge applied the standard of proof applicable in a criminal case correctly and whether the learned trial judge failed to evaluate the

infirmities of the prosecution case correctly .In view of the analysis given above, especially with regard to the identity of the appellant, I answer the said two questions of law in the affirmative.

The appellant's defense at the trial was that the appellant was at the Matara Office on the day in issue and not on flying squad duty. The evidence of the 2nd witness for the defense, namely the driver of the cab allocated to the flying squad was that he took the cab alone to Galle office to change the tyres on the day in question. Both parties heavily relied upon the day books and running charts to justify their position. The prosecution in its cross examination took up the position that all these records are maintained by the individuals concerned and was not subjected to approval from higher ups of the Forest Department. The learned trial judge considered the said evidence and disbelieved the said witnesses and found the appellant guilty of the offence. At the hearing of the appeal before the High Court, the learned High Court Judge also disbelieved the position of the defense, though the plea of alibi was strenuously argued before the High Court, by the learned President's Counsel who appeared for the appellant at that point of time.

J.A.N. de Silva CJ in **Jayatissa Vs Attorney General [2010] 1 SLR page 279** discussed in detail the plea of alibi and referred to certain fundamentals to be observed when an alibi is set up as a defense. In the instance case before us the plea of alibi was taken up belatedly, when evidence for the defense was led and this proposition was not put forward to any of the witnesses for the prosecution. As stated in **Jayatissa's case** when an alibi is taken up belatedly the credibility of the alibi will be less and a false alibi will weaken the defense case and strengthen the prosecution case.

In **Attorney General Vs Sandanam Pitchi Mary Theresa 2011(2) SLR page 292** Shirani Thilakawardena, J. dealt with the proper analysis and assessment of evidence and laid down many guidelines and at page 300 stated, the spontaneity or the promptness in which a witness makes a statement to the police would accrue in favour of the credit worthiness of the witness, as it precludes the time needed for deliberate fabrication.

However, in the instant case it is not necessary for this Court, now to evaluate and analysis the weight of evidence led by the prosecution against the weight of evidence led by the defense, with special reference to the plea of alibi, since as discussed in detail earlier a more fundamental issue cropped up pertaining to the identity of the appellant specifically in view of the failure of the complainant to identify the appellant in the dock on day one of the trial. Moreover, it was transpired during the hearing before this Court that the original Identification Parade notes were not available at the trial and the evidence of the Magistrate who conducted the parades was not led. Only uncertified copies of parade notes produced and marked by the Investigation Officer at the trial, were briefed to this Appeal. This Court is thus, not privy to the said evidence and no reliance is

placed on the identification of the Appellant at the Identification Parade, leaving only the dock identification of the Appellant, which too was belatedly made by the complainant.

This Court has already answered the 1st, 2nd and 3rd questions of law in the affirmative in favour of the appellant.

For the reasons enumerated above, I am of the view that the conviction and the sentence imposed on the accused-appellant-appellant cannot be sustained. Accordingly, I set aside both the judgements of the learned Magistrate as well as the learned High Court Judge and make order acquitting the accused-appellant-appellant of all charges.

In view of the above finding, answering the 4th, 5th and 6th questions of law on which leave was granted will not arise.

The appeal of the Accused-Appellant-Appellant is allowed.

Judge of the Supreme Court

Nalin Perera, Chief Justice.

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

SC APPEAL NO.26/2013
SC/HCCA/LA No.154/2012

NCP/HCCA/ARP/842/2010.
D.C. Polonnaruwa case No.11585/L/06.

In the matter of an Application for Leave to Appeal from the Judgment dated 13-03-2012 in NCP/ HCCA/ ARP No.842/2010(F) in terms of Section 5C(1) of the Act No. 54 of 2006.

Hennkachchi Gedara Rasika Kumara Prematilaka Bandara.
No. 576, Kirimetiyawa,
Galamuna.

Plaintiff

Vs.

H.G. Gnanawathie,
No. 245, Co- operative Junction,
Kirimetiyawa, Galamuna.

Defendant

AND THEN,

Hennkachchi Gedara Rasika Kumara Prematilaka Bandara.
No. 576, Kirimetiyawa,
Galamuna.

Plaintiff-Appellant.

Vs.

H.G. Gnanawathie,
No. 245, Co- operative Junction,
Kirimetiyawa, Galamuna.

Defendant-Respondent.

AND NOW BETWEEN,

H.G. Gnanawathie,
No. 245, Co- operative Junction,
Kirimetiyawa, Galamuna.
Defendant-Respondent-Appellant

Vs.

Hennkachchi Gedara Rasika Kumara
Prematilaka Bandara.
No. 576, Kirimetiyawa,
Galamuna.
Plaintiff-Appellant-Respondent

BEFORE : **PRASANNA JAYAWARDENA, PC, J.**
P. PADMAN SURASENA, J. and
S. THURAIRAJA, PC, J.

COUNSEL : H. Withanachchi for the Defendant-Respondent- Appellant.
Lal Wijenayake for the Plaintiff- Appellant- Respondent.

ARGUED ON : 26th February 2019.

WRITTEN SUBMISSIONS: Plaintiff-Appellant-Respondent on 19th March 2019 and 28th June 2018.

Defendant- Respondent-Appellant on 06th May 2019 and 18th March 2013.

DECIDED ON : 1st of November 2019.

S. THURAIRAJA, PC, J.

The Defendant-Respondent –Appellant (hereinafter referred to as the "Appellant"), Hennakatchi Gedara Gnanawathie filed this appeal and leave was granted on the 1st of February 2013, on the following questions of law contained in paragraph 15(i), (v) and (vi) of the Petition dated 24th April 2012 as amended by petition dated 23rd June 2012. For the purpose of easy reference they are reproduced as below.

(i) Was the Civil Appellate High Court in error by not appreciating the failure of the Respondent to discharge the burden of establishing his title to the land in dispute?

(v) Did the High Court err in law, by disregarding the evidence led on behalf of the Petitioner to the effect that the impugned document (P1) relied upon by the Respondent had not been issued in compliance with the requirements of the law under the Land Development Ordinance?

(vi) Were the learned High Court Judges misdirected themselves on the question of the validity of the purported insertion of the name of the Respondents as the grantee of the land in suit in "P1" in violation of the provisions of the Land Development Ordinance?

In addition to the above Respondent suggested the following questions of law.

"*Is the Defendant- Respondent-Appellant is entitled to seek possession of the subject matter of this case without an order nullifying the permit marked as P1"*

Both Counsel have filed their written submissions and the matter was argued before this bench and both Counsel have filed additional written submissions.

According to the facts of this case, Hennakatchi Gedara Kiribanda (hereinafter referred to as the "original Grantee") was given a State Grant in respect of a paddy land bearing No. අඑ/ඉ 1436 dated 26/01/1982 containing in extent 4A- 0R- 23P under Section 19(6) to be read with Section 19(4) of the Land Development Ordinance. Thereafter Original Grantee namely Hennakatchi Gedara Kiribanda passed away intestate in 1998 without nominating a successor to the land. His wife Meragammana Gedara Heenamma was given life interest over the said land. The deceased Hennakatchi Gedara Kiribanda had one son and ten daughters. Grandson, Hennakatchi Gedara Rasika Kumara Prematilaka Bandara (son of the sole son of the

deceased) claimed permit to the said land from the State. After an inquiry, upon the death of the said Kiribanda, by letter of the Divisional Secretary of Lankapura bearing reference No.NCP/LP/LD/ගල්/722 the Plaintiff-Appellant-Respondent, Hennakachchi Gedara Rasika Kumara (hereinafter referred to as the "Respondent") became the permit holder/ successor to the said paddy land.

Respondent claimed that, the Appellant, H.G. Gnanawathie (a daughter of the original grantee) at the material time to this action, without leave and licence of the Respondent, was in forcible possession in respect of the said paddy land standing to the North of the entire land. The Respondent filed an action at the District Court of Polonnaruwa and asked for a declaration that,

i. the Respondent was the Grant Holder and/or owner of the land described in the First Schedule to the Plaint,
ii. ejectment of the appellant and the persons holding under her from the land described in the Second Schedule to the Plaint and the delivery of undisturbed possession to the Respondent,
iii. damages in a sum of Rs. 150/- per season from June 2006.

The Respondent in his Plaint dated 16/11/2006 had averred inter alia as follows.

i. That under the Land Development Ordinance Grant bearing No. ඵ/ඵ 1436 dated 26/01/1982 was issued in favour of the Hennakachchi Gedara Kiribanda in respect of the paddy land containing in extent 04A-00R-23P and morefully described in the First Schedule to the Plaint.
ii. That upon the death of the said Kiribanda, by letter of DivisionalSecretary of Lankapura bearing reference No. NCP/ LP/ LD/ ගල්/722 the Respondent became owner of the said land.

iii. That the Appellant at the time material to this action without the leave and licence of the Respondent was in forcible possession in respect of a portion of the said land standing to the North of the entire land and described in the Second Schedule to the Plaint.

iv. That Proceeding were held in the Hingurakgoda Primary Court under No.16910 in relation to the dispute between the Respondent's mother and the Appellant in respect of the subject matter in the instant action described in the Second Schedule to the Plaint.

v. That the Appellant had failed to respond to the notice issued to the Appellant demanding her to quit the land in dispute.

The Appellant filed her answer dated 25/02/2008 stating inter alia as follows.

i. That the Appellant with leave and licence of her father came to the possession of the land referred to in the Grant bearing No. ඔ)/ළ 1436 during the life of her father and the Appellant allowed the Respondent's father to posses 2 Acres of the land.

ii. That the father had eleven children and the Respondent's son was the sole male child of her family.

iii. That the Appellant was restored to the possession of the land in dispute by order dated 04/01/2006 in the proceedings held in Hingurakgoda Primary Court between the Appellant and the Respondent's mother.

iv. That the life interest in the Grant bearing No. ඔ)/ළ 1436 was passed to her mather, Meeragammana Gedara Heenamma after the death of her father and the said Heenamma had not relinquished her life interest to the property in suit.

v. That upon the delivery of the order in case No.16910 in favour of the Appellant, several inquiries were held before the Divisional Secretary of

Lankapura and the Appellant objected to the change of the original title in respect of the Grant bearing No. ඔ)/ළ 1436.

vi. That the Divisional Secretatry of Lankapura had not complied with the provisions of the Land Development Ordinance at the time of the issue of document marked "ඇ 1" and hence the said document was null and void.

vii. That the Appellant had made improvements to the value of Rs. 200,000/- to the land referred to in the Grant bearing No. ඔ)/ළ 1436.

After the trial learned District Judge delivered the judgment on 23/07/2010 in favour of the Appellant and dismissed the Respondent's action. Learned District Judge, among other grounds, based her decision on the following grounds.

i. That as per the evidence, all the parties were not present at the inquiry held in order to transfer the right to the Respondent and a statement had not been recorded from the Appellant at the said inquiry.

ii. That the document marked "ඇ 1" had no validity in law by reason that it was not issued in compliance with the provisions of the Land Development Ordinance.

iii. That the Respondent had failed to establish his title based on a valid document issued in terms of the provisions of the Land Development Ordinance.

Being aggrieved with the said judgment Respondent appealed to the Provincial High Court of North Central Province (hereinafter referred to as the 'High Court"). Thereafter High Court delivered the judgment on 13/03/2012 and allowed the appeal. Learned High Court Judges among other things based their decision on the following grounds;

i. That the Respondent had established his title upon documents produced and the evidence led at the trial and hence action should be decided in favour of the Respondent

ii. That the Appellant had failed to challenge the evidence to the effect that, Heenamma had transferred her rights to the land in dispute to the Respondent.

iii. That the Appellant could not challenge the validity in relation to the transfer of title to the Respondent in the District Court and the Appellant could have challenged the validity thereof only by way of writ in a competent court namely Court of Appeal.

Being aggrieved with the said, the Appellant had filed this appeal before this Court.

I have carefully considered the material before the District Court and the learned Judges of the Provincial High Court, I observed that, the Divisional Secretary who issued the said permit and his officials had given evidence before the Learned District Judge (appear at pages 60-109 of the appeal brief). There it was stated and evidenced that, all the relevant parties namely, the Appellant and the other daughters were summoned for an inquiry and relevant parties did not object and gave their consent to grant the leave and licence to the Respondent. Being convinced with the materials before him the Divisional Secretary using his authority had decided that the Respondent is entitled to succeed under Section 72 of the Land Development Ordinance which is read with Rule 1 of the third Schedule of the Ordinance as amended.

Third schedule to the Section 72 reproduced as follows;

"72. If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this

Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19At or to the holding of an owner shall, upon the death of such permit-holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule I of the Third Schedule.

I. (a) The groups of relatives from which a successor may be nominated for the purposes of section 51 shall be as set out in the subjoined table.

(b) Title to a holding for the purposes of section 72 shall devolve on one only of the relatives of the permit holder or owner in the order of priority in which they are respectively mentioned in the subjoined table, the older being preferred to the younger where there are more relatives than one in any group.

i.	*Sons.*	*vii.*	*Brothers.*
ii.	*Daughters*	*viii.*	*Sisters.*
iii.	*Grandson*	*ix.*	*Uncles.*
iv.	*Granddaughters.*	*x.*	*Aunts.*
v.	*Father.*	*xi.*	*Nephews.*
vi.	*Mother.*	*xii.*	*Nieces.*

In this rule, "relative" means a relative by blood and not by marriage."

Respondent has proved before Court on balance of probability that he is the lawful successor to the disputed land.

Under the Declaration of Title action a person is expected to submit a title if available. There, the Respondent had submitted the letter of Grant, granted by the Divisional Secretary of Lankapura to him.

In **Piyasena vs. Wijesinghe and other (2002) SLR Vol 2, page 242** it was held that,

> *"Issuance of a grant changes the status of a permit holder to that of a 'owner' who derives title to the land in question. The owner - includes the permit holder who has paid all sums which he is required to pay. The satisfaction of paying all sums and complying with all conditions entitles that permit holder to a grant which 'shall' be issued in terms of s. 19 (4)."*

In **Bandaranayake vs. Karunawathie (2003) SLR Vol 3 page 295** it was held that,

> *"Permit-holder under the Land Development Ordinance enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser."*

It is settled law that in Declaration of title actions the plaintiff must prove his title. In establishing his title the plaintiff cannot rely on the weakness of the defendant's title. In this appeal I have to consider whether the plaintiff has established his title or not and I am of the view that, Respondent had established his title.

The Judgment of the learned District Judge questioning the validity of the succession of the plaintiff to this land has no acceptable basis. The learned Judge of the High Court correctly held that, the learned Judge of the District Court has erred. Hence, I answer the first question of law negatively.

The question of law raised by the Respondent namely, whether "the Defendant-Respondent is entitled to seek possession of the subject matter of this case without

an order nullifying the permit marked as P1", will not arise on considering the above circumstances. Hence, I find this question need not be answered.

Considering all facts and circumstances I find that, all these questions of law raised before this Court cannot be sustained hence all are answered in the negative. I find there is no merit in this appeal. Therefore, I dismiss the appeal with costs and I fix the cost at Rs. 25,000/.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

PRASANNA JAYAWARDENA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

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 No. 54 of 2006

Kaluthanthrige Dona Jayaseeli

No. 352,

Rajasingha Mawatha,

Hewagama, Kaduwela.

Plaintiff

Vs.

SC Appeal No. 29/2016

SC/HC (CA) LA No. 675/2014

HCCA Colombo Case No: WP/HCCA/COL/39/2013 (RA)

DC Homagama Case No: 3559/P

1. Kaluthanthirige Dona Dayawathi
   No. 2/6, Pannawala,
   Delgoda.

2. Kaluthanthirige Dona Karunawathi
   No. 47, Pegiriwatta Road,
   Gangodawila, Nugegoda.

3. Kaluthanthirige Don Karunadasa
   No. 159, Hewagama,
   Kaduwela.

3A. U.A. Chandrawathie

No. 159, Hewagama,

Kaduwela.

4. Kaluthanthirige Dona Gunaseeli
   residence unknown

5. Liyana Arachchige Podisingho
   No. 185, Hewagama,
   Kaduwela.

5A. Liyana Arachchige Dona
   Leelawathie
   No. 185, Hewagama,
   Kaduwela.

6. Kaluthanthirige Dona Rupawathi
   No. 152/1, Hewagama,
   Kaduwela.

7. Weligama Arachchige Somadasa Perera
   152/5, Hewagama,
   Kaduwela.

Defendants

AND

Kaluthanthrige Dona Jayaseeli
No. 352,
Rajasingha Mawatha,
Hewagama, Kaduwela.

Plaintiff – Petitioner

Vs.

1. Kaluthanthirige Dona Dayawathi
   No. 2/6, Pannawala,
   Delgoda.

2. Kaluthanthirige Dona Karunawathi
   No. 47, Pegiriwatta Road,
   Gangodawila, Nugegoda.

3. Kaluthanthirige Don Karunadasa
No. 159, Hewagama,
Kaduwela.

3A. U.A. Chandrawathie

No. 159, Hewagama,

Kaduwela.

4. Kaluthanthirige Dona Gunaseeli
residence unknown

5. Liyana Arachchige Podisingho
No. 185, Hewagama,
Kaduwela.

5A. Liyana Arachchige Dona

Leelawathie

No. 185, Hewagama,
Kaduwela.

6. Kaluthanthirige Dona Rupawathi
No. 152/1, Hewagama,
Kaduwela.

7. Weligama Arachchige Somadasa Perera
152/5, Hewagama,
Kaduwela.

Defendants – Respondents

AND BETWEEN

Kaluthanthrige Dona Jayaseeli

No. 352,
Rajasingha Mawatha,
Hewagama, Kaduwela.
Presently at;
No. 343/14,
Rajasingha Mawatha,
Hewagama, Kaduwela

Plaintiff – Petitioner – Petitioner

Vs.

1. Kaluthanthirige Dona Dayawathi
   No. 2/6, Pannawala,
   Delgoda.

2. Kaluthanthirige Dona Karunawathi
   No. 47, Pegiriwatta Road,
   Gangodawila, Nugegoda.

3A. U.A. Chandrawathie

No. 159, Hewagama,

Kaduwela.

4. Kaluthanthirige Dona Gunaseeli
   residence unknown

5A. Liyana Arachchige Dona

Leelawathie

No. 185, Hewagama,
Kaduwela.

6. Kaluthanthirige Dona Rupawathi
   No. 152/1, Hewagama,
   Kaduwela.

7. Weligama Arachchige Somadasa Perera
   152/5, Hewagama,
   Kaduwela.

Defendants – Respondents – Respondents

AND NOW BETWEEN

Kaluthanthrige Dona Jayaseeli
No. 352,
Rajasingha Mawatha,
Hewagama, Kaduwela.
Presently at;
No. 343/14,
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Hewagama, Kaduwela

Plaintiff – Petitioner – Petitioner – Appellant

Vs.

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   No. 2/6, Pannawala,
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   No. 47, Pegiriwatta Road,
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No. 159, Hewagama,

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Residence unknown

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No. 152/1, Hewagama,
Kaduwela.

7. Weligama Arachchige Somadasa Perera
152/5, Hewagama,
Kaduwela.

Defendants – Respondents –
Respondents - Respondents

Before: Priyantha Jayawardena, PC, J

Prasanna Jayawardena, PC, J

Vijith K. Malalgoda, PC, J

Counsel: Manohara de Silva, PC for the plaintiff – petitioner – petitioner – appellant

Edward Ahangama for the 5A defendant – respondent – respondent – respondent

Argued on: 03rd of December, 2018

Decided on: 28th of February, 2019

Priyantha Jayawardena, PC, J

Facts of the case

The plaintiff – petitioner – petitioner – appellant (hereinafter referred to as the "appellant") filed an action in the District Court of Homagama seeking to partition a land.

Being aggrieved by an interlocutory order made in the said case, the appellant had preferred a revision application to the High Court of the Western Province holden in Colombo, established under Article 154P of the Constitution which exercises civil appellate and revisionary jurisdiction within the Western Province.

When the said revision application was taken up for support, a preliminary objection had been raised on behalf of the 5A substituted – defendant – respondent in respect of the jurisdiction of the said High Court holden in Colombo exercising civil appellate and revisionary jurisdiction on the basis that the said High Court had no jurisdiction to hear and determine the aforementioned revision application, as the impugned order was delivered by the District Court of Homagama.

Further, the 5A respondent had submitted that the said revision application should have been filed in the High Court holden in Avissawella, exercising civil appellate and revisionary jurisdiction, since the application was against an interlocutory order delivered by the District Court of Homagama.

The appellant had taken up the position that in view of Section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, any High Court exercising civil appellate and revisionary jurisdiction situated within the province has appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court within such Province.

After hearing the submissions made by the parties on the said preliminary objection the said High Court of the Western Province holden in Colombo had upheld the said preliminary objection and dismissed the said revision application. Further, the said High Court had held that the said revision application should have been filed in the High Court holden in Avissawella exercising civil appellate and revisionary jurisdiction.

Being aggrieved by the said judgment, the appellants filed an application seeking leave to appeal and accordingly, this court granted leave to appeal on the following questions of law.

(i) Did the High Court err in holding that the High Court of the Western Province holden in Colombo had no jurisdiction to revise a judgment or order of the District Court of Homagama?

(ii) Was the High Court misdirected, and err in law by failing to properly consider and interpret Section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 154P (1) and Article 154P (3) of the Constitution?

(iii) Was the High Court misdirected, and err in law in upholding the objection made by the respondent in respect of the jurisdiction of the High Court of Colombo established by Article 154P of the Constitution?

Did the High Court err in holding that the High Court of the Western Province holden in Colombo had no jurisdiction to revise a judgment or order of the District Court of Homagama?

According to Section 5A (1) of the said Act as amended, a High Court established in a province under Article 154P of the Constitution is conferred with jurisdiction to exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court within such province.

Section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended states as follows;

> *"**A High Court** established by Article 154P of the Constitution **for a Province**, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court **within such province** and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be."* [Emphasis added]

There are nine provinces in Sri Lanka. For the purpose of administration of justice, several High Courts exercising civil appellate and revisionary jurisdiction have been established in each province, taking into consideration the population of each province and the number of cases filed in those provinces. Under and in terms of the said section, the said High Courts are

conferred with jurisdiction to hear and determine appeals and revision applications arising from the judgments and orders by any District Court and Family Court situated within such province.

At present, the High Courts of the Western Province exercising appellate and revisionary jurisdiction are established in Colombo, Avissawella, Kalutara, Gampaha, Negombo, Homagama and Mount Lavinia. There are similar arrangements in the other provinces as well.

The appellant submitted that the District Court of Homagama is situated within the Western Province and the High Court holden in Colombo exercising civil appellate and revisionary jurisdiction has jurisdiction to hear the revision application under reference.

This requires the consideration of the phrase "within such province" referred to in Section 5A (1) of the said Act as amended.

According to the *Oxford English Dictionary* (Second Edition), at Page 456, the word 'within' is defined as follows;

> "In the limits of, or in the inner part of, a space or region, especially a city or country, in the place or realm."

Furthermore, *Collins English Dictionary* and the *Compact Oxford English Dictionary* defines the word 'within' as;

> "Not beyond the limits of", and
> "Inside the range or bounds of" respectively.

Therefore, any High Court established in a Province under section 5A (1) of the said Act as amended, has jurisdiction to hear appeals and revision applications in respect of judgments and orders delivered by any District Court or Family Court within the boundaries of such province.

Thus, I am of the view that any such High Court situated within the Western Province has jurisdiction to hear all appeals and revision applications arising from the judgments and orders delivered by any District Court or Family Court situated within the Western Province.

In the circumstances, I hold that the High Court of Western Province holden in Colombo exercising civil appellate and revisionary jurisdiction established under and in terms of section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, has jurisdiction to hear appeals and revision application in respect of judgments and decrees

delivered by the District Court of Homagama as the District Court of Homagama is situated within the Western Province.

Accordingly, the aforementioned question of law is answered as follows;

> Did the High Court err in holding that the High Court of the Western Province holden in Colombo had no jurisdiction to revise a judgment or order of the District Court of Homagama? - Yes

In view of the above conclusion, it is not necessary to consider the other questions of law in this appeal.

Accordingly, I allow the appeal and direct the High Court of the Western Province holden in Colombo exercising civil appellate and revisionary jurisdiction to consider the said revision application according to law and deliver a judgment.

No costs.

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**

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

In the matter of an application under the provisions of High Court of the Province (Special Provisions) Act No.19 of 1990 as amended by the Act No.54 of 2006, for leave to appeal against judgement dated 11/09/2012 delivered by the High Court of the Southern Province in SP/HCCA/GA/0030/2006 (F) D.C. Galle Case No.13556/L.

S.C. Appeal No.31/2013,

S.C.HCCA/LA No.444/2012,

S.C.HCCA/GA/Appeal No.030/2006 (f),

D.C.Galle Case No.13556/L

Dona Premawathie
Kodithuwakkurachchi,
'Seedevi', Narawala,
Poddala.

Plaintiff

Vs.

1. Kuragodage Sujitha Gunawathie

2. Piyasena Annatta Pathirana alias A.P. Gunadasa both of Post Office Quarters, Poddala.

Defendants

Dona Premawathi
Kodithuwakkuarachchi,
'Seedevi', Narawala,
Poddala.

Plaintiff -Appellant

Vs.

1. Kuragodage Sujitha Gunawathie
2. Piyasena Annatta Pathirana alias A.P. Gunadasa both of Post Office Quarters, Poddala.

Defendant –Respondent

And Now Between

1. Kuragodage Sujitha Gunawathie
2. Piyasena Annatta Pathirana alias A.P. Gunadasa both of Post Office Quarters, Poddala.

Defendant-Appellant-Petitioner

Vs.

Dona Premawathi
Kodithuwakkuarachchi,
'Seedevi', Narawala,
Poddala.

Plaintiff-Appellant-Respondent

Before: Buwaneka Aluwihare PC, J.

Priyantha Jayawardena PC, J.

L.T.B.Dehideniya, J.

Counsel: Dr. S.F.A.Cooray with Ms. Sudarshani Cooray and Nilanga Perera for the Defendant-Respondent –Appellants.

Manoj de Silva instructed by Dhammika Gabadage for the Plaintiff-Appellant-Respondent

Argued on: 02.03.2018

Decided on: 05.04.2019

L.T.B.Dehideniya J,

The Plaintiff –Appellant- Respondent (hereinafter sometime called and referred to as the Respondent) has appealed to this court against the Defendant-Respondent- Appellants (hereinafter sometime called and referred to as the Appellants) to seek a revocation of a Deed of Gift No: 25057 dated 24.07.1994 subject to the life interest of Respondent on the ground of 'gross ingratitude' on the part of the 1st Appellant.

It appears from the circumstances of the case that, the Respondent has gifted the property to the 1st Appellant for the affection towards her. The 1st Appellant has resided with the Respondent and her ailing husband providing due care and support to both of them. The 2nd Appellant was at that time employed in Katuwana as a post master, travelling regularly to see his wife (1st Appellant) and the children. Simultaneously, he has provided care and support to the Respondent and her husband.

The deed of gift which is subjected to the discussion in this case was executed on 24-06-1994 subsequent to the death of the Respondent's husband. The date on which the Respondent's husband died was 12-06-1994. The Respondent's position was that the 2nd Appellant was handed over the original of her deed with the intention of preparing the impugned deed, 2 or 3 days before the execution of the deed. This position is rejected by the 2nd Appellant and he produced evidence before the court to prove that, he was working at his workplace in Katuwana, for continuous 05 days prior to the execution of the deed. With this allegation, the Respondent further holds the position, that there was an inducement on the part of the 2nd Appellant at the point of executing the deed and reiterates that there was an inducement to execute the deed by deceit. The inducement as the Respondent discloses, was a request to transfer the property to enable him to obtain a telephone connection. The Appellants denied this connection.

The Respondent's contention is that, she was the chief householder and the 1st Appellant was a resident in her household. The Respondent further states that, she was induced to execute the deed in favour of 1st Appellant. Once the deed was executed the 1st Appellant on two occasions had taken the keys of the house with

them leaving the Respondent at home. The main complaint which was directed against the 1st Appellant was the maltreatment. The Respondent states that, the 1st Appellant offered her stale food or food without proper complementary curries. Further, the Respondent alleges that, the 1st Appellant left the house with her family on 15th January and 28th March 1997, and on the latter date, she resided at the official quarters of Poddala Post Office where her husband (2nd Appellant) was working.

The 2nd Appellant was employed as a Post master attached to the Postal Department. The children of them were attending to the schools in Katuwana and the family was spending a highly contended life in 2nd Appellant's hometown in Katuwana. The 1st Appellant has revealed that, there was a close relationship between the Respondent and her from childhood. Both Appellants emphatically state that, they do not have a trace of ill will towards their relations.

This matter proceeded to trial at the District Court and the Learned District Judge delivered the judgement in favour of the Appellants.

The Learned District Judge scrutinized the allegations which were made by the Respondent against the Appellants on the ground of 'gross ingratitude'. He highlighted the fact that the Respondent attempted to establish ingratitude, by stating that, the 1st Appellant has made a differentiation between her children and the Respondent when preparing meals. What the District Judge emphasizes in his judgement is that, a single instance related to the preparation of meals within the family unit in which the Respondent and the Appellants live with their children is not sufficient to blame it on the 1st Appellant. Further, the contention of the District Judge specified that, 1st Appellant's act of preparing a special kind of

meal to her children at the schooling stage is not a reason to revoke a notarialy executed deed on the ground of 'gross ingratitude'. The Respondent's evidence clearly show that, she had lived with the Appellants for a considerably long period of time. In such a condition, the Respondent's complaint over a trifle matter connected to a meal on the ground of ingratitude is not of much importance.

The view of the Learned High Court judge is different from what the District Judge held. According to her viewpoint, the deed was executed by the Respondent, by considering her own condition of life as a childless widow, and with the expectation that the 1st Appellant will look after her with care and kindness. Subsequently, the Respondent needed to revoke the deed upon the understanding that her expectation is not fulfilled by the 1st Appellant, and she was mentally crestfallen due to the acts of the 1st Appellant. The learned high court judge further held the view that, the Respondent being an aged childless widow confronted a helpless situation in her life due to the conduct of the Appellants and the Appellants' acts reflect 'gross ingratitude'.

The Appellants being the Petitioners sought to leave to appeal from this court on the following questions of law and the court granted leave on all the said questions. The said questions are,

1) Did the learned High Court Judge err in Law by intervening the judgement of the learned District Judge without analysing the evidence of this case;

2) Did the learned High Court Judge err in Law by not considering that the Appellant's main complaint of maltreatment by the 1st Respondent is in respect of offering her stale food or food without proper complementary

curries and that this position is a total fabrication on her part to conjure up this false case;

3) Did the learned High Court Judges err in law by failing to consider that the law pertaining to the revocability of an irrevocable deed of gift on the ground of ingratitude constitutes a grave causes like assault or acting in manner which an attempt at the life or limit or some atrocious conduct is attributed to the donee;

4) Did the learned High Court judges err in law by coming to the conclusion that, there was gross ingratitude on part of the Petitioners;

The Respondent's main allegation against the 1st Appellant is the maltreatment accompanied with 'gross ingratitude' and further emphasizes it as the basis for the revocation of the deed of gift. In the general sense, there are certain instances where it is authorized by the law, for the revocation of a deed of gift.

In **Kirshnaswamy vs. Thillaiyampalam NLR 265**, Basnayake C.J held that, gift is generally irrevocable but some exceptional instances renders it revocable.

1) *If the donee failed to give effect to a direction as to its application (donatio sub mode) or*
2) *On the ground of the donee's ingratitude or*
3) *If at the time of the gift, the donor was childless but afterwards became the farther of a legitimate child by birth or legitimation.*

It is clear that, the Respondent is legally entitled to revoke the deed of gift on 'gross ingratitude'. But, the term 'gross ingratitude' does not denote a ground of revocation which can easily be utilized by a donor to revoke a deed of gift under his own whims and fancies. Justice Bandaranayake further identifies the instances of ingratitude to revoke a deed of gift and further, followed and emphasized by Justice Amarasinghe in **Dona Podi Nona Ranaweera Menike vs. Roshini Senanayake [1992] 2 Sri.LR 180.**

1) *If the donee lays 'manusimpias' (impious hands) on the donor.*
2) *If he does him an atrocious injury.*
3) *If he wilfully causes him great loss of property.*
4) *If he makes an attempt on his life.*
5) *If he does not fulfil the conditions attached to the gift.*
6) *Other, equally grave causes.*

It is apt to consider the acts of ingratitude which have been complained by the Respondent. Her contention is that, the 1st Appellant with her family left the house on or about 15th January 1997 isolating the Respondent at home and the Respondent confronted the same situation on or about 28th March 1997, when the 1st Appellant left with her family to reside at the official quarters allocated to the 2nd Appellant at the Poddala Post Office. The Respondent's contention is that, it was an act of ingratitude to leave her alone in the empty house and the situation aggravated due to the fact that she is a widow.

Basnayake C.J. said regarding the commission of a single act or serious acts relating to ingratitude, is of predominant concern. His Lordship states as follows,

'There is nothing in the books which lays down the rule that a revocation may not be granted on the commission of a single acts of ingratitude. Ingratitude is a frame of mind which has to be inferred from the donee's conduct. Such an attitude of mind will be indicated either by a single act or by series of acts.'

This court has to decide whether, the 1st Appellant's act of leaving the house with her family constitutes an act of 'gross ingratitude' in the eyes of law. With the advancement of the society, the family has become the smallest social unit of the society. The 1st Appellant being married to a government servant, and a mother has her own commitments in life. It is clear from the facts of the case, that the 1st Appellant was providing due care and support to the Respondent and her late husband while residing with her. The 2nd Appellant similarly treated the Respondent with care while keeping her in the same footing as his family. The evidence clearly show that, there was a close relationship subsisting between the Appellants and the Respondent. After the demise of the husband, the Respondent had a joint bank account with the 2nd Appellant and the money had been withdrawn by the Respondent in December 1996. This shows that, the Appellants were trustworthy to the Respondent which implies that, there was an impression on the part of the Respondent which is positive in nature towards the Appellants. Generally, a person may not enter into a monetary bond with another, if there is any doubt of existing or imminent maltreatment on latter's part. This is contrary to the view of the Learned High Court Judge, which says that, the Respondent was helpless with the conduct of the Appellants. The Respondent herself was confident with her life spent with the Appellants, and it is apparent to this court that, the Respondent attempts to create a chaos over a trifle matter she confronted or imagined may be. This clearly reiterates the view which was held by the

District Judge, which he stated that, a trifle matter in connection with a meal is not of high importance to revoke a deed on the basis of 'gross ingratitude'.

The Learned District Judge is logical in his viewpoint on the preparation of meals by the 1st Appellant. What the District Court judge attempted to emphasize was that, the 1st Appellant being a mother preparing a special kind of meal for the children at the schooling stage does not amount to an act of ingratitude. An act of a mother offering her children with a special cannot be criticized as an act which treated an adult with gross ingratitude and is a trivial ground for this court to revoke a deed. It is a matter of less importance and in the eyes of law 'preparation of a meal' is purely a subjective matter that depends on one's sentimentality.

There is another controversy regarding the view of the Learned High Court Judge; the Appellants leaving the house amounts to an act of gross ingratitude. What the High Court Judge attempted to convince was that, the Respondent executed the deed in favour of the 1st Appellant, with the intention that, she would be looked after by her with due care and affection and leaving her alone at house is prima facie ingratitude. It is clear that in Sri Lanka, the exigencies of the Public Service necessitate the government servants to work in distant areas, and more or less they have to live apart from their families. The 2nd Appellant was a government servant who worked as a Post Master attached to the Postal Department. Previously, he was working in Katuwana and the evidence show that he treated the Respondent with sufficient care and support by considering her as a member of his own family. It is evident, that he regularly travelled from Katuwana to the place where the 1st Appellant lived with children and the Respondent. Subsequently, the 2nd Appellant had started working as a post master in Poddala Post office and he had the facility of a quarters there. The family moved to reside

at the official quarters. The law does not see any misconduct on the side of a party who quitted a residence to live at an official residence the party was lawfully entitled to. As far as the situation of the Appellants is concerned, it is not only an exigency of the public service, but also an exigency of their nuclear family as well. The Respondent's attempt to establish an act of ingratitude on the basis of leaving the home is apparently selfish in nature.

In the perusal of facts of the case, it is evident that the act or a series of acts alleged by the Respondent against the Appellants are slight. It is worthy to consider the view of Basnayake C.J in **Kirshnaswamy vs. Thillaiyampalam (Supra)**. His Lordship cited a passage of Voet at page 269 as follows;

> *'Of course slighter causes of ingratitude are by no means enough to bring about a revocation. Although both the laws and right reason entirely condemn every blot and blemish of ingratitude, albeit somewhat slight, nevertheless, they have not intended that for that reason, it should be forthwith penalized by revocation of the gift.'*

The Respondent has alleged that the Appellants conduct in preparing meals and a series of acts related to the offering of food constitute an act of gross ingratitude. This is contrary to the general principles of law, which reiterate the fact that, an act of ingratitude, which is sufficient to revoke a deed should be 'grave' in nature. As stated in, **Dona Podi Nona Ranaweera Menike vs. Roshini Senanayake (Supra),** an act of gross ingratitude which is grave in nature symbolizes a physical trauma inflicted by the donee on the donor. This may take different actions namely, laying impious hands on the donor, causing injuries which are atrocious in nature, causing a loss to the property, attempted in taking the life, donee acts

in violation of the conditions of the deed, equally grave causes. It is impractical for the law to consider that, an allegation in relation to the provision of meals, or food which is purely subjective and sentimental in nature constitutes an act of gross ingratitude to revoke a deed of gift. It is evident to this court, the learned High court judge's view in regard to the maltreatment is not adduced by proper evidence. The acts complained of by the Petitioner does not amount to gross ingratitude. Therefore, a notarially executed deed cannot be revoked on the said behaviour.

By considering the circumstances, I answer all questions of law in affirmative and set aside the order of the High Court dated 11.09.2012 and affirm the order of the District Court dated 12.04.2006.

I allow the appeal subject to cost of this court fixed at Rs.25, 000.00.

Judge of the Supreme Court

Buwaneka Aluwihare PC, J

Judge of the Supreme Court

Priyantha Jayawardena PC, J

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006

Rajamanthri Gedera Somalatha,
Polwatta, Samapura,
Hemmathagama

Plaintiff

SC Appeal 33/2013

SC/HCCA/LA 526/2012
WP/ HCCA/KAG/826/2011(F)
DC/ Mawanella Case No. 702/L

Vs,

Wajira Kanthi Rathnasinghe,
Siriwardena Niwasa, Samapura,
Hemmathagama

Defendant

And then between

Wajira Kanthi Rathnasinghe,
Siriwardena Niwasa, Samapura,
Hemmathagama

Defendant-Appellant

Vs,

Rajamanthri Gedera Somalatha,
Polwatta, Samapura,
Hemmathagama

Plaintiff-Respondent

And Now between

Rajamanthri Gedera Somalatha,
Polwatta, Samapura,
Hemmathagama

Plaintiff -Respondent-Petitioner

Vs,

Wajira Kanthi Rathnasinghe,
Siriwardena Niwasa, Samapura,
Hemmathagama

Defendant-Appellant-Respondent

Before: **Justice Vijith K. Malalgoda PC**
Justice L.T.B. Dehideniya
Justice P. Padman Surasena

Counsel: Sunil Abeyratne with Ms. Lakmali Algama for Plaintiff-Respondent-Appellant

Ms. Sudarshani Cooray for Defendant-Appellant-Respondent

Argued on: **06.09.2019**

Decided on: **07.11.2019**

Vijith K. Malalgoda PC J

The Plaintiff-Respondent-Appellant (hereinafter referred to as 'the Plaintiff-Appellant') instituted action in the District Court of Mawanella against the Defendant-Appellant-Respondent (hereinafter referred to as 'the Defendant-Respondent') for declaration of title and for

ejectment of the Defendant-Respondent from the land called 'Madangahamulawatte Assedduwe Kumbura'. After the trial, the learned District Judge delivered the judgment dated 31st of March 2011 in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment of the District Court, the Defendant-Respondent appealed to the High Court of Civil Appeal holden in Kegalle. However, on appeal, the learned Judges of the High Court of Civil Appeal, by the judgment dated 23rd of October 2012, set aside the judgment of the District Court. Being dissatisfied with the said judgment of the High Court of Civil Appeal, the Plaintiff-Appellant has made this appeal to this court seeking leave to appeal. This court, by the order dated 6th of February 2013, granted leave to appeal on the questions of law set out in paragraph (7) (i) (ii) (iii) (iv) (v) (vi) and (vii) of the Petition dated 30th November 2012, which reads as follows;

(i) Whether the learned Judges of the High Court of Province (Civil Appellate), Kegalle erred in facts and law of this case declaring the Respondent has obtained prescriptive title for the Corpus?

(ii) Whether the learned Judges of the High Court of Province (Civil Appellate), Kegalle erred in law by giving undue weight on case No: 93969 filed under Primary Court's Procedure Act in which the Respondent and one Jayarathne were the parties to the case however, Petitioner was not a party to the same case?

(iii) Whether the learned Judges of the High Court of Province (Civil Appellate), Kegalle have misinterpreted the provision under the section 110 of Evidence Ordinance?

(iv) Whether the learned Judges of the High Court of Province (Civil Appellate), Kegalle have applied erroneously in their judgment that the detail in the Agricultural Land Registry was prima facie evidence in prescription case?

(v) Whether the learned Judges of the High Court of Province (Civil Appellate), Kegalle have failed to express reasons to reject findings of the learned District Judge, Mawanella on contradictory evidence forwarded by the Respondent and her witnesses for the defense?

(vi) Whether the learned Judges of the High Court of Province (Civil Appellate), Kegalle have failed to give reasons for the conclusion in their judgment on adverse, independent, uninterrupted possession of the Respondent for more than 10 years of the subject matter as requirements to establish the prescriptive title for the subject matter under section 03 of the Prescription Ordinance in favour of the Respondent?

(vii) Whether the Learned Judges of the High Court of Province (Civil Appellate), Kegalle erred in facts and law by setting aside the judgment dated 31.03.2011 of the learned District Judge, Mawanella?

The facts observed as relevant by this court will be summarized in order to ascertain the question of law and facts in relation to the present case. In an action for declaration, the burden to establish the title to the land is vested on the Plaintiff. As observed in the case of ***Abeykoon Hamine vs. Appuhamy 52 NLR 49***, the initial burden of proof rests on the plaintiff to prove that he had *dominium* to the land in dispute. Furthermore, in ***Wanigarathne vs. Juwanis Appuhamy 65 NLR 167***, *Herat J* observed that

> "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."

Accordingly, it is necessary to consider whether the Plaintiff-Appellant in the present case has discharged the burden of proof that rests on him. As per the evidence led before the District

Court, it can be summarized that, the original owner of the land was one Uduma Lebbe Mariyam Bibi. By deed No. 4479 dated 19th August 1942, the land was transferred to Segu Mahudun Adam Lebbe Padiliyar. Then, by the deed No. 4685 dated 26th October 1942, the same land was transferred to Rajamanthrie Gedara Abaran Appu. Later, by the deed No. 213 dated 17th October 1994, this land was transferred to Rajamanthrie Gedara Somalatha who was the Plaintiff before the District Court. Thus, this court is in a position, to observe that, the Plaintiff-Appellant has established a clear paper title to the land in dispute.

In ***Fernando vs. Somasiri 2012 BLR 121***, it was held that,

> "In a vindicatory action the burden of proof rests upon the plaintiff to prove his title including identification of the boundaries and it is necessary to establish the corpus in a clear and unambiguous manner."

Therefore, it is a must to consider these aspects, since the ownership cannot be ascribed without clear identification of the land. (*vide*: ***Abdul Latheef v Abdul Majeed (2010) 2 SLR 333***). However, in the present case, there was no controversy and both parties admitted the boundaries of the land in question.

Accordingly, the Plaintiff-Appellant has established the title to the land and clearly identified the corpus. This was accepted by both the learned District Judge and the learned Judges of the High Court. Conversely, the Defendant-Respondent argued before us, that he has been in possession of the land in question and claimed prescriptive title to the land for over a period of ten years. However, once the title is proved by the Plaintiff, the burden of proof shifts to the Defendant to prove that he has a right to possession of the property (*vide*: ***Siyaneris vs. Udenis De Silva 52 NLR 289***).

According to section 3 of the Prescription Ordinance, if a person claims prescriptive title, he must prove that he has been in undisturbed, uninterrupted and adverse possession of the land for a period of ten years. Therefore, it is necessary to consider whether the Defendant-Respondent has proved her prescriptive title to the land. As per the evidence adduced by the Defendant-Respondent, one William Rathnasinghe has cultivated the said land prior to 80 years. After the death of William Rathnasinghe, his son, Wilfred Rathnasinghe had cultivated the said land and after the death of Wilfred, his son, Nandalal Rathnasinghe, and his daughter Wajira Kanthi Rathnasinghe, who is the Defendant-Respondent in this case, has continued the possession. Later, on 12th of July 2004, the Defendant-Respondent's brother, Nandalal, transferred undivided ½ portion by deed No 3372 to his sister, the Defendant-Respondent.

In ***De Silva vs. Commissioner General of the Inland Revenue 80 NLR 292***, it was held that;

> "A person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

Furthermore, in the case of ***Sirajudeen and others vs. Abbas (1994)2 SLR 365***, *G.P.S. De Silva CJ* held,

> "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court. One of the essential elements of the plea of prescriptive title as provided for in

> section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner."

Accordingly, when considering the present case, mere statements of witnesses that the Defendant-Respondent possessed the land in dispute for several years exceeding prescriptive period are not enough for *rei vindicatio* action and payment receipts issued on the basis of Agricultural Land Register cannot be considered as prima facie evidence to prove undisturbed, uninterrupted and adverse possession under section 3 of the Prescription Ordinance.

The learned Judges of the High Court when reversing the judgment of the learned District Judge had further observed that,

> "Where the Plaintiff fails to prove ouster, the defendants possession must be assumed to be lawful and the defendant is entitled to rely on the presumption created by section 110 of the Evidence Ordinance."

However, as discussed above, it is obvious that once the Plaintiff-Appellant has proved his or her title to the land, then the burden shifts to the Defendant-Respondent to prove his or her possession. In the said circumstances, section 110 of the Evidence Ordinance is misinterpreted by the learned High Court Judges and cannot be assumed that the Defendant-Respondent's possession is lawful.

It is further observed by this court that the learned Judges of the Civil Appellate High Court were carried away by a Primary Court decision which was marked as V-1 during the trial before the

District Court. Whilst referring to the said action before the Primary Court, it is observed in the said judgment that,

> "It is worth to be mentioned that there is a case (case No. 93969) instituted under Primary Court Procedure Act which is marked as V-1. This action clearly demonstrates that there was a dispute between the defendant and one Jayarathne as to the possession of the field. The Plaintiff in this case was not a party to case No. 93969 when the Plaintiff was cross examined on this point she replied that she had intervened to the case, which is a lie. On the other land, if she possess the land she should have been a party to this case. This position clearly convinced my mind that the plaintiff did not possess the land"

As revealed before us, the said action was instituted on 15th of April 2015 which is a day after filing the present action before the District Court for Declaration of Title and ejectment of the Defendant-Respondent.

Furthermore, a matter under section 66 of the Primary Court Procedure Act is not a civil action and the object is to prevent a breach of peace, not to decide any question of title or right to possession of the parties to the land (*vide*: ***Ramalingam vs. Thangarajah (1982)2 SLR 693***). Therefore, an order of the said action does not affect to the civil case relating to the declaration of title or *rei vindicatio*. Accordingly, based on the Order made by the Magistrate's Court under the section 66 application, the learned Judges of the High Court cannot justify that the Defendant-Respondent in the present case had adverse possession to the land in dispute.

In ***Alwis vs. Piyasena Fernando (1993)1 SLR 119***, it was held that, finding of primary facts by trial judges who hear and see witnesses are not to be lightly disturbed on appeal. However, on the perusal of the Judgment of the High Court, I observe that the learned Judges of the High Court

have failed to give reasons for rejecting the findings of the learned District Court Judge and the learned High Court Judges are not in a position to re-analyze the facts of the case without having any reasonable ground to do so. Accordingly, it can be concluded that there is no reasonable basis upon the High Court to reverse the findings of the trial judge, since the learned District Judge has clearly analyzed the facts of this case and has come to a correct conclusion.

As per the aforementioned reasons, I hold that the Judges of the Civil Appellate High Court had erred in law when they reverse the judgment of the learned District Judge of Mawanella. In the said circumstances, I answer the questions of law under which the leave was granted, in favour of the Plaintiff- Appellant. The judgment dated 23.10.2012 of the Civil Appellate High Court of Kegalle is set aside and the Judgment dated 31.03.2011 of the District Court of Mawanella is affirmed.

The appeal is allowed.

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree,

Judge of the Supreme Court

Justice P. Padman Surasena

I agree,

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal to the Supreme Court from an order of the Provincial High Court under and in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950, as amended.

LT CASE NO. 23/KU/7850/2002.

NWP/HCCA/KUR No. LT Appeal 37/2010.

SC APPEAL NO. 36/2015.

Dassanayake Mudiyanselage Ranbanda,
"Dharshana", Narammala Road,
Wadhakada.

APPLICANT

VS.

People's Bank,
P.O Box 728,
Colombo 02.

RESPONDENT

AND BETWEEN,

People's Bank,
P.O Box 728,
Colombo 02.

RESPONDENT -APPELLANT

VS.

Dassanayake Mudiyanselage Ranbanda,
"Dharshana", Narammala Road,
Wadhakada.

APPLICANT –RESPONDENT

AND NOW BETWEEN,

Dassanayake Mudiyanselage Ranbanda,
"Dharshana", Narammala Road,
Wadhakada.

APPLICANTNT –RESPONDENT – APPELLANT

VS.

People's Bank,
P.O Box 728,
Colombo 02.

RESPONDENT –APPELLANT – RESPONDENT

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.**
S. THURAIRAJA, PC, J. AND
E.A.G.R. AMARASEKARA,J.

COUNSEL : Mr. Geoffrey Alagaratnam PC with Ayesha Goonesekera for the Applicant –Respondent-Appellant.

Mrs. Manoli Jinadasa with Ms. Shehara Karunaratne for the Respondent –Appellant –Respondent.

ARGUED ON : 22nd July 2019.

WRITTEN SUBMISSIONS : Respondent –Appellant- Respondent on 6th May 2015.
Applicant –Respondent-Appellant on 8th April 2015.

DECIDED ON : 10th December 2019.

S. THURAIRAJA, PC, J.

The Employee Applicant-Respondent-Appellant (hereinafter referred to as the "Employee Appellant") filed an application in the Labour Tribunal of Kurunegala (hereinafter referred to as the "Labour Tribunal") against the Employer Respondent-Appellant-Respondent (hereinafter referred to as the "Employer Respondent") for unlawful termination of his services. After an Inquiry, the Learned President of the Labour Tribunal held that, the termination of the services of the Appellant was unjust and inequitable and awarded the retirement benefits to the Appellant.

Being aggrieved by the order of the Labour Tribunal, the Employer Respondent appealed to the Provincial High Court of the North Western Province (hereinafter referred to as the 'High Court') seeking inter alia, to set aside the order of the Labour Tribunal. The Learned High Court Judge by his judgment had set aside the order of the Labour Tribunal.

Being aggrieved with the said order, the Appellant had preferred this appeal before us, special leave to appeal was granted on 25.02.2015, on the issues set out in paragraph '8 (g)' of the petition dated 23.12.2011 reads as follows:

> *"Did the High Court err in holding that in the light of the facts before the Labour Tribunal, it was not just and equitable to award pension rights to the petitioner? "*

Both parties have filed their written submissions and have advanced their oral arguments. I find it pertinent to set out the material facts of the case prior to addressing the question of law before us.

The workman, Dassanayake Mudiyanselage Ranbanda, the Employee Appellant was an employee of the People's Bank, the Employer Respondent from 16.10.1972 as a clerk. The Employee Appellant gradually rose in rank and was appointed as Manager of Grade 3(1) of Thambuththegama Branch of the Respondent Bank on 01/06/1996. In the material time relevant to this application,

Applicant worked as the Manager of the Thambuththegama Branch of the Respondent Bank and is charged for violating instructions of Circular No.388/84 with regard to granting of TODs (Temporary Over Drafts) and several other charges as demonstrated below (Charge sheet marked as R1 at Page 530 of the brief).

Charge 1: Risking of the Bank Funds by granting TODs in excess of his authorized limit of Rs. 100,000/- and failing to obtain covering approval for the said overdrafts in violation of Circular Instructions 491/96 and 388/84;

Charge 2: Granting TODs to G.B. Dissanayake and H.M. Samanthilaka in excess of the Applicant's authorized limit, failing to obtain covering approval and continued granting of overdrafts when there were defaults in repayments by the said customers in violation of Circular 388/44.

Charge 3: Granting of TODs to specified customers before completing one year from the opening of accounts in violation of Paragraph 2.1 Section 5 of the Circular No.388/44.

Charge 4: Failing to report to the regional head office details pertaining to granted TODs by sending "form 593s" within 30 days in violation of Circular Instructions contained in Circular No.388/84.

Charge 5: Risking Bank Funds by granting parallel TODs to specified customers in excess of powers and in violation of Paragraph 3.1 and 3.2 of C Circular No.388/84.

Charges 6-9: Charges 6-9 were ancillary charges related to the above five charges. The Appellant is charged with (a) risking finance of the bank; (b) causing loss to the bank; and (c) causing a loss of confidence in the Appellant.

The Employee Appellant was served with a charge sheet dated 20/09/2001 Marked as 'X 10'. Consequently, a domestic inquiry was conducted by the Respondent Bank against the Employee Appellant and was found guilty of misconduct for all the charges. Thereafter, Employee Appellant was dismissed from

his service on 20.06.2002. Employee Appellant filed an application on 30/11/2002 before the Labour Tribunal against the Employer Respondent for unlawful termination of his services seeking, *inter alia*, re-instatement in his service and/ or reasonable compensation and costs and for such other relief as the Labour Tribunal shall seem fit and proper. The Employee Appellant did not specifically seek the relief of Pension benefits in his application because, the Employee Appellant was 52 years and 09 months on the day he filed his application. The Employee Appellant was entitled to seek the pension relief only upon the completion of 55 years and thereafter at the age of 60 if annual extensions were allowed to the Employee Appellant. The Employer Respondent stated that, the Employee Appellant's service was terminated on lawful grounds.

In the Employee Appellant's evidence, the Employee Appellant admits that, he has powers only to grant TODs for Rs.100, 000/- for 30 days (page 231 and 235 of the brief). Further the Employee Appellant admitted that, he exceeded the authority and granted TODs 42 accounts with an aggregate value of Rs. 5.4 Million of which he brought down the outstanding to Rs. 4.25 Million when sufficient time granted to him.

Employee Appellant led the evidence of T.A. Ariyapala (Assistant Regional Manager) and Priyangika Hettiarachchi (Staff Assistant) on his behalf and submitted documents marked R1-R51. Employer Respondent led the evidence of D.M. Ranbanda (the Employee Appellant) and Amarawansa Wijesekara (Retired Assistant Manager) and submitted the documents marked A.01-A.09.

As per the Circular No.388/84 (marked as 'R3' at page 549 of the brief) clause 9.3 stated that, 593 forms have to be sent on the same day for covering approval to the Regional Office for TODs over and above the authorized limit. The Bank clerk; Priyangika Hettiarachchi, during her cross examination admitted that, she sends Form 593 only when the Manager instructs her to do so (page 179 and 219 of the brief).

The Employee Appellant in his defence took up the position that, circulars are merely guidelines issued to the managers. However, the Respondent Bank demonstrated that, the Circular instructions are not mere guidelines, but clear limits have been imposed on the grant of TODs by the Bank Circulars. Further, it was stated by the fact that, the Bank uniformly and consistently took severe disciplinary action against those who violated circular instructions of the Bank. The evidence reveals that, even other managers who have committed similar misconduct of acting contrary to circular instructions especially when granting TODs have been terminated (Pages 170-171 of the Brief).

This position was not disputed by the Employee Appellant. It is not revealed that, he was victimized whilst others were favoured. Therefore, it is evident that, the Respondent Bank has uniformly and consistently dismissed employees who have flouted the financial regulations of the Bank. Therefore, I found that, this is not a case where only the Employee Appellant has been treated discriminatively or unjustly was given the same punishment that was meted out to others who had committed similar misconduct.

Accordingly, the Employee Appellant was found guilty of the charges of misconduct complained against him by the Labour Tribunal. On 28/10/2010, Learned President of the Labour Tribunal decided that, the termination of the services of the Employee Appellant is an excessive punishment because; by acting in violation of the circular instruction he had not gained any personal benefits. Further, ordered that, the Employee Appellant to be considered as having served to the Respondent Bank without break his service until he reached 55 years and granted him all pension rights on the premise that, he is a retired employee.

Being aggrieved with the order of the Labour Tribunal, the Employer Respondent appealed to the High Court to set aside the order of the Learned President of the Labour Tribunal. The Learned Judge of the High Court held,

"The alleged acts of misconduct have sufficiently been established by the Respondent-Appellant and as I have already stated above the Applicant-Respondent did not seek to challenge the proprietary of the said findings of the Learned President. If the Applicant-Appellant was allowed to continue to grant temporary overdrafts arbitrarily without having any disregard to circular instructions, it would no doubt result in a huge financial loss to the bank.

The Learned Counsel submitted that the Respondent- Appellant Bank being a financial institution the strict compliance of circular instructions is of absolute importance and failure to follow such instructions by an employee who is holding the position of manager of a Branch amounts to a gross act of misconduct which entails a severe punishment. I am in agreement with the submission of the Counsel.

This is a case where the public should be taken into consideration for the reason that, the respondent-appellant bank is an institution that deals with money deposited by the public with very high expectation of safety of their money and higher benefits.

In view of the aforesaid I hold that the Learned President of the Labour Tribunal erred in awarding the applicant-respondent pension benefits as if his service was not terminated. The appeal is accordingly allowed and the application of the applicant-respondent is dismissed."

(Page 3-6 of the High Court Order dated 15/11/2011 marked as 'X4')

Being aggrieved with the said order, the Employee-Appellant had preferred this appeal before us, in terms of Section 31DD of the Industrial Disputes Act, No. 43 of 1950, as amended and special leave to appeal was granted on 25.02.2015, on the issues set out in paragraph '8 (g)' of the petition dated 23.12.2011.

In "**The Legal Framework of Industrial Relations in Ceylon**" by S.R. De Silva at Page 546 the following is stated in this regard.

"As a general rule, refusal to obey reasonable orders justifies dismissal"

"A single act of disobedience may justify dismissal if sufficient grave."

I am of the view that, Employee Appellant, as the Branch Manager of a Bank is responsible for the discipline and management of the entire branch of the Respondent Bank. The Employee Appellant is the enforcer of discipline and the supervising authority of the activities within the branch to ensure the compliance with the rules and regulations. If he is blatantly disregarding strict circular instructions in favour of third parties and grant TODs at his will over and above the authorized limits is a breach of trust and confidence placed on him by the Bank. It is observed that, the irresponsible conduct of the Employee Appellant exposed the Bank to very heavy losses. The TODs facility given for a very limited period and the customer is required to settle TODs within that time, which is generally 30 days. If TODs are long outstanding without payment, it is a loss to the Respondent Bank.

In **Adami v. Maison de Luxe Limited (1924) Comm. LR 145**, stated that,

"where it is a condition that, the servant shall obey all lawful orders of the master, then a willful and deliberate and intentional disobedience of any of those orders is tantamount to a refusal to be bound by the terms of the Contract, entitling the other party to treat it as an end, and to dismiss the servant….and his failure to obey instructions was such as to go to the foundation and root of the whole contract between the parties."

In this case due to the conduct of the Employee Appellant, the bank has been exposed to a loss of Rs. 19,686,889.22 and an actual loss of Rs. 4, 373,687.21 has been caused to the Respondent Bank. Thus, as mentioned above, the strict adherence to circular instructions is mandatory to the Bank and on many occasions, branch managers who have granted TODs in a manner caused a loss to the Bank have been terminated as a deterrent against such practice and the Employee Appellant is one of such a manager.

As observed by Siva Selliah, J, in **Sithamparanathan v. People's Bank [1986] 1 Sri LR 411** at page 414-415,

> *"It is needless to emphasize that the utmost confidence is expected of any officer employed in a Bank. He owes a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank. Integrity and confidence thus are indispensable and where an officer has forfeited such confidence has been shown up as being shown up as being involved in any fraudulent or questionable transaction, both public interest and the interest of the Bank demands that he should be removed from such confidence."*

In **Manager vs. Nakiadeniya Group vs. The Lanka Estate Workers Union [1969 77 CLW 52]** at page 54de Krester J. said,

> *"In the making of a <u>just and equitable order one must consider</u> not only the interests of the employees but also the interests of the employers and the <u>wider interest of the country for the object of social legislation</u> is to have not only contended employees but also contended employers."*

The public interest was also recognized as a relevant factor for the courts, when they made just and equitable order. In **Ceylon Transport Board vs. Julian** [SC 54/71 decided on 16/06/1972] where this Court stated that,

> *"In the particular circumstances of this case where the public interest must be a factor to be considered the <u>President should have also directed his mind as to what was just and equitable in the context of the public interest</u>. A just and equitable order must be made after considering all the circumstances and not only the interests of the applicant."*

This is the fact that, the Learned President of the Labour Tribual has failed to do in the present case. I therefore find myself unable to agree with the view of the Learned President of the Labour Tribual.

In cases involving an employer-employee relationship, founded on the principles of trust and discipline. As a result, any breach of these principles will affect, not only the relationship between the employer and the employee but also the quality of the services provided by the employer along with the reputation of his establishment. In the case of **Bank of Ceylon vs. Manivasagasivam, [(1995) 2 SLR 79]**, it was observed that:

> *"Utmost confidence is expected from any officer employed in the bank. There is a duty, both to the bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the bank"*

In the above circumstances, I am of the view that, the termination of the Employee Appellant's services was just and proper in law and the Learned President of the Labour Tribunal has erred in law in considering the termination to be unjust and inequitable on the premise of excessive punishment.

It is submitted that, the Pension Fund administered by a Trust and only those who fulfill the eligibility criteria is entitled to the Pension, in addition to their other terminal benefits. As I stated above, an employee who ceases to be in service prior to reaching 55 years as a result of his services been terminated by the Bank, is not entitled for pension.

In **Abysundera vs. Samuel SC 13-123/67 decided on 16/06/1968 and Martin Singho vs. Kularatna and others (CA Appeal No. 248/95)** Court held that,

> *"it appears to this Court that Labour Tribunal has granted the pension rights to the Applicant purely on sympathetic grounds. The Labour Tribunal should act in a just and equitable manner to both parties and not award any relief on the basis of sympathy. Just and equitable order must be fair to all parties. It never means the means the safeguarding of the interest of the workman alone. Legislature has not given a free license to a President of a Labour Tribunal to*

make award as he my please. In the above circumstances we hold that, granting of a pension to respondent is totally wrong and contrary to law."

The Court also held:

"There are specific criteria to be fulfilled for an employee to qualify for a pension. According to the Peoples' Bank Pension Scheme, pension is granted only if an employee is in service and at the age of 55 years. Pension will not be granted to an employee who is under the age of 55 years except on the recommendation of a Medical Board and approved by the General Manager. Employees who leave the Bank before reaching 55 years and those and those who are dismissed from service are not entitled to pension under the pension rules that exist in the Bank."

The Employer Respondent has filed the requisite proof to establish that, the Employee Appellant had indeed been paid his terminal benefits of EPF, ETF and Gratuity. The said statement of account depicts the deposit of a sum of Rs. 464,257.37 and a sum of Rs. 336,253.73 which consists of the EPF and gratuity paid to the Employee Appellant.

As enumerated above, I am of the view that the Employee Appellant is not entitled for the pension benefits.

With the aforementioned circumstances, I answer the question of law raised by the Employee Appellant negatively.

On carefully analyzing the materials that was produced before the President of the Labour Tribunal of Kurunegala and the material submitted before the learned High Court Judge, I am of the view that the finding of the President of the Labour Tribunal is incorrect. Accordingly, I find that, the findings of the learned High Court Judge are correct in setting aside the order of the Learned President of the Labour Tribunal dated 28/10/2010, Therefore, I affirm the findings of the Learned Judge of

the High Court in order dated 15.11.2011, in case no. NWP/HCCA/KUR/37/2010(L.T). Appeal Dismissed and I order no cost.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.
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 North Central Province dated 24/02/2011 in Case No. NCP/HCCA/ANU 688/2009 D.C. Anuradhapura Case No.10596/L.

SC APPEAL NO.39/2013
SC/HCCA/LA No.105/2011

NCP/HCCA/ANU 688/2009.
D.C. Anuradhapura case No.10596/L

W. Justin Fernando. **(Deceased)**

Thambarawila, Waikkala.

(Plaintiff)

K. Mary Margaret Fernando.

Thambarawila,

Waikkawala.

Substituted Plaintiff

Vs.

W.M. Seneviratne,

No. 402, Eliya Diwulwewa,

Eppawala.

Defendant

And then,

W.M. Seneviratne,

No. 402, Eliya Diwulwewa,

Eppawala.

Defendant-Appellant.

Vs.

K. Mary Margaret Fernando.

Thambarawila,

Waikkawala.

Substituted Plaintiff-Respondent.

AND NOW BETWEEN,

K. Mary Margaret Fernando.

Thambarawila,

Waikkawala.

Substituted Plaintiff-Respondent-Petitioner

Vs.

W.M. Seneviratne,

No. 402, Eliya Diwulwewa,

Eppawala.

Defendant-Appellant-Respondent

BEFORE : **BUWANEKA ALUWIHARE, PC, J.**

L.T.B. DEHIDENIYA, J.

S. THURAIRAJA, PC, J.

COUNSEL : Sudarshani Cooray Attorney-at-Law for the Substituted Plaintiff-Respondent- Petitioner.

Defendant- Appellant- Respondent is absent and unrepresented.

ARGUED ON : 01st February 2019.

WRITTEN SUBMISSIONS : Substituted Plaintiff- Respondent-Appellant filed on 12th February 2019.

DECIDED ON : 5th April 2019.

S. THURAIRAJA, PC, J.

Justin Fernando had instituted an action in 1982, against Wijekoon Mudiyanselage Seneviratne (the Defendant-Appellant-Respondent) for declaration of title to the land described in the schedule to the plaint (as amended) dated 29th October 1993 and to eject the Defendant-Appellant- Respondent and Rs.1000/- per month as damages from October 1980 on the basis that, the Plaintiff-Respondent-Appellant is the owner of the said land on deeds and possession. The Defendant-Appellant-Respondent resisted the action and took the defence of prescription. During the case was pending Justin Fernando passed away and he was substituted by his wife K. Mary Margret Fernando (Substituted Plaintiff-Respondent-Appellant). The case was fixed for trial on 17th June 2005, the Defendant-Appellant-Respondent was absent and the Court fixed this case for trial for the 13th time (as per the journal entry) on 26th August 2005 and marked it as final date.

On the said date, the Defendant-Appellant-Respondent was absent and his regular Counsel informed Court that, he has no proper instructions from his client. It is also observed, even though it was the final date for trial; the Defendant-Appellant-Respondent had not filed the list of witnesses and documents. The Learned District Judge considering all factors, decided to take up this case ex-parte. All procedures were followed and the trial was taken up on the same day and order was delivered on 14th November 2005 (page 137 of the Appeal Brief). The order was delivered in favour of the Substituted Plaintiff- Respondent- Appellant and served the said order to the Defendant-Appellant-Respondent.

According to the available documents, the Defendant-Appellant- Respondent had filed papers to purge his default (page 113 of the Appeal Brief). Substituted Plaintiff-Respondent-Appellant objected to the said application of purge in default of the Defendant- Appellant- Respondent and to set aside the said ex-parte judgement (at page 11 of the Appeal Brief) dated 21st July 2006. When we go through the journal entries of the proceedings in the District Court, it is evident that, the Defendant-Appellant- Respondent had not been present before the District Court on several dates and the Counsel appeared for the Defendant-Appellant- Respondent had moved for dates.

Defendant-Appellant-Respondent's position is that, he was seriously ill and that, he had to go to the clinic on 26th August 2005 and as such, he could not come to Court (vide page 03 of the proceedings dated 23rd January 2007) and in the cross-examination it was revealed that, though he went to the Clinic as scheduled by his Doctor on the previous date of the Clinic, on 26th August 2005, he was not admitted to the Hospital on that day.

After a proper inquiry, Learned District Judge dismissed the application and refused to vacate his original judgment.

Being aggrieved with the said order, the Defendant-Appellant-Respondent appealed to the Provincial High Court (Holden in Anuradhapura) and the Learned Judges of the said Provincial High Court had decided that, under Section 86(2) of the Civil Procedure Code, that the Defendant-Appellant-Respondent had purged his default. Hence, he had directed the Learned District Judge to re-hear the case.

Being aggrieved with the said order of the Provincial High Court, the Substituted Plaintiff-Respondent- Appellant had preferred this appeal to the Supreme Court. The Counsel alleges that, the Learned Judge of the Provincial High Court had misdirected

himself with the medical certificates. Hence the order is perverse. Further, it was submitted that, the evidence at the inquiry does not revealed "a reasonable ground" to set aside the Order dated 26th August 2005. Leave was granted on the question of law raised in paragraphs 9 (b) and (c) of the Petition dated 1st of April 2011 which reads as follows.

I. (b) Did the Learned High Court Judges gravely err in holding that the Learned District Court Judge did not consider the seriousness of the illness of the Defendant-Appellant whereas the vital question that has to be considered in a purging default application is that whether the Defendant was so sick that he could not attend Court or give instruction to his lawyers to appear on the 26.08.2005?

II. (c) Did the Learned High Court Judges gravely err in holding that the Defendant was an inpatient at the Hospital on 26/08/2005, when actually he was not an inpatient and had only attended the Clinic on 26/08/2005?

The Defendant-Appellant-Respondent was absent and unrepresented from the inception of the case before this Court. This Court has taken all necessary steps including publishing notices in National Newspapers, but, the Defendant-Appellant-Respondent was both absent and unrepresented.

Considering the available materials before this Court we find that, the Defendant-Appellant- Respondent was present at the District Court of Anuradhapura for a considerable period of time. When the matter was fixed for trial finally, the Defendant-Appellant-Respondent was absent and unrepresented.

It is noted on the relevant date namely 26th August 2005; his Attorney-at-Law was present and informed Court that, he had no instructions from his client. Since, the

matter was fixed for trial and that was the 13th date of trial. Further, parties were informed, that was the final date. Perusing the trial proceedings, it is observed that the Defendant-Appellant-Respondent had not taken meaningful steps including filing of list of witnesses and documents to proceed with the trial. The Learned District Court Judge had taken necessary precautions and reasonable steps to conduct an ex-parte trial and proceeded with the trial. Subsequently, judgment was delivered on 14th November 2005.

Thereafter, the Defendant-Appellant–Respondent filed petition and affidavit dated 26th February 2006 to purge the default and moved to have the ex parte judgment set aside. The Defendant-Appellant–Respondent made an application under Section 86(2) of the Civil Procedure Code to the Judge of the District Court, to purge his default. He mainly relied on a medical certificate issued by an Ayurvedic Doctor. Where it says, he had attended a clinic on the 26th of August 2005. Further he had submitted medical records (exercise book) to Courts. It appears that he was attending clinic regularly for some time. He was attending the General Hospital for illness regarding kidney and taking medicine at Ayurvedic Hospital for swelling of his legs (page 152 of the Appeal Brief).

The Learned District Judge had comprehensively analysed the evidence before him and concluded that the reasons are insufficient/inadequate to purge his default.

Being aggrieved with the said order Defendant-Appellant- Respondent made an appeal to the High Court (Civil Appeal). There, the same materials were analysed and the Learned Judges of the High Court (Civil Appeal) had concluded that, the Defendant-Appellant-Respondent had substantially purged his default and the Judgment was delivered on 23rd February 2011 (marked as 'P4').

It appears that the High Court of Civil Appeal had come to the conclusion that, the finding of the District Judge is wrong because, medical certificates submitted by the Defendant-Appellant-Respondent were not properly considered. The High Court of Civil Appeal had concluded that, the Defendant-Appellant- Respondent had purged his default.

Purge in Default is discussed in Section 86(2) of the Civil Procedure Code and it reads as follows:

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

Considering the submissions made by the Counsel for the Plaintiff-Respondent-Petitioner, we find that the materials submitted before the District Court and the High Court of Civil Appeal were differently considered. Hence, we perused the relevant medical certificates which are submitted as sole evidence. According to the medical certificate submitted by the Defendant-Appellant-Respondent, it was obtained from the Ayurvedic doctor of Anuradhapura. The medical records revealed that, he had taken treatment for illness in kidney at the General Hospital of Anuradhapura. It is evidenced before the Court that on the said date ie. 26/08/2005 the Defendant-Appellant-Respondent had attended Ayurvedic Clinic at the Anuradhapura Hospital and he was never hospitalised on the said date. Hence, the finding of the District Judge is correct.

In **David Appuhamy Vs. Yasassi Thero (1987 SLR 253**) it was held that,

> *"an ex- parte order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default.."*

Considering all, we find that the Learned District Judge had carefully considered the evidence and all the materials before him and concluded that, the Defendant-Appellant-Respondent has not adequately purged his default. Further we find that, the Learned Judge of the High Court of Civil Appeal has misconceived the facts, especially the medical certificates and hospitalization. As such I answer the questions of law on which leave to appeal was granted in the affirmative. Accordingly, I allow the appeal and vacate the order made by the High Court of Civil Appeal; Anuradhapura dated 23rd February 2011 and affirm the order of the Learned District Judge dated 14th November 2005.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B.P. 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 Appeal by the High Court of Under provisions of Article 128 of the Constitution.

Officer In Charge,

Police Station,

Kosgoda.

Complainant

Vs,

Meegastennage Prince Gunawardena,

"Starlight",

Warakamulla,

Maha- Induruwa.

Accused

AND

Meegastennage Prince Gunawardena,

"Starlight",

Warakamulla,

Maha- Induruwa.

Accused-Appellant

Vs,

SC APPEAL NO. 42/2014

H.C. Balapitiya No. 116/2000

M.C. Balapitiya Case No.93704.

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

AND NOW BETWEEN

Meegastennage Prince Gunawardena,

"Starlight",

Warakamulla,

Maha- Induruwa.

Accused-Appellant-Appellant

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent-Respondent

BEFORE : **L.T.B. DEHIDENIYA, J.**
S. THURAIRAJA, PC, J. and
E.A.G.R. AMARASEKARA, J.

COUNSEL : Amila Palliyage with Duminda De Alwis for Accused- Appellant-Appellant.
Induni Punchihewa,SC for the Complainant-Respondent-Respondent.

ARGUED ON : 01st October 2019.

WRITTEN SUBMISSIONS : not filed by both parties.

DECIDED ON : 07th November 2019.

S. THURAIRAJA, PC, J.

This is an appeal against the order of the Provincial High Court of Balapitiya. It will be appropriate to mention the particulars of the case. The Accused - Appellant-Appellant namely, Meegastennage Prince Gunawardena (hereinafter referred to as the "Accused- Appellant") was charged before the Magistrate Court on two counts punishable under Section 400 and 386 of the Penal Code respectively for committing the offences of cheating and misappropriation of sum of Rs. 80, 000/-.

On the 20/01/1999 the Learned Magistrate had taken up the case for trial. Prosecution led the evidence of Vendahandi Padmasiri, Vijemuni Lenton Terrance de Soysa, and Police Sergeant Yatagama Lokuge Leelawansa and closed the case for the prosecution. When, defence called the Accused-Appellant made a dock statement and stated that, the allegations made against him were false. The Learned Magistrate found the Accused- Appellant guilty on first and second counts and imposed Rs. 5000/- fine in-default 2 months Rigorous Imprisonment and 2 years Rigorous Imprisonment for the first count and 2 years rigorous imprisonment for the second count. Further, it was ordered to implement both sentences concurrently.

Being aggrieved by the said order Accused- Appellant appealed to the Provincial High Court (sitting in appeal) and raised the following questions of law.

" (1) විත්තියේ උගත් නීතිඥ මහතා විසින් හරස් ප්‍රශ්න ඇසීමේදී ගන්නා ලද ස්ථාවරය විත්තිකරු සාක්ෂි දෙමින් වෙනස් නොකර වෙන ස්ථාවරයක් නැත්නම් උගත් නීතිඥ මහතාගේ යෝජනාවක් පිලිගැනීමක් ලෙස සලකා ඒ මත විත්තිකරු වරදකරු කල හැකිද?

(2) උගත් මහේස්ත්‍රාත් තුමා විත්තිකරු වරදකරු කිරීමට උපයෝගි කර නොගත් සාක්ශිමය කරුනු උපයෝගි කර ගනිමින් අභියාචනය ප්‍රතික්ශේප කිරීමට නීතිමය වශයෙන් බලයක් ඇත්ද?"

(*Sic eret scriptum)*

English translations of the above grounds of appeal are as follows:

" (1) when the accused does not suggest any defence, is it acceptable to convict the accused solely based on a suggestion made by the Counsel for the Prosecution to the Court?

(2) Is there any jurisdiction to dismiss the appeal based on evidence which was not utilised by the Magistrate Court to convict the Accused?"

The High Court Judges hearing the arguments found that, the Accused-Appellant not guilty on the 2nd count and acquitted him. Further, found the Accused-Appellant guilty on the first count and affirmed the sentence imposed by the Learned Magistrate (Rs. 5000/ fine in default 2 months Rigorous Imprisonment and 2 years Rigorous Imprisonment.)

Being dissatisfied with the order of the Learned High Court Judge the Accused-Appellant preferred this appeal to the Supreme Court and raised the following questions of law.

1. The Conviction solely based not on the evidence in the case, but on the suggestions made by the defence counsel in cross-examination of the main witness, where the accused-appellant did not take up such position.
2. The Learned High Court Judge has used the evidence which were not considered by the Learned Magistrate to dismiss the appeal.

(*Sic eret scriptum)*

When the matter was taken up for argument the counsel for the Accused-Appellant submitted that, there is no acceptable judgment by the Learned Magistrate. Therefore, anything proceeding further becomes illegal. State Counsel initially submitted

that, the judgment is proper and acceptable. After a while, she admitted that, the Learned Magistrate has not pronounced the judgment with reasons and sought to send the case for re-trial.

The facts of the case as per the submissions of the Counsels and the available evidence are as follows. It is alleged that, the Accused-Appellant had obtained Rs. 80,000/- from the First Prosecution Witness to send him to Malaysia to seek an employment as a driver. PW1 was sent to Malaysia and employed on casual basis to one "Upali". After about 8 months, the Accused- Appellant had made a forged visa with the help of Upali and entered to Singapore, where he was arrested and detained. After his deportation to Sri Lanka, he lodged a complaint at the Police Station of Kosgoda against the Accused-Appellant and he was charged under section 400 and 386 of the Penal Code for cheating and Criminal Misappropriation. After the trial, on the 17/11/1999 the Accused-Appellant was found guilty and on the 03/05/2000 and the Learned Magistrate imposed the sentences. The relevant Journal Entry is reproduced for clear reference.

"2000/05/03

වුදිත- එම් ප්‍රින්ස් ගුනවර්ධන.

වුදිතට 1 වන චෝදනාවට රුපියල් 5000 ක් මුදලින් දඩ නියම කරමි. නොගෙවන්නේ නම් මාස දෙකක් බ/වැ සිර දඬුවම් නියම කරමි. අමතරව අවු. 2ක් බ/වැ සිර දඬුවම් නියම කරමි.

අවුරුදු දෙකක්

2 වන චෝදනාවට අවු. 2ක් බ/වැ සිර දඬුවම් නියම කරමි. චෝදනා 2 සඳහා දඬුවම් එකවර ගෙවී යාමටද නියම කරමි."

(Emphasis by the Magistrate)

English translation of the above paragraph as follows:

"2000/05/03

Accused- M. Prince Gunawardena.

I impose a fine of Rs. 5000/- for the first count in default 2 months rigorous imprisonment. In addition, I impose 2 years rigorous imprisonment.
Two years

I impose 2 years rigorous imprisonment for the second count. I order that, both sentences run concurrently".

(Emphasis the Magistrate)

When the matter was taken up in the appeal before the High Court of Balapitiya the Learned High Court Judge almost re-written the Judgment and found the Accused-Appellant guilty for the first count and acquitted him on the second count. The Learned High Court Judge affirmed the sentence imposed by the Magistrate on the first count.

The first count is under Sec.400 of the Penal Code and it states as follows.

"Punishment for cheating-Whoever cheats shall be punished with imprisonment of either description for a term which may extend to ***one year****, or with fine, or with both."*

(Emphasis added)

Maximum sentence spelled out in the law is one year and the sentence imposed by the Learned Magistrate and the Learned High Court Judge is patently wrong because, the Court has no jurisdiction to impose the said sentence.

Further, under Section 14 of the Code of Criminal Procedure Act No. 15 of 1979 the Learned Magistrate has no jurisdiction to impose the said fine. Hence, the fine

imposed by the Learned Magistrate and affirming the sentence by Learned High Court Judge is bad in law.

Article 13(4) of the Constitution of the Republic states as follows: -

> *"No person shall be punished with death or imprisonment except by order of a competent Court, made in accordance with the procedure established by law."*

For the purpose of completeness, I wish to consider the facts, order of the learned Magistrate and learned High Court Judge to determine the questions of law raised before this Court. It is alleged that the Accused- Appellant had obtained Rs. 80,000/- to get an employment to First Prosecution Witness in Malaysia. PW1 was sent to Malaysia. There, he worked with Upali for about 8 months, made a forged long term visa and entered Singapore. There he was arrested, detained and deported to Sri Lanka. On return he complained to the Police and they preferred charges against the Accused-Appellant under section 400 and 386 of the Penal Code for Cheating and Criminal Misappropriation respectively.

The Learned Magistrate found the Accused-Appellant guilty for both counts and imposed sentences as stated above. When the matter was appealed to the High Court, the High Court found the Accused- Appellant guilty for the first count and affirmed the sentence and acquitted him on the second count.

Order of the learned Magistrate was discussed by the learned High Court Judge and she had not accepted or denied the said order. Further, she had not given reasonable reasons for re-writing the judgment. Anyhow, I considered the available reasoning given by the learned High Court Judge, where she had found the Accused-Appellant guilty under section 400 of the Penal Code for cheating. But, the learned High Court Judge had not considered proof of ingredients of the charge of cheating. She had merely narrated selected portions of the evidence and decided that, the case is proved.

It is mandatory for the Judge to analyze the entire evidence before the Court and to find whether the ingredients are proved beyond reasonable doubt. But, in this case neither the Magistrate nor the High Court Judge had followed the basic evaluation of facts and standard of proof. It is also noted that the both the Magistrate and High Court Judge had not properly analysed the dock statement.

As stated above, I am of the view that, there is no case proved against the Accused-Appellant beyond reasonable doubt. Hence, finding of the Accused- Appellant guilty is unacceptable.

Considering all, I find that, the conviction is not supported by the Evidence before the Court therefore; I do not incline to uphold the conviction. For the reasons stated above I find that, the sentence is bad in law. Accordingly, I allow the appeal and find the Accused-Appellant not guilty and make an order to acquit him.

Appeal allowed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.
I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for special leave to appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under in terms of Article 128(2) of the Constitution read with the Supreme Court Rules of 1990.

1. Dayanthi Dias Kaluarachchi,
   Hitiyawatta,
   Kodagoda, Imaduwa.

   And 03 others

Petitioners

-Vs-

SC/ Appeal 43/2013
Spl./L.A. No. 94/2010
Court of Appeal Writ
Application 318/2007

1. Ceylon Petroleum Corporation,
   No:109, Rotunda Tower
   Galle Road, Colombo 03.

   And 64 Others

Respondents

AND NOW BETWEEN

1. Ceylon Petroleum Corporation,
   No: 109, Rotunda Tower,
   Galle Road, Colombo 03.

2. Chairman,
   Ceylon Petroleum Corporation
   No: 109, Rotunda Tower,
   Galle Road, Colombo 03.

3. Senior Legal Officer,
   Ceylon Petroleum Corporation,
   No: 109, Rotunda Tower,
   Galle Road, Colombo 03.

4. Deputy General Manager (Finance),
   Ceylon Petroleum Corporation,
   No: 109, Rotunda Tower,
   Galle Road, Colombo 03.

5. Deputy General Manager,
   (Administration),
   Ceylon Petroleum Corporation,
   No: 109, Rotunda Tower,
   Galle Road, Colombo 03.

Respondents-Petitioners

-Vs-

1. Dayanthi Dias Kaluarachchi,
   Hitiyawatta,
   Kodagoda, Imaduwa.
   (**Deceased)**

1A. Sunethra Dias Kaluarachchi,
   Pussewatta, Kodagoda,
   Imaduwa.

1B. Ranjith Dias Kaluarachchi,
   45/19, Neligama,
   Meerigama.

1C. Manel Dias Kalurachchi,
   Pussewatta, Kodagoda,
   Imaduwa.

1D. Sujatha Dias Kaluarachchi
   27, Madawalamulla, New Road,
   Galle.

Substituted Petitioner-Respondents

2. Don Nalaka Rasika Sarath Hettiarachchi,
   Samagi,
   Gelioya.

3. Sunil Rajapaksha,
   103/95, Dharmaraja Mawatha,
   Kandy.

4. Herath Mudiyanselage Abeykoon,
   29A, Godagandeniya,
   Peredeniya.

Petitioners-Respondents

S.N.T. Palihena,
Member of the Board of Directors,
Ceylon Petroleum Corporation
No: 109, Rotunda Tower,
Galle Road, Colombo 03.

And 59 Others

Respondents-Respondents

Before: Sisira J de Abrew, J
Vijith K. Malalgoda, PC. J, and
Murdu N.B.Fernando, PC. J.

Counsel: Milinda Gunathilake, DSG for Respondents -Petitioners.
Saliya Pieris, PC with Rukshan Nanayakkara for Petitioners-Respondents

Argued on: 14.06.2018

Decided on: 19.06.2019

Murdu N.B. Fernando, PC. J.

The 1st to 5th Respondents-Petitioners (Ceylon Petroleum Corporation and its officials- "the Appellants") came before this Court being aggrieved by the Judgment of the Court of Appeal dated 29-04-2010 wherein a Writ of Mandamus was issued directing the Ceylon Petroleum Corporation to pay the Petitioners-Respondents ("the Respondents") certain salary arrears.

This Court on 01-03-2013 granted the Appellant Ceylon Petroleum Corporation, Special Leave to Appeal on the following questions of law.

(a) Did the Court of Appeal err in law in holding that the matters in dispute did not arise directly from a contract of employment between parties?

(b) Did the Court of Appeal err in law by holding that the circular marked P6 issued by the 1st Petitioner Corporation is an exercise of the power vested in the Minister under Section 7(1) of the Act?

(c) Did the Court of Appeal err in law in holding that the Respondents have a substantial legitimate expectation that the salary revision will be paid to them after retirement in terms of the circular P6?

(d) Did the Court of Appeal err in law in issuing a Writ of Mandamus to enforce a legitimate expectation?

(e) Did the Court of Appeal err in law in issuing a Writ of Mandamus without considering whether a public statutory duty existed?

(f) Did the Court of Appeal err in law by failing to consider that the Respondents had not sought relief in respect of the decision of the Commissioner of Labour?

(g) Did the Court of Appeal err in law in failing to consider that the Respondents had by documents marked 1R5 to 1R8 accepted that all dues under the VRS had been paid?

The 1st Appellant to this Appeal Ceylon Petroleum Corporation is a statuary Corporation established under Ceylon Petroleum Corporation Act No 28 of 1961. The 2nd to the 5th Appellants are the Chairman and three officials of the Ceylon Petroleum Corporation ("CPC") respectively.

On 15-10-2002, CPC offered a Voluntarily Retirement Scheme (VRS) to its employees by circular bearing No 1515 and called for applications by 15.11.2002. On 13-11-2002 by circular bearing No 1515A the date for tendering the applications was extended to 30.11.2002. (The said two circulars were annexed to the petition filed before the Court of Appeal as P5 and P6). Approximately 1500 employees accepted the said VRS and retired from service with effect from 31.12.2002 and within a month of retirement all employees were paid their due financial entitlements.

The Respondents (the four petitioners before the Court of Appeal) availed of this opportunity and retired from the CPC with effect from 31.12.2002 except the 4th Respondent whose application for VRS was considered subsequent to issuance of circular No 1515B (IR10) which permitted an appeal process and was retired from service on 01-04-2003. (For convenience date of retirement is referred to as 31.12.2002)

Five years after retirement the said four former employees of CPC (the Respondents) filed a writ application before the Court of Appeal and moved court for Writs of Certiorari and Mandamus among other reliefs. (vide prayer (c) and (d) of the petition)

The reliefs stated in prayers (c) and (d) are reproduced below *in verbatim*.

(c) issue a writ of certiorari quashing the said decision of the cabinet made on 27-08-2003 contained in the cabinet paper marked "P16" read together with the cabinet memo marked "P17" refusing payment of the unpaid balance of the arrears of salary revision of year 2000 to the VRS employees aforesaid.

(d) issue a writ of mandamus directing the 1st to 8th Respondents to pay the petitioners their unpaid balance of their arrears of salary revision of year 2000 aforesaid.

The Court of Appeal by its Judgment dated 29-04-2010 refrained from granting the writ of certiorari but granted the writ of mandamus and the appellants are before this Court being aggrieved by the said judgment.

The case presented by the four former employees of the CPC before the Court of Appeal was that though they retired from service on 31-12-2002 and obtained the compensation package under the VRS, that they were not paid arrears of the salary revision granted to the remaining employees of CPC consequent to the cabinet decision dated 27-08-2003 and their legitimate expectation was frustrated by the said decision.

The response of the CPC in the Court of Appeal, to the said contention was that the CPC granted the VRS compensation package as a full and final settlement and the respondents accepted the said settlement voluntarily and signed a declaration to that effect and retired on 31.12.2002; there was no collective agreement signed between the employer and the employees to effect a salary revision once in every three years as envisaged in the petition; a trade union went before the Court of Appeal to rectify/eliminate salary anomalies of CPC prior to implementation of the VRS but the Court of Appeal dismissed the said application; the Commissioner General of Labour has upheld the position that the employees who voluntarily retired under the VRS and obtained all statuary emoluments are not entitled to salary revisions and increments subsequently granted to the employees who did not avail of the VRS; VRS does not arise out of a statutory duty of the CPC; the contracts of employment of the respondents do not come within the realm of writ jurisdiction; the application before the Court of Appeal is futile and no good or valid reasons have been given in the petition to explain the delay of four years in coming before the Court of Appeal.

The Court of Appeal in its judgment at page 12, states thus,

"The grievance of the petitioners is the nonpayment of the arrears of salary in view of the salary revision of the year 2002. The learned Senior State Counsel who appeared for the respondents also agreed that the only consequence of the aforesaid Cabinet Decision P16 is to grant certain salary revisions and advances to current employees and to those who have died or retired under normal circumstances on or after 01.05.2003 of the Ceylon Petroleum Corporation. Therefore the said Cabinet Decision would not be a bar to grant the relief sought by the petitioners. In these circumstances the decision of the Commissioner General of Labour communicated by his letter dated 02.11.2004 to the effect that Voluntary Retirement Scheme employees are not entitled to the said arrears of salary revision

as the cabinet has taken a decision on 27.08.2003 refusing payment of it to them is erroneous."

This Court observes that the judgment does not refer to prayer 'c', nor to the writ of certiorari prayed for by the petitioners. It does not refer to the preliminary objections raised pertaining to laches. It does not give reasons for its conclusion that the opinion of the Commissioner General of Labour is erroneous.

Further this court observes that the Court of Appeal held that the only consequence of the cabinet decision P16 dated 27-08-2003 is to grant certain salary revisions and advances to 'current employees of CPC and to those who have died or retired under normal circumstances on or after 01-05-2003.'

In the Cabinet Memorandum the term 'current employees' and the rationale for granting the salary revision has been clearly identified as present employees and those who have died or retired under normal circumstances on or after 01-05-2003, excluding those who have retired under VRS, on condition that over time work of the employees will be curtailed to the minimum so that such increase will be set-off by such curtailment of overtime.

It is also observed that the Court of Appeal did not grant the principal relief (prayer c) sought from the Court of Appeal a writ of certiorari to quash the cabinet decision dated 27-08-2003 refusing payment of an unpaid balance of salary arrears to persons who retired under the VRS as prayed for. The reasons for non-granting of the writ of certiorari is not enumerated in detail in the judgment, but as seen above the learned judges concur that the cabinet decision moved to be quashed is not a bar to grant the relief sought, as the cabinet decision only pertains to granting of a salary revision to current employees.

Clearly, the respondents do not come within the term 'current employees'. The respondents were not 'present employees as at 27-08-2003, nor retired under normal circumstance after 01-05-2003 but retired under VRS with effect from 31.12.2002' and specifically excluded from the salary revision. Therefore, the non-issuance of the writ of certiorari and non-granting the principal relief sought from the Court of Appeal is proper and justified.

Having correctly refrained from issuing a writ of certiorari in the first instance, the Court of Appeal went on to issue a writ of mandamus, a mandatory order, 'directing the 1st to 8th respondents to pay the petitioners their unpaid balance of their arrears of salary revision of year 2000' aforesaid, on the ground that the petitioners have a substantive legitimate expectation for the payment of their unpaid salary arrears as provided in the Circular P6, upon the basis that the circular P6 has a statutory underpinning and the four former employees have a legitimate expectation in obtaining the benefits accrued to them by the salary revision.

Prior to discussing the issuance of writ of mandamus, let me consider another matter that was raised before this Court as a preliminary objection i.e. laches. The counsel for the appellants strenuously argued that the Court of Appeal should have dismissed the application in limine on the ground of laches as firstly, four years had lapsed between the decision complained of and the filing of the petition in the Court of Appeal and secondly, as no good and valid reasons have been given in the petition to explain the delay.

It is an undisputed fact that the respondents accepted the VRS and retired from service on 31.12.2002. The matter in issue is the subsequent salary increment granted to the current employees on 27.08.2003 and the entitlement of the respondents for same. The respondents went before the Court of Appeal on 21.03.2007, four years after the said decision to grant a salary increment on 27.08.2003. Thus, on the face of the record four years had lapsed prior to the respondents seeking the discretionary remedy of a writ and no good and valid reasons have been given by the respondents in the petition filed in the Court of Appeal pertaining to same. In the written submission filed before this Court the respondents make an attempt to give reasons for its delay but such belated reasons given before this Court cannot be considered as good and valid reasons to justify delay in seeking a review of an administrative decision. Reasons should have been given when the application was filed in the Court of Appeal and not now. Thus, there is merit in the argument of the appellant, that the respondents were guilty of delay and the writ application filed before the Court of Appeal should have been dismissed in limine.

In the Supreme Court decision **Biso Menike Vs Cyril de Alwis 1982 (1) SLR 368 at page 377 to 378** Sharvananda J (as the then was) has held that.

> "a writ of certiorari is issued at the discretion of the Court. It cannot be held to be a writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by well accepted principles. The court is bound to issue a writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver…….The proposition that the application for writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a writ application dwindle and the Court may reject a writ application on the ground of unexplained delay…….An application for a writ of certiorari should be filed within a reasonable time from the Order which the applicant seeks to have quashed."

In **Seneviratne Vs Tissa Bandaranayake and another 1999(2) SLR 341 at page 351**, Amerasinghe J adverting to the question of long delay, commented that.

> "if a person were negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, *nam leges vigilantibus, non dormientibus, subveniunt,* and for other reasons refuses to assist those who sleep over their rights and are not vigilant."

In **Issadeen Vs the Commissioner of National Housing and others 2003 (2) SLR 10 at page 15,** Amerasinghe J held that;

> "although there is no statutory provision in this country restricting the time limit in filling an application for judicial review and the case law of this country is indicative of the inclination of the court to be generous in finding a good and valid reason for allowing late applications, I am of the

view that there should be proper justification given and explained in the delay in filling such belated application."

Based upon the above judicial dicta, I am inclined to accept the contention of the appellants that the Court of Appeal should have dismissed this application in limine on the ground of laches which was a threshold issue. The Court of Appeal did not consider the ground of laches, which was raised as a preliminary objection. I observe this omission as a grave error in the Court of Appeal Judgment.

Let me, now move onto, the issuance of a writ of mandamus by the Court of Appeal.

When granting the said relief, the Court of Appeal relied on three judgments. One was from the Court of Appeal and two from the Supreme Court. The two judgments of the Supreme Court pertain to fundamental right applications.

In the first instance, I wish to refer to the facts pertaining to the said cases, which I consider are vastly different to the facts of the instant appeal and therefore can be easily distinguished.

In the 1st fundamental rights application namely, **Sirimal and others Vs Board of Director of the Co-operative Wholesale Establishment (CWE) and others 2003(2) SLR 23**, optional age of retirement of employees at CWE, which was 55 years of age with a right to seek extensions up to 60 years of age was changed by way of a circular to make retirement compulsory at 55 years. The Supreme Court held that the petitioners had a legitimate expectation of receiving extensions up to 60 years (except where medical or disciplinary grounds were present) and further went on to hold that if it is sought to change conditions of service denying the right of extension, the employees should be given a reasonable time and an opportunity of showing cause against change and therefore the decision of the CWE to change the age of retirement is not warranted either upon consideration of public interest or upon principles of fairness and the petitioners were entitled to seek relief for violation of fundamental rights even if there were other remedies to pursue, namely applications to the Labour Tribunal or Arbitration in terms of the CWE Act.

In the 2nd fundamental rights application, **Dayaratne and others Vs Ministry of Health and Indigenous Medicine and others 1999(1) SLR 393,** the Ministry of Health called for applications from persons desirous in following a course of training leading to the award of the certificate of competency as Assistant Medical Officers and the petitioners applied and sat the competitive examination. Prior to holding of the interviews to check the qualifications in order for the petitioners to be enrolled for the said course, upon pressure yielded by the GMOA, holding of the said training course was cancelled and by a circular letter the petitioners were given the option of following another course, a course for paramedical services (pharmacists, medical laboratory technologists, public health inspectors). Based upon the facts it was held that the petitioners had a legitimate expectation that they would upon satisfying prescribed conditions, be provided with a course of training for the examination leading to the award of the certificate of competency as Assistant Medical Practitioners (AMP's) and the decision effecting a change of policy destroyed the expectations of the petitioners and in deciding of this change of policy only the views of the GMOA was considered and not the views of the AMP's nor the petitioners and hence the rights of the petitioners guaranteed under Article 12(1) of the Constitution were violated. Court further held that where a change of policy is likely to frustrate the legitimate expectation of individuals, they must be given an opportunity of stating why the change of policy should not affect them

unfavorably and such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution.

In the said two cases, a public body has made an unambiguous representation which was subsequently altered due to a policy change or more so as an administrative requirement. The petitioners were not given a hearing nor an opportunity of showing cause and therefore the procedure adopted was flawed and the Supreme Court held that the individual's legitimate expectation have been affected and that a violation of a fundamental right has taken place. In my view these two cases pertaining to procedural legitimate expectation has no application to the matter before us, as no allegation of a procedural legitimate expectation nor a violation of a fundamental right has been alleged. Therefore, the said cases can be clearly distinguished from the instant writ application in which a writ of mandamus was granted to effect payment of 'an unpaid balance of arrears of a salary revision' allegedly based upon substantive legitimate expectation.

The third case relied on by the Court of Appeal is **Multinational Property Development Ltd Vs Urban Development Authority 1996 (2) SLR 52**, a judgment of the Court of Appeal itself, wherein a decision to lease a land (Charmers Granary in Colombo) on a 99-year lease was subsequently cancelled. In this case the Court held a substantive change in policy resulting from a change in executive presidency cannot be avoided, but where a new policy is to be applied, the individuals who have legitimate expectation based on promises made by public bodies that they will be granted certain benefits, have a right to be heard before those benefits are taken away and directed to give the petitioner a hearing. No writ of mandamus was issued in this case and only a hearing was granted by the Court of Appeal. Thus, this case too can be distinguished from the appeal before us.

In the instant appeal, the respondents retired from service on 31.12.2002 under a voluntarily retirement scheme, after accepting and having obtained the compensation package referred to in the circular P5 as a full and final payment and after duly making a declaration to such effect and also that nothing further is due to them (vide 1R5 to 1R8) Therefore, by mutual agreement, the contract of employment between the CPC and the employees were terminated.

Eight months after the termination of the employment contract between the 1st appellant and the respondents, the cabinet memorandum (P17) referred to earlier was submitted to the Cabinet of Ministers for an increase of salaries (upon the basis that overtime work of employees will be curtailed to the minimum so that such increase will be set-off by such curtailment of overtime) and the increase being applicable only to the present employees and to those who have died or retired under normal circumstances on or after 01-05-2003, *excluding those who have retired under VRC*, which proposal was approved (P16) by the Cabinet of Ministers on 27-08-2003. This was the cabinet decision which their Lordships of the Court of Appeal refrained from quashing by way of a writ of certiorari. Nevertheless, it is observed that the Court of Appeal issued a writ of mandamus directing the appellants to make an unspecified payment to the respondents on the ground of substantive legitimate expectation. In issuing the writ of mandamus, the Court of Appeal held that CPC owed a statutory duty to the respondents to make such unspecified payment based upon the penultimate clause of circular P6 which reads thus "whatever allowances and salary which will fall due after the payment of salary in December 2002 will be paid in the future."

VRS was offered by circular P5, with specific reference to the compensation package and the last date of receipt of applications for VRS. Circular P6, covered incidental matters and referred to the statutory payments in detail which the employees opting for VRS would be entitled to and extended the time period of tendering application for VRS and opened it to employees who were earlier excluded and had the above referred clause as the penultimate clause.

When issuing the writ of mandamus, the reasoning of the Lordships of Court of Appeal was VRS (P6) was approved by the Cabinet of Ministers; under section 7(1) of the CPC Act the Minister can give general or special directions and the Board should give effect to such directions; the P6 circular has a statutory underpinning; the salary increase cannot be considered as seeking to enforce a contractual right and the employees have a legitimate expectation that the terms and conditions stipulated in P6 would be adhered to by the CPC.

Let me now consider the said reasoning. viz-a-viz the seven Questions of Law for which Special Leave was granted by this Court. In my view all Questions of Law weave around the availability of a writ of mandamus.

There was no material placed before this Court to substantiate that the VRS was approved by the Cabinet of Ministers on the request of the Minister, as stated in the judgment. The circular P5 by which the VRS was offered, issued under the hand of the Chairman/ Managing Director of CPC clearly stated that the VRS is offered by the Management with the concurrence of the General Treasury in view of the award of financial emoluments. Therefore, the attempt to sanctify the circular P5 to the level of a statutory duty of CPC, in my view has no merit and is erroneous. Similarity, circular P6 which covered incidental matters too was not issued as an exercise of power under section 7(1) of the CPC Act. The terms and conditions in the said circular does not have a statutory flavor or a statutory underpinning as stated in the judgement and on that ground too, the judgment is erroneous.

P5 is simply a circular issued in the course of contract of employment, by the employer offering a voluntarily retirement. The employees were free to accept or reject the VRS. P5 circular dated 15.10.2002 clearly spelt out the termination package, compensation to be calculated at two months salary for each year of service and one-month salary for balance years of service until the age of retirement and emoluments to be calculated upon the *last drawn salary*, i.e. salary of December 2002. This is the offer that was accepted by the 1500 employees as a full and final settlement and emoluments based on the last drawn salary. Vide 1R5 to 1R8 the respondents voluntarily accepted the compensation as a full and final settlement based upon the last drawn salary and terminated their contracts of employment and retired from service. Any dispute pertaining to the terms of VRS is contractual and does not fall within the scope of writ application. Thus, no relief can be granted by a writ court based upon legitimate expectation or otherwise.

The relationship between the CPC a public corporation and its employees is entirely contractual and has no statutory flavor. In a plethora of Appellate Court decisions, it has been held that matters pertaining to contracts of employment does not come within the realm of writ applications.

Sripavan J, (as he then was) in **Gawarammana Vs Tea Research Board and others 2003(3) SLR page 120** held that,

> "powers derived from contract are matters of private law. The fact that one of the parties to a contract is a public authority is not relevant since

> the decision sought to be quashed by way of certiorari is itself was not made in the exercise of any statutory power."

Hence, on the ground of contractual relationship too, the judgment is erroneous.

The rationale for revising the salary is clearly and unambiguously spelt out in the cabinet paper P17 dated 23.08.2003 as overtime work of employees to be curtailed to a minimum, so that such increase will be set-off by such curtailment of overtime and the increase being applicable only to the present employees and to those who have died or retired under normal circumstance on or after 01.05.2003, excluding those who have retired under VRS. Thus, the intention of the CPC is very clear. Salary revision is only for present employees. In the facts and circumstances of the appeal, I do not see any merit or justification of the reasoning of the Court of Appeal, that the respondents had a substantive legitimate expectation to obtain unpaid salary arrears based only upon the penultimate paragraph in circular P6 which was issued subsequent to circular P5 by which the VRS was offered. In any event, the judgments the Court of Appeal relied on in respect of legitimate expectation and discussed in detail earlier, pertains to procedural legitimate expectation and not to substantive legitimate expectation.

The respondents in the petition filed before the Court of Appeal did not move to quash the decision of the Commissioner General of Labour referred to therein. Thus, there is no merit nor reason for the declaration by the Court of Appeal, that such decision is erroneous.

In Administrative Law by HWR Wade and C.F. Forsyth (11th Edition) at pages 450-452, the authors observe that,

> "The phrase legitimate expectation (which is much in vogue) must not be allowed to collapse into an inchoate justification for judicial intervention. (page 450)
>
> As Lord Bridge in 1986 set out clearly there are two ways in which legitimate expectations may be created. He said in Re. Westminster City Council [1986] AC 668 at 689, the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation. (page 451)
>
> It is not enough that an expectation should exist: it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law. A crucial requirement is that the assurance must itself be clear, unequivocal and unambiguous. Many claimants fail at this hurdle after close analysis of the assurance. The test is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made." (page 452)

When applying the above stated principles to the instant appeal the question that begs an answer is whether an assurance was given by CPC, if so whether such assurance given is clear, unequivocal or unambiguous, the only conclusion that could be arrived at is that it is not so and that no assurance what so ever was given by CPC. The penultimate paragraph in P6 is unspecified, equivocal, ambiguous, vague and not clear and thus will not create a legitimate expectation. It does

not fall into either of the two sub-headings of legitimate expectation, procedural or substantive. Therefore, the determination that the respondents had a substantive legitimate expectation and the issuance of a writ of mandamus to enforce such legitimate expectation by the Court of Appeal in my view has no merit and is erroneous.

In **Weligama Multipurpose Co-operative Society Ltd Vs Chandradasa Daluwatta (1984) 1 SLR 195**, a five judge bench of the Supreme Court, held that a writ of mandamus will not issue for a private purpose, that is to say for the enforcement of a mere duty stemming from a contract or otherwise. Sharvananda J (as he then was) at page 200, went onto say,

> "the Court of Appeal has over looked the fact that the authority relied on by the petitioner for the payment of salary to the interdicted officer is only a circular and not a regulation. A circular is not referable to the exercise of any delegated legislative power, it does not prescribe any duty having statutory potential."

Thus, based upon the above dicta, I am inclined to accept that in the instant appeal before us, an enforcement of a mere duty stemming from a contract of employment cannot be enforced by a writ of mandamus on the basis of either procedural or substantive legitimate expectation in the absence of any statutory duty on the appellant CPC. Therefore, the contention of the Court of Appeal is erroneous and has no justification.

The Lordships of the Court of Appeal, when granting the writ of mandamus relied on the dicta of Ameratunga J in the Court of Appeal case of **Karavita and others Vs Inspector General of Police and others 2002(2) at page 287** wherein it was stated,

> "the absence of precedent does not deter me when I am convinced that the only effective remedy to remedy the injustice caused to the petitioners is an order of mandamus."

However, I am mindful of the observations of the authors quoted above from Administrative Law by Wade and Forsyth, that legitimate expectation must not be allowed to collapse into an inchoate justification for judicial intervention.

In the judgment of the Supreme Court in **Credit Information Bureau of Sri Lanka Vs Messers Jafferjee and Jafferjee (Pvt) Ltd. 2005 (1) SLR page 89** Court set aside the judgment of the Court of Appeal which issued a writ of mandamus.

JAN de Silva J (as he then was) (with Sarath N Silva CJ and Weerasuriya J agreeing) referred to many conditions to be fulfilled prior to issuance of a writ of mandamus and I quote below from page 93.

> "There is rich and profuse case law on mandamus, on the conditions to be satisfied by the applicant. Some of the conditions precedent to the issue of mandamus appear to be:
>
> a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the mandamus is sought…… The foundation of mandamus is the existence of a legal right.
>
> b) The right to be enforced must be a "public right" and the duty sought to be enforced must be of a public nature…."

At page 94, JAN de Silva J went on to state,

> "Whether the facts show the existence of any or all pre-requisites to the granting of the writ is a question of law in each case to be decided, not in any rigid or technical view of the question, but according to a sound and reasonable interpretation. The court will not grant a mandamus to enforce a right not of a legal but purely equitable nature however extreme the inconvenience to which the applicant might be put."

I re-iterate the observations of JAN de Silva J, quoted above that the foundation of mandamus is the existence of a legal right. A court should not grant a writ of mandamus to enforce a right which is not legal and not based upon a public duty. Judicial intervention based upon legitimate expectation should not be used as a tool for enforcing a right purely of an equitable nature.

In the circumstances, in this instant appeal I do not find any merit or justification for judicial intervention for issuance of a writ of mandamus on the ground of substantive legitimate expectation by the Court of Appeal. For reasons adumbrated in this judgment, I hold that the Court of Appeal was in error in issuing a writ of mandamus.

Accordingly, all questions of law raised before this Court are answered in the affirmative. I allow the appeal of the Respondents-Petitioners (the Appellants) made to this Court. There will be no costs.

The judgment of the Court of Appeal dated 29.04.2010 is set aside and the petition filed by the Petitioners-Respondents in the Court of Appeal is also dismissed.

Appeal is allowed.

Judge of the Supreme Court

Sisira J de Abrew, 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

Dadallage Mervin Silva
No.239/1, Wijewardana Mawatha,
Pasyala Road, Meerigama.

Plaintiff

SC Appeal 45/2010
SC/HC/CA/LA 178/2009
WP/HCCA/GPH/70/2001Final
DC Gampaha Case No.38028/L

Vs-

1. Dadallage Anil Shantha Samarasinghe
   Walawwatte, Meerigama.

2. Mohamed Rosaid Misthihar
   No.5, Masjid Mawatha,Kaleliya

Defendants

AND

Dadallage Anil Shantha Samarasinghe
Walawwatte, Meerigama.

1st Defendant-Appellant

Vs

Dadallage Mervin Silva
No.239/1, Wijewardana Mawatha,
Pasyala Road, Meerigama.

Plaintiff-Respondent

Mohamed Rosaid Misthihar
No.5, Masjid Mawatha,Kaleliya

2nd Defendant-Respondent

AND BETWEEN

Dadallage Anil Shantha Samarasinghe
Walawwatte, Meerigama.

1st Defendant-Appellant-Appellant

Vs

Dadallage Mervin Silva
No.239/1, Wijewardana Mawatha,
Pasyala Road, Meerigama.

Plaintiff-Respondent-Respondent

Mohamed Rosaid Misthihar
No.5, Masjid Mawatha,Kaleliya

2nd Defendant-Respondent-Respondent

Before: Sisira J de Abrew J
L.T.B.Dehideniya J &
P.Padman Surasena J

Counsel: Rohan Sahabandu PC with Hasitha Amarasinghe for the 1st Defendant-Appellant-Appellant
Manohara de Silva PC for the Plaintiff-Respondent-Respondent

Written submission
tendered on : 29.7.2010 and 22.5.2019 by the 1st Defendant-Appellant-Appellant
9.9.2010 and 24.5.2019 by the Plaintiff-Respondent-Respondent
Argued on : 10.5.2019

Decided on: 11.6.2019

Sisira J. de Abrew, J
The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action against the Defendants in this case for a declaration of title that he is the lawful owner of the land in question,

The learned District Judge by his judgment dated 30.8.2001, held in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment, the 1st Defendant-Appellant-Appellant (hereinafter referred to as the 1st Defendant-Appellant) appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 3.7.2009, affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 1st Defendant-Appellant has appealed to this court. This court by its order dated 26.5.2010, granted leave to appeal on the following question of law.

Did the Hon.Judges of the Civil Appellate High Court of Gampaha err in law as well as on facts in holding that the Deed bearing No.127 dated 23.8.1990 attested by N.K.de Soysa Notary Public and marked as P2 had been duly proved in law?

The Plaintiff-Respondent at the trial took up the position that Hector Silva by Deed No.127 (marked P2) dated 23.8.1990 attested by N.K.de Soysa Notary

Public had transferred the land in question to his brothers and sisters and that brothers and sisters of Hector Silva by Deeds Nos. 3017 dated 26.3.1994, 3027 dated 18.4.1994 and 3031 dated 24.4.1994 attested by V.K.Senanayake Notary Public transferred the land in question to Plaintiff-Respondent. Therefore, for the Plaintiff-Respondent to get title to the land, the above mentioned deed No.127 should be a genuine document and it must be proved in accordance with the procedure set out in section 68 of the Evidence Ordinance.

Section 68 of the Evidence Ordinance reads as follows.

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

It has to be noted here that the Notary Public who attested Deed No.127 and the two attesting witnesses of the sad deed were not called as witnesses. Therefore it is undisputed that the above mentioned Deed No.127 was not proved in accordance with the procedure set out in Section 68 of the Evidence Ordinance.

Although the Deed No.127 marked P2 at the trial was produced by the Plaintiff-Respondent subject to proof, the1st Defendant-Appellant at the close of the case of the Plaintiff-Respondent, did not object to the said Deed No.127. The learned District Judge considered the Deed No.127 marked P2 as evidence at the trial. Learned President's Counsel for the 1st Defendant-Appellant contended that although the 1st Defendant-Appellant did not object

to the Deed No.127 marked P2 at the close of the Plaintiff-Respondent's case, it could not have been considered as evidence since it was not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. The learned Judges of the Civil Appellate High Court however considered the principle enunciated in Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East [1981] 1SLR 18 and decided that since the Deed No.127 marked P2 was not objected to at the close of the Plaintiff-Respondent's case, it can be considered as evidence. In the case of Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East (supra) this court decided as follows.

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

In Balapitiya Gunananda Thero Vs Talalle Methananda Thero [1997] 2 SLR101this court held as follows.

> *"Where 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 curses curiae."*

Learned President's Counsel for the Plaintiff-Respondent took up the same position in his submission. Then the most important question that must be considered in this case is when Deed No 127 which was marked subject to proof was not objected at the close of the Plaintiff-Respondent's case whether it can be considered in evidence when it was not proved in accordance with the procedure set out as section 68 of the Evidence Ordinance. In finding an

answer to this question, I would consider Robins Vs Grogan 43 NLR 269 wherein Howard CJ held as follows.

> *"A document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by Court."*

Therefore it is seen that although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved. If the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East (supra) is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence if it is not objected by the opposing party at the close of the case of the party which produced it. In such a situation, one can argue that courts will have to disregard section 68 of the Evidence Ordinance. I do not think that the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East (supra) extends to such a situation. Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the courts will have to follow the procedure laid down in law. In this connection I would like to consider the judicial decision in the case of Samarakoon Vs Gunasekara [2011] 1SLR 149 wherein this court observed the following facts.

> *"In order to prove the Plaintiff's title to the property which is the subject matter of the action, he produced at the trial the notarially executed deeds marked P3 to P6 which were marked subject to proof. No witnesses were called at the trial on behalf of the Plaintiff to prove the said deeds. At the end of the Plaintiffs case, when the Plaintiff's Counsel read in evidence the deeds produced in evidence marked P3 to P6, the defence had made an*

application to Court to exclude those documents which were not properly proved. The learned District Judge held that the documents P3 to P6 had not been properly proved and accordingly, that the Plaintiff had failed to prove his title to the land in question.

The Plaintiff appealed against the decision of the District Judge to the High Court. The High Court reversed the District Judge's finding on the basis that when a deed had been duly signed and executed it must be presumed that it had been properly executed."

His Lordship Justice Amaratunga (with whom Ratnayake J and Ekanayake agreed) held as follows.

The High Court in total disregard of the specific and stringent provisions of Section 68 of the Evidence Ordinance had relied on an obiter dictum made in a case where due execution was challenged, to reverse the decision of the District Judge.

In terms of Section 2 of the Prevention of Frauds Ordinance a sale or transfer of land has to be in writing signed by two or more witnesses before a notary, duly attested by the notary and the witnesses. If this is not done the document and its contents cannot be used in evidence.

His Lordship Justice Amaratunga at page 151 further held as follows.

A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the

vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence.

Considering all the above matters, I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved. I would like to note that the acts performed or not performed by parties in the course of a trial do not remove the rules governing the proof of documents.

In the present case, the Deed No.127 marked P2 has been produced in evidence subject to proof but was not objected to at the close of the Plaintiff-Respondent's case. The said deed was not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. Therefore the said the Deed No.127 marked P2 at the trial could not have been used as evidence by the trial court. The trial court has used the said Deed No.127 marked P2 as evidence and the learned Judges of the Civil Appellate High Court have affirmed the judgment of the learned District Judge. For the above reasons, I hold that the learned District Judge was in error when he used the

Deed No.127 marked P2 as evidence and the learned Judges of the Civil Appellate High Court were also wrong when they affirmed the judgment of the learned District Judge.

For the above reasons, I answer the above question of law in the affirmative and set aside the judgment of the Judges of the Civil Appellate High Court dated 3.7.2009 and the judgment of the learned District Judge dated 30.8.2001. Since I set aside the judgments of both courts below, I dismiss the action of the Plaintiff-Respondent. The learned District Judge is directed to enter decree in accordance with this judgment.

Judgments of the District Court and the Civil Appellate High Court set aside.

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.

P.Padman Surasena J

I agree.

Judge of the Supreme Court.

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

In the matter of an application for Leave to Appeal in terms of Article 128 of the Constitution read with Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC. Appeal No. 48/2011

SC. HC. CA. LA. No. 122/09

HC (Civil) WP/HCCA/COL -140/2007 (F)

D.C. Colombo 42217/MR

National Housing Development Authority
P.O. Box 1826,
5th Floor,
Chittampalam A. Gardiner Mawatha,
Colombo 02.
Defendant-Appellant-Petitioner

Vs.

D. S. Paranayapa
No. 263A (1),
Devala Road,
Koswatte,
Battaramulla.
Plaintiff-Respondent-Respondent

BEFORE : Sisira J. de Abrew, Acting CJ.

Murdu N. B. Fernando, PC, J.

E. A. G. R. Amarasekara, J.

COUNSEL : Sanjay Rajaratnam, PC, ASG, with Ravindra Pathiranage, DSG, for the Defendant-Appellant-Appellant.

M. U. M. Ali Sabry, PC, with Shamith Fernando and Nalin Alwis for the Plaintiff-Respondent-Respondent.

ARGUED & DECIDED ON : 22.01.2019

Sisira J. de Abrew, Acting CJ.

Heard both Counsel in support of their respective cases.

This is an appeal filed against the Judgment of the learned Judges of the Civil Appellate High Court Judge dated 14.05.2009 wherein they affirmed the order of the learned District Judge dated 27.03.2007.

Learned District Judge in this case by the said order refused the application to purge the default by the Defendant. This Court by its order dated 31.03.2011 granted leave to appeal on questions of law set out in paragraph 13 of the petition of appeal dated 16.06.2010 which are stated below:-

(i) Did the learned Judges of the Provincial Civil Appellate High Court err on law when it came to the finding that there was

no due diligence displayed on the part of the Attorney-at-Law on behalf of the Petitioner who was assigned to appear in the District Court of Colombo on the said date?

(ii) Did the learned Judges of the Provincial Civil Appellate High Court err on law when it came to the finding that filing of a proxy on behalf of a relevant party amounts to a legal representation in Court?

(iii) Did the learned Judges of the Provincial Civil Appellant High Court err in law when it did not take cognizance of the motion dated 03.12.2004, which encompassed the proxy of the Petitioner?

(iv) Did the learned Judges of the Provincial Civil Appellate High Court misdirect themselves in rejecting the bona fide conduct of the Attorney-at-Law for the Petitioner who had filed a motion dated 03.12.2004 along with the proxy (P2)?

(v). Did the learned Judges of the Provincial Civil Appellate High Court misdirect themselves that filing of the motion (P2) was a clear indication that the Petitioner never intended the trial to proceed by default?

Learned District Judge on 07.12.2004 noted that summons had been served on the Defendant and the Defendant was

absent and unrepresented. He therefore made an order to the following effect. "The case is fixed for ex-parte trial against the Defendant. In order to fix the case for ex-parte trial, call the case in Court No. 06 on 25.01.2005."

According to the journal entry No. 03, the Attorney-at-Law for the Defendant has filed a motion with a proxy. The date, according to the said journal entry is 07.12.2004/03.12.2004. The District Judge has noted that the Attorney-at-Law had failed to fix relevant stamps to the proxy. However, according to journal entry No. 04, dated 07.01.2005, the Attorney-at-Law for the Defendant has, by way of a motion, filed a proxy with correct stamps. The learned District Judge on the said motion has made an order to call the case on 27.01.2005 for the answer as prayed for by the said motion. This order has been made on 07.01.2005. According to the said order in journal entry No. 04 dated 07.01.2005, the case has to be called on 27.01.2005. However, the learned District Judge has called the case on 25.01.2005. According to journal entry No. 05 dated 25.01.2005, the case was being called in order to fix the matter for ex-parte. The learned District Judge has, on 25.01.2005, noted that the Defendant has filed proxy and moved for time to file the answer.

When considering all the above matters, the most important question that must be decided by this Court is whether the learned District Judge fixed the case for ex-parte trial on 07.12.2004 or 25.01.2005. I now advert to the said question. According to journal entry No. 04 dated 07.01.2005, the Attorney-at-Law for the Defendant has moved permission of Court to file the answer and the Judge has granted a date to file the answer. The said date was 27.01.2005.

According to journal entry No. 05 dated 25.01.2005, the case was being called in order to fix for ex-parte trial. Even according to journal entry No. 02 dated 07.12.2004, there is an order to the effect that the case will be called in Court No. 06 on 25.01.2005 in order to fix the matter for ex-parte trial.

When we consider all the above matters, we hold the view that the learned District Judge has decided to fix the case for ex-parte trial on 25.01.2005 and not on 07.12.2004. If the learned District Judge took a decision on 25/01/2005 to fix the case for ex-parte trial, how did he ignore his own order made on 07.01.2005 giving a date to the Defendant to file the answer on 27.01.2005? Therefore, fixing the case for ex-parte trial even on 25/01/2005 is wrong.

When we consider the above matters, we hold the view that the order made by the learned District Judge on 25.01.2005 fixing the matter for ex-parte is wrong and cannot be accepted. Learned District Judge however, by order dated 27.03.2007 has rejected the application of the Defendant to purge the default. He has made the said order on the basis that he fixed the matter for ex-parte trial on 07.12.2004. This is an error on the part of the learned District Judge.

Learned Judges of the Civil Appellate High Court unfortunately too have fallen into the same error. We have earlier held that the learned District Judge has fixed the case for ex-parte trial on 25.01.2005 and not on 07.12.2004.

For the aforementioned reasons, we hold that both the learned District Judge and the Judges of the Civil Appellate High Court were wrong when they rejected the application of the Defendant to purge the default. For the purpose of clarity, we hold that the learned District Judge has made the order fixing the matter for ex-parte only on 25.01.2005. Therefore, the learned District Judge could not have ignored his own order dated 07.01.2005 giving a date for the Defendant to file answer on 27.01.2005. We have earlier pointed out that fixing the case for ex-parte trial even on 25/01/2005 is wrong.

For the reasons, we answer questions of law Nos. 3 and 5 in the affirmative. The question of law Nos. 1, 2 and 4 do not arise for consideration.

For the aforementioned reasons, we set aside the ex-pate order of the learned District Judge dated 27.03.2007 and the judgment of the Civil Appellate High Court Judge dated 14.05.2009.

Learned District Judge by ex-parte judgment dated 13.09.2005 has held the case in favour of the Plaintiff.

For the reason stated above, we are unable to permit the said judgment dated 13.09.2005 to stand. We set aside the said judgment dated 13.09.2005 as well.

We direct the learned District Judge to grant an opportunity to the Defendant to file answer and expeditiously conclude this case.

ACTING CHIEF JUSTICE

Murdu N. B. Fernando, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara, 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 for leave to appeal under section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

Asan Kalenderlebbe, (deceased)
Sinnaulla, Pottuvil.

Plaintiff

Ismail Fathima,
Sinnaulla, Pottuvil.

Substituted Plaintiff

SC Appeal 48/2013

SC/C.H.C/LA 48/2013

EP/HCCA /KAL 241 /2011

DC Potuvil Case No. 298L

DC Kalmunai Case No. 2364L

Vs,

1. Weeragoda Arachchige Pathmasiri Silva,
   No. 90/A/1, Rajapihilla Mawatha, Kandy

2. Srikathuge Sunantha Deepal Fernando,
   No. 43, Saranankara Street, Kandy

3. Srikathuge Wimalasurendra Fernando,
   Pasyala

4. Justin Chandrapala de. Silva,
   No. 102/1, Rajapihilla Mawatha, Kandy

5. Kalander Asiya Umma,
   Sinna Ulla, Arugambay, Pottuvil

6. Peter Goodman, (deceased)
   Star Dust Beach Hotel, Pottuvil

7. Mohomed Ismail Cadre Mohaideen,
   Pottuvil

Defendants

And between

Mohideen Bawa Abdul Cassim,
Pottuvil

Petitioner

Vs,

1. Weeragoda Arachchige Pathmasiri Silva,
   No. 90/A/1, Rajapihilla Mawatha, Kandy

2. Srikathuge Sunantha Deepal Fernando,
   No. 43, Saranankara Street, Kandy

3. Srikathuge Wimalasurendra Fernando,
   Pasyala

4. Justin Chandrapala de. Silva,
   No. 102/1, Rajapihilla Mawatha, Kandy

5. Kalander Asiya Umma,
   Sinna Ulla, Arugambay, Pottuvil

6. Peter Goodman, (deceased)
   Star Dust Beach Hotel, Pottuvil

7. Mohomed Ismail Cadre Mohaideen,
   Pottuvil

Defendants-Respondents

And between

Kalander Asiya Umma,
Sinna Ulla, Arugambay, Pottuvil

5th Defendants-Respondents-Appellant

Vs,

Mohideen Bawa Abdul Cassim,
Pottuvil

Petitioner-Respondent

And now between

Kalander Asiya Umma,
Sinna Ulla, Arugambay, Pottuvil

5th Defendants-Respondents-Appellant-Petitioner

Vs,

Mohideen Bawa Abdul Cassim,
Pottuvil

Petitioner-Respondent-Respondent

1. Weeragoda Arachchige Pathmasiri Silva,
   No. 90/A/1, Rajapihilla Mawatha, Kandy

2. Srikathuge Sunantha Deepal Fernando,
   No. 43, Saranankara Street, Kandy

3. Srikathuge Wimalasurendra Fernando,
   Pasyala

4. Justin Chandrapala de. Silva,
   No. 102/1, Rajapihilla Mawatha, Kandy

5. Kalander Asiya Umma,
   Sinna Ulla, Arugambay, Pottuvil

6. Peter Goodman, (deceased)
   Star Dust Beach Hotel, Pottuvil

7. Mohomed Ismail Cadre Mohaideen, (deceased)
   Pottuvil

Defendants-Respondents-Respondents

7A Abdul Jabbar Nona Jesmine
Pottuvil 01

7B Farzan Mohideen
Pottuvil 01

7C Fowzi Mohideen
Pottuvil 01

7D Faizal Mohideen
Pottuvil 01

7E Farzana
Pottuvil 01

7F Firosa
Pottuvil 01

Parties seeking substitution in place of the 7th Defendant- Respondent-Respondent

Before: **Hon. Justice Buwaneka Aluwihare PC**
Hon. Justice Vijith K. Malalgoda PC
Hon. Justice Murdu N.B. Fernando PC

Counsel: Manohara de. Silva, PC with Ms. Pubudini Wickramarathne for the 5th Defendant-Respondent-Appellant-Petitioner

N.R. Sivendran with Ms. Anushiya Ramen for the Petitioner-Respondent-Respondent

Nuwan Rupasinghe with Ms. Dhanushka Elpitiya for the 7A-7F Substituted Defendant-Respondents-Respondents

Argued on: 18.02.2019

Decided on: 04.09.2019

Vijith K. Malalgoda PC J

This Appeal had been filed before the Supreme Court challenging the decision of the Provincial High Court of Civil Appeal of the Eastern Province holden in Kalmunai dated 13.09.2012 in HC CA Application No. 241/11.

The 5th Defendant-Respondent-Appellant-Appellant (hereinafter referred to as the Appellant) who is the Petitioner in the instant appeal had raised several grounds in appeal but, leave was granted only on the following grounds of appeal.

1. The High Court erred in considering section 404 of the Civil Procedure Code as the relevant section applicable to the instant case for substitution of the Petitioner-Respondent and failed to give due consideration to the other provisions of Chapter XXV of the Civil Procedure Code
2. The High Court misdirected itself in failing to consider that the wording “other cases of assignment, creation or devolution of any interest pending the action” in section 404 denotes that the section would apply to a situation where the alternation of a party’s status has occurred other than by the modes stipulated in section 392 to 398 of the Civil Procedure Code and thus where there is assignment, creation or devolution of any interest other than due to the death of a party, section 404 would apply

3. The High Court failed to consider that the relevant sections under which the application for substitution should have been made by the Petitioner-Respondent are section 395 read with section 392 of the Civil Procedure Code

When this application was supported for leave, court granted permission for the learned President's Counsel who represented the contesting party i.e. substituted Petitioner-Respondent-Respondent (hereinafter referred to as the Respondent) to raise the following question of law

4. Has the High Court acted appropriately where there has been no contesting application for substitution in the circumstances of this case?

The deceased Plaintiff instituted action against the 1st to the 7th Defendants on 03.10.2000 and averred in his plaint that he become entitle to occupy and possess the land more fully described in the schedule to the plaint under and by virtue of a permit issued under the provisions of the Land Development Ordinance. The Plaintiff had further averred that the defendants are in unlawful possession of the same and prayed for declaration of title, ejectment and to set aside and declare the deed nos. 120 and 302 attested by S.M. Gaffoor Notary Public are null and void.

When the said trial was proceeding before the District Court, the original Plaintiff had passed away and steps were taken to substitute, the living spouse of the deceased plaintiff as the substituted Plaintiff and the trial proceeded to the end and the case was fixed for judgment on 01.08.2007.

The court delivered its judgment entering the judgment in favour of the Plaintiff.

Being dissatisfied with the said judgment the 7th Defendant to the District Court action had filed a petition of appeal and the said appeal was taken up before the High Court of Civil Appeal of the Eastern Province holden in Kalmunai. During the appeal before the said High Court it was revealed

that the Substituted Plaintiff had passed away prior to the delivery of the judgment by the District Judge on 01.08.2007. Accordingly the appeal was sent back to the District Court for substitution of the Substituted Plaintiff.

As revealed before us, prior to the death of the original Plaintiff, one Mohideen Bawa Abdul Cassim had been nominated as the successor for the said land under the provisions of the Land Development Ordinance by the deceased permit holder Asan Kalender Lebbe and the said Mohideen Bawa Abdul Cassim had filed a petition and affidavit before the District Court under section 404 of the Civil Procedure Code seeking the Court to substitute his name in the place of the deceased Substituted Plaintiff in order to continue with the said case.

The learned District Judge who inquired into the said Petition and affidavit filed by the Petitioner (before the District Court and the Petitioner-Respondent-Respondent or the Respondent before this court) allowed the said application for substitution on 14.12.2011.

The said order of the District Court allowing the application filed by the Respondent to be substitute in the room and place of the deceased substituted Plaintiff was challenged before the High Court of the Civil Appeal of the Eastern Province holden in Kalmunai by way of a leave to appeal application filed by the 5th Defendant Appellant.

By order dated 13.09.2012 the High Court of the Civil Appeal of the Eastern Province dismissed the appeal before the said court and affirmed the order of the District Court dated 14.12.2011.

Being dissatisfied with the said order of the High Court of the Civil Appeal of the Eastern Province, the 5th Defendant Appellant Petitioner had filed the instant application.

As revealed before us the subject matter before the District Court was based on a permit issued under the Land Development Ordinance in the name of the original Plaintiff Asan Kalender Lebbe.

As further revealed during the trial before the District Court, on 31st December 1964 the permit holder had nominated his daughter Cassia Umma as the successor to the land referred to the permit but, the said name was deleted on 27.06.2000 and the name of Mohideen Bawa Abdul Cassim, the grandson of the permit holder was inserted as the successor to the land referred to in the said permit.

Section 62 of the Land Development Ordinance which allows the fresh nomination of successor reads as follows;

Section 62 **1)** After the registration of a document whereby a person is nominated as successor to a holding or a land alienated on a permit, a document which purports to nominate any other person as successor to that holding or land shall not be registered unless the nomination effected by the registered document has been duly cancelled by the registration of a document of cancellation.

Provided that it shall be lawful in one and the same document to cancel a registered nomination and to make some other nomination in lieu thereof; and in that event, notwithstanding anything in this section contained, the document in which such cancellation and nomination are combined may be registered and shall upon due registration operate both as cancellation of a previously registered nomination and as a nomination of a new nominee.

During the trial before the District Court of Kalmunai, several officers from the Divisional Secretariat Pothuvil including the Land Officer, Divisional Secretary, Clerk attached to the land division at the Divisional Secretariat were called to give evidence with regard to the cancellation of the previous nomination and the registration of the fresh nomination.

In the said circumstances it is clear that, Mohideen Bawa Abdul Cassim was considered as the lawful nominee by the permit holder at the time the permit holder instituted proceedings before the District Court on 03.10.2000.

As far as the present case is concerned, the matter to be decided is the substitution and nothing else. However the main case that was pending before the District Court and was appealed to the Provincial High Court of Civil Appeal was, with regard to a permit that was issued under the provisions of the Land Development Ordinance in the name of the original plaintiff Asan Kalender Lebbe. Relevant government officials were summoned during the District Court trial and their evidence was led to establish that fact. As observed by this court, the Distract Court had entered judgment in favour of the Substituted Plaintiff and what was appealed against was the said decision. In the said circumstances until otherwise decided by a competent court, it was accepted that the land in question is state land which was granted to the deceased Plaintiff by way of a permit. The Land Development Ordinance has its own provisions with regard to the succession and therefore what should follow after the death of a permit holder is the provisions of the Land Development Ordinance and not the principles of General Law.

Section 170 of the Land Development Ordinance provides that,

> "No written law (other than this Ordinance) which provides for succession to land upon an intestacy and no other law relating to succession to land upon an intestacy shall have any application in respect of any land alienated under this Ordinance"

In the case of Dharmalatha Vs. Davis De. Silva (1995) 1 Sri LR 259 it was held that,

> "Under section 170 of the Land Development Ordinance, no written or other law which provides for succession to land upon intestacy has application in respect of land alienated under the Land Development Ordinance."

Section 48A (1) of the Land Development Ordinance refers to a right of a wife of a permit holder as follows;

Section 48A (1) Upon the death of a permit holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19A the spouse of that permit holder, whether he or she has or has not been nominated as successor by that permit holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to such spouse.

The rights of a person who was nominated, other than the spouse of the permit holder and at what time he can succeed to such property is referred to in section 49 of the Land Development Ordinance as follows;

Section 49; Upon the death of permit-holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19A or of an owner of a holding, without leaving behind his or her spouse, or, where such permit holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land alienated to that permit holder on the permit or holding or upon the death of such spouse, a person nominated as successor by such permit holder or owner shall succeed to that land or holding.

In the said circumstances it is clear, that according to the above provisions of the Land Development Ordinance, a nominated person can only succeed to a land to which he is lawfully nominated, is either after the death of the spouse or when the said spouse failed to succeed to the said property. When going through the above provisions it is further observed that the nominee is not entitled by law to succeed to a property until the death (or failure to succeed to the land) of the spouse of the original permit holder. In other words he becomes entitled by law to succeed to the property only after the death (or failure to succeed) of the spouse of the original permit holder.

Section 404 of the Civil Procedure Code provides that;

> "In other cases of assignment, creation or devolution of any interest pending the action, the action may, **with leave of the court**, given either with consent of all parties or after service of notice in writing upon them, and hearing their objections, in any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person form it has passed; as the case may require."

As observed by this court the above provision of the Civil Procedure Code makes provision for a person acquiring an interest pending the action, continue with the action with leave obtained from that court ***Paaris and another Vs. Bridget Fernando 1992 (1) Sri LR 36***.

As discussed in this judgment, a person nominated to succeed to a state land, which is on a permit issued under the Land Development Ordinance will only "acquire interest" at the time of the death of the spouse (or failure to succeed) of the original permit holder and therefore the correct cause of action available to him is to act under section 404 of the Civil Procedure Code, at the time he acquire such interest.

In the Court of Appeal decision in ***Brunswick Exports Ltd. Vs. Hatton National Bank Ltd CA 581/93*** CA minute dated 05th May 1994 BALJ 1994 Vol. V part II, a bench comprising of S.N. Silva P/CA (as he was then) and Ranaraja J had considered the term "assignment" in section 404 as follows;

> Section 404 of the Civil Procedure Code makes provision for a person acquiring an interest in an action to continue with it having obtained leave of court. It does not provide that, if he does not obtain the leave of court to continue the action, the action should stand dismissed. The Plaintiff is still entitled to continue the suit and his successor will be bound by the result

of the litigation even though he is not represented at the hearing. (See ***Chittambaram Chettiar V. Fernando, 49 NLR 49***)

It is also settled law that a right of action can be assigned after *litis contestatia*. In such an event section 404 of the Civil Procedure Code applies. (See ***Pless Pol V. De Soysa, 10 NLR 252***, where Hutchinson, C.J. observed "On these authorities it does not seem to me quite clear that the Roman Dutch Law forbids such an assignment. But if it did, think it cannot have been intended to make the transaction altogether illegal and void as between the parties to it, but that the rule was only a rule of procedure and that section 404 overrides it. That section gives the court power to allow the assignee to be added as a party when the assignment was made any time pending the action; and the court ought to do so in proper case when it appears convenient and possible without prejudice to the other party."

On the facts of the present case, it was open to the 2nd Respondent to continue with the action or as was done for the 1st Respondent to seek leave of court to be substituted in place of the 2nd Respondent. The court has the discretion to permit such a course provided it was convenient and possible without prejudice to the Petitioner.

The learned President's Counsel for the Petitioner submitted that the 1st Respondent had no status as an assignee to be substituted in place of the 2nd Respondent for the five reasons that the mortgage bond No. 2245 did not provide for an assignment of the mortgage to third parties. In terms of the bond, one of the parties, namely the Union Bank of the Middle East was to include only the said bank and its "successors". It was submitted the word "successors" does not include assigns,-Stroud's Legal Dictionary. 5th Ed. p203 defines the word "assign" thus:

> "So generally, of assignable contracts eg.: ordinary trade contracts, and those contracts which can be performed "vicariously" (per Knight –Bruce L.J.) and involve no element of personal skill or confidence through "assigns" be not named, the contracts should be read and construed as through it contained an interpretation clause extending its operation to the heirs (where lands of inheritance are concerned), executors, administrators and assigns of the parties respectively and, if a company, its successors and assigns (per Lord Macnaghten-Tolhurst vs. Associated Portland Cement Manufacturers (1903 AC 417 at p420)."
>
> I would prefer to adopt the broader definition given above of the word "assigns" and hold that the term "successors" used in the relevant Mortgage Bond would also include "assigns", thus covering the 1st Respondent to the present application"

The learned President's Counsel who represented the Appellant before us, whilst relying on section 68 (1) (2) of the Land Development Ordinance had further argued that both the spouse and the nominee had failed to succeed to the land held by such permit holder and had also failed to obtain a permit under section 84 (1) and (2) of the said Ordinance and therefore not entitled to succeed to the land held by the original permit holder.

However when going through the questions of law under which this court had granted leave, I see no relevance in the said argument to the questions before this court but as observed by me the said argument does not hold water, for the reason that the original Plaintiff was before the District Court seeking declaration of title and possession with regard to the land in question by virtue of a permit issued under the provisions of the Land Development Ordinance at the time of his death. The right acquired by the deceased Plaintiff, his spouse and the nominee under the said permit was explained before court by the official witnesses summoned before court.

When considering the matters considered above, I answer the 1st, 2nd and the 3rd questions of law raised on behalf of the 5th Defendant-Respondent-Appellant in negative and dismiss this appeal with costs.

Appeal dismissed with costs.

Judge of the Supreme Court

Hon. Justice Buwaneka Aluwihare PC

I agree,

Judge of the Supreme Court

Hon. Justice Murdu N.B. 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 Article 154P of the Republic of Sri Lanka read with section 09 of the High Court of the Special Provision Act No.19 of 1990 as amended.

SC APPEAL NO.69/2011
SC/HCCA/LA No.96/2011

NWP/HCCA/KUR/04/2010 LT.
LT Chilaw Case No. LT/28/430/03.

Lanka Banku Sewaka Sangamaya.
(on behalf of E.A. Sugathapala)
No.20, Temple Raod,
Maradana,
Colombo 10.

APPLICANT

-VS-

People's Bank.
Head Office,
Sir Chittampalam A Gardiner Mawatha,
Colombo 02.

RESPONDENT

AND,

People's Bank.

Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 02.

RESPONDENT-APPELLANT

-VS-

Lanka Banku Sewaka Sangamaya.

(on behalf of E.A. Sugathapala)

No.20, Temple Raod,

Maradana,

Colombo 10.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Lanka Banku Sewaka Sangamaya.

(on behalf of E.A. Sugathapala)

No.20, Temple Raod,

Maradana,

Colombo 10.

APPLICANT-RESPONDENT-PETITIONER

-VS-

People's Bank.

Head Office,

Sir Chittampalam A Gardiner Mawatha,
Colombo 02.

RESPONDENT-APPELLANT-RESPONDENT

BEFORE : **PRASANNA JAYAWARDENA, PC, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Dilip Obeysekera with Lal Perera and Sanjeewa Dissanayaka Attorneys-at-Law for the Applicant-Respondent-Petitioner.
Manoli Jinadasa with Shehara Karunaratne Attorneys-at- Law for the Respondent- Appellant- Respondent.

ARGUED ON : 07th March 2019.

WRITTEN SUBMISSIONS : Applicant-Respondent-Appellant on 5th April 2019 and 16th of July 2011.
Respondent- Appellant-Respondent on 10th of August 2011.

DECIDED ON : 7th June 2019.

S. THURAIRAJA, PC, J.

The Applicant-Respondent-Petitioner, Lanka Banku Sewaka Sangamaya filed this application in the Labour Tribunal on behalf of E.A. Sugathapala (hereinafter sometimes referred to as Applicant- Appellant) who was attached to the Peoples' Bank, Respondent-Appellant-Respondent (hereinafter sometimes referred to as Respondent -

Respondent). He joined as an office assistant in 1970 and gradually rose up to the position of Assistant Manager, Class II. During this period of 1st June 1996 to 9th May 1997, he was attached to Kalpitiya branch as an acting branch manager. During the brief period of 11 months, he was found to have granted Temporary Overdrafts (TODs) much higher than his limit of approval. He was immediately transferred to the Regional Office and an independent inquiry was held, at which it was found that, he had acted in violation of Bank Circulars and brought risk to the financial situation of the Bank, hence, was found guilty and his services were terminated (the said investigation report was marked as R1 and produced at the Labour Tribunal).

The Applicant-Appellant had complained to the President of Labour Tribunal against his termination, after the inquiry, the President of Labour Tribunal held, the termination of employment to be unjust and inequitable and awarded salary for the period that, he was not in service, which amounts to Rs. 1,581,178/-. Being aggrieved by the said order of the Labour Tribunal, the Respondent-Respondent appealed to the Provincial High Court of the North Western Province, holden at Kurunegala. The Provincial High Court set aside the order of the Labour Tribunal and determined the order of the Labour Tribunal is wrong and allowed the appeal.

Being aggrieved by the said order of the Provincial High Court, the Applicant- Appellant has preferred this appeal.

This Court granted leave to appeal on the following questions of law.

1. Has the High Court (civil appeal) misdirected itself in regard to the burden of proof in the circumstances of this case?
2. Did the High Court err in its conclusion that the Labour Tribunal had failed to properly evaluate the evidence placed before it?

Both Counsel made their submissions orally and filed written submissions and the proceedings before the Labour Tribunal and the Provincial High Court (Civil Appeal), are available before this Court, it is revealed that, the Applicant-Appellant was an Officer in the rank of Class II. According to the bank circulars every officer had approval limits. As per the bank rules and regulations, TODs could be granted only for customers who fulfil specified criteria (marked as R6 to R13). The circular marked R6; states instructions given to all branch managers to strictly adhere to the circular, when granting TODs. Accordingly, said Applicant-Appellant had a limit of **Rs. 100,000/-** for TODs and it is for **30 days**. Beyond this limit, he should get approval from his higher officials, who were in the higher spectrum of the loan line. They were permitted in very exceptional circumstances to grant TODs, when some of the qualifying requisites had not been satisfied.

It is evidenced that, the said Applicant- Appellant had granted TODs much higher than his approval limits and the said amounts were not recovered within the said limited period of 30 days. According to the accounts submitted, he had granted more than Rs. 30 million on TODs which were not recovered for a period more than 10 months. It is also revealed that, said Applicant-Appellant had over-valued some properties for the purpose of granting the said TODs.

Evidence reveals that, granting of TOD is different to a loan, permanent overdraft and other facilities. There are several safety measures to be taken before granting each of these facilities. It is further revealed during the trial before the Labour Tribunal that, most of these facilities were granted to the fishermen in that area. Due to the Civil War, these fishermen could not carry on with their fishing business. Because of this situation, the banks were careful of the granting of loan facilities. The Applicant-Appellant not only granted TODs beyond his approval capacity but also did not recover the money lent within the stipulated period. Further it was found that, he had not obtained

adequate sureties and some of the surety assets were over-valued by the said Applicant- Appellant.

The Applicant-Appellant's defence was that, he had obtained approval from the higher officials and that, those documents were available at the Bank. But, none of these documents were produced at the inquiry or at the Labour Tribunal. Applicant-Respondent-Petitioner further submitted that, the money can be recovered from the borrowers. However, according to the Respondent-Respondent in most of the cases, money was not recovered and it was referred to the mediation board and some were referred for filing of cases for money recovery (R5).

Considering the 1st question of law on which the leave was granted namely, Has the High Court (civil appeal) misdirected itself in regard to the burden of proof in the circumstances of this case.

It will be appropriate to consider the judgment of the said President of the Labour Tribunal. He had analysed the facts of the case and placed a burden on the Respondent-Respondent, Bank to prove its case at a standard of proof beyond reasonable doubt.

In the case of **Indrajith Rodrigo v. Central Engineering Consultancy Bureau (2009) 1 SLLR 248 at 267**, Marsoof J pronounced that,

> *"it is trite law that the burden of proof lies upon him who affirms, not upon him who denies as expressed in the maxim ei incdimbit probation, qui dicit, non qui negat..."*

The Learned President has a duty to consider all of the evidence placed before him and to properly evaluate them. In the case of **Ceylon Transport Board v. Gunasinghe (72 NLR 76)** the Court held that,

"The duty of hearing evidence must necessarily carry with it the duty of considering such evidence, for the duty to hear such evidence is meaningless without the duty to consider. The present case reveals quite clearly a total omission by the tribunal to consider the evidence which has been placed before it and it cannot be said that the Tribunal has been acting in accordance with the duties laid down for it by Statute."

In **Jayasuriya v. Sri Lanka State Plantation Corporation (1995) 2SLLR 379** the Court held that,

"Due account must be taken of the evidence in relation to the issues in the matter before the Tribunal. Otherwise, the order of the Tribunal must be set aside as being perverse."

Further, he had completely relied on the provisions of the Evidence Ordinance. But, as per the Section 36 (4) of the Industrial Disputes Act No. 43 of 1950 as amended by Section 17 of Act No.62 of 1957, provides that in the conduct of proceedings under this Act, any Industrial Court, Labour Tribunal shall not be bound by any of the provisions of the Evidence Ordinance.

It is well accepted fact that, the Labour Tribunal acts on just and equitable standard. Tribunal should not set the standard of proof of any fact at a standard of beyond reasonable doubt as expected in criminal cases. It is reasonable for the President of the Labour Tribunal to inquire into the matter to find the truth to come to a just and equitable decision. He is not expected to apply two different standards of proof between the parties before him. The Learned Judge of the Provincial High Court had analysed the judgment of the Labour Tribunal and had come to a conclusion that, the President of the Labour Tribunal erred by requiring the Respondent to establish its case beyond reasonable doubt.

In this regard Justice Sharvananda (as he then was) in the case of **Caledonian (Ceylon) Tea and Rubber Estate Ltd. Vs. Hillman 79 (1) NLR 421 at page 436** 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".*

In **C.T.B. vs. Gunasinghe (72 NLR 76 at page 83)** as per Justice Weeramanthry, it was held that,

> *"Proper findings of fact are a necessary basis for the exercise by Labour Tribunal of what wide jurisdiction given to them by Statute of making such orders as they consider to be just and equitable. Where there is no such proper findings of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for Justice and equity cannot be administered in a particular case apart from its own particular facts."*

Considering all available materials we find that, the Learned Judge of the Provincial High Court has not misdirected himself in regard to the burden of proof in this case.

Considering the 2nd question of law, for the reasons stated above we find that, the Provincial High Court had not erred in its conclusion that, the Learned President of the

Labour Tribunal has failed to evaluate the evidence placed before it and Provincial High Court had properly evaluated the evidence placed before it.

Considering all, we are of the view that, the decision of the Provincial High Court is correct. Accordingly, we dismiss the appeal and affirm the decision of the Provincial High Court (Civil Appeal) dated 11th February 2011. We make no order for cost.

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 under Article 128 of the constitution read with Sec 5C of the Provincial High Court (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC. Appeal No. 70/13
SC/HC(CA) LA/500/2012
SP/HCCA/KAG/900/2011
D.C. Kegalle No. 7100/L

Hewayalage Ranjani Hemalatha,
Newsmire Pahala,
Bulathkohupitiya.

PLAINTIFF.

Vs.

Hewayalage Kanthi Kusumalatha
Newsmire Pahala,
Bulathkoupitiya.

DEFENDANT.

AND

Hewayalage Kanthi Kusumalatha,
Newsmire Pahala,
Bulathkohupitiya.

DEFENDANT – APPELLANT.

Hewayalage Ranjani Hemalatha,
Newsmire Pahala,
Bulathkohupitiya.

PLAINTIFF – RESPONDENT.

AND NOW BETWEEN.

Hewayalage Kanthi Kusumalatha,
Newsmire Pahala,
Bulathkohupitiya.

DEFENDANT – APPELLANT – PETITIONER.

Hewayalage Ranjani Hemalatha,
Newsmire Pahala,
Bulathkohupitiya.

PLAINTIFF – RESPONDENT – RESPONDENT.

Before : L.T. B. Dehideniya J
Murdu N.B. Fernando PC, J
E. A. G. R. Amarasekara J

Counsel : S. N. Vijithsingh for the Defendant – Appellant – Appellant.
Harith de Mel for the Plaintiff – Respondent – Respondent.

Argued on : 29.01.2019.

Decided on : 02.09.2019.

E.A.G.R. Amarasekara J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff - Respondent) instituted proceedings against the Defendant – Appellant – Petitioner (herein after referred to as the Defendant - petitioner) in the District Court of Kegalle seeking a declaration of title to the lands more fully described in the plaint and to have the Defendant - petitioner ejected from the said lands and for damages.

The Plaintiff - Respondent in her amended plaint stated that;

- The lands in suit initially belonged to the crown and was granted to P.W.D. Aron upon the Grant No.2579 under and in terms of section 19(4) of the Land Development Ordinance.
- The said Aron died and thus, P.W. Somawathie, the eldest daughter of Aron succeeded to the said lands.
- The said P.W.D. Somawathie also died intestate and consequently Ranjanee Hemalatha, the plaintiff respondent who was the eldest daughter of Somawathie succeeded and became the owner of the said lands.
- The Plaintiff - Respondent and her predecessors were in possession of the said lands for more than 10 years. Thus, they are entitled to prescriptive title.
- Since the year 2003 the Defendant Petitioner started disputing the Plaintiff Respondent's title without any legal right or undisturbed possession to the property, causing damages to the Plaintiff Respondent.
- The Plaintiff Respondent informed the Divisional Secretary of Bulathkohupitiya of the dispute and an inquiry was held in that regard.

Thereafter the Defendant - Petitioner filed the amended answer and pleaded inter alia that;

- After the demise of P.W.D. Aron his rights were devolved on his child Sopiya and after the death of said Sopiya her rights were devolved on the three children

namely; Ranjanee Hemalatha (The Plaintiff – Respondent), Kanthi Kusumalatha (The Defendant - Petitioner) and Violet Ramyalatha,

- The Defendant - Petitioner and her predecessors in title were in possession of the said lands in dispute for more than 10 years and thus, is entitled to the prescriptive title,
- After the inquiry held, the Divisional Secretary of Bulathkohupitya gave his approval to divide the lands and the said subdivision is depicted in the Plan No. 680 made by L.C.K. Liyanage, licensed surveyor.

Thereby, the Defendant - Petitioner sought an order dismissing the Plaint and Rs. 100,000/- as damages for the institution of a malicious action.

The title of P.W.D. Aron based on the grant was admitted by the parties (Vide admission No.1 at page 60). It is also not disputed that Somawathie referred to in the amended plaint and Sopiya referred to in the amended answer is one and the same person as the Defendant petitioner has admitted the same in her evidence in chief -Vide page 79. The parties went on to trial on 13 issues raised by them. However, it is pertinent to note that no issue was raised to challenge Somawathie alias Sopiya's entitlement to the lands on the ground that she was not a blood relation of Aron. On the other hand, the Plaintiff Respondent's position was that she succeeded to the title of the lands in issue as Somawathie alias Sopiya's eldest daughter while the Defendant Petitioner's position was that rights of Sopiya devolved on all three children including herself and the Plaintiff - Respondent.

After the trial Learned District Judge delivered the Judgment on 26.09.2011 in favor of the Plaintiff - Respondent and dismissed the Defendant - Petitioner's claim in reconvention. Learned District Judge, among other grounds, based his decision on the following grounds;

1. The defendant and the plaintiff during the trial have admitted that they are daughters of Somawathie alias Sopiya and the plaintiff is the eldest daughter.
2. The defendant had attempted to indicate that Somawathie was an adopted child of Aron after the closure of the plaintiff's case. It was not a stance taken in her answer, nor any issue was raised in that regard. The defendant cannot be allowed to adduce evidence contrary to the stance taken in her pleadings.
3. It is proved that Somawathie was the eldest daughter of Aron and the plaintiff and defendant are her daughters while the plaintiff is the eldest. Thus, as per the provisions in the Land Development Ordinance, the plaintiff succeeds to the land in question.
4. The plaintiff had proved the title and the defendant is in possession of certain portions of the said lands.
5. The letter V1 written by the divisional secretary is only an approval for division but there is no proof with regard to the transfer of title in accordance with the letter V1.
6. The defendant has not adduced evidenced to prove prescriptive title and thus, prescriptive title of the defendant is not proved.

Being aggrieved by the said judgment, the Defendant - petitioner appealed to the Civil Appellate High Court of Kegalle. Thereafter, Civil Appellate High Court of Kegalle delivered the Judgment on 23.10.2012 and dismissed the appeal with costs affirming the Judgment of the District Court. Learned High Court Judges of the Civil Appellate High Court among other things based their decision on the following grounds;

1. *The premises in suit was originally owned by the state and was granted to Aron upon the state grant No.2579 marked P1 which was an admitted fact by the parties at the commencement of the trial.*

2. *Aron fails to nominate a successor. Thus, succession should be determined as per the provisions of section 72 of the Land development Ordinance*

3. *As specified in Section 72 of the Land Development Ordinance succession flows on the chronological order set out in the 3rd Schedule. Accordingly, if the spouse survives, he or she succeeds; in the absence of the spouse the eldest son is preferred; if there is no son eldest daughter succeeds.*

4. *As per the paragraph 3 of the answer, it was an admitted fact by the defendant that Sopiya alias Somawathie succeeded to the title after Aron and it need not be proved in terms of section 58 of the Evidence Ordinance. The heirship of Sopiya alias Somawathie was an admitted fact; Hence the Appellant cannot go back on it as stated in* Mariammai Vs pethurupilli *reported in 21 NLR page 200.As per the explanation 2 of section 150 of the Civil procedure Code the defendant cannot take up a position contrary to her pleadings. Thus, the dispute is regarding the succession of Sopiya alias Somawathie.*

5. *The evidence led clearly convince the fact that Sopiya alias Somawathie is the daughter of Aron who could legally succeed to him after his demise and Ranjani Hemalatha, the plaintiff being the eldest daughter of Sopiya is entitled to succeed after the demise of Sopiya under the Land Development Ordinance.*

6. *Subdivision cannot be done as there is no provision under the ordinance. Therefore, the correct procedure is to cancel the previous grant and execute three new grants in respect of each divided lot. Therefore, it is clear the documents V1(letter approving division) and V3(a plan made indicating division) have no force in law.*

Being aggrieved by the judgment of Civil Appellate High Court, the Defendant - Petitioner appealed to this Court on number of grounds and among them leave to appeal was granted on the questions of law set out in paragraph 20(b), (c), (d), and (e) of the petition, namely, on the following questions of law,

1. "Did the High Court of Civil Appeal err in law by failing to take cognizance of the fact that the Divisional Secretary of the Bulathkohuptiya by his letter dated 19/11/2013 approved the subdivision of the land among the three sisters in terms and the powers vested with the Divisional Secretary under the Land Development Ordinance?

2. Did the High Court of Civil Appeal err in law by failing to take cognizance of fact that the grant itself permitted the subdivision at the time of issuance of the said grant?

3. Did the High Court of Civil Appeal err in law by holding that the Respondent (plaintiff) was entitled to succeed the rights of the Aron in terms of section 72 of the Land Development Ordinance, when subdivision was approved by the Divisional Secretary?

4. Did the learned District Judge and the High Court of civil Appeal have the jurisdiction to decide the questions of succession when the Divisional Secretary has allowed the subdivision of the land among *the heir* of the deceased Sopiya?" (sic)

It is pertinent to note that even though this Court did not grant leave on the issue of law proposed by the Defendant - Petitioner on the ground that Sopiya was merely an adopted child of Aron and had no blood relationship, the counsel for the Defendant - Petitioner still argues that the Learned High Court judges erred in law in this regard-vide paragraph 13 of the final written submissions of the Defendant - Petitioner. As observed by the learned judges of the courts below, the Defendant - Petitioner did not bring the matter of blood relationship as an issue before the district court and she herself had admitted the heirship of Somawathie alias Sopiya to Aron in her answer. Furthermore, this new position was not at least proposed to the Plaintiff - Respondent when she was giving evidence. Even during her evidence in cross examination, the Defendant - Petitioner, herself had admitted that Sopiya became the owner under the grant after the demise of Aron. It is only in her re-examination, the Defendant - Petitioner takes up this new stance that Sopiya alias Somawathie was an adopted child of Aron and not a blood relation in contrast to her position taken in her pleadings and answers to the questions put to her during cross examination. As mentioned above the learned District Judge as well as the learned High Court judges have refused to accept this new stance of the Defendant - Petitioner. As correctly pointed out by the learned High Court judges, an admitted fact needs no further proof-vide section 58 of the Evidence Ordinance. Even though there is no formal admission recorded in this regard at the commencement of the trial other than the admission in the averments in the answer, a party cannot be allowed to take a materially different stance contrary to the stance taken in their pleadings-vide Explanation 2 of section 150 of the Civil Procedure Code and Uvais Vs Punayawathie (1993) 2 SLR 46. Thus, the refusal of the Defendant -

Petitioner's new stance that Sopiya alias Somawathie had no blood relationship to Aron is correct in law and can be endorsed by this court. There was no evidence to show that Aron had a son or elder daughter to Sopiya or Aron nominated anyone as his successor or Aron left behind his spouse. Thus, it is a correct finding that as per section 72 and the rule 1 of the 3rd schedule Sopiya alias Somawathie succeeded as the title holder under the grant.

It should be noted that there was no evidence to indicate that Sopiya alias Somawathie left behind her spouse or that she had a son or that she nominated a successor. The evidence was and the stance of the Defendant – Petitioner was that she had three daughters and as per the evidence led, it is clear that the Plaintiff - Respondent is the eldest. As per section 73 of the Land Development Ordinance (hereinafter sometimes referred to as "the ordinance"), title devolves on the successor on the date of the death of the owner of the holding and as per section 2 "Holding" means land alienated by grant under the Ordinance, and includes any part thereof or interest therein. Same section 2 defines the 'Owner' as the owner of a holding whose title thereto is derived from or under a grant issued under the Land Development Ordinance. Thus, the Plaintiff Respondent must succeed to the land as the owner and title holder on the date of death of Sopiya alias Somawathie as per the section 72 and rule 1 of the 3rd schedule. Therefore, even at the time the divisional secretary held the inquiry and/or gave approval or permission for subdivision by V1 the Plaintiff - Respondent was the owner or title holder under the Grant. As per section 42 of the Ordinance the power to dispose the holding is with the owner unless the disposition is prohibited under the ordinance.

Furthermore, section 19(6) of the ordinance provides that every grant issued under subsection 4 shall contain the conditions that the owner of the holding shall not;

a) dispose of a divided portion, or an undivided share of the holding which is less in extent than the unit of the sub-division or the minimum fraction specified in the grant; and

b) dispose of such holding except with the prior approval of the Government agent.

In the grant marked P1, there is no total prohibition on the owner to dispose the holding but as per the conditions set out therein the owner cannot dispose a portion which is less than 1/4th of the holding and the owner needs to get the prior permission in writing for the disposal of any portion of the holding- vide condition Nos 2 and 7 in schedule 2 of the grant.

Hence, it is clear that as per the afore-mentioned provisions of the ordinance and the conditions set out in the grant that it is the owner of the holding who has the power to dispose but he needs the approval/permission of the Divisional Secretary when he intends to dispose the property or a portion of it. Thus, mere approval of the Divisional Secretary is not sufficient to pass the title to the Defendant - Petitioner but a corresponding disposal by the owner of the holding is needed. This court further observes that V1 is a permission addressed to the Defendant - Petitioner and not to the Plaintiff - Respondent. Even if it is considered for the sake of argument that V2 was proved (V2 was marked subject to proof and it was never put to the Plaintiff - Respondent when she was giving evidence. No step had been taken to send it to the examiner of questioned document or to list a witness acquainted with the plaintiff - Respondent's signature to prove the Plaintiff - Respondent's signature. Thus, in fact it was not a proved document) and V1 was an approval or permission given on a request made by the plaintiff. There is no evidence to show that the plaintiff - Respondent, who became the owner as per the provisions of the ordinance, conveyed title of the holding or any portion of it to the Defendant - Petitioner.

On the other hand, this court observes that as per the section 104 of the Ordinance the President has the power to cancel a grant due to the failure of succession. In such a situation, there is no bar to issue new grants for the same land or to divided portions

of it. However, there is no evidence to show that there was such cancellation and issuance of new grants or sub grants to the Defendant - Petitioner and/or to any other.

As found by the courts below there is no sufficient evidence to prove adverse possession of the Defendant - Petitioner for a period exceeding ten years against the owner to prove prescriptive title of the Defendant - Petitioner. As per section 161 no person can claim prescriptive title to a land alienated on a permit. It is observed that grants are generally issued to lands for which a permit is issued in the first instance- vide section 19 of the Ordinance.

One may argue that the learned High Court judges erred by stating that subdivision cannot be done as there is no provision for subdivision under the Ordinance. The said statement has to be understood as one made in relation to the document marked V1 as it follows a reference made to the said document. There is no provision in the Ordinance that allows the divisional secretary to carry out or order a subdivision through a letter similar to V1. The divisional Secretary can only give permission. It is the owner who should do the subdivision with the permission of the Divisional secretary and dispose such portions of the land when there is a valid grant. On the other hand, it is only when a grant is cancelled as aforesaid the authorities get the power to issue a new grant or grants for subdivided portions of the holding alienated by the previous grant. A careful perusal of the provisions indicates that the Ordinance discourage subdivisions of the holding and disposal of subdivided portions can only be done with the approval or permission of the relevant authority.

The defendant - Petitioner appears to argue that without obtaining a writ to quash the decision of the Divisional Secretary, the learned District judge or the High Court had no jurisdiction to hear the case filed by the Plaintiff - Respondent. Since V1 is a mere approval/permission and the owner as per the Law is the Plaintiff - Respondent this position cannot be upheld.

For the foregoing reasons, the documents marked by the Defendant - Petitioner or the alleged subdivision made as per V1 cannot give her title to the lands in dispute and on preponderance of evidence the Plaintiff - Respondent has proved her case. Thus, I answer the issues of law in the negative and in favour of the Plaintiff - Respondent.

Hence, the appeal is dismissed with costs.

Judge of the Supreme Court

L. T. B. Dehideniya 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.

SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREMA
Lenagala, Weragala.

PLAINTIFF

SC Appeal No. 72/2012
SC/HCCA/LA/No. 33/2009
SP/HCCA/KAG/162/2007 (F)
D.C. Kegalle No. 24228/P

1. **SUDU HAKURAGE HARAMANIS**
   Koskande, Viyana Ovita, Deraniyagala.
2. **SUDU HAKURAGE PUNCHI SINGHO**
   Andahena, Lenagala, Weragala.
3. **SUDU HAKURAGE JAYASEKERA**
   Lenagala, Weragala. (deceased)

3A. VITHARAMALAGE LEELAWATHIE
Lenagala, Weragala.

4. **SUDU HAKURAGE NANDORIS (alias) NANDUWA**
   Lenagala, Weragala. (deceased)

4A. SUDU HAKURAGE ALPENIS
Lenagala, Weragala.

5. **SUDU HAKURAGE JEELIS**
6. **SUDU HAKURAGE THEMIS**
7. **SUDU HAKURAGE PODINERIS**
8. **SUDU HAKURAGE GUNASENA**
9. **SUDU HAKURAGE JAYARATNE**
10. **SUDU HAKURAGE PODISINGHO** (deceased)

10A. SUDU HAKURAGE SWARNALATHA

11. **SUDU HAKURAGE SEDERIS**
12. **SUDU HAKURAGE ALPENIS**
13. **SUDU HAKURAGE ASILIN**
14. **SUDU HAKURAGE ARIYADASA**
15. **SUDU HAKURAGE RANASINGHE**

All of Lenagala, Weragala.

DEFENDANTS

AND BETWEEN

10A. SUDU HAKURAGE SWARNALATHA

14. SUDU HAKURAGE ARIYADASA

10A AND 14 DEFENDANT-APPELLANT-RESPONDENTS

VS.

SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREM A

Lenagala, Weragala.

PLAINTIFF-RESPONDENT

1. **SUDU HAKURAGE HARAMANIS**
   Koskande, Viyana Ovita, Deraniyagala.
2. **SUDU HAKURAGE PUNCHI SINGHO**
   Andahena, Lenagala, Weragala..
3. **SUDU HAKURAGE JAYASEKERA**
   Lenagala, Weragala. (deceased)

3A. VITHARAMALAGE LEELAWATHIE

Lenagala, Weragala.

4. **SUDU HAKURAGE NANDORIS (alias) NANDUWA** (deceased)
   Lenagala, Weragala.

4A. SUDU HAKURAGE ALPENIS
Lenagala, Weragala
5. SUDU HAKURAGE JEELIS
6. SUDU HAKURAGE THEMIS
7. SUDU HAKURAGE PODINERIS
8. SUDU HAKURAGE GUNASENA
9. SUDU HAKURAGE JAYARATNE
(deceased)
9A. PARANA MANNALAGE AMARA WIJESINGHE
9B. SUDUSINGHE HEWAWITHARANALAGE CHAMIKA CHATHURANGA JAYARATNE
10.SUDU HAKURAGE SEDERIS
(deceased)
11.SUDU HAKURAGE ALPENIS
12.SUDU HAKURAGE ASILIN
13.SUDU HAKURAGE RANASINGHE

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

9A. PARANA MANNALAGE AMARA WIJESINGHE
9B. SUDUSINGHE HEWAWITHARANALAGE CHAMIKA CHATHURANGA JAYARATNE
Both of Lenagala, Weragala.

9A AND 9B DEFENDANTS-RESPONDENTS-PETITIONERS

VS.

10A. SUDU HAKURAGE SWARNALATHA
14. SUDU HAKURAGE ARIYADASA

10A AND 14 DEFENDANTS-APPELLANTS-RESPONDENTS

SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREMA (deceased)
Lenagala, Weragala.

PLAINTIFF-RESPONDENT-RESPONDENT

1A. WEERASURIYA AMARAWANSAGE JAYANTHAA JAYAWATHI
1B. THAMARA KUMARI ABEYWICKRAMA
1C. AJITH DHAMMIKA ABEYWICKRAMA
1D. NAYANA KUMARI ABEYWICKRAMA

SUBSTITUTED

PLAINTIFFS-RESPONDENTS-RESPONDENTS

1. **SUDU HAKURAGE HARAMANIS**
   Koskande, Viyana Ovita,
   Deraniyagala. (deceased)

1A. SUDU HAKURAGE GUNAWARDHANE
R13, Veediyawatte, Viyana Owita,
Deraniyagala.

2. **SUDU HAKURAGE PUNCHI SINGHO** (deceased)
   Andahena, Lenagala, Weragala.

2A. WINSON SENEVIRATNE
Pahala Lenagala, Weragala.

3. **SUDU HAKURAGE JAYASEKERA**
   Lenagala, Weragala. (deceased)

3A. VITHARANAMALAGE LEELAWATHIE
Lenagala, Weragala.

4. **SUDU HAKURAGE NANDORIS (alias) NANDUWA**
   Lenagala, Weragala. (deceased)

4A. SUDU HAKURAGE ALPENIS
Lenagala, Weragala.

5. SUDU HAKURAGE JEELIS
(deceased).

5A. KODAPOLAGE ASILIN

6. SUDU HAKURAGE THEMIS
(deceased).

6A. PARANAMANNAGE SOPIYA

7. SUDU HAKURAGE PODINERIS
(deceased).

7A. SUDU HAKURAGE GUNASENA

8. SUDU HAKURAGE GUNASENA

11.SUDU HAKURAGE SEDERIS
(deceased)

11A. SUDU HAKURAGE SWARNALATHA
Lenagala, Weragala.

12. SUDU HAKURAGE ALPENIS
(deceased).

12A. SUDU HAKURAGE SWARNALATHA
Lenagala, Weragala.

13. SUDU HAKURAGE ASILIN

15. SUDU HAKURAGE RANASINGHE
All of Lenagala, Weragala

DEFENDANTS-RESPONDENTS RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
Vijith K. Malalgoda, PC, J.
P. Padman Surasena, J.

COUNSEL: Manohara de Silva, PC with Ms. Pubudini Wickramaratne for the 9A and 9B Defendants-Respondents-Appellants.
Harsha Soza, PC with Athula Perera for the Plaintiff-Respondent-Respondent and the 2nd and 15th Defendants-Respondents-Respondents.

Ranjan Suwandaratne, PC for the 13th Defendant-Respondent-Respondent.
R. Wimalaweera for the 6A Substituted Defendant-Respondent.

WRITTEN SUBMISSIONS: By the Plaintiff-Respondent-Respondent on 13th July 2012.
By the 9A and 9B Defendants-Respondents-Petitioners/ Appellants on 17th May 2012.

ARGUED ON: 14th March 2019

DECIDED ON: 19th December 2019

Prasanna Jayawardena, PC, J,

The plaintiff is named Sudu Hakurage Saima. He also uses the name of H. Sunil Abeywickrema. The plaintiff filed this action seeking to partition a land named "Hitinawatte" situated in the village of Pahala Lenagala, which is located in the Keeraweli Pattuwa of the Kegalle District. The land is 1A 2R 18.8P in extent and is a highland. There is no dispute between the parties with regard to the identity of the land.

In his plaint dated 20th May 1985, the plaintiff named 8 defendants, They are: the 1st defendant - Sudu Hakurage Haramanis, the 2nd defendant - Sudu Hakurage Punchisingho, the 3rd defendant - Sudu Hakurage Jayasekera, the 4th defendant - Sudu Hakurage Nandoris, the 5th defendant - Sudu Hakurage Jeelis, the 6th defendant - Sudu Hakurage Themis, the 7th defendant - Sudu Hakurage Podineris and the 8th defendant - Sudu Hakurage Gunasena. The plaintiff prayed that the land be partitioned as follows: a 6/24th share to the plaintiff; a 2/24th share each to the 1st to 3rd defendants; a 4/24th share to the 4th defendant; and a 2/24th share each to the 5th to 8th defendants.

Seven other persons filed Statements of Claim claiming shares of the land and were added as the 09th to 15th defendants. They are, namely: the 09th defendant - Sudu Hakurage Jayaratne, the 10th defendant - Sudu Hakurage Podisingho, the 11th defendant - Sudu Hakurage Sediris, the 12th defendant - Sudu Hakurage Alpenis, the 13th defendant - Sudu Hakurage Asilin, the 14th defendant - Sudu Hakurage Ariyadasa and the 15th defendant - Sudu Hakurage Ranasinghe.

It should be mentioned at the outset that it was common ground between all the parties that the original owners of the land were Singho and Dinenchiya, each of whom had a half share - *ie:* a 12/24th share each. It was also common ground that Singho's half

share devolved on Subaya, Puhula and Kirinerisa in equal 4/24th shares; and that Dinenchiya's half share devolved on Kirihonda, Siriwadiya and Jothiya in equal 4/24th shares. Further, it was common ground that all the parties are governed by the Kandyan Law and that the land is *paraveni* property.

The plaintiff, the 2nd and 3rd defendants, the 10th to 14th defendants and the 15th defendant all filed Statements of Clam claiming shares in the land which they pleaded had devolved to them from Singho's half share which had been inherited by Subaya, Puhula and Kirinerisa in equal 4/24th shares.

The 4th defendant, the 5th to 8th defendants and the 9th defendant filed Statements of Claim claiming shares in the land which they pleaded had devolved to them from Dinenchiya's half share which had been inherited by Kirhonda, Siriwadiya and Jothiya in equal 4/24th shares. The 4th defendant claimed the 4/24th share which had been held by Jothiya. The 5th to 8th defendants claimed the aggregate 8/24th share which had been held together by Kirihonda and Siriwadiya. The 9th defendant also claimed the aggregate 8/24th share which had been held by Kirihonda and Siriwadiya.

After a lengthy trial, the learned District Judge delivered judgment ordering that the land be partitioned between the following parties in the following shares and making some consequential Orders with regard to the allocation of the buildings and structures shown on the plan no. 415 marked "X" at the trial, at the time of the division of the land:

The plaintiff and the 1st to 3rd defendants	- a 3/24th share each [which was held to have devolved on them from the 12/24th share which had come to Subaya, Puhula and Kirinerisa, each of whom had a 4/24th share].
The 4th defendant	- a 4/24th share [which was held to have devolved on him from Jothiya who had a 4/24th share].
The 5th to 8th defendants	- a 2/24th share each [which was held to have have devolved on them from the aggregate 8/24th share held by Kirihonda and Siriwadiya.

Thus, the District Judge did not allot any shares in the land to the 9th, 10th to 14th and 15th defendants.

Even though the 9th defendant had claimed that the aggregate 8/24th share held by Kirihonda and Siriwadiya had come to him, he did not file an appeal in the High Court

seeking to set aside the judgment of the District Court which, as set out above, had allotted this aggregate 8/24th share to the 5th to 8th defendants.

However, the 10A defendant [who had been substituted in place of the 10th defendant who had died during the course of the trial in the District Court] and the 14th defendant had filed an appeal in the High Court of Civil Appeal Holden in Kegalle and claimed that they were each entitled to a 1/24th share of the land which had devolved upon them from Puhula's 4/24th share [which, as mentioned earlier, had been allotted to the plaintiff and the 1st to 3rd defendants by the District Court]. The respondents to this appeal were the plaintiff-respondent, the 1st to 9th defendants-respondents, the 11th to 13th defendants-respondents and the 15th defendant-respondent.

However, prior to the hearing of the 10A and 14th defendants-appellants' appeal in the High Court, the 9th defendant-respondent filed a written objection to the judgment and decree entered by the District Court, as provided for in section 772 read with section 758 (*e*) of the Civil Procedure Code. Such a written objection under section 772 is often referred to as a *"cross objection"* or *"cross appeal"*. The 9th defendant-respondent's aforesaid written objection was broadly in the form prescribed in section 758 (*e*) of the Civil Procedure Code and written notice appears to have been given prior to the hearing of the appeal, as required by section 772 Civil Procedure Code.

In that written objection, the 9th defendant-respondent stated that it was common ground between the parties that Dinenchiya's half share had devolved upon Kirihonda, Siriwadiya and Jothiya in equal 4/24th shares; and that, in fact, the trial judge had answered issue no. 32 holding that Kirihonda, Siriwadiya and Jothiya had each been entitled to a 4/24th share of the land. The 9th defendant-respondent went on to state that the trial judge had erred by completely overlooking the clear and undisputed oral testimony of the 9th defendant-respondent and the undisputed deeds of transfer marked "9වි1" to "9වි4" which established that the aforesaid aggregate 8/24th share held by Kirihonda and Siriwadiya had come to the 9th defendant-respondent by the said deeds of transfer. Thus, the 9th defendant-respondent prayed in his written objection that the High Court corrects this error and allots that 8/24th share to him.

Thus, by way of his written objection filed under section 772 of the Civil Procedure Code, the 9th defendant-respondent only sought to challenge the District Court's judgment allotting to the 5th to 8th defendants-respondents, the aggregate 8/24th share which had been held by Kirihonda and Siriwadiya. The 9th defendant-respondent did not challenge the relief sought in the appeal by the 10A and 14th defendants-appellants, who had filed the appeal.

This gives rise to the somewhat thorny question of whether, even though the 9th defendant-respondent had not filed an appeal, the 9th defendant-respondent had a *right* or *entitlement* to have his written objection filed under section 772 of the Civil Procedure Code and claim made thereby against the 5th to 8th defendants, determined by the High Court in appeal. This issue needs to be considered by us since it is a preliminary question which will determine whether the 9th defendant-respondent is entitled to pursue this appeal. Further, the principle which is at the root of the question is of some general importance and should be examined in this appeal.

Section 772 states:

"(1) Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his registered attorney seven days' notice in writing of such objection.

(2) Such objection shall be in the form prescribed in paragraph (e) of section 758."

Thus, where an appellant from a decree entered by an original Civil Court has filed an appeal seeking to set aside or vary that decree: the first limb of section 772 recognises the right of a respondent to that appeal to resist the appeal and support the decree on any grounds including those decided against him by the trial court, without filing a written objection under section 772; and the second limb of section 772 enables a respondent to the appeal who is dissatisfied with some specific finding in or aspect of the decree but has not filed an appeal to canvass it, to dispute that finding or aspect of the decree and seek to have it set aside or varied or decided in his favour by the appellate court, provided he has duly filed a written objection under section 772.

Our Courts have taken the view that the general rule is that section 772 of the Civil Procedure Code can be invoked and resorted to by a respondent to an appeal against only the *appellant* and in instances where that respondent disputes particular determinations of fact or law made in the decree and seeks to have them set aside or varied or decided in his favour by the appellate court *vis-à-vis* the *appellant*. Thus, in RABOT vs. DE SILVA [8 NLR 82 at 89], Middleton J stated with regard to section 772, *"The section to my mind divides itself into two parts, comprising support of and objection to the decree. No notice is required except upon an objection to the decree. ….. By giving seven days' notice the respondent may take any objection to the decree which he could have taken by way of appeal, but without notice he may not only support the decree on grounds decided in his favour in the Court below, which goes without saying, but also on the grounds decided against him."* Accordingly, in MARIKAR vs. PUNCHI BANDARA [43 NLR 261] it was held that, where the District Court had entered decree for the plaintiff in a lesser amount than had

been prayed for in the plaint and the plaintiff appealed, the defendant was not entitled to canvass in that appeal, the District Court's dismissal of his claim in reconvention, without filing a written objection under section 772. A similar view was taken in SOLOMON vs. MOHIDEEN PATHUMMA [64 NLR 227]. The decision of the Court of Appeal in WIJERATNE vs. GUNASEKERE [1997 2 SLR 291] is an illustrative example of when section 772 can be properly resorted to by a respondent to an appeal. In this case, the plaintiff filed action in the District Court to eject the defendant from the premises. The defendant filed answer pleading that the action should be dismissed on two grounds. The District Court upheld the defendant's first ground and dismissed the plaintiff's action, but rejected the second ground relied on by the defendant. The plaintiff appealed. The defendant resisted the appeal and also filed a written objection under section 772 praying that the Court of Appeal decides the second ground she had urged in the District Court in her favour in the appeal. Wigneswaran J with Weerasekera J agreeing, when both their Lordships were in the Court of Appeal, held that the District Court had erred when it dismissed the action on the first ground taken by the defendant, but upheld the validity of the second ground urged in the District Court by the defendant and pursued in appeal by way of the written objection filed by the defendant under section 772; and dismissed the plaintiff's action on that second ground.

The aforesaid analysis of section 772 enunciated by Middleton J in RABOT vs. DE SILVA proceeds on the basis that section 772 envisages instances where a respondent invokes section 772 against the *appellant*. Other early decisions also took the view that section 772 can be invoked by a respondent to an appeal, only against the appellant and *not* to challenge a finding in the decree in favour of another *respondent*. Thus, in CROOS vs. FERNANDO [1913 1 Bal. Notes 84], Woodrenton ACJ held that section 772 *"does not enable one respondent to file a cross notice of objections against another."*.

However, a perusal of the subsequent decisions on section 772 suggests that this Court has recognised that there may be *exceptional situations* in which one respondent to an appeal [in which there are more than one respondent], can invoke section 772 to challenge a determination in the decree in favour of *another respondent* to the appeal. Thus, in PALDANO vs. HORATALA [3 Times of Ceylon LR 58 at p.59] Jayewardene J, with Schneider J agreeing, expressed the view that there could be exceptions to the general rule that section 772 does not enable a respondent [who has not filed his own appeal] to dispute a finding in the decree in favour another respondent. In the later case of DOLOSWELA RUBBER AND TEA ESTATE CO. vs. SWARIS APPU [31 NLR 60 at p. 63], Drieberg J, with Dalton J agreeing, referred to instances where there is an identity of interests between the appellant and the respondent against whom the written objections under section 772 are filed, as exceptional circumstances in which one respondent [who has not filed his own appeal] would be entitled to have the Appellate Court consider objections filed by him under section 772 disputing the entering of the

decree in favour of another respondent. However, in the subsequent case of JURY vs. ATTORNEY-GENERAL [39 NLR 416 at p. 424-426], Maartensz with Abrahams CJ agreeing, took the more stringent view that section 772 permits a respondent to file a written objection only against the appellant and doubted the correctness of a proposition that a respondent may be permitted to dispute the entering of the decree in favour of another respondent in exceptional circumstances.

A different view was expressed *obiter* in BRITISH CEYLON CORPORATION LTD vs. UNITED SHIPPING BOARD [36 NLR 225]. In this case, the plaintiff had filed action in the District Court against the 1st and 2nd defendants. The District Court dismissed the plaintiff's action against the 1st defendant and entered judgment only against the 2nd defendant. Only the 2nd defendant appealed, naming the plaintiff and the 1st defendant as respondents to that appeal. Prior to the hearing of the appeal, the plaintiff-respondent filed written objections under section 772 seeking to canvass the dismissal of its case against the 1st defendant-respondent and seeking judgment against the 1st defendant-respondent too. The 1st defendant-respondent took up the position that the plaintiff-respondent was not entitled to do so without filing a separate appeal against the 1st defendant-respondent. MacDonell CJ appears to have taken a broad view of the scope of section 772 when His Lordship commented [at p. 243] *"The section seems to say that where there is an appeal, whether against a decree or an order, objection may be taken to anything appealable in the decree out of which the appeal rises ….. I am of the opinion then that it was permissible to the plaintiff company to bring this objection, namely that the decree was wrong in dismissing its claim as against the first defendant, and to have it determined."*. However, this appeal was eventually decided on the insufficiency of Stamp Duty and this observation by MacDonell CJ was made *obiter*.

The attention of MacDonell CJ does not seem to have been drawn to the previous decisions of this Court in RABOT and CROOS which had taken the view that one respondent to an appeal [who has not filed his own appeal] cannot invoke section 772 to challenge a determination in the decree in favour of another respondent to the appeal and the later cases of PALDANO and DOLOSWELA RUBBER AND TEA ESTATE CO which had expressed the view that this could be permitted in exceptional circumstances. I would add, with respect, that the aforesaid observation by MacDonell CJ in BRITISH CEYLON CORPORATION LTD does not reflect the correct position with regard to the scope of section 772. I would also state, with respect, that I am unable to agree with the `absolute' interpretation accorded by Maartensz J in JURY that section 772 cannot be invoked even in exceptional circumstances to enable a respondent [who has not filed his own appeal] to dispute a decree entered against another respondent. As set out later, the consistent approach of the Courts in India to the provision in the Indian Civil Procedure Code which is comparable to our section 772, fortifies the view I have taken.

I would add in support of the construction of section 772 set out in RABOT and CROOS and later modified in PALDANO and DOLOSWELA RUBBER AND TEA ESTATE CO and by this Court in the present case before us, that a party to an action in the trial court who is dissatisfied with a judgment entered in favour of one or more parties to the case, has a right of appeal against that party or parties within the specified time period allowed for an appeal. If a party who is dissatisfied with the judgment, fails or neglects to exercise that right of appeal or sees no need to exercise that right of appeal, he should not, *other than in exceptional circumstances*, be given a *carte blanche* to belatedly resort to section 772 in an appeal filed by another party to which he is a respondent and *re-agitate his dispute with the other respondents* in whose favour the judgment was entered. As Malik J, as he then was, stated in the Allahabad High Court in MOHAMED HASAN vs. MOHAMED HAMID HASAN [AIR 1946 All. 395 at para.9] *"It sometimes happens that a party may content himself with what he has got, even if the Court did not give him what he wanted, rather than take the trouble and incur the expense of going up to the Court of appeal. But where he is dragged there by the other side ….. There seems to be no sufficient reason, however, why a respondent should be given a second chance to file an independent appeal by way of cross-objection against another respondent when at the time the decree was passed both respondents were satisfied with the decree and did not file an appeal against it, so that it had become final so far as they were concerned."*.

It is also necessary to consider the decision of this Court in RATWATTE vs. GOONASEKERA [1987 2 SLR 260]. In that case, the District Court entered judgment for the plaintiff on the ground of *laesio enormis* pleaded by the plaintiff and rejected the ground of undue influence which the plaintiff had also relied on at the trial. When the defendant appealed seeking to set the decree aside, the plaintiff defended the decree entered on the ground of *laesio enormis* and also sought to canvass, in appeal, the District Court's rejection of the ground of undue influence. However, the plaintiff had not filed a written objection under section 772 giving notice to that effect. The defendant objected to the plaintiff being heard in the appeal with regard to the ground of undue influence because the plaintiff had not filed a written objection under section 772.

Sharvananda CJ was of the view that the Appellate Court should take into account the interests of justice when determining whether the plaintiff was entitled to canvass in appeal the rejection of the ground of undue influence by the District Court despite the plaintiff's failure to file a written objection under section 772. The learned Chief Justice stated [at p.267], *"This section requires the respondent, if he had not filed a cross-appeal to give the appellant or his Proctor seven days notice in writing to entitle him to object to the decree or any part of the decree, entered by the trial court. Only if he had duly given the said notice, will he have a* ***right*** *to object to the decree; if he had failed to give such notice, he cannot claim,* ***as a matter of entitlement****, the right to take any objection to the decree; but the provision does not bar the court, in the exercise of its powers to do complete justice between*

the parties, permitting him to object to the decree, even though he had, failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice. If however the respondent is not taking any objection to the decree, it is competent to him without filing any cross objections to support the decree not only on the grounds decided in his favour but also on the grounds decided against him, by asserting that the points decided against him should have been decided in his favour; he may thus challenge a finding against him although the decree may be in his favour. But a respondent cannot attack the decree in the appellant's favour without filing a cross-appeal or cross-objections under this section.". [emphasis added by me].

It has to be kept in mind that Sharvananda CJ was considering an appeal by the plaintiff against the only defendant - *ie:* a case where there was only a single respondent. The learned Chief Justice was not considering or referring to an instance where there were several respondents to an appeal and one respondent [who had not filed his own appeal] sought to invoke section 772 in the appeal to challenge the decree entered against *other respondents*. Thus, the decision in RATWATTE vs. GOONASEKERA has no bearing on the view expressed earlier in the present judgment that, *other than in exceptional circumstances*, section 772 cannot be invoked by a respondent to an appeal [who had not filed his own appeal] to challenge a finding in the decree in favour of *another respondent*.

As mentioned earlier, the position is similar in India where the provision which is comparable to section 772 of our Civil Procedure Code is found in Order 42 r. 22 of the (First) Schedule to the Indian Civil Procedure Code. Order 42 r. 22 is on broadly similar lines to our section 772. The Indian Courts have consistently laid down the general rule that Order 42 r. 22 can be invoked by a respondent only against the *appellant* and where that respondent disputes particular determinations of fact or law made in the decree and seeks to have them set aside or varied or decided in his favour by the appellate court *vis-à-vis* the *appellant*. However, the Indian Courts too have recognised that there could be *exceptional circumstances* in which a respondent [who has not filed his own appeal] may be permitted to invoke Order 42 r. 22 in order to dispute a decree entered in favour of *another respondent*. Thus, Justice Takwani on Civil Procedure [6th ed. at p. 478-479] states *"Ordinarily, cross-objections may be filed only against the appellant. In exceptional cases, however, one respondent may file cross-objections against the other respondents, for instance, when the appeal by some of the parties cannot be effectively disposed of without opening the matter as between the respondents inter se; or in a case where the objections are common as against the appellant and co-respondent."*. Sarkar states [Law of Civil Procedure 8th ed. Vol. 2 p.1502] *"As a general rule respondent's right to urge cross-objections should be limited to urging them against the appellant. In exceptional cases it maybe urged against co-respondents, eg, in questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents."*.

Since the question of the scope of section 772 is of some importance, it will be useful to cite a few of the decisions in India which enunciate aforesaid principles regarding the scope of Order 41 r. 22, which is equivalent to our section 772. These principles enunciated by the Courts in India are of direct relevance when determining the scope of section 772 of our Civil Procedure Code.

In VADLAMUDI VENKATESWARLU vs. RAVIPATI RAMAMMA [AIR 1950 Mad. 379], Rajamannar CJ, speaking for a Bench of five Judges of the Madras High Court, carefully examined the history of decisions on Order 41 Rule 22. Having done so, the learned Chief Justice, referring to the nature of an objection that can be raised under Order 41 r. 22, held [at para. 27] that *"In my opinion, such an objection should, as a general rule, be primarily against the appellant. In exceptional cases, it may incidentally be also directed against other respondents."*. The learned Chief Justice cited with approval, the following words of Malik J in MOHAMED HASAN vs. MOHAMED HAMID HASAN [at para. 7] *"Mehdi Hasan, whose contentions were overruled [in the trial Court] , submitted to the decree and did not file an appeal. In the appeal filed by defendant, Saiyed Mohammad Hasan, he was impleaded as one of the defendants-respondents. This cross-objection of Saiyed Mehdi Hasan is not against the defendant-appellant, Saiyed Mohammad Hasan, but is a cross-objection really aimed at the plaintiff-respondent, Saiyed Hamid Hasan. So far as this Court is concerned, the law is now well settled that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent."*. In the later decision of the Supreme Court of India in PANNALAL vs. STATE OF BOMBAY [1963 AIR SC 1516 at para. 16], Das Gupta J held *"In our opinion, the view that has now been accepted by all the High Courts that Order 41, r. 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, that an objection under Or. 41, r. 22 can be directed against the other respondents, is correct."*. In MAHANT DHANGIR vs. MADAN MOHAN [AIR 1988 SC 54] at para. 15], the Supreme Court of India referred with approval to Das Gupta J's above enunciation of the scope of Order 41 R.22.

To conclude this discussion on the scope of section 772, it seems to me that the following principles can be extracted from a reading of section 772, the decisions of this Court cited earlier and also the aforesaid decisions of the Courts in India:

(i) A respondent to an appeal can resist the appeal and support the entirety of the decree on any grounds including those decided against him by the trial court, without filing a written objection under section 772;

(ii) A respondent to an appeal who disputes particular determinations of fact or law made in the decree which is canvassed in appeal by the appellant and wishes to have them set aside or varied or decided in his favour by the appellate court *vis-à-vis* the *appellant*, can do so by duly filing a written objection in terms of section 772 of the Civil Procedure Code;

(iii) The general rule is that section 772 of the Civil Procedure Code can be invoked by a respondent to an appeal only against the *appellant* and in the manner and for the purpose described in (ii) above;

(iv) A respondent to an appeal who wishes to invoke and resort to section 772 in the aforesaid circumstances and in the manner and for the purpose set out in (ii) and (iii) above, will have a *right* or *entitlement* to do so only if he has duly filed a written objection under section 772 and given due notice to the appellant. However, it was held in RATWATTE vs. GOONASEKERA that, even in the absence of a duly filed written objection under section 772, an Appellate Court has the discretion, in the interests of justice, to permit the respondent to an appeal to canvass his objections to a specific finding in or specific aspect of the decree with which he is dissatisfied *vis-à-vis* the *appellant*;

(v) Section 772 cannot be invoked by a respondent to an appeal [who has not filed his own appeal], to challenge a finding in the decree in favour of *another respondent other than in exceptional circumstances* such as: in instances where a determination of the relief sought by the appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree *inter se* the respondents; or where the interests of the appellant and the interests of the respondent against whom a written objection under section 772 is filed, are identical or substantially similar.

It is necessary to now apply the aforesaid principles to the 9th defendant-respondent's written objection under section 772 filed in the High Court and ascertain whether the 9th defendant-respondent had a *right* or *entitlement* to have his written objection considered by the High Court.

As stated earlier, the 9th defendant-respondent sought to challenge by way of his written objection filed under section 772, the District Court's decree entered in favour of other *respondents* - namely, the 5th to 8th defendants-respondents, without the 9th defendant-respondent filing his own separate appeal to that effect.

It is evident from the principles set out earlier that the 9th defendant-respondent could not do so *other than in exceptional circumstances* such as: where a determination of the relief sought by the appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree *inter se* the respondents; or, where the interests of the appellant and the interests of the respondent against whom a written objection under section 772 is filed, are identical or substantially similar.

Accordingly, it is necessary to examine whether such exceptional circumstances existed in the 9th defendant-respondent's favour.

In this regard and as mentioned earlier, in their appeal to the High Court, the 10A and 14th defendants-appellants claimed a 1/24th share each of the 4/24th share which had come to Puhula from Singho who was the original owner of a half share in the land. The 10A and 14th defendants-appellants only challenged in their appeal, the allotting of shares to the plaintiff-respondent and the 1st to 3rd defendants-respondents who had also claimed the 4/24th share which had come to Puhula from Singho.

However, the 9th defendant-respondent only sought to challenge, by way of his written objection filed under section 772, the District Court having allotted to the 5th to 8th defendants-respondent, the aggregate 8/24th share held by Kirihonda and Siriwadiya which had devolved to Kirihonda and Siriwadiya from Dinenchiya who was the original owner of the *other* half share in the land. Thus, the 9th defendant-respondent did not dispute the claim made in the appeal by the 10A and 14th defendants-appellants to a part of the 4/24th share which had come to Puhula from Singho.

Accordingly, it is clear that the determination of the 10A and 14th defendants-appellants' appeal by the High Court would not have required the High Court to examine the lawfulness of the allotment of shares which had devolved from Dinenchiya *inter se* the 9th defendant-respondent and the 5th to 8th defendants-respondents. Therefore, it cannot be said that the first type of exceptional circumstance described above, existed.

Next, for the reasons set out above, it is also clear that there was no identity of interests between the 10A and 14th defendants-appellants who claimed under Singho's half share; and the 5th to 8th defendants-respondents to whom the District Court had allotted a part of the other half share held by Dinenchiya, which allotment was challenged by the 9th defendant-respondent by way of his written objection filed under section 772. Therefore, it also cannot be said that the second type of exceptional circumstance described above, existed.

Consequently, the conclusion must be that the the 9th defendant-respondent did not have a *right* or *entitlement* to have his written objection under section 772 determined by the High Court.

Nevertheless, the factual position is that the 9th defendant-respondent's written objection under section 772 was filed in the High Court in broadly the correct form and with notice being given and that all the parties to the appeal were well aware of the 9th defendant's written objection. It is clear that none of the other parties to the appeal objected, at any stage, to the 9th defendant-respondent's written objection being determined by the High Court. Further, the High Court has not made an Order rejecting the 9th defendant-respondent's written objection filed under section 772, nor made a statement to such effect in its Judgment.

Next, when this application for leave to appeal was filed in this Court by the 9th defendant, none of the respondents to the application took up the position that the 9th defendant was not entitled to appeal or to have the matters set out in his written objection under section 772 determined by this Court in appeal. The questions of law now before this Court arise specifically from the matters set out in the 9th defendant's written objection filed under section 772. None of the respondents have objected, at any stage, either by way of a motion or in their written submissions or during their oral submissions during the hearing of this appeal, to the determination of those questions of law. To the contrary, all the learned counsel who appeared at the hearing of this appeal agreed that the questions of law before us now should be determined upon the facts and merits of the 9th defendant's appeal to this Court.

In those circumstances, it is too late to now deprive the 9th defendant of a determination by this Court, of the facts and merits of the questions of law which are now before us. I would add that a lack of an *entitlement* or a *right* of the 9th defendant to have filed a written objection under section 772 did not amount to a patent lack of jurisdiction on the part of the High Court to determine the matters set out in that written objection. Instead, the High Court had the jurisdiction to determine the matters set out in the 9th defendant-respondent's written objection unless one of the other parties had objected to the written objection being determined and the High Court upheld that objection or the High Court chose to reject the written objection *ex mero motu* on the ground that it was outside the scope of section 772, and made Order to such effect.

In this regard, I am of the view that any objection to an Appellate Court considering a written objection under section 772 filed by a respondent to the appeal, must be taken up at the earliest opportunity or, at the latest, at the commencement of the Hearing, so that the Appellate Court can make an Order either rejecting the written objection or

holding that the respondent filing the written objection is entitled to have them considered by the Court. If no such objection is raised and no Order is made by the Appellate Court rejecting the written objection filed under section 772, the respondent filing the written objection is entitled to have its merits determined by the Appellate Court.

However, in a very brief judgment, the learned High Court Judges only considered the appeal filed by the 10A defendant and 14th defendant and dismissed that appeal and affirmed the judgment of the District Court. The High Court made no reference whatsoever to the 9th defendant's written objection to the decree which had been filed under section 772 and was before the High Court, nor to the 9th defendant's claim to a 8/24th share of the land and the evidence in support of that claim. Thus, as discussed earlier, the High Court erred when it failed to consider and determine the 9th defendant-respondent's written objections filed under section 772.

The 9th defendant had died during the pendency of the appeal in the High Court and the 9A and 9B defendants had been substituted in his place. They filed an application in this Court seeking leave to appeal from the judgment of the High Court and prayed that the judgment of the High Court be set aside and that this Court makes Order that the 9A and 9B defendants are entitled to a 8/24th share of the land.

This Court has granted the 9A and 9B defendants leave to appeal on the following questions of law [rephrased for the sake of brevity]:

(i) Is the judgment of the High Court of Civil Appeal is contrary to law ?

(ii) Did he High Court err in failing to consider the written objections raised by the 9th defendant under and in terms of section 772 of the Civil Procedure Code ?

(iii) Did the High Court fail to consider the testimony of the 9th defendant and the deeds of transfer produced in evidence by the 9th defendant ?

(iv) Did the High Court fail to consider that the trial judge had answered issue no. 32 in the affirmative and, despite doing so, proceeded to answer issue no. 33 to issue no. 36 by stating *"Not Proved"* ? [By way of an explanation, issue no. 32 asked whether Kirihonda, Siriwadiya and Jothiya each held a 4/24th share in the land, while issue no. 33 to issue no. 36 specifically asked whether the aggregate 8/24th share held by Kirihonda and Siriwadiya had come to the 9th defendant by the deeds of transfer marked "9වි1" to "9වි4"] ?

(v) Did the High Court err by failing to consider the manner in which the shares on Siriwadiya and Kirihonda had devolved ?

For the reasons set above, I will proceed to determine these questions of law. I would add that, in the light of the evidence led at the trial, the provisions of section 25 (1) of the Partition Law make it incumbent on this Court to determine questions of law no.s (iii) to (v) in the exercise of its jurisdiction under Article 127 of the Constitution.

The devolution of Dinenchiya's half share will be considered first since the 9th defendant's appeal before us relates to the devolution of that half share.

As mentioned at the outset, it was common ground between all the parties that Dinenchiya's 12/24th share [half share] had devolved to Kirihonda, Siriwadiya and Jothiya in equal 4/24th shares. As also mentioned at the outset, the 4th defendant claimed the 4/24th share which had been held by Jothiya. The 5th to 8th defendants on the one hand, *and* the 9th defendant on the other hand, claimed the aggregate 8/24th share which had been held by Kirihonda and Siriwadiya.

Only the 4A defendant [who had been substituted in place of the deceased 4th defendant - Sudu Hakurage Nandoris] and the 9th defendant gave evidence in support of their claims under Dinenchiya. The 5th to 8th defendants did not give evidence in support of any claim they may have had to a share in the land. No documents were produced in support of their claim.

With regard to the 4/24th share held by Jothiya, there is no dispute between the parties that this 4/24th share has devolved upon the 4th defendant - Sudu Hakurage Nandoris. The learned District Judge has correctly allotted that 4/24th share to the 4th defendant and this determination was affirmed by the High Court.

With regard to the remaining aggregate 8/24th share held by Kirihonda and Siriwadiya, the learned District Judge upheld the claim made by the 5th to 8th defendants in their joint Statement of Claim that: (i) the 8/24th share held together by Siriwadiya and Kirihonda had devolved upon Suwaris; and (ii) that this 8/24th share held by Suwaris had devolved upon the 5th to 8th defendants, who were his four children. On that basis the learned District Judge allotted a 2/24th share of the land each to the 5th to 8th defendants. The High Court has affirmed that determination in appeal.

However, both the District Court and the High Court completely overlooked the 9th defendant's clear testimony that Kirihonda and Siriwadiya had, during their lifetime, transferred their aggregate 8/24th share in the land to Kumarapeli Arachchilage Don

Davith Singho by the deed of transfer no. 535 marked “9වි4”; thereafter, the said Don Davith Singho transferred that 8/24th share to Niyadurupola Hakurage Sinchina by the deed of transfer no. 1437 marked “9වි3”; thereafter, the said Sinchina transferred that 8/24th share to Sudu Hakurage Githona by deed of transfer no. 9330 marked “9වි2”; and, finally, the said Githona transferred that 8/24th share to the 9th defendant - Sudu Hakurage Jayaratne - by deed of transfer no. 4231 marked “9වි1”. All these deeds were executed long prior to the institution of this action in 1985. Further, it is evident from the Surveyor’s Report that the 9th defendant - Jayaratne - had been in possession of a substantial part of the land and had preferred a claim to that part of the land at the Survey.

All these deeds of transfer marked “9වි1” to “9වි4” were produced in evidence without any challenge to their validity or requirement of further proof. These deeds of transfer clearly establish that the 9th defendant was entitled to the 8/24th share of the land which had devolved upon Kirihonda and Siriwadiya. Further, a perusal of the proceedings shows that this fact was not disputed by any party at the trial.

Despite, it having been clearly established that the 8/24th share previously held by Kirihonda and Siriwadiya had come to the 9th defendant by the deeds of transfer marked “9වි1” to “9වි4”, the learned District Judge has erroneously held that the 9th defendant had failed to establish his claim to a 8/24th share in the land and erroneously answered the aforesaid issue no.s 33 to 36 in the negative.

Instead, the learned District Judge has proceeded to allot the aggregate 8/24th share previously held by Kirihonda and Siriwadiya to the 5th to 8th defendant on the basis that they were the heirs of Kirihonda and Siriwadiya. However, as mentioned earlier, the 5th to 8th defendants did not give evidence and no documents were produced to support any claim by them to a share of the land. Further, it is evident from the Surveyor’s Report that the 5th to 8th defendants were not in possession of any part of the land. In fact, the Report states that the 5th and 6th defendants, who had been present at the time of the Survey, had not preferred a claim to the land.

Upon a perusal of the proceedings, it is evident that the learned District Judge has allotted a 2/24th share each to the 5th to 8th defendants relying solely on the averments in the plaint which stated that the aggregate 8/24th share held by Kirihonda and Siriwadiya had devolved to the 5th to 8th defendants and the plaintiff’s passing statement to that effect in his evidence-in-chief. However, the learned District Judge failed to take into account the fact that, when the plaintiff was cross-examined by learned counsel for the 9th defendant, the plaintiff admitted that the shares held by Kirihonda and Siriwadiya had been transferred to Sinchina, who had transferred those shares to Githona by the

deed of transfer no. 9330 marked “9වි2” and that, thereafter, Githona had transferred these shares to the plaintiff by the deed of transfer no. 4231 marked “9වි1”.

Thus, it is clear that the learned District Judge erred when he allotted a 2/24th share each to the 5th to 8th defendants and failed to allot to the 9th defendant, the 8/24th share previously held by Siriwadiya and Kirihonda. This is a manifest error committed by the District Court, which should have been corrected when the High Court heard the appeal. It is unfortunate that the learned High Court Judges have failed to do so. Section 25 (1) of the Partition Law placed a duty on the High Court, when hearing the appeal, to consider whether the District Court had correctly examined the evidence and to consider whether the District Court had correctly determined the issue of the 9th defendant’s claim to a 8/24th share of the land. It is to be regrettable that the learned High Court Judges failed to perform that duty.

For the reasons set out above, I answer the aforesaid five questions of law raised by the 9A and 9B defendants in the affirmative and hold that that 9th defendant - Sudu Hakurage Jayaratne - was entitled to a 8/24th share of the land which has come to him from the 8/24th share held by Kirihonda and Siriwadiya. Further, I hold that none of the 5th to 8th defendants are entitled to any shares in the land.

To now consider the devolution of Singho’s half share: as mentioned at the outset, it was common ground between all the parties that Singho’s 12/24th share [half share] had devolved to Subaya, Puhula and Kirinerisa in equal 4/24th shares.

The position of the plaintiff and the 1st to 3rd defendants and 15th defendant was that both Puhula and Kirinerisa had died without legitimate issue and that, as a result, Subaya, who was the brother of Puhula and Kirinerisa, became the sole owner of Singho’s half share [*ie:* 12/24th] of the land. The plaintiff and the 1st to 3rd defendants and 15th defendant stated that Subaya had six children - *ie:* four sons, namely: the plaintiff - Saima, the 1st defendant - Haramanis, the 2nd defendant - Punchisingho and the 3rd defendant - Jayasekera, and two daughters, namely, Soyda and Seelawathie.

The plaintiff, the 2nd defendant and the 3rd defendant gave evidence at the trial. The 2nd defendant stated that he also gave evidence on behalf of the 15th defendant, who was his son and with whom he had filed a joint Statement of Claim. The 1st defendant did not enter an appearance at the trial

In his plaint and when he gave evidence, the plaintiff’s claimed that all six of Subaya’s aforesaid children inherited Subaya’s half share of the land in equal 2/24th shares. The plaintiff went on to claim that his two sisters - *ie:* Soyda and Seelawathie - transferred

their shares in the land to him by the deed of transfer no. 22853 dated 22nd October 1983 marked "පැ1". Thus, the plaintiff claimed that he had a 6/24th share of the land and that his three brothers - namely, the 1st to 3rd defendants - each had a 2/24th share in the land.

However, the position of the 2nd, 3rd and 15th defendants in their Statements of Claim and when the 2nd and 3rd defendants gave evidence was that both Soyda and Seelawathie had married in *diga* during the lifetime of their father, Subaya, and that, therefore, Soyda and Seelawathie did not inherit any share in the land since all parties to this case are governed by the Kandyan Law. On that basis, the 2nd and 15th defendants stated that the aforesaid deed of transfer no. 22853 marked "පැ1" was of no force or effect in law. Accordingly, the position of the 2nd and 15th defendants was that Subaya's half share [12/24th] of the land was inherited, in equal 3/24th shares by the plaintiff and the 1st to 3rd defendants.

In this regard, when the plaintiff was cross-examined at the trial, he admitted that Soyda and Seelawathie had contracted *diga* marriages and admitted the related marriage certificates which were marked "2වි1" and "2වි2". The plaintiff had earlier stated in his evidence-in-chief that his father, Subaya, who was also the father of Soyda and Seelawathie, had died in 1968. The marriage certificate marked "2වි1" establishes that Soyda married in *diga* on 17th November 1941 and the marriage certificate marked "2වි2" establishes that Seelawathie married in *diga* on 05th December 1964.

It is a well-known principle of the Kandyan Law that a daughter who marries in *diga* during the lifetime of her father, inherits no part of her father's immovable property if he dies intestate. Thus, Hayley's Kandyan Law [at p.379] states *"The general rule is that neither a diga-married daughter, nor her children can compete with other children of the same mother, or their descendants, in the distribution of a deceased's intestate estate."*. Similarly, Dissanayake and De Soysa [Kandyan Law and Buddhist Ecclesiastical Law [p.156-157] state *"A daughter will be incapacitated from inheriting landed property from her father, by being given away in diga marriage by her father, it being premised that she remained settled in diga until her father's death."*. and *"The general rule is that when a woman marries in diga she forfeits her right to inherit any portion of her father's estate."*. Basnayake J observed in SIRISENA vs. DINGIRI [45 CLW 24 at p.25-26], referring to the devolution of the immovable property of the intestate deceased in that case, *"….. if [the deceased] had married only once and had five daughters each of whom married in deega in his lifetime they would not inherit his immovable property"* . I should add here that, there was also no evidence before the District Court of the occurrence of any events *after* Soyda and Seelwathie contracted their *diga* marriages

which might have revived their claim to inherit their father's immovable property, as contemplated in the Kandyan law.

For these reasons, the learned District Judge correctly held that the deed of transfer no. 22853 marked "ඈ1" under which the plaintiff claimed the alleged 2/24th shares of both Soyda and Seelawathie, was of no force or effect in law.

Consequently, the learned District Judge correctly held that Subaya's half share [12/24th] of the land was inherited, in equal shares by the plaintiff - Saima, the 1st defendant - Haramanis, the 2nd defendant - Punchisingho and the 3rd defendant - Jayasekera - *ie:* that the plaintiff and the 1st to 3rd defendants each had inherited a 3/24th share of the land. On that determination, the learned District Judge allotted a 3/24th share each in the land to the plaintiff and the 1st to 3rd defendants.

However, it had been clearly established by the evidence of the 2nd defendant that the 1st defendant - Haramanis - [who was the 2nd defendant's brother] had transferred his 3/24th share to the 15th defendant- Ranasinghe - by the deed of transfer no. 2215 dated 16th March 1980 marked "15වි1", five years prior to the institution of the action. "15වි1" states that the 1st defendant was entitled to a 3/24th share in the land by paternal inheritance from his father, Subaya, and that the 1st defendant has transferred the entirety of that 3/24th share to the 15th defendant. This deed marked "15වි1" was not disputed by any party at the trial. The 1st defendant - Haramanis - did not enter an appearance at the trial and did not prefer any claim when the Survey was done. On the other hand, the 15th defendant preferred his claim to the Surveyor. Further, in cross examination, the plaintiff specifically admitted the aforesaid deed of transfer no. 2215 marked "15වි1" by which his brother, the 1st defendant, had transferred the entirety of his share in the land to the 15th defendant.

In these circumstances, the learned District Judge had correctly answered in the affirmative, issue no. 31 which specifically asked: *"Has the 1st defendant had transferred his share of the land to the 15th defendant - Ranasinghe - by the deed of transfer no. 2215 dated 16th March 1980 [ie: "15වි1"] ?"* However, despite having done so and despite the unequivocal and undisputed evidence that the 1st defendant had transferred his 3/24th share to the 15th defendant by the deed marked "15වි1", the learned District Judge has erred and allotted a 3/24th share to the 1st defendant - Haramanis - instead of allotting that 3/24th share to the 15th defendant - Ranasinghe.

This is a manifest error which should have been corrected when the High Court heard the appeal. It is unfortunate that, in this instance too, the learned High Court Judge have failed to do so.

In these circumstances, this Court is obliged to correct the error. In my view, the requirements of section 25 (1) of the Partition Law read with the appellate jurisdiction vested in this Court by Article 127 of the Constitution, justify the correction of this manifest error by this Court in appeal.

For the reasons set out above, I hold that the 15th defendant - Sudu Hakurage Ranasinghe is entitled to a 3/24th share of the land which has devolved to him from Subaya. I also hold that the 1st defendant - Sudu Hakurage Haramanis - is not entitled to any share in the land.

With regard to the 10th, 11th, 12th 13th and 14th defendants - namely, Podisingho, Sediris, Alpenis, Asilin and Ariyadasa - their Statement of Claim averred that Puhula and Kirinerisa died leaving legitimate issue to whom the 4/24th shares of Puhula and Kirinerisa had devolved. The 10th to 14th defendants claimed that: (i) upon Puhula's death, his 4/24th share had devolved upon his four legitimate children - namely, one Haramanis and the 10th to 12th defendants, each of whom, thereby, became entitled to a 1/24th share in the land and, subsequently, the said Haramanis had died intestate and his 1/24th share in the land had come to his son, the 14th defendant. The 13th defendant claimed that upon Kirinerisa's death, his 4/24th share in the land had devolved to her as his legitimate daughter.

The plaintiff and the 2nd and 3rd defendants had all expressly denied that Puhula and Kirinierisa had any legitimate issue. As mentioned earlier, it is undisputed that the land is *paraveni* property and it is a principle of Kandyan Law that illegitimate children of an intestate deceased do not inherit the *paraveni* property of that intestate deceased - *vide:* section 15 (*a*) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, as amended, which states *"When a man shall die intestate after the commencement of this Ordinance leaving an illegimate child or illegitimate children - (a) such child or children shall have no right of inheritance on respect of the paraveni property of the deceased;"*. In these circumstances, the burden was firmly placed on the 10th to 14th defendants to prove that they were the legitimate issue of Puhula and Kirinierisa.

Only the 11th defendant gave evidence on behalf of himself and the 10th, 12th and 14th defendants. The 13th defendant did not give evidence despite the 11th defendant having expressly stated that he does give evidence in support of the 13th defendant's claim.

However, the 11th defendant did not produce a marriage certificate which established that Puhula had contracted a lawful marriage and did not produce any of the birth certificates of the aforesaid Haramanis and the 10th to 12th defendants, to prove that they were Puhula's children. The 13th defendant's birth certificate was also not produced.

The 11th defendant has referred in his evidence to the documents marked "9වි1" to "9වි8" which were some extracts from the case records in case no.15 and case no. PA 11795 which had been previously filed in the District Court of Kegalle. The 11th defendant took up the position that it had been held in these two cases that the aforesaid Haramanis and the 10th to 12th defendants are the children of Puhula and that these findings amounted to *res adjudicata* with regard to the aforesaid Haramanis and the 10th to 12th defendants being the legitimate children of Puhula. However, a perusal of "9වි1" to "9වි8" shows that these are only a few of the documents which would have been in the case records of these two cases and, more importantly, that these documents do not establish that there was a judicial determination in either case that the aforesaid Haramanis and the 10th to 12th defendants are the legitimate children of Puhula.

Further, a perusal of the evidence of the 11th defendant shows that, as the learned District Judge has noted, the credibility of the evidence of the 11th defendant was shaken in cross examination. When learned counsel for the 2nd, 3rd and 15th defendants specifically put to the 11th defendant that he, the aforesaid Haramanis and the 10th and 12th defendants were not Puhula's children, the 11th defendant had no answer. Thereafter, when learned counsel for the plaintiff specifically put to the 11th defendant that Puhula did not have any legitimate issue, the 11th defendants answered saying he did not have any such knowledge.

In these circumstances, the learned District Judge held that the 10th to 14th defendants had failed to prove that they were the legitimate issue of Puhula and Kirinerisa and rejected their claims. The High Court affirmed that view. I see no reason to take a different view. In any event, the 10th to 14th defendants have not sought leave to appeal to this Court from High Court's affirmation of decision of the District Court to reject their claims to shares in the land. In these circumstances, I need not further examine the 10th to 14th defendants' claims.

To conclude, I set aside the judgments of the District Court and High Court and hold that the following defendants are entitled to shares in the land as set out below:

The plaintiff	-	3/24th
2nd defendant	-	3/24th
3rd defendant	-	3/24th
4th defendant	-	4/24th
9th defendant	-	8/24th
15th defendant	-	3/24th

Based on the aforesaid determination with regard to the parties entitled to shares in the land and taking into account the claims preferred by the parties at the time of the Survey as set out in the Surveyor's Report which was submitted to the District Court, I order that the following be given effect to, as far as is practically possible, at the time of the division of the land into lots: (i) the buildings and structure marked A and B on Lot No. 1 in the plan no. 415 marked "X" at the trial and the Kohila Plantation on the 2.5 perch extent of land shown as Lot No. 2 in the said plan, to be within the portion of land allotted to the plaintiff - Sudu Hakurage Saima; (ii) the buildings and structures marked C, D, E and F in the said plan, to be within the portion of land allotted to the 4th defendant - Sudu Hakurage Nandoris; (iii) the buildings and structures marked G, H, I, J and K in the said plan to be within the portion of land allotted to the 3rd defendant - Sudu Hakurage Jayasekera; and (iv) the buildings and structures marked L, M, N, O and P in the said plan to be within the portion of land allotted to the 9th defendant - Sudu Hakurage Jayaratne.

Accordingly, the land shown as Lot No. 1 and Lot No. 2 in plan no. 415 marked "X" is to be partitioned between the plaintiff, 2nd to 4th, 9th and 15th defendants in the aforesaid shares determined by this Court and subject to the aforesaid orders will regard to the manner of partition and subject to compensation for improvements and any necessary owelty to be paid, as assessed by the Surveyor and determined by the District Court in terms of the law, to the parties named in the Surveyor's' Report submitted to the District Court.

The District Court is directed to enter an Interlocutory Decree in terms of this judgment. This case has been pending in the Courts for more than three decades and the District Court is directed to take all necessary subsequent steps to expeditiously conclude these proceedings in compliance with the provisions of the Partition Law. In the circumstances of this 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

P. Padman Surasena, J.
I agree

Judge of the Supreme Court

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

Kongahagedara Sumanawathie,
Land No.114, Mahagama Colony,
Sevenagala.

Plaintiff

-Vs-

Siripala Subasinghe,
No.23, Ela, Kurugamvatiya,
Mahagama Colony,
Sevanagala.

Defendant

S.C. Appeal 73/2011

SC/HCCA/LA NO: 421/2010
SP/HCCA/RAT No.494/2007 (F)
DC Embilipitiya Case No. 6862/L

AND

Siripala Subasinghe,
No.23, Ela, Kurugamvatiya,
Mahagama Colony,
Sevanagala.

Defendant -Appellant

-Vs-

Kongahagedara Sumanawathie,
Land No.114, Mahagama Colony,
Sevenagala.

Plaintiff-Respondent

AND NOW BETWEEN

Kongahagedara Sumanawathie,
Land No.114, Mahagama Colony,
Sevenagala.

Plaintiff-Respondent-Appellant

-Vs-

Siripala Subasinghe,
No.23, Ela, Kurugamvatiya,
Mahagama Colony,
Sevanagala.

Defendant-Appellant-Respondent

Hattasinghe Arachchige Kusumawathie,
No.23, Ela, Kurugamvatiya,
Mahagama Colony,
Sevanagala.

Substituted Defendant – Appellant - Respondent

Before: Buwaneka Aluwihare, PC. J.,
Murdu N.B.Fernando, PC. J. and
S. Thurairaja, PC. J.

Counsel: Anuruddha Dharmaratna with Indika Jayaweera for the Plaintiff-Respondent - Appellant.
Bimal Rajapakse with B.C. Balasuriya for the Substituted Defendant-Appellant-Respondent.

Argued on: 13.02.2019

Decided on: 20.12.2019

Murdu N.B. Fernando, PC. J.

This Appeal arises from the judgment of the Civil Appellate High Court of Ratnapura dated 10.11.2010 wherein the Civil Appellate High Court ("the High Court") set aside the judgment of the District Court of Embilipitiya dated 14-11-2007.

On 10.06.2011, this Court granted Special Leave to Appeal on the following three questions of Law: -

i) Have their Lordships of the High Court erred in law by failing to appreciate that the plaintiff has duly discharged her burden of proof and has duly proved all ingredients that needs to be established by a plaintiff in a rei vindicatio action?

ii) Have their Lordships of the High Court erred in law in failing to appreciate that the said permit issued to the plaintiff subject to conditions therein gives the plaintiff absolute rights in respect of the land described therein and it has not reserved any rights to the defendant over the said land by way of a servitude or otherwise?

iii) Have their Lordships of the High Court erred in law in arriving at the finding that the permit had been given to the plaintiff subject to the right of water way and the roadway?

The plaintiff-respondent-appellant ("the plaintiff/appellant") filed an action against the defendant-appellant-respondent ("the defendant") in the District Court of Embilipitiya on 22-05-2000 and prayed for a declaration of title to the land referred to in the schedule to the plaint. The Plaintiff also sought a declaration that the defendant did not have a right of way and/or a right to obtain water over the plaintiff's land.

The plaintiff in her plaint averred that she and her late husband had been in occupation of a Mahaweli land for many years; that she was holding the paddy land described in the plaint in extent of 0.492 hectares (lot 603) on a permit issued by the State; that the defendant illegally filled a portion of the said land; that the defendant was using the said illegally filled land as a road way (6 feet wide, 300 feet in length) to access his land and also to obtain water to his paddy fields; that there was a dispute pertaining to the said road way and the water course which was referred to the Primary Court; and that she was advised by the Mahaweli Authority of Sri Lanka to file a civil action with regard to the said disputed land.

The defendant in his answer stated that he was in possession of the land referred to in the schedule to the answer from the year 1978; that there was a four feet wide road and a three feet wide 'ela', a water course on the eastern boundary of the plaintiff's land leading on to the defendant's land; that the said road and the water course were blocked by the plaintiff in November 1995; that the dispute was referred to the Primary Court of Embilipitiya by way of a Section 66 application; after inquiry on 19-09-1996 the Primary Court granted him the use of the road and access to the water course to obtain water for his fields; that he has a valid permit to the said land; and moved Court for dismissal of the plaint and for an Order of Court to permit the defendant for the continuous use of the road and to obtain water from the water course to his fields.

After trial, the learned Additional District Judge gave judgment in favour of the plaintiff based upon the permit (P1) and the extract of the Final Village Plan (P2) produced at the trial and dismissed the defendant's claim on the basis that the defendant has failed to prove the right to use the road way and the water course. In determining the matter before the District Court the learned Additional District Judge relied heavily on a Commission Report dated 24-04-2002 and the two plans annexed to the said report submitted by the Resident Manager of the Walave Special Zone. This report was initially called for by the District Court in order to enter a settlement between the parties. It is observed that the evidence of the author of the said report was never led nor cross-examined during the trial.

The High Court in setting aside the said judgment, upheld the defendant's contention that the plaint does not disclose a cause of action and has failed to describe the encroached portion of land which is in dispute and which is sought to be recovered from the defendant and dismissed the action of the plaintiff.

Being aggrieved by the said judgment the plaintiff is now before this Court having obtained special leave to appeal on three questions of law.

(i) Have their Lordships of the High Court erred in law by failing to appreciate that the plaintiff has duly discharged her burden of proof and has duly proved all ingredients that needs to be established by a plaintiff in a rei vindicatio action?

The plaintiff's Counsel's submission before this Court was that in order to establish a rei vindicatio action the plaintiff had clearly identified the subject matter of the action with reference to a distinct allotment of land depicted in the Final Village Plan prepared by the Survey General (P2) and also has title to the subject matter by being given a permit issued in terms of Section 19(2) of the Land Development Ordinance (P1) which was valid and not cancelled.

The Counsel for the plaintiff relied on the judgment of **Palisena Vs Perera 56 NLR 407** to establish that a permit holder enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser and referred to the defendant as a trespasser.

On behalf of the plaintiff it was further submitted that the defendant having no right whatsoever to the plaintiff's land has made a canal to take water and an access road to his land over the plaintiff's land and therefore the plaintiff is entitled to obtain from Court a consequential relief, i.e. a declaration that the defendant has no right of way and/or no right to draw water over the subject matter of the action. The Counsel for the plaintiff went on to submit that the learned Judges of the High Court erred when it held that the plaintiff has failed to demarcate and show by way of a plan the disputed roadway. He further asserted that since

the defendant had prayed for a judgment stating that the defendant has a right to continuous use of the roadway and a right to use the water canal, that the burden of proving same is on the defendant and not on the plaintiff. Counsel for the plaintiff rested his case on the Court of Appeal judgment of **David V. Gnanawathie 2000 [2] SLR 352.**

The Counsel for the defendant in his submissions before this Court, relied heavily on the ingredients of a rei vindicatio action and Section 41 of the Civil Procedure Code. The learned Counsel submitted that what was of paramount importance was that the plaint filed by the plaintiff did not contain a pedigree, an abstract of title, no sketch or plan showing the metes and bounds of the extent of land from which the defendant dispossessed the plaintiff, no date of the alleged disposition nor a prayer to seek the ejectment of the defendant and therefore critiqued the judgment of the District Court. The learned Counsel submitted in view of the above deficiencies in the plaint, *ex-mero motu* the plaint ought to have been rejected by the District Court.

The Counsel for the defendant further submitted that the Additional District Judge, was in error and misdirected himself when he held that the burden to prove the roadway and the water way was on the defendant. The Counsel also submitted that the Additional District Judge's statement that the date of disposition was not a relevant fact, was also a misdirection. Thus, the learned Counsel for the defendant submitted that the correction of such errors and misdirection of the District Judge by setting aside the said judgment by the High Court was correct and warranted. Therefore, the Counsel submitted that the High Court judgment was unassailable and should be affirmed by this Court.

A rei vindicatio action or *action rei vindicatio* is essentially an action *in rem*, and has its origins in the Roman Law and is for the recovery of property. Rei vindicatio action in modern terms is referred to as an action for a declaration of title.

Wille's Principles of South African Law (9th edition-2007) at page 539-540 sets out the essentials of the rei vindicatio action as follows: -

> "To succeed with the *rei vindicatio*, the owner must prove on a balance of probabilities, first his ownership in the property…. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed….. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that defendant is in a position to comply with an order for restoration."

Admittedly, the plaintiff is in occupation of a State land and is a valid permit holder. The defendant too is a permit holder and is occupying State land. The plaintiff was issued with the permit (P1) on 28-11-1999 for an extent of land 0.492 hectares whereas the defendant's

permit for an extent 0.897 hectares was dated 23-08-2000. Even prior to the issuance of the permits both parties were in occupation of the said lands. Both lands are in a Mahaweli colony in the Sevenagala area. No party has been issued a Grant in terms of the Land Devepoment Ordinance as yet. Thus, the ownership of the property is still with the State.

Marsoof J., **in Latheef and another Vs Mansoor and another S.C. Appeal 104/2005 S.C. minutes 27-10-2010** (reported in 2011 BLR at p. 189) has succinctly dealt with the legal principles governing a rei vindicatio action and the plethora of Judicial dicta, pertaining to same, wherein it had been held that a party claiming a declaration of title must have title himself (Abeykoon Hamine V. Appuhamy 52 NLR 49); that burden is on a plaintiff to establish the *dominium*, or title to the land and the plaintiff should succeed only on the strength of his own title and not upon the weaknesses of the defence (Jinawathie Vs Emalin Perera [1986] 2 SLR 121); and that a defendant need not prove anything, leave alone his own title (Wanigaratne Vs Juwanis Appuhamy 65 NLR 167).

The land in issue in this instant appeal, lot 603 referred to in the schedule to the plaint is a State land and given to the plaintiff on a permit. The Prayer (i) granted by the District Court pertain to the declaration of title to the said lot 603.

However, the bone of contention in this appeal is the consequential prayer granted by the District Court i.e prayer (iii), that the defendant does not have a right of way and/or a right to obtain water over the said lot 603.

It is observed that what the plaintiff has sought and what the District Court has granted is a negative right. The learned Additional District Judge has categorically held that the said relief is granted since the defendant has failed to prove the declaration sought by him in the claim in reconvention referred to in the answer. It is observed that this stance taken up by the Additional District Judge is erroneous.

The judicial dicta referred to earlier clearly states that *dominium* to the land should be established by the plaintiff on his own accord and not on the weaknesses of the defence. Similarly, consequential rights flowing from *dominium* to a property, should also be established by the plaintiff on a balance of probability. The burden is clearly on the plaintiff to prove it's case. The weaknesses and the inability of the defendant to prove it's claim is immaterial and has no bearing. Thus, in the instance case, the burden was on the plaintiff to prove her case, which she failed to do.

The Counsel for the defendant also submitted before this Court, that the plaint ought to have been rejected *in limine* for non-adherence with the provisions of Section 41 of the Civil Procedure Code.

Section 41 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"

The plaint in it's schedule describes lot 603 in reference to a portion of a Final Village Plan namely section 05 of FVP 43. But the plaint does not describe nor gives the metes and bounds of the land alleged to have been filled up by the defendant. Nor does it indicate where the defendant's land lies in the said plan. Thus, *ex-facie* on the plaint, Court cannot ascertain from the land described in the schedule the specific portion of the land upon which the cause of action has arisen to grant the relief.

On the corollary, the defendant in the schedule to his answer described his land bearing lot No 2755 depicted in section 04 of the Final Village Plan No. 73 as well as the disputed road way and the water course said to be on the eastern boundary of the plaintiff's land.

Therefore, the submission of the defendant that the plaint is not in accordance with the provisions of the Civil Procedure Code, as it does not refer to the specific disputed portion of land has merit and can be accepted.

The Counsel for the defendant further submitted that the plaint does not disclose a date on which the plaintiff was disposed from the land. The plaint only indicates that the defendant unlawfully filled a portion of the plaintiff's land. The evidence led, especially the proceedings in the Section 66 application indicate that the plaintiff has blocked the road way and the water course in December 1995 and the Primary Court restored the possession to the defendant in September 1996. The plaint upon which this appeal lies has been filed in May 2000, four and a half years after the said Section 66 order and does not indicate the date upon which the plaintiff was dispossessed from the land. Was it the date of the Section 66 notice or some other date? The plaintiff has also not prayed for ejectment of the defendant. The record further bears out that in 2001, whilst the District Court case was pending once again the Primary Court has made order to restore the possession of the defendant, as the plaintiff has blocked the water course and impeded cultivation of the defendant's fields. Hence, it is observed that the nondisclosure of the date of dispossession of the plaintiff is a material omission. More over the statement that the date is not relevant in a rei vidicatio action is a clear misdirection by the District Court.

In the said circumstances, we hold that the District Court has failed to appreciate the ingredients and the burden of proof in a rei vindicatio action. Thus, the High Court correctly

set aside the said judgment for the reason that the plaintiff has failed to establish and prove the ingredients required to be proved in a rei vindicatio action.

Hence, this Court answers the 1st question of law in the negative.

The 2nd and the 3rd questions of law raised before this Court pertains to the permit and I wish to consider the said two questions together.

The plaintiff's position before this Court was that the permit granted the plaintiff, absolute rights and has not reserved any right, servitude or otherwise to the defendant and thus the permit is not subject to a right of a water way or a roadway.

The permit given to the plaintiff has many conditions.

Condition 03 of the permit reads as follows: -

> "The permit holder's occupations of the land is subject to any right of way or other servitude existing over the land on the date of this permit."

Thus, it is apparent that the permit holder occupies the land subject to any existing right of way or other servitudes over the land. This Court observes that the High Court has considered and evaluated the said condition correctly and in the proper manifestation whereas the District Court has not lend it's mind to the said condition.

According to condition 03 of the permit, the permit holder's occupation of the land is subject to any right or servitude existing over the land on the day the permit was issued. Thus, the next question that has to be ascertained is whether there was any right of way or servitude existing over the land when the permit was issued to the plaintiff in August 1999.

The evidence led at the trial clearly establishes that a right of way or a servitude existed. Both parties admit that they occupied the said properties for many years, though the permits were issued as stated earlier, in the year 1999 and 2000 respectively. However, plaintiff failed to establish by way of a sketch or a plan, whether the right of way was over or on the eastern boundary of the land given to her under the permit.

In fact the Primary Court in September 1996 issued an Order for the plaintiff not to obstruct the water course and the road way. Thus, a roadway and a water course existed as at that date. The plaintiff did not go up in appeal or revision against the said Order and accepted the Order of Restoration of the defendant's possession of the road way and the water way.

The roadway and the waterway referred to in this appeal could easily be understood when considering the factual ground position. These lands are part of the Walave Basin of the Mahaweli Zone. These lands were given to villagers for cultivation many decades ago. Block

out plans were made subsequently and permits issued to the occupiers of the high lands and paddy lands. This position was clearly spelt out in the Commission Report filed in this case. The roadway when referring to the paddy fields is commonly referred to as a Niyara (නියර) and where existing the bund of a canal which is also referred to as a water way/water course/ ela/ඇළ (and runs adjoining or parallel to the road way/niyara) which channels water to the fields from the main water source being a wewa or a river. According to the Primary Court Order the plaintiff was asked to restore the blocked waterway and roadway or repair the 'niyara' that was cut to divert water exclusively to the plaintiff's paddy fields.

Thus, it is amply clear that a road way or a servitude was in existence at the time the permit was issued to the plaintiff. A road way (bund) and a water course is a *sine-quo-non* for a paddy field and is an essential element and held in *rem*.

We observe, that the plaintiff moved the District Court to obtain a declaration preventing the defendant from using the said road way or the servitude in such a background. The plaint did not disclose a date of dispossession nor an identifiable specific portion of land from which the plaintiff was dispossessed. Nevertheless, the District Court granted the plaintiff the said relief.

Having analyzed the evidence led and the documents marked, the High Court quite rightly set aside the said judgment of the District Court granting the said relief, viz a negative right to the plaintiff.

We see no reason to interfere with the said judgment of the High Court as the facts elicited categorically establish that the plaintiff did not have an absolute right to lot 603 and holds the said lot subject to the existing servitudes and other rights, either running over or adjacent to the said lot 603.

In the circumstances the 2nd and the 3rd questions of law are also answered in the negative.

Another factor that drew the interest of this Court were the two plans annexed to the Commission Report filed in the District Court. The Plan marked annexure (i) to the Commission Report was marked as P5(ii) in the appeal brief before us. In view of the paramount interest given to this plan and the bone of contention of the parties been the right of way and the water course, this Court, examined the original record (called for by this Court some time back) to verify the layout of the irrigation scheme.

The plan marked annexure (i) (P5 (ii) in the appeal brief) clearly encompasses the lots given to the plaintiff and the defendant bearing no 603 and 2755 and the existing water courses. It also shows lot 2752 adjacent to lot 603 referred to in the Commission Report as been

occupied by the plaintiff for which a permit had not been issued. No reference was made by the plaintiff in the plaint with regard to this lot occupied by her. There exists a water course from the source 'Yodha Ela' which runs on the eastern boundary of lot 603 and abruptly ends near the plaintiff's land. This factor correspondence with the defendant's version with regard to the existing roadway and the water course.

To the Commission Report was also annexed the proposed block out plan marked annexure (ii) in which the two lands occupied by the plaintiff (on a permit and without a permit) have been marked as a single block of land and the 'proposed' waterways are depicted. It is observed by this Court, that this proposed block out plan had been referred to by the learned Additional District Judge when coming to a finding that the water course and the road way referred to by the defendant did not exist. The District Court went on the assumption that the defendant was not a permit holder as at the date of the plaint and thus a trespasser. The learned Additional District Judge also referred to the defendant's land being high land, though paddy was cultivated and therefore did not consider the importance of the existing water course as depicted in the plan annexure (i) to the Commission Report.

Thus, we hold that the learned Additional District Judge was in error when emphasis was placed on the said proposed block out plan to grant a declaration that the defendant has no right of way nor a right to access water from the water course.

On the corollary, the High Court has correctly analysed the legal position pertaining to a rei vidicatio action and the servitude rights. It based its judgment on the legal principles enunciated in the Court of Appeal case of **David Vs Gnanawathie [2000]2 SLR 352** where it was held that a plaintiff claiming a prescriptive use of a right of way over a defined route should imperatively comply with Section 41 of the Civil Procedure Code, since noncompliance would impede the execution of the decree and/or the judgment if the servient tenement is not described with precision and definiteness. Incidentally, this case pertains to a right of way, over State land in Embilipitiya vested with the Mahaweli Authority of Sri Lanka.

The High Court also relied on the judgment of another Court of Appeal case **Gunasekara Vs Punchimenike and other [2002] 2 SLR 43**, where it was held that the Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon - vide Section 46(2)(a) read together with Section 41 of the Civil Procedure Code.

With regard to the burden of proof it is observed that the High Court relied on the dicta of Dias S.P.J. in **Peeris Vs Savunhamy 54 NLR 207** where he held that the initial burden of proof rests upon the plaintiff to prove his title including the identification of the boundaries

and went on to hold that a finding of fact may be reversed on appeal if the trial judge has demonstrably misjudged the position.

Thus, the learned Judges of the High Court have analysed the evidence led and the judicial decisions and came to a correct finding and set aside the judgment of the District Court on valid and cogent grounds.

Hence, we see no reason to interfere with the judgment of the High Court.

Thus, we answer all three questions raised before this Court in the negative and in favour of the substituted defendant-appellant-respondent. We see no merit in this appeal.

In the aforesaid circumstances, we affirm and we uphold the judgment of the Civil Appellate High Court holden in Ratnapura dated 10-11-2010. The judgment of the District Court of Embilipitiya dated 14-11-2007 is set aside and the plaint is dismissed.

Appeal filed before this Court by the plaintiff-respondent-appellant is dismissed with costs fixed at Rs 25,000/=

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.
I agree

Judge of the Supreme Court

S. Thurairaja, PC. J.
I agree

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal to the Supreme Court in terms of the High Court of the Provinces (Special Provision) Act No. 19 of 1990.

SC APPEAL 85/2014.

HC COLOMBO CASE NO.
HC MCA 215/2008.

MC FORT CASE NO.
66183.

The Officer-in-Charge,
Fraud Bureau –Unit 06,
No. 05, Dharmarama Road,
Colombo 06.

COMPLAINANT

Vs.

Warnakulasuriya Michael Angelo Fernando
'Eastern Spray', Ma-Eliya Watte,
Ma-Eliya,
Ja-Ela.

ACCUSED

AND BETWEEN,

Warnakulasuriya Michael Angelo Fernando
'Eastern Spray', Ma-Eliya Watte,
Ma-Eliya,
Ja-Ela.

ACCUSED -APPELLANT

Vs.

The Officer-in-Charge,
Fraud Bureau –Unit 06,
No. 05, Dharmarama Road,
Colombo 06.

COMPLAINANT -RESPONDENT

The Hon. Attorney General,
Attorney General's Department,

Colombo 12.

2nd RESPONDENT

AND NOW BETWEEN,

Warnakulasuriya Michael Angelo Fernando
'Eastern Spray', Ma-Eliya Watte,
Ma-Eliya,
Ja-Ela.

ACCUSED –APPELLANT –APPELLANT

Vs.

The Officer-in-Charge,
Fraud Bureau –Unit 06,
No. 05, Dharmarama Road,
Colombo 06.

COMPLAINANT –RESPONDENT – RESPONDENT

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

RESPONDENT –RESPONDENT

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.**
MURDU N.B. FERNANDO, PC, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Anil Silva, PC, for the Accused –Appellant –Appellant.
Madhawa Tennakoon, SSC, for the Hon. Attorney General.

ARGUED ON : 20th February 2019.

WRITTEN SUBMISSIONS : Accused –Appellant –Appellant on 6th January 2015.
Respondent –Respondent on 12th June 2019.

DECIDED ON : 13th November 2019.

S. THURAIRAJA, PC, J.

The Accused-Appellant-Appellant, Warnakulasuriya Michael Angelo Fernando (hereinafter referred to as the 'Accused-Appellant') had filed an Appeal against the order of the High Court of Colombo, through his Power of Attorney holder, Wanigasuriyaarachige Don Sharan Mary Dolita to the Supreme Court. Before proceeding to address the grounds of appeal, I find it essential to produce the material facts of the case.

The Accused-Appellant was employed as a General Cashier (Chief Cashier) at the Hilton Hotel, Colombo. He was entrusted with many responsibilities, including buying of Embarkation Tax Tickets from the Airport Aviation Sri Lanka Ltd. (hereinafter referred to as 'AASL') for their hotel customers. Once the tickets are obtained from AASL, the General Cashier distributes the tickets to other cashiers, namely the Front Office, Cafeteria, Pool Cashiers, etc. It is to be noted that any passenger who is departing through the Bandaranaike International Airport should pay an Embarkation Tax. Many tourist hotels, including the Hilton Hotel, pre-purchase the Embarkation Tax Tickets and provide them to their customers to have a smooth departure at the Airport.

As a practice, the General Cashier creates necessary vouchers, seeks permission from relevant authorities, makes the payment to AASL, obtains the ticket, sells the same and reimburses the money, which is obtained from the cashier's imprest.

In the present case, the Accused-Appellant who is the General Cashier had raised necessary documents and drawn two cheques for the value of Rs. 300,000/- each in favour of AASL and the same was sent through the travel desk of Ebert Silva Tours, who is permanently stationed at the hotel. The said cheques were sent in a

sealed envelope to the agents of the hotel, stationed at Bandaranaike International Airport. There, they open the envelope, make payments to AASL and obtain the Embarkation Tax Tickets. In this case, the agents have obtained three books which contained, one hundred tickets on the first occasion and similarly, on the second occasion as well, altogether amounting to six hundred tickets, which were sent to the Hotel in a covered parcel. There is no practice of sending these documents through delivery books.

It is the duty of the General Cashier i.e. the Accused-Appellant, to follow up on the purchase of the tickets, to obtain and to distribute the same to his cashiers and further, to collect the money and reimburse it to his petty cash. It is notable that, in 2006, the petty cash of the General Cashier was Rs. 3,000,000/-.

It was found, at the routine accounts verification that, the cashier had not accounted for the said money of Rs. 600,000/- and when they investigated, it was found that the cashier had not reimbursed Rs. 600,000/- (i.e. 300,000 x 2), which was used to purchase the Embarkation Tax Tickets. The Hotel held an independent enquiry and found the Accused-Appellant guilty. Thereafter, the matter was referred to the Colombo Fraud Investigations Bureau (hereinafter referred to as 'CFIB'). After formal investigation, a case was filed against the Accused-Appellant, at the Colombo-Fort Magistrate's Court on two counts under Section 391 of the Penal Code and two alternate counts under Section 386 of the Penal Code.

A trial was held and the Prosecution led the evidence of the following witnesses and concluded their case- 1) Sunil Chandrasiri Perera –Assistant Financial Controller, Hilton Hotel, Colombo, 2) Senerath Lal Perera –Payment Officer, Hilton Hotel 3) Anthony Ranjith Trevor Perera –Restaurant Cashier, Hilton Hotel 4) Senerath Mudalige Alexis Vineetha Jayathilake –Accounts Administrator, Hilton Hotel, 5) Sarath Premalal Perera –Staff Assistant, Department of Airport and Aviation Services Ltd., 6) Tuan Feral Ali –Executive, Hilton Hotel Counter at the Bandaranaike International Airport, 7) Jagath Udaya Kumara Mendis –Tourist Driver, Ebert Silva Tours, 8) Brian

Christopher Pieris –Manager, Transport, Ebert Silva Tours, 9) George Seneviratne – Manager, Ebert Silva Tours, 10) Salinka Dilshan Serasinghe –Accountant, Ernest and Young, 11) Ajith Neranjan Ranaweera, Banking Assistant, HSBC, 12) Police Sergeant 9255 Hewage Vijitha Kumara Ananda and 13) Anthony Jayasena –Partner, Chartered Accountant, Ernest and Young.

It is noted that, on the 14th of February 2006, the charges were explained by the Magistrate to the Accused-Appellant and he pleaded, not guilty. He was present throughout, till the 10th of October 2007, almost till the tail end of the case of the Prosecution. When the case was postponed to the 5th of December 2007, he absconded from Court. The learned Magistrate, after following necessary procedures under the Code of Criminal Procedure Act (CCPA), continued the trial and concluded the same. It is observed that the Attorney-at-Law continued to appear on behalf of the accused, on his instructions.

The learned Magistrate, after giving reasons, found the Accused-Appellant guilty on the first and the third counts and sentenced him to one year of rigorous imprisonment for each charge, in addition to a fine of Rs. 1,500 on each count. Further, the learned Magistrate discharged the Accused-Appellant on the second and fourth counts.

Being aggrieved with the said order, the Accused-Appellant preferred an appeal to the High Court. There, the learned High Court Judge, after hearing both counsels, delivered an order affirming the conviction and the sentence of the learned Magistrate.

Being dissatisfied with the said order of the High Court, the Accused-Appellant preferred an appeal to the Supreme Court and obtained leave to proceed on 10.06.2014. When the matter was taken up for argument, it was found that the grounds of appeal were not certain and clear. Hence, the court invited the Counsels to frame the grounds of appeal.

Accordingly, the following grounds of appeal were raised and are reproduced, as it is-

1. *Did the learned High Court Judge has misinterpreted the documents marked 'P1' and 'P2' and had considered them as receipts issued by the Petitioner in respect of the receipts of the embarkation tax tickets?*
2. *Did the learned High Court Judge err in law by basing his decision on the misconceive fact that the documents marked 'P1' and 'P2' are proof of embarkation tax tickets being entrusted to the Petitioner?*
3. *Did the learned High Court Judge misdirected himself by erroneously determining that the main ingredients in the charge of criminal breach of trust has been established by the Prosecution beyond reasonable doubt?*

(Sic erat scriptum)

Regrettably, although both counsels agreed to file further written submissions within 3 weeks from 20.02.2019 and a further two week period was given to respond to each other if necessary, until the preparation of this judgment, neither of the parties had filed their written submissions.

The learned President Counsel based his submission on the fact that there is no proper entrustment proved by the prosecution and hence, the conviction should fail.

In ***Walgamage v. The Attorney-General***, 2000 3 SLR 1 SC 828, it was observed-

> *"Entrustment … includes the delivery of property to another to be dealt with in accordance with an arrangement made either then or previously."*

The Accused-Appellant had worked as a cashier at the said hotel and the relationship between the employer and the employee is completely based on trust. Both parties cannot rely on documents and signatures for each and every dealing. The relationship shared between the employer and the employee is also reflected in the entrustment of Rs. 3,000,000/- as petty cash amount to the General Cashier. In comparison with Government Institutions, this is a large sum given to a cashier. This shows the extent of trust that is placed on the employee for the smooth operation of the hotel activities. Further, it is revealed that the staff was sufficiently and adequately remunerated. A person such as the Accused-Appellant, who holds the position of a General Cashier (Chief Cashier) should be more trustworthy and committed to his employer, in carrying out the entrusted functions.

In ***Beuchanan v. Conrad***, 1 SCR 38 2 CL Rep. 135, while discussing the requirements in an offence of criminal breach of trust, it was observed-

> *"There must be evidence of some specific sum having being misappropriated or converted to the defendant's use."*

In the present case, the misappropriation of the Accused-Appellant has been proved beyond reasonable doubt. Owing to the employer-employee relationship shared between the Complainant and the Accused-Appellant, the finding of the learned Magistrate that, the Accused-Appellant is guilty under Section 391 of the Penal code is well founded.

In consideration of the grounds of appeal, it is necessary for us to peruse the evidence led before the learned Magistrate and the arguments advanced before the learned High Court and this Court. I am of the view that, the learned Judge of the High Court had adequately considered the materials before him. I do not find there to be any inconsideration of the grounds of appeal. Hence, I find that, there is no merit in these grounds of appeal.

Considering the sentence, I find that, the learned magistrate has been very reasonable in imposing the legal sentence. Therefore, I am of the view that, there exists no reason to interfere with the findings of the learned Magistrate, regarding the conviction of the Accused-Appellant and the sentence imposed upon him.

For the stated reasons, I find that, the learned Judge of the High Court was correct in affirming the conviction and the sentence imposed upon the Accused-Appellant by the learned Magistrate.

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

Appeal dismissed.

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 appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against a judgment of the Court of Appeal.

S C Appeal 86 / 2010

S C Spl/LA 106 / 2010

High Court of Galle

Case No. 2361

1. Ramasamy Mayalagu,

   Nagoda Watta,

   Nagoda,

   Galle.

   1ST ACCUSED - APPELLANT - APPELLANT

2. Mayalagu Tangaraja,

   Nagoda Watta,

   Nagoda,

Galle.

3RD ACCUSED - APPELLANT - APPELLANT

-Vs-

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT - RESPONDENT - RESPONDENT

Before: **VIJITH K. MALALGODA PC J**

P. PADMAN SURASENA J

E. A. G. R. AMARASEKARA J

Counsel:

Saliya Pieris PC with Varuna de Seram for the Accused - Appellant - Appellant.

Dilan Rathnayaka DSG for the Attorney General.

Argued on : 2019 - 02 - 11

Decided on : 2019 - 06 - 07

P Padman Surasena J

In this case, Hon. Attorney General had indicted the 1st Accused - Appellant - Appellant who was named as the 1st Accused in the indictment (hereinafter sometimes referred to as the 1st Accused), the 3rd Accused - Appellant - Appellant who was named as the 3rd Accused in the indictment (hereinafter sometimes referred to as the 3rd Accused), along with another who was named as the 2nd Accused in the indictment (hereinafter sometimes referred to as the 2nd Accused) in the High Court of Galle under two counts.

The first count has alleged that the said accused, on or about 9th September 1998, at Gulugahakanda, had committed the murder of one Govindan Sevanu, an offence punishable under section 296 read with section 32 of the Penal Code.

The 2nd count has alleged that the said accused, at the same time and in the course of the same transaction, had caused injuries to one Sevanu Nagaiya, an offence punishable under section 315 of the Penal Code.

The said Accused, upon the charges in the indictment being read over and explained to them, had pleaded not guilty to the said charges.

Learned High Court Judge thereafter having conducted the trial against them, by his judgment dated 30th June 2008 had convicted the 1st and 3rd Accused for both counts in the indictment and had proceeded to acquit the 2nd Accused from both counts in the indictment.

Learned High Court Judge having pronounced his judgment, has accordingly sentenced the 1st and 3rd Accused. Since the 1st and 3rd

Accused were convicted for the 1st count, which is a charge of murder, the learned High Court Judge has imposed the death sentence on both of them.

Being aggrieved by this conviction, 1st and 3rd Accused had appealed to the Court of Appeal. The Court of Appeal after the argument of the case, by its judgment dated 16th December 2009 has held that there is no merit in that appeal and had proceeded to affirm the conviction and the sentence imposed on the said accused by the High Court. Accordingly, the Court of Appeal had dismissed that appeal.

It is the said conviction that the 1st and 3rd Accused are seeking to canvass before this Court in this appeal.

Upon supporting the special leave to appeal application relevant to this appeal, this Court by its order on 30th August 2010 had granted special leave to appeal on the following question.

"Did not the nature of the evidence relating to the manner in which the incident commenced, make it unrealistic to have merited a finding of murder as the alleged killing had taken place on the spur of the moment, devoid of any trace of deliberation?"

Learned President's Counsel for the 1st and 3rd Accused submitted before this Court that the incident relevant to this case is an incident occurred in the course of a sudden fight between two neighbors. It is therefore his contention that the dismissal of the appeal by the Court of Appeal and affirming the conviction for the offence of murder is not justifiable. He further submitted that the Court of Appeal should have substituted a verdict of culpable homicide not amounting to murder punishable under

section 297 of the Penal Code against the 1st and 3rd accused on the basis that the relevant incident had occurred in the course of a sudden fight. It would be necessary for this Court to briefly refer to the evidence led at the trial in order to evaluate the above argument.

Evidence of witness Sevenu Nagaiyya

Sevenu Nagaiyya who is an eyewitness to the incident giving evidence before the High Court has narrated the sequence of events relevant to this incident. Some of the facts revealed from his evidence, which would be of some use for the disposal of this appeal, could be encapsulated as follows.

i. the 2nd and the 3rd Accused are husband and wife;

ii. the 1st Accused is the son of the 2nd and the 3rd Accused;

iii. the incident occurred at about 6.30 PM on 1998-09-09;

iv. the Accused had built a kitchen adjoining their line room about a week before this incident obstructing the pathway used by the family of the deceased to access their line room;

v. at about 6.30 PM on the relevant day this witness went to the boutique to purchase sugar;

vi. the 2nd accused had assaulted this witness with a hard broom;

vii. when he raised cries at that time his elder sister (Sevanu Muni Amma) had come and prevented the said assault, and his father (deceased) too had followed his sister;

viii. at that time the 1st accused had stabbed this witness twice with a rubber tapping knife.

This witness has only seen his father (deceased) coming as he had become unconscious because he had sustained stab injuries.

Evidence of witness Sevanu Muni Amma

Sevanu Muni Amma is the elder sister of the previously mentioned witness (Sevenu Nagaiyya) who came to his rescue when he raised cries. She has stated in her evidence;

1) that they have to pass the courtyard of the line room of the accused to gain access to their line room;

2) that the accused had built a kitchen in their courtyard;

3) that a dispute had arisen when the deceased had knocked his head on a rafter fixed to the newly built kitchen presumably when he was walking pass the courtyard of the accused (not on the day of the incident of murder occurred);

4) that this incident had occurred at a later stage;

5) that in the morning of 1998-09-09 also the 2nd and the 3rd accused had abused the deceased;

6) that she and her father (deceased) had rushed when they had heard his brother (Sevanu Nagaiya) raising cries;

7) that she had seen the 1st accused armed with a rubber-tapping knife and the 3rd accused armed with a club;

8) that she had seen the 1st accused stabbing her brother's back (Sevanu Nagaiya's back) with a rubber-tapping knife;

9) that her deceased father who was 62 years of age came there at that time; and

10) that she had also seen the 1st accused stabbing the deceased with a rubber-tapping knife and the 3rd accused assaulting the deceased with a club.

According to the evidence of the Judicial Medical Officer, there had been ten external injuries on the body of the deceased. For the purpose of easy comparison, the said injuries described in the post mortem report could be arranged into a table in the following manner.

Injury No.	Description	Categorization by JMO
01	Cut injury of 7 cm long on the right side of forehead 5 cm above the eyebrow longitudinally placed cutting into the skull cavity	Grievous injury
02	Contusion of 3 cm x 2 cm on the right frontal area	Grievous injury
03	Abrasion of 1 cm x 2 cm on the left temporal region	Non Grievous injury
04	Stab injury of 2 ½ cm long on the right side of chest 5 cm below and 6 cm right to the nipple which	An injury sufficient in the ordinary course of nature to cause death

	enters the chest cavity between 6th and 7th ribs	
05	Stab injury of 2 ½ cm long on the back of left side of chest 3 cm below the shoulder and 7 1/2 cm left to the midline cutting the 3rd and 4th ribs,	An injury sufficient in the ordinary course of nature to cause death
06	Stab injury of 3 cm long, 4 cm right to the midline and 15 cm below the injury No. 05	Grievous injury
07	Stab injury of 3 cm long, 2 cm below and 3 cm right to the midline	Grievous injury
08	Stab injury of 3 cm long on the back of left side of chest 11 cm right to the midline 10 cm below the injury No. 07	Non Grievous injury
09	Stab injury of 3 cm long, 10 cm right to the midline and 5 cm below the injury No. 08	Grievous injury
10	Contusion of 3 cm x 4 cm on the back of right side of lower chest	Non Grievous injury

It would be of paramount importance to observe that the cause of death of the deceased according to the Post Mortem Report is 'haemorrhage and shock following stab injuries to the chest.

In the light of the above question of law to which this Court has granted special leave to appeal and in the light of the submissions made by the learned counsel for the accused, the issue that this Court needs to address in this case is whether the learned High Court Judge should have convicted the accused for an offence of culpable homicide not amounting to murder on the basis that the incident relevant to this case falls under the exception 4 to section 294 of the Penal Code. The said exception is as follows.

Exception 04;

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

The above provision clearly indicates that primarily two requirements must be satisfied for an incident to fall under the above exception. It would not be difficult to draw this inference due to the presence of the word 'and' which has clearly conjoined the phrases 'committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel', **and** 'without the offender having taken undue advantage or acted in a cruel or unusual manner'.

Thus, it is clear that the followings must be proved if the conviction of the instant case is to be brought under the above exception,

i. that the accused had acted without premeditation,

ii. that the injuries were inflicted in the course of a sudden fight,

iii. that it happened in the heat of passion upon a sudden quarrel,

iv. that the accused did not take any undue advantage or acted in a cruel or unusual manner.

In the instant case the prosecution evidence does not shed even a semblance of light on any fight. The evidence led by the prosecution and the material elicited by the learned counsel for the accused through the cross examination of the witnesses do not justify any inference as to the presence of any sudden fight.

It would be in order at this stage to turn to section 105 of the Evidence Ordinance, which reads as follows;

"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."

The legislature has proceeded to provide some examples of the instances where the above provision comes into play. This is by setting out several illustrations under the said provision. Thus, for the purposes of the instant case, it would be relevant to reproduce below, the illustrations (a) and (b) of section 105.

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) 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

Since section 105 of the Evidence Ordinance is specifically referring to the special exceptions set out in the Penal Code and casting the above burden of proof on the accused, it would not be legal for Courts to ignore the above provisions. Further, one must bear in mind that the Courts must presume the absence of such circumstances until and unless the accused discharges that burden to the satisfaction of Court according to law.

In the instant case, the accused neither gave evidence no made a dock statement. They also did not call any other witness on their behalf. Moreover, there is not even iota of evidence elicited from the witnesses although the said witnesses had been subjected to lengthy cross examination by the learned Counsel who had appeared for the accused.

When two of the accused attacked the unarmed deceased who was sixty two years of age, with a knife and a club, it stands to reason to hold that the accused have taken an undue advantage or have acted in a cruel or unusual manner. Thus, it is not difficult for this Court to hold that this incident where two accused persons had attacked the unarmed deceased person using dangerous weapons at an instance where there is no

evidence of any sudden fight, would not be within the limits of exception 4 above mentioned.

It is the evidence of the Judicial Medical Officer that the haemorrhage and shock following the stab injuries inflicted on the chest area had caused the death of the deceased. This Court observes that there are six stab injuries on the chest area of the deceased. Two of those stab injuries (injuries No. 04 and 05) are injuries, which are sufficient in the ordinary course of nature to cause the death of the deceased.

Further, the medical evidence as a whole too suggests that the accused had taken an undue advantage and had acted in a cruel manner. This is particularly so because there is not even an iota of evidence that any of the accused had sustained any injury; not even a single superficial abrasion.

Perusal of the judgment of the High Court shows to the satisfaction of this Court that the learned High Court Judge had carefully considered all aspects he ought to have considered before concluding that the 1st Accused and the 3rd Accused should be convicted for the offence of murder punishable under section 296 of the Penal Code. Thus, this Court cannot find any basis to deviate from the course of action that was adopted by the Court of Appeal when it decided to affirm the judgment of the High Court and dismiss the appeal filed before it by the said accused.

In these circumstances, this Court is of the view that it has no basis to interfere with either the judgment of the Court of Appeal or that of the High Court.

This Court answers the question of law mentioned above in the negative.

Thus, for the foregoing reasons, this Court decides to affirm the judgment of the High Court dated 30th June 2008 and the judgment of the Court of Appeal dated 16th December 2009. This appeal should therefore stand dismissed.

This Court makes no order for costs.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda PC J

I agree,

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara J

I agree,

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against a judgment of the Court of Appeal.

S C Appeal 86 / 2015

C A case No. 205 / 2009

High Court of Trincomalee

case No. 158 / 2001

1. Jauffer Mohamed Nuhuman,

ACCUSED - APPELLANT - APPELLANT

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT - RESPONDENT - RESPONDENT

Before: **PRIYANTHA JAYAWARDENA PC J**

P. PADMAN SURASENA J

S. THURAIRAJA PC J

Counsel:

Darshana Kuruppu with Buddhika Thilakarathna for the Accused - Appellant - Appellant.

A R H Bary SSC for the Complainant - Respondent - Respondent.

Argued on : 22 - 05 - 2019

Decided on : 01 - 11 - 2019

P Padman Surasena J

In this case, Hon. Attorney General has indicted the Accused - Appellant - Appellant (hereinafter sometimes referred to as the Accused), in the High Court of Trincomalee, on a charge of murder. The said charge has alleged that the Accused, on or about 27th November 1997, at Trincomalee, has caused the death of one Ismile Lebbe Izzadeen and committed an offence punishable under section 296 of the Penal Code.

The Accused, upon the charge in the indictment being read over and explained to him, had pleaded not guilty to the said charge.

Learned High Court Judge thereafter having taken steps to conduct the trial, has pronounced his judgment dated 27th November 2009 convicting the Accused for the charge in the indictment and consequently imposed the death sentence on him.

Being aggrieved by this conviction, the Accused had appealed to the Court of Appeal. The Court of Appeal after the argument of the case, by its judgment dated 07th February 2014 had dismissed the appeal and affirmed the conviction and the sentence of the Accused.

It is the said conviction and the sentence that the Accused is seeking to canvass before this Court in this appeal.

At the time of argument, the learned counsel for the Accused stated before this Court that it would suffice for this Court to answer one question of law and therefore he will confine his submissions only to that question.[1] The said question of law is as follows.

Question of law

[1] Vide the journal entry dated 22-05-2019 in the docket.

- Was the Judgment of the Court of Appeal contrary to law and against the weight of the evidence adduced at the trial?

In order to answer the above question of law it would be necessary for this Court to briefly refer to the evidence led at the trial. The prosecution has led evidence of several Witnesses at the trial. It would be helpful to first outline the salient facts revealed from the evidence of witness Abu Bakar Iqbal. Those facts are as follows.

i. The deceased is the brother in law of this witness.

ii. The deceased lived in front of his house in Palaiyutru with his family.

iii. The uncle of the deceased shouted that someone had stabbed with a knife calling for help.

iv. When he went to the house at which this incident had happened, the Accused, his wife, his children and the uncle of the deceased were present.

v. The uncle was in the house of the Accused.

vi. He and uncle took the injured deceased to the hospital.

The evidence of witness Ismail Sahabdeen is limited to the fact that he had identified the body of the deceased as that of his elder brother and the fact that he had identified a knife and a stone, which Police had recovered upon the statement made by the Accused.

The evidence of the Medical Superintendent of the General Hospital Trincomalee, Dr. Gnanakunalan is also important as it establishes the nature of injuries sustained by the deceased. In his evidence, he has confirmed that there were three stab injuries two of which were found in the stomach area and the other on the left jaw of the deceased. He has further stated that the said injuries could have been caused by the knife recovered by the police upon the statement made by the Accused.

Father of the Accused, Mohammadu Muhaideen Muhammadu Jauffer giving evidence before the High Court has stated that;

(i) he was sleeping at that time,

(ii) he woke up as children shouted,

(iii) there was a scuffle in the house on the date of the incident,

(iv) the Accused who is his son told him that the deceased assaulted him,

(v) he saw the deceased with bleeding injuries in a serious condition,

(vi) therefore, he also helped to take him to the Trincomalee hospital.

(vii) thereafter, he made a statement to Police.

A remarkable feature of this witness (Jauffer) is the fact that he is the father of the Accused. Thus, demonstrably, he appeared to have been somewhat reluctant witness for the prosecution. Despite his reluctance, he has categorically established the presence of the Accused at the very time of the incident at the scene. His evidence has also positively established the involvement of the Accused in the incident as he has described the incident as a fight between the Accused and the deceased.

Wife of the deceased Mohammed Izzadeen Fausal Jemmina in her evidence has stated that the deceased is her husband and she was not there at the time of the incident. Her younger brother (Nuhuman) is the Accused.

The Accused had given evidence in this case. He also had admitted that it was his brother in law who had died in this incident. He has taken up the position that he has no knowledge at all about the incident relevant to this case. It is his position that he was not present at the scene at the time of the incident and only returned home on Friday evening after working in

Colombo. It is his position that he came to know later, that someone has stabbed the deceased and that his father has taken the deceased to the hospital.

Further, he had taken up the position that he has got to know from his wife, that there were some people who are blood relatives of the deceased who had engaged in gambling there at that time. According to the Accused, it was the said blood relatives who may have killed the deceased. He has categorically stated that he was not there at the time of the incident in that house.

Section 103 of the Evidence Ordinance reads as follows;

"The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person."

The second illustration mentioned under the above section states thus, "B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it."

Thus, in the face of the evidence and the circumstances of this case, this Court would now consider whether the Accused had managed at least to

create a reasonable doubt before Court regarding the fact whether he was indeed present there at that place at the relevant time.

The Accused, apart from his own evidence, had led no other evidence on his behalf. What remains in the case, is only his bear statement that he does not know what happened on that day. His position was that he was not at home. It was his evidence that he was arrested soon after he arrived at home from Colombo.

The following facts are revealed from the evidence of Chief Inspector Sunil Shantha.

(i) He served as the Officer in Charge of the Crime Branch of Kanthale Police station at the time of the incident relevant to this case.

(ii) The first information relating to this incident was given to the Police Station by the father of the Accused whose statement was recorded by Police Constable Upatissa at 1545 hrs. at the Police Station.

(iii) On his instructions, Police Constable Upatissa had arrested the Accused little afterwards at the Police Station and recorded his statement around 1715 hrs. on the same day.

(iv) It was little thereafter that he and Police Constable Upatissa along with some other Police officers had gone to the scene.

(v) Consequent to the statement and upon being pointed out by the Accused, he had recovered a blood-stained knife from the backyard of the house where the incident occurred.

The Government Analyst has confirmed (report was produced marked **P 7**) that the stains found on the said knife is human blood.

Moreover, as has already been mentioned before, there is absolutely no reason for the father of the Accused to fabricate false evidence against his son. The Accused had made no attempt to explain his father's evidence against him.

According to the prosecution evidence including the evidence of the father of the Accused, the fact that the Accused was present at the scene at or about the time of the incident has become a strongly established fact. The position taken up by the Accused is that he just arrived from Colombo and was arrested by Police. The Accused does not explain his father's evidence that he was engaged in a scuffle with the deceased and that the deceased had received three stab injuries in the said scuffle. The evidence has also

positively established that no other person other than the Appellant could be held responsible for inflicting these injuries on the deceased as only the deceased, the Accused, father of the Accused, wife of the Accused (apart from the children) had been there in the house at that moment. It is the view of this Court that the learned counsel for the Appellant in the course of his submissions did not succeed in controverting the above conclusions.

The above circumstances clearly show that the Accused in the trial, without making any attempt to explain as to how the incident had occurred, had chosen to take up a defence of alibi making a failed attempt to convince Court that he was not there at the scene of the incident at the relevant time. The evidence of the Accused is not only unconvincing per se but also does not draw support even from the evidence of his father.

In these circumstances, it is the view of this Court also that the decision by the learned High Court Judge to reject the evidence of the Accused particularly because the father of the Accused himself has positively established the presence of the Accused at the very moment of this incident is a well-founded decision.

This Court is satisfied that the evidence of this case taken in its totality, would only be consistent with the guilt of the Accused and inconsistent with any reasonable hypothesis of his innocence.

Perusal of the judgment of the High Court shows to the satisfaction of this Court that the learned High Court Judge had rightly decided that the Accused should be convicted for the offence of murder punishable under section 296 of the Penal Code.

Therefore, it is the view of this Court that the Court of Appeal was correct when it held that there are no grounds to interfere with the judgment of the learned trial judge.

This Court cannot find any basis to deviate from the course of action that was adopted by the Court of Appeal when it decided to affirm the judgment of the High Court and to dismiss the appeal filed before it by the Accused.

In these circumstances, this Court has no basis to interfere with either the judgment of the Court of Appeal or that of the High Court.

This Court answers the question of law mentioned above in the negative.

For the foregoing reasons, this Court affirms the judgment of the High Court dated 27 November 2009 and the judgment of the Court of Appeal dated 07th February 2014. This appeal is therefore dismissed.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA PC J

I agree,

JUDGE OF THE SUPREME COURT

S. THURAIRAJA PC J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to appeal under section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

SC Appeal 88/2016

SC/HCCA/LA 92/2012
CP/HCCA /KAN 143 /2008F
DC Kandy Case No. 19216L

Wimala Rubasinghe,
No. 69/1, Peradeniya Road, Kandy

Plaintiff

Vs,

1. Lazarus Peter George,
   No. P6 Housing Scheme, Suduhumpola,
   Kandy

2. Chandra Gunasekara,
   No. D7, Aruppola Flats, Kandy

Defendants

And between

Chandra Gunasekara,
No. D7, Aruppola Flats, Kandy

2nd Defendant- Appellant

Vs,

Wimala Rubasinghe,
No. 69/1, Peradeniya Road, Kandy

Plaintiff- Respondent

Lazarus Peter George,
No. P6 Housing Scheme, Suduhumpola,
Kandy

1st Defendant- Respondent

And Now Between

Wimala Rubasinghe,
No. 69/1, Peradeniya Road,
Kandy

Plaintiff- Respondent -Appellant

Vs,

Chandra Gunasekara,
No. D7, Aruppola Flats, Kandy

2nd Defendant- Appellant-Respondent

Lazarus Peter George,
No. P6 Housing Scheme, Suduhumpola,
Kandy

1st Defendant- Respondent- Respondent

Before: **Hon. Justice Vijith K. Malalgoda PC**

Hon. Justice Murdu N.B. Fernando PC

Hon. Justice S. Thurairaja PC

Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam for the Plaintiff-Respondent-Appellant

Hirosha Munasinghe for the 2nd Defendant-Appellant-Respondent

Argued on: 29.03.2019

Decided on: 25.07.2019

Vijith K. Malalgoda PC J

The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted proceedings before the District Court of Kandy for declaration and ejectment of one Lazarus Peter George from premises bearing assessment Number 19/4 Vihara Mawatha, Suduhumpola, Kandy. When the said matter was pending before the District Court of Kandy, one Chandra Gunasekara claiming to be the wife of one Gunasiri Rubasinghe sought intervention to the above case. When court permitted the said intervention, the Plaintiff, with permission of court filed an amended plaint making the said Chandra Gunasekara the 2nd Defendant to the case and praying a declaration that the Plaintiff is entitled to the possession of the property in the schedule to the plaint and ejectment of the 1st Defendant and/or any other person holding under him from the said premises.

At the beginning of the District Court Trial the learned Counsel who appeared for the 1st Defendant had taken up the position that his client the 1st Defendant will not claim the property in question and is willing to handover the property to the party whose rights are affirmed by the District Court. Based on the above position taken up by the 1st Defendant, the Plaintiff and the 2nd Defendant proceed to trial recording one admission and raising 1-5 and 13-16 issues on behalf of the Plaintiff and 6-12 on behalf of the 2nd Defendant.

As revealed before this court the trial before the District Court was limited to a single witness summoned by the Plaintiff namely Kotapitiyegedara Appuhamy Maldeniya, Manager National Housing Development Authority (NHDA) Kandy.

During the trial before the District Court the Plaintiff marked document from *P*-1 to *P*-7 through the above witness and the defendant too had produced document 2*D*1 to 2*D*7 through the same witness.

When the said witness was under cross examination, the 2nd Defendant had produced several documents to establish that the property in question i.e. No 19/4 Vihara Mawatha, Suduhumpola was offered to one Gunasiri Rubasinghe by the NHDA and thereafter a payment of Rs. 45,000/- had been accepted from the said Gunasiri Rubasinghe. Even though the witness did not have the office copies of those documents in the file he produced before the District Court, witness had admitted those documents in his evidence. However the position taken by the witness before the District Court was that, after the death of the said Gunasiri Rubasinghe a request had been made by his sister Wimala Rubasinghe for the same property. An inquiry was held at the Head Office and during the inquiry it was revealed that Gunasiri Rubasinghe was unmarried at the time of his death and his father, mother and the other remaining sister had no objection for the property being given to the said Wimala Rubasinghe. Accordingly an agreement was signed between Wimala Rubasinghe and the NHDA to transfer the property to her after accepting Rs. 45,000/- from the said Wimala Rubasinghe. During the trial before the District Court, the agreement between Wimala Ruibasinghe and NHDA, affidavits received for the family members of deceased Gunasiri Rubasinghe, the request made by Wimala Rubasinghe and the payment receipt issued in the name of Wimala Rubasinghe were produced through witness Maldeniya.

When the witness was under cross-examination on behalf of the 2nd Defendant, it was brought to his notice that, the property referred to in the said agreement cannot be identified since the schedule has not been filled.

The witness whilst admitting that the schedule of the said agreement is not filled, submitted that there is no other agreement signed in respect of the property in question and the property which was allocated to Gunasiri Rubasinghe was granted to Wimala Rubasinghe based on the said agreement produced (marked *P*-1) after an inquiry held with regard to the same property. At the

conclusion of the trial before the District Court, the learned District Judge whilst answering the issues infavour of the Plaintiff had entered the judgment infavour of the Plaintiff.

Being dissatisfied with the above decision of the learned District Judge, the 2nd Defendant had preferred an appeal before the Provincial High Court of Civil Appeals of the Central Province holden in Kandy. At the conclusion of the hearing, the learned Judges of the Provincial High Court of Civil Appeals had allowed the said appeal and dismissed the action of the plaintiff.

The Plaintiff Respondent before the Provincial High Court of Civil Appeal had preferred the present appeal before this court, and this court on 4th May 2016 granted leave on the following questions of law.

a) Was the High Court in err by not taking into consideration the evidence adduced by the official from the National Housing Department to the effect that the Authority had transferred the rights thereof to the Plaintiff as borne out by the documents contained in the file maintained by the Authority?
b) Did the High Court err in law by ignoring the fact that the Plaintiff became entitled to the property in suit upon the sales agreement marked එ.1 which was followed by the allocation of the premises described in the schedule of the plaint to the plaintiff?
c) Were the learned High Court Judges in error in reversing the findings arrived at by the learned District Judge upon the evaluation of evidence adduced by the witness called by the Plaintiff at the trial?
d) Did the High Court err in law by its failure to take into account that the contest raised by the 2nd Defendant was with regard to her right to be in possession as a mistress of the original allottee, Gunasiri Rubasinghe and not the identity of the corpus?

When going through the grounds on which the leave had been granted by this court it is important to consider the issues raised before the District Court, since the decision of the District Court will be based on those issues raised by the parties.

As referred to in this judgment earlier, there was one admission recorded at the trial and in the said admission both parties admitted that the property in question was belonging to the National Housing Development Authority. When considering the above admission recorded before the District Court, it is observed by this court that both contesting parties before the District Court had no doubt with regard to the property in question and the said property was belonging to the NHDA.

The 2nd Defendant had raised the following issues before the District Court,

06. The property said to have acquired by the Plaintiff was sold and handed over to one Gunasiri Rubasinghe by NHDA previously

07. Did Gunasiri Rubasinghe and the 2nd Defendant lived as husband and wife and invested their money for the said Gunasiri Rubasinghe to purchase the said property?

08. Even though the property was in Gunasiri Rubasinghe's name, it belongs to both the 2nd Defendant and Gunasiri Rubasinghe

09. The relationship the 2nd Defendant had with the said Gunasiri Rubasinghe amounts to a marriage between the two under the Common Law

10. Did Gunasiri Rubasinghe died on 23.03.1993?

11. After the death of Gunasiri Rubasinghe, did the 2nd Defendant become entitled to the his share of the properly

12. If the said questions are answered infavour of the 2nd Defendant, did the 2nd Defendant entitled to the relief claimed by her in her amended answer.

When going through the above questions raised on behalf of the 2nd Defendant, it is clear that there was no doubt with regard to the identity of the corpus and the property that is allocated to the Plaintiff as claimed by her in her plaint was once allocated to Gunasiri Rubasinghe. As further observed by this court, the 2nd Defendant's case before the District Court was that, she lived with the deceased as husband and wife prior to his death and invested their money to purchase the said property. Therefore she too is entitled for a share of the said property and due to her marriage with the deceased Gunasiri Rubasinghe, she is entitled to his share as well.

However when going through the proceedings before the District Court I cannot see any evidence led before the District Court to establish the said position. Even though the 2nd Defendant had produced some documents through the same witness (who was summoned by the Plaintiff) to establish that the property in question was allocated to the said Gunasiri Rubasinghe by NHDA and that he paid Rs. 45,000/- to the said NHDA, the 2nd Defendant had failed to lead any evidence before the District Court to establish that there was a marriage between Gunasiri Rubasinghe and her and the money spent to purchase the property in question is not only belongs to the deceased Gunasiri Rubasinghe but belongs to both.

As further observed by this court, the evidence placed before the District Court clearly established that the property in question which was previously allocated to the Gunasiri Rubasinghe was allocated to the Plaintiff after a full inquiry held at the Head office when the Plaintiff made a request to allocate the said property to her after the death of the previous allottee. When allocating the said property, the inquiry officer was satisfied that the deceased Gunasiri Rubasinghe was not married at

the time of his death and all the other family members had no objection for the property being allotted to Wimala Rubasinghe who is a sister of the deceased Gunasiri Rubasinghe.

As observed by this court, the learned District Judge after analyzing the above evidence which was placed before him during the trial was satisfied with regard to the identity of the property in question and the failure to include the schedule to the property in එ.1 has not considered as a serious laps on the part of the Plaintiff's case in the light of the evidence placed before him by the Plaintiff and answered issue 1 to 5, 15 and 16 raised on behalf of the Plaintiff infavour of him.

However during the appeal before the Provincial High Court of Civil Appeal, the Hon. Judges who heard the appeal whilst analyzing the case for the Plaintiff had observed that,

> "It is common ground between the parties the premises in dispute was owned by the NHDA. The position of the Plaintiff is that she is entitled to possess these premises in terms of the agreement to sell entered into between her and the NHDA. The said agreement is evidence marked as P1 it was submitted by the learned Counsel for the 2nd Defendant that the aforesaid agreement was not in respect of the premises in suit.
>
> …….
>
> It does not describe the premises in respect of which the agreement was entered into between the Plaintiff and the NHDA. Therefore the learned District Judge was not correct in holding that the Plaintiff was entitled to possess these premises on this agreement.
>
> and decided to allow the appeal and dismiss the action of the Plaintiff.

However as observed by this court the learned District Judge was mindful of the above position when deciding the trial before him but he has analyzed the evidence placed before him correctly and

observed that property referred to in the Plaint as claimed by both parties before him is one and the same and there is no doubt that the said property had been now granted to the Plaintiff by the NHDA after death of Gunasiri Rubasinghe.

As further observed by this court the learned Judges of the Provincial High Court of Civil Appeal too had concluded that the premises in dispute was owned by the 'NHDA' but failed to appreciate the evidence placed before the Trial Judge and as to how the learned Trial Judge analyzed the said evidence and answered the issues raised by both parties before him, in the absence of any contest as to the identity of the corpus.

When considering the matters already discussed by me in this judgment, I answer the questions of law raised before this court infavour of the plaintiff Respondent Appellant and hold that the learned Judges of the Provincial High Court of Civil Appeal had erred when they decided to allow the appeal before them.

The appeal before this court is allowed and the Judgment of the learned District Judge Kandy is affirmed.

Appeal allowed with costs.

Judge of the Supreme Court

Hon. Justice Murdu N.B. Fernando PC

I agree,

Judge of the Supreme Court

Hon. Justice S. Thurairaja 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 Special Leave to Appeal from a Judgment of the Provincial High Court of the Southern Province holden in Galle in terms of the Industrial Disputes Act and the High Court of the Provinces (Special Provisions) Act No. 10 of 1990

Shanthi Sagara Gunawardena,
'Sea Sand', Habakkala,
Induruwa.

Appellant

SC Appeal 89/2016
SC SPL/LA 229/2015
GL/HC/LT/AP/1044/13
LT 4G/112/2011

Vs,

1. **Ranjith Kumudusena Gunawardena**
2. **Indika Gunawardena**
3. **Nirosha Gunawardena**

All of
8D 17, National Housing Scheme, Raddolugama

Respondents

And between

Ranjith Kumudusena Gunawardena
8D 17, National Housing Scheme, Raddolugama

1st Respondent -Appellant

Vs,

Shanthi Sagara Gunawardena,
'Sea Sand', Habakkala, Induruwa

Applicant-Respondent

2. **Indika Gunawardena**
3. **Nirosha Gunawardena**

Both of
8D 17, National Housing Scheme, Raddolugama

Respondents-Respondents

And now between

Shanthi Sagara Gunawardena,
'Sea Sand', Habakkala, Induruwa

Applicant-Respondent- Appellant

Ranjith Kumudusena Gunawardena
8D 17, National Housing Scheme,
Raddolugama

1st Respondent -Appellant-Respondent

2. **Indika Gunawardena**
3. **Nirosha Gunawardena**

Both of
8D 17, National Housing Scheme,
Raddolugama

Respondents-Respondents-Respondents

Before: **Hon. Vijith K. Malalgoda PC J**

Hon. M.N.B. Fernando PC J

Hon. E.A.G.R. Amarasekara J

Counsel: Suren Fernando with K. Wickramanayake for the Applicant-Respondent-Appellant

Pradeep Fernando for the 1st Respondent-Appellant-Respondent

Argued on: 08.02.2019

Decided on: 02.04.2019

Vijith K. Malalgoda PC J

The Applicant-Respondent-Appellant (hereinafter referred to as the 'Appellant') has instituted proceedings before the Labour Tribunal of Galle against the 1st Respondent-Appellant-Respondent (hereinafter referred to as the 1st Respondent) and 2nd and 3rd Respondent-Respondent-Respondents (hereinafter referred to as 2nd and 3rd Respondents) alleging that the said Respondents had wrongfully and unlawfully terminated his services from the post of Superintendent, at a Cinnamon Plantation called "Punchimalakanda".

The Respondents, responded to the complaint made against them, denying the employment of the Appellant and the inquiry proceeded before the Labour Tribunal on that basis.

At the conclusion of the said inquiry, the Labour Tribunal held in favour of the Appellant and ordered compensation in a sum of Rupees 375000/- to be paid to the Appellant for the wrongful termination.

Being aggrieved by the said order, the 1st Respondent appealed to the Provincial High Court of Galle and the said Provincial High Court by its judgment dated to 6th October 2015, allowed the said appeal and set aside the findings of the Labour Tribunal dated 11.11.2013.

The Appellant who was aggrieved by the said judgment of the Provincial High Court of Galle had preferred the instant application before the Supreme Court seeking special leave to challenge the

above findings and when this matter was supported, this court granted special leave on questions of law raised by the Appellant in paragraph 13 (a) – (e) of the petition dated 12.11.2015 which reads as follows;

a) Did the learned Judge of the Provincial High Court fail to assess the evidence in an overall manner?
b) Did the learned Judge of the Provincial High Court err in law in analyzing and applying the applicable principles of the law of evidence and especially the burden of proof?
c) Did the learned Judge of the Provincial High Court err in law in failing to appreciate the jurisdiction of the High Court in terms of section 31D (3) of the industrial Disputes Act?
d) Did the learned Judge of the Provincial High Court fail to appreciate that there was no error of law on the part of the learned President of the Labour Tribunal which warranted the invocation and/or exercise of the appellate jurisdiction of the High Court?
e) Did the learned Judge of the Provincial High Court err in law in failing to analyze and apply the applicable legal principles and/or evidence pertaining to calculation of compensation?

It is well settled legal principle, that it is not open for Appellate Court to re-examine and re-appraises the evidence analyzed by the learned President of the Labour Tribunal. Hence an Appellate Court in appeal will not re-examine and/or re- appraises the material considered before the Labour Tribunal unless there is a question of law on the face of the Record.

Section 31D of the ***Industrial Dispute Act No. 43 of 1950*** also state that;

> "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"

However an exception to the above rule was discussed in the case of ***Jayasuriya V.Sri Lanka State Plantations Corporation (1995) II Sri LR 379*** when *Dr. Amarasinghe J* had observed that;

> "The industrial Disputes Act No. 43 of 1950 states in section 31D 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 e.g. ***Somawathie vs. Baksons Textile Industries Ltd***, ***Caledonan (Ceylon) Tea and Rubber Estates Ltd vs. Hillman***, ***Thevarayan vs. Balakrishnan***, ***Nadarajah vs. Thilagaratnam***, yet if it appears that the Tribunal has made a finding wholly unsupported by evidence ***Ceylon Transport Board vs. Gunasinghe***, ***Colombo Apothecaries Co. Ltd vs. Ceylon Press Workers' Union***, ***Ceylon Oil Workers' Union vs. Ceylon Petroleum Corporation***, or which is inconsistent with the evidence and contradictory of it ***Reckitt & Colman of Ceylon Ltd vs. Peiris***, or where the Tribunal has failed to consider material and relevant evidence ***United Industrial Local Government & General Workers' Union vs. Independent Newspapers Ltd***, or where it has failed to decide a material question ***Hayleys Ltd vs. De Silva*** or misconstrued the question at issue and has directed its attention to the wrong matters ***Colombo Apothecaries Co. Ltd vs. Ceylon Press Workers' Union (Supra)***, or where there was an erroneous misconception amounting to a misdirection ***Ceylon Transport Board vs. Samastha Lanka Motor Sevaka Samithiya***, or where it failed to consider material documents or misconstrued them (***Virakesari Ltd vs. Fernando***) or where the Tribunal has failed to consider the version of one party or his evidence ***Carolis Appuhamy vs. Punchirala***, ***Ceylon Workers' Congress vs. Superintendent, Kallebokke Estate*** or erroneously supported there was no evidence ***Ceylon Steel Corporation vs. National Employees' Union*** the finding of the Tribunal is subject to review by the Court of Appeal."

Further in the case of ***Kotagala Plantations Ltd and Lankem Tea and Rubber Plantations (Pvt) Ltd V. Ceylon Planters' Society SC Appeal 144/2009*** SC minute 15.12.2010 *J.A.N de. Silva CJ* had observed that;

> …. "It is not for an Appellate Court to review the evidence and come to a different conclusion regarding the facts of the case unless the findings on the fact by the Tribunal was against the weight of the evidence. In fact on a reading of the entirety of the judgment of the High Court it would appear that the High Court Judge has misdirected himself"

As revealed before this court the Appellant and the 1st Respondent are brothers and the 2nd and 3rd Respondents are the children of the 1st Respondent. The land by the name of 'Punchimalakanda' was a five acre Cinnamon Plantation owned mainly by the 1st Respondent and his brother, the Appellant too had a small portion of land closer to Punchimalakanda land where he too had cultivated cinnamon.

It was the position taken by the Appellant, that since his retirement in the year 1996, he was employed by his brother as the superintendent of the said land and he continued to maintain the said land under the instruction of the 1st Respondent until the 1st Respondent transferred the said land to his children, the 2nd and 3rd Respondents. The 2nd and 3rd Respondents being the new owners of 'Punchimalakanda, decided to dispose the said property after discontinuing, the services of the Appellant.

However the above position taken by the Appellant was challenged by the 1st Respondent and it was the position taken by the 1st Respondent that he continued to live in their ancestral home and attended to the cinnamon cultivation on his own.

Both parties have challenged each other with regard to the position taken up by them before the Labour Tribunal and several documents including extracts of Electoral Registers were also produced before the tribunal in order to assist the tribunal to come to a just an equitable finding. In this regard we further observe that the permanent residency of the 1st Respondent and the extent to which he could involve in cultivation of cinnamon including fertilizing, maintaining and harvesting cinnamon of the 5 acre land were matters to be decided by the Labour Tribunal and all the said matters were questions of facts to be decided by the president of the Labour Tribunal.

However as observed by this court the learned High Court Judge in his very short judgment had considered some of the facts such as the period spent for fertilizing the land and whether it is a full time job for a person to look after five acre land and had decided to reverse the conclusions reached by the President of the Labour Tribunal merely on few observations made on those points, to which he is not entitled without analyzing the entirety of the evidence and come to a finding that the findings of the President of the Labour Tribunal are against the weight of the evidence led before the tribunal.

Even though the learned High Court Judge had observed that the tribunal has failed to give due consideration to the evidence placed before it when concluding that the Appellant was employed by the Respondents at 'Punchimalakanda' and thereby his services were wrongfully and unlawfully terminated as complained by the Appellant, I see no merit in the said observations made by the learned High Court Judge since it appears on perusal of the said order, that the Tribunal had taken considerable effort to reach the said conclusion.

In the case of ***Air Port and Aviation (SL) Ltd Vs. K.D.H. Sunil SC Appeal 147/94*** SC minute dated 23.03.1995 it was observed that,

> "Undoubtedly the President of the Labour Tribunal had advantage of seeing and hearing the witnesses and observing their demeanors and was thus in a better position to assess their evidence in relation to the questions of fact. In any event, it was not open to the High Court Judge to interfere with such finding based on credibility, in the absence of an error of law."

In the case of ***Ceylon Cinema and Film Studio Employees' Union V. Liberty Cinema Ltd (1994) 3 Sri LR 121 at 124*** this issue was once again observed by court and held;

> "It may be possible that the Appellate Court may come to a different finding on facts but the evaluation of the facts is a matter for the tribunal"

In the said circumstances, I observe that the learned High Court Judge had misdirected himself when he conclude that the President of the Labour Tribunal had failed to give due consideration to the evidence placed before the tribunal.

Based on the above conclusion the learned High Court Judge had further observed that the President of the Labour Tribunal could not have come to a just and equitable finding that there is a termination of the Appellant by the Respondents and the said termination is wrongful and unlawful. When reaching the said conclusion the learned High Court Judge had referred to the decisions in ***Ceylon Transport Board V. Gunasinghe 72 NLR 76*** and ***Suprintendent Nakiyadeniya Group V. Coranelishamy 72 NLR 142***.

However it is observed that, *Weeramanthri J* in the case of ***Ceylon Transport Board V. Gurusinghe 72 NLR 76*** had identified the need for a proper finding on facts by the President of the Labour Tribunal in the following terms,

> "Proper finding of facts are necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by the statute of making such orders as they consider to be just

> and equitable, where there is no such proper findings of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for justice and equity cannot be administered in a particular case apart from its own particular facts".

As referred to above in my judgment, the President has clearly analyzed the evidence placed before the tribunal by both parties and come to a just and equitable finding. In the said circumstances, I see no merit to the said observation made by the learned High Court Judge.

In this regard this court is further mindful of the decision in ***Asian Hotels and Properties PLC V. Benjamin and five others (2013) 1 Sri LR 407 at 414*** where *Dr. Shirani Bandaranayake (CJ)* had observed that,

> "It is well settled law that the Labour Tribunals are expected to grant just and equitable reliefs. It is also necessary to be born in mind that for the purpose of granting such relief there is no necessity for the Labour Tribunals to follow rigid rules of law."

The learned High Court Judge had further observed that granting of compensation in a sum of Rupees 375000/- is excessive for the reason that the learned President of Labour Tribunal when granting the said compensation was of the view that the Appellant could work for further 12-15 years until he reached the age of 70 years.

As revealed before us, the Appellant's contention was to receive compensation in lieu of re instatement since the land in question had been transferred to a third party at the time he came before the Labour Tribunal. In the said circumstances question of re- instatement was not a matter to be considered by the President of the Labour Tribunal.

Discretion of deciding the amount of compensation is a matter for the President of the Labour Tribunal and, he has to consider the facts and circumstances of each case when using his discretion. This position was decided in the case of ***Up Country Distributors (PVT) Ltd vs. Subasinghe (1996) 2 Sri LR 330*** as follows;

> "The award made by the tribunal is just and equitable. The tribunal has discretion in determining the quantum of compensation, on the basis of the facts and circumstances of each case. That discretion should not be unduly fettered."

In the same case *Wijetunga J* had further observed,

> "The legislature has in its wisdom left the matter in the hands of the tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order."

The roll of the Labour Tribunal when granting compensation was discussed by *Vythialingam J* in the case of ***Ceylon Transport Board vs. A.H. Wijeratne 77 NLR 481*** as follows;

> "In making an order for the payment of compensation to a workman in lieu of an order for reinstatement under section 33 (5) of the Industrial Disputes Act, a Labour Tribunal should take into account such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge leveled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights. Account

should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place."

As observed by me the tribunal after concluding that the Appellant was wrongfully and unlawfully terminated by the 1st Respondent, had proceeded to consider the relief that could be granted as follows;

"මෙම නඩුවේ ඉල්ලුම්කරු 1 වන වගඋත්තරකරු තම ඉල්ලුම්පත්‍රයෙන් සේවයෙන් පහ කිරීම සඳහා වන්දි මුදලක්ද, සියළුම ව්‍යවස්ථාපිත දීමනාද අයැද ඇත. මෙම ඉල්ලුම්කරු නැවත සේවයේ පුනස්ථාපනය කිරීමට හැකියාවක් නොමැති බව පැහැදිලිය. ඒ අනුව ඔහුගේ සේවය අවසන් වීම වෙනුවෙන් ඔහුට වන්දි මුදලක් ප්‍රදානය කිරීම සුදුසු බව තීරණය කරමි.

1996 වර්ෂයේ සිට ඉල්ලුම්කරු 1 වන වගඋත්තරකරු යටතේ වසර 15 ක් සේවය කර ඇති බව සාක්ෂිවලින් හෙළිදරව් වේ. (ඔහු 1973 වර්ෂයේ සිට අර්ධ කාලීන සේවකයකු ලෙස සේවය කල බව කියා ඇත. එකී අර්ධ කාලීන සේවය මෙම ගණනය කිරීම් වලට ඇතුලත් කර නොමැත) ඉල්ලුම්කරුගේ දැන් වයස අවුරුදු 57 කි. ඔහුට වෙනත් රැකියාවක් සොයා ගැනීමට ඔහුගේ වයස බාධාවක් බව පැහැදිලිය. ඔහුට තව වසර 12-15ක් පමණ සේවය කිරීමට හැකි බව ඔහු කියා ඇත. ඉල්ලුම්කරු නිරෝගී, සෞඛ්‍යය සම්පන්න පුද්ගලයකු බැවින් විනිශ්චයාධිකාරයට එම ප්‍රකාශය සමඟ එකඟවීමට හැකය. ඒ අනුව ඉල්ලුම්කරුට තම රැකියාව අහිමිවීම වෙනුවෙන් ඔහුට සිදුවූ පාඩුව සහ 1 වන වගඋත්තරකරුගේ ගෙවීමේ හැකියාවද සැලකිල්ලට ගෙන ඉල්ලුම්කරුට වන්දි මුදලක් ප්‍රධානය කිරීම සුදුසු බව පෙනේ. 1 වන වගඋත්තරකරුට දැනට කුරුඳු ඉඩමෙන් ආදායමක් නොලැබේ. දේපොළ විකුණා ලැබුණු මුදල් ද ඔහුට ලැබුණු බවට සාක්ෂි නැත. එම කරුණු කෙරෙහිද අවධානය යොමු කිරීම අවශ්‍යය. ඉල්ලුම්කරුගේ සේවාකාලය වසර 15ක් බැවින් ඔහු සේවය කළ එක් වසරකට මාස 2ක වැටුප බැගින් ඔහුට වන්දි වශයෙන් හිමි විය යුතු බව තීරණය කරමි."

The tribunal has correctly considered all relevant issues and decided to grant 30 months compensation in lieu of re- instatement and I see no reason to interfere with the compensation awarded by the tribunal on the Appellant.

For the above reasons, I answer the questions of law raised in this case in the affirmative and allow the appeal.

Appeal is allowed.

Judge of the Supreme Court

Justice M.N.B. Fernando PC

I agree,

Judge of the Supreme Court

Justice E.A.G.R. Amarasekara

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

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

Complainant

Vs.

Sabrudeen Kamrudeen,
1249/C, Ananda Mawatha,
Hunupitiya, Wattala.

Accused

SC. Appeal No. 90/2013

SC (SPL) LA 69/2013
CA Appeal 211/2006
HC Negombo 55/2002

And between

Sabrudeen Kamrudeen,
1249/C, Ananda Mawatha,
Hunupitiya, Wattala.

Accused-Appellant

Vs.

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

Complainant-Respondent

And now between

Sabrudeen Kamrudeen,
1249/C, Ananda Mawatha,
Hunupitiya, Wattala.

Accused-Appellant- Appellant

Vs.

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

Complainant-Respondent-Respondent

Before: **Vijith K. Malalgoda PC J**
Murdu N.B. Fernando PC J
P. Padman Surasena J

Counsel: Shanaka Ranasinghe PC with Niroshan Mihindukulasuriya,
for the Accused-Appellant- Appellant

Ms. Varunika Hettige, DSG for the Attorney General

Argued on 15.03.2019

Decided on 25.07.2019

Vijith K. Malalgoda PC J

The Hon. Attorney General had indicted the Accused Appellant Appellant (here in after referred to as the Appellant) namely Sabrudeen Kamrudeen before the High Court of Negombo for possession of 249.4 grams of diacetyl morphine, an offence punishable under section 54 (c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The Appellant faced the trial before the said High Court where the prosecution had relied on the evidence of 04 witnesses, including the Chief Investigation Officer, Inspector of Police Priyantha

Liyanage and Inspector of Police Bogamuwa who assisted the said detection. When the court decided to call for the defence, the Appellant after making a statement from the dock, led the evidence of three witnesses, including a medical officer from prison hospital and two members of his immediate family.

At the conclusion of the said trial, the learned High Court Judge convicted the Appellant on the indictment and sentenced him to death. Being dissatisfied with the said conviction and sentence, the Appellant preferred an appeal before the Court of Appeal.

At the conclusion of the hearing of the said appeal, the Court of Appeal affirmed the conviction and dismissed the appeal. The Appellant had preferred the present appeal before this court challenging the said decision of the Court of Appeal.

When the Special Leave to Appeal application filed by the Appellant was supported before this court on 21.05.2013, the court granted Special Leave on the following questions of law raised on behalf of the Appellant.

1) The judgment of the Court of Appeal is contrary to law and against the weight of the evidence adduced at the trial
2) Did the Court of Appeal misdirected itself by its failure to give adequate consideration to the fact that the Petitioner truthfully unfolded the narrative in his dock statement which fact clearly raises doubt as to the place and circumstances of the arrest
3) Did the Court of Appeal misdirected itself by its failure to give appropriate weightage to the fact that,
    i. There was a serious discrepancy between the gross weight of the Heroin parcels (730 grams) as weighted by the electronic weighing scale of the

Police Narcotic Bureau and the gross weight of the Heroin parcels submitted the Government Analyst (749.4 grams)

ii. There was a serious discrepancy in regard to the colour of the cellophane bags said to have been seized from the Petitioner. According to the police the bags were said to have been pink in colour but the cellophane bags produced in court and submitted to the Government Analyst were found to be blue in colour

iii. The Prison Doctor has stated that the injuries noted on the Petitioner were consistent with a history of assault. No injures whatsoever have been noted by the police at the time of arrest

iv. That the evidence of the son of the Petitioner corroborates his evidence particularly as regards the place of arrest and the assault and was unshaken in cross-examination

v. That the evidence of the Petitioner as regards to the place of arrest and the assault was further corroborated by the evidence of his wife

vi. That the Court of Appeal has disregarded the clarification made and emphasized that the wife of the Petitioner has stated in the Petitioner's bail application in the High Court that a parcel of Heroin was recovered from under a dressing table in her house and thereby her evidence given at trial that Heroin was not found in the possession of the Petitioner becomes false. The Court of Appeal and the High Court have disregarded the fundamental principle- Res inter Alios Acts Altieri Nocere Non Debet- that the acts, declarations and conduct of others ought not to operate to the disadvantage of another (the Petitioner)

vii. That Court of Appeal has not been cognizant of the fact that no such recovery of Heroin has been made from the house of the Petitioner according to the police, thus giving credence to the clarification of the Petitioner's wife as to the impugned statement in the affidavit

viii. That the productions have never been taken before a Magistrate's Court and all the purported seals have been placed therein by the Police Narcotics Bureau (PNB) itself

ix. That in any event the said affidavit has not been marked in evidence and hence is not part of the record

x. That the evidence establishes that the productions lay in the drawers of the OIC of the PNB for over five days in violation of section 431 of the Criminal Procedure Code

Even though the Appellant had relied on several grounds of appeal, as referred to above, the learned President's Counsel who represented the Appellant before us had mainly relied the appeal to the following grounds,

1. The discrepancy of the gross weight of the Heroin when it was weighed at the Police Narcotic Bureau and the Government Analyst
2. The discrepancy with regard to the colour of the cellophane bags said to have been seized from the Appellant
3. The discrepancy with regard to the number of bags observed by the Government Analyst during her examination

and submitted that the learned trial judge as well as their lordships of the Court of Appeal had failed to give adequate consideration and appropriate weightage to the above discrepancies and therefore the findings reached by the said courts were against the weight of the evidence placed before the trial court.

As revealed before the trial court, the Appellant was arrested at Ananda Mawatha in the Wattala Police Area when he was carrying a bag which contained eight parcels of Heroin. The said detection was carried out by the officers of the Police Narcotic Bureau on a tip off received by an informant of Inspector Liyanage.

Subsequent to the arrest the officers visited the house of the Appellant which was on the same road but could not find anything incriminatory. The parcel recovered from the Appellant was a polythene bag and inside the said polythene bag there was a brown paper bag which carried eight cellophane bags containing suspected brown powder.

The subsequent investigations carried out by IP Liyanage after returning to the Police Narcotic Bureau was explained by him as follows;

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ප්‍ර: සාක්ෂිකරු නිවස පරීක්ෂා කරලා කිසිදෙයක් සොයාගත්තේ නැහැනේ විෂ මත්ද්‍රව්‍ය හෝ සැකකටයුතු දෙයක් ඉන් අනතුරුව ඔබ ගත් ක්‍රියාමාර්ග කුමක්ද?

උ: සැකකරු සහ නිලධාරී මණ්ඩලයත් සමඟ කාර්‍යාංශයට පැමිණියා.

ප්‍ර: පැමිණිලා ඔබ කුමක්ද මුලින්ම කලේ?

උ: හෙරොයින් බවට සැකකල කුඩු අඩංගු පාර්සල් අටේ කුඩු වෙන්වෙන් වශයෙන් ක්ෂේත්‍ර පරීක්ෂණයට ලක්කලා.

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ප්‍ර: මොකක්ද ක්ෂේත්‍ර පරීක්ෂණයෙදී ලැබුනු ප්‍රථිඵලය?

උ: තවදුරටත් බෑග්වල අඩංගුව තිබුනේ නීති විරෝධී මත්ද්‍රව්‍යයක් වන හෙරොයින් බව

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ප්‍ර: පරීක්ෂා කිරීමට අවශ්‍ය වන සාම්පල කොහොමද ලබා ගත්තේ?

උ: බෑගයන් විවෘත කරලා.

ප්‍ර: කොහොමද පැකට් විවෘතවද තිබුනේ?

උ: පැකට් වල කටවල් ගැටගහලා.

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ප්‍ර: හෙරොයින් බවට එම පැකට් අටේ තිබුනු ද්‍රව්‍ය සාධක පෙන්නුවාට පස්සේ ඔබ ඊලඟට ගත්ත ක්‍රියා මාර්ගය කුමක්ද?

උ: ස්වාමීනි පැකට් අට කොහොමද වෙන්වෙන්ව ස්ථානයේ තරාදියෙන් කිරා බැලුවා

ප්‍ර: මොන වර්ගයේ තරාදියක්ද තියන්නේ?

උ: ඉලෙක්ට්‍රොනික් තරාදියක්

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ප්‍ර: කිරා බැලීමේදී පැකට් අට කොහොමද හඳුනාගත්තේ මේ බර තිබුනයි කියලා?

උ: පාර්සල් අට ස්වාමීනි මා හඳුනාගැනීම සඳහා සලකුණු කලා වෙන්වෙන් වශයෙන් කොල අවුරලා

ප්‍ර: කොහොමද ඒ සලකුණු කිරීම් කලේ?

උ: සලකුණු කලේ එස් 1 සිට එස් 8 දක්වා

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ප්‍ර: සම්පූර්ණ බර කීයද ආවේ ඒ ඔක්කෝගෙම සාකෂිකරු?

උ: ග්‍රෑම් 730 ක් ආවා

ප්‍ර: ඒ බර කිරීමෙන් අනතුරුව එස් 1 සිට එස් 8 දක්වා පාර්සල් වලට ඔබ කුමක්ද කලේ?

උ: පාර්සල් අට වෙන්වෙන් වශයෙන් විනිවිද පෙනෙන පොලිතින් බැග් අටකට දැම්මා ඒ පාර්සල් අට වෙන්වෙන් වශයෙන් විනිවිද පෙනෙන බෑග් අටකට දැම්මා

ප්‍ර: ඉන් අනතුරුව මොකද කලේ?

උ: ඒ කවර සියල්ලම සීලරය කරනු ලැබුවා ඒ බෑග් අට නැවත විනිවිද පෙනෙන පොලිතින් බැගයකට දමල ඒ බෑගයත් සීල් කලා.

As observed by me, the matters raised on behalf of the Appellant before this court stems from the evidence of witness Priyantha Liyanage referred to above.

When explaining how he weighed the eight parcels found inside the bag he recovered, witness had taken up the position that each bag was separately weighed using the electronic scale at PNB and the eight figures he obtained was added to each other in order to obtain the final figure which was only 730 grams.

However when the production was referred to the Government Analyst for examination the total weight of the brown powder was found to be 749.9 grams and the Government Analyst who conducted the said examination had explained the condition under which she carried out her examination as follows;

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ප්‍ර: 2002 වගේ කාලෙ කිරා බැලීම සඳහා මොනවගේ තරාදියක්ද තිබුනේ?

උ: ඉලෙක්ට්‍රොනික් තරාදියක් තිබුනා. එය දශම ස්ථාන 4 කට නිවැරදියි දහදාහෙන් පංගුවකට නිවැරදියි එය හැමදාම උදේට ක්‍රමාංකනය කරනවා

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ප්‍ර: දන්න බරක් යොදා නිවැරදි දත්ත තිබෙනවාද කියා අවධියෙන් ඉන්නවා?

උ: ඔව්

ප්‍ර: විද්‍යාගාර තත්වයේ තිබෙන්නේ මෙම තරාදිය?

උ: ඔව්

ප්‍ර: ප්‍රසස්ථ මට්ටමේ තිබෙන්නේ මෙම තරාදිය?

උ: ඔව්

The learned President's Counsel among the other issues raised before us, insisted that the above discrepancy goes to the root of his case and the learned trial judge and their lordships of the Court of Appeal, had failed to give due consideration to the above discrepancy.

However as observed by me the learned trial judge had considered the above discrepancy in her judgment in the following terms;

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> "මීලඟට අධිකරණයට කල්පනා කිරීමට සිදුවන කරුණ නම් පොලිස් මත්ද්‍රව්‍ය කාර්‍යාංශය විසින් මෙම හෙරොයින් කිරන ලද අවස්ථාවේදී ඒ තුල හෙරොයින් ග්‍රෑම් 730 ක් තිබුණු බවට සාක්ෂි දී තිබෙන අතර රසරීක්ෂකවරිය විසින් කිරන ලද අවස්ථාවේදී එකී එස් 1 සිට එස් 8 දක්වා බෑග් වල තිබුණු හෙරොයින් ග්‍රෑම් 749 ක් වශයෙන් සටහන් කර තිබීමයි. රජයේ රසරීක්ෂකවරිය අධිකරණයේ සාක්ෂි දෙමින් පැහැදිලිව කියා තිබෙන්නේ ඇය මෙම බරකිරීම කරන ලද්දේ ඉලෙක්ට්‍රොනික් තරාදියෙන් බවත්, එය දශම ස්ථාන 4 කට නිවැරදි දත්තයන් ලබාදෙන බවත්ය. තවද එකී ඉලෙක්ට්‍රොනික් තරාදිය දිනපතා උදේට ක්‍රමාංකනය කරන බවත් මෙය විද්‍යාගාර මට්ටමේ ඉතා ප්‍රසස්ථ මට්ටමින් පවත්වාගෙන යන තරාදියක් බවත්ය. නමුත් පොලිස් පරීක්ෂක ලියනගේ විසින් මැනීම සිදුකර තිබෙන්නේ මත්ද්‍රව්‍ය නාශක අංශයේ තිබූ තරාදියෙන් වන අතර, මේ ආකාරයෙන් දිනපතා ක්‍රමාංකනය කිරීමට මෙම තරාදිය ලක් නොවන බවත්, එය නඩත්තු කිරීම රජයේ රසරීක්ෂක දෙපාර්තුමේන්තුවේ ඇති බැලන්සය මෙන් සිදු නොවන බවත් සාක්ෂි වලින් පැහැදිලි වී ඇත. තවද රජයේ රසරීක්ෂක දෙපාර්තුමේන්තුවේදී මැනීම සිදුකරන ලද නිලධාරිනිය මැනුම් කිරුම් සම්බන්ධව නිපුන දැනුමක් ඇති රසායන විද්‍යාව හා භෞතික විද්‍යාව උගත් විශේෂඥ මට්ටමේ තැනැත්තියක් බවත් පොලිස් මත්ද්‍රව්‍ය කාර්‍යාංශයේදී මෙම වැටලීම සිදුකර තිබෙන්නේ පොලිස් පරීක්ෂකවරයකු විසින් යන කරුනත් අප විසින් අමතක කලයුතු නැත. ඒ අනුව මෙම මැනීමේ වෙනස මත චූදිත නිවැරදිකරු බවට තීරණය කිරීමට අධිකරණයට කල නොහැකි අතර, මෙම මැනීමේ වෙනස නඩුවේ අරටුව තෙක් කිඳා බසින දුර්වලතාවයක් නොවන බවත් මාගේ නිගමනයවේ."

As observed by this court, the learned trial judge had correctly analyzed the matter placed before her with regard to the discrepancy in weight and come to a correct conclusion.

The learned President's Counsel is further concerned with regard to the number of bags recovered by the Government Analyst when she was conducting her examination. The learned President's

Counsel highlighted the recovery of 16 “knotted bags” by the Government Analyst and argued that it is contrary to the evidence of witness Priyantha Liyanage. According to the learned counsel, witness Liyanage had referred to eight “knotted bags” and not to 16 knotted bags.

However when going through the evidence of witness Priyantha Liyanage, referred to above in this judgment, it is clear that he refers to the sealing of bags in the following terms;

> “පාර්සල් 8 වෙන්වෙන් වශයෙන් විනිවිද පෙනෙන පොලිතින් බැග් 8 කට දැම්මා ඒ පාර්සල් 8 වෙන්වෙන් වශයෙන් විනිවිද පෙනෙන බෑග් 8කට දැම්මා
>
> ඉන් අනතුරුව මොකද කලේ?
>
> ඒ කවර සියල්ලම සීලරය කරනු ලැබුවා ඒ බෑග් 8 නැවත විනිවිද පෙනෙන පොලිතින් බැගයකට දමල ඒ බෑගයත් සීල් කලා.”

If I understood the above explanation correctly, it appears to me that the witness had first put the eight bags (which contained Heroin) in to 8 more transparent bags and thereafter put those 8 parcels (containing 16 bags) in to 8 more transparent bags and sealed them. Thereafter put the 8 parcels (sealed) in to another transparent bag and sealed it.

In his evidence witness Liyanage had not referred to putting an additional ‘knot’ on the second bag, but that itself is not sufficient to reject his evidence.

The Government Analyst in her evidence had referred to the number of bags she found when opening the parcel referred to by PNB in the following words,

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> ප්‍ර: සාක්ෂිකාරිය ඒම කවර අටේම වෙනවෙනම පරීක්ෂාකර බලා පොලිතින් සීලර් යෙදූ කවර අටේම සීලර් අදත් තිබෙනවාද?
>
> උ: ඔව්
>
> ප්‍ර: පොලිතීන් කවර අටේම තමාගේ අත්සන සහ රසරීක්ෂක අංක සඳහන් කර තිබෙනවාද?

උ: ඔව්

……

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ප්‍ර: හෙරොයින් ද්‍රව්‍ය අඩංගු පාර්සල් වලින් චිලියට ගත්තා?

උ: ඔව්

……

ප්‍ර: දැල වශයෙන් ලා නිල්පාට පැකට් තිබුනා?

උ: පොලිතීන් කවර ඇතුලේ කෙලවර ගැටගසා තිබුනා ඇතුලේ දුඹුරු පාට කුඩු අඩංගු වෙලා තිබුනා

ප්‍ර: පොලිතීන් බෑග් දෙකක් තිබුනා? ඒ දෙකම පරීක්ෂාකරන්න පුලුවන්ද?

උ: ඔව් කෙටි අත්සන සහ දිනය යොදා තිබෙනව අංකය යොදා තිබෙනවා

ප්‍ර: බෑග් 16 ක් තිබුනා ලා නිල්පාට

උ: ඔව්

……

ප්‍ර: ලා නිල්පාට හුරු පොලිතීන් කවරයක් ඇතුලේ තවත් කවරයක හෙරොයින් තිබුනා

උ: ඔව්

……

As observed by this court the positions taken up by the two parties i.e. the Investigating Officer and the Government Analyst corroborates each other. The learned President's Counsel for the Accused Appellant Appellant had an issue as to why both sets of bags had a knot but, this is a matter for the person who did that to give an answer but, without asking the said question from the witness, it is too late for the counsel to raise it as an issue before this court.

The next issue raised before this court is the discrepancy with regard to the colour of the bags which contained Heroin. According to the bags produced before court the bags were light blue in

colour but the bags had been discolured to some extent. The Government Analyst when opened the parcels had found Heroin inside eight bags and those bags were in light blue in colour.

However when the witness Priyantha Liyanage was questioned as to the colour of those bags, he took up the position that those bags were pink in colour. As observed by this court, the said question was put to the witness little prior to the opening of the sealed parcel, and once it was opened the discrepancy was noticed. At that time the witness was asked to check the Productions Register but it was observed that the colour of the bags which contained Heroin was not entered in the Productions Register. It is also observed that no contradiction had been marked with regard to the colour of the bags which contained Heroin when witness Priyantha Liyanage was cross examined by the defence. In the said circumstances it is very much clear that the witness had given the said answer from his memory after three years from the detection. Witness has further said that he has conducted more than 250 such raids and one cannot expect any reasonable person to keep everything in his memory to testify several years later. However the court observes a laps from the part of the Investigating Officer for not entering the colour of those bags at least in the Productions Register but when considering the amount of evidence placed before the trial court to establish the identify of those productions, I am not in a position to agree with the arguments placed before this court by the learned President's Counsel. As further observed by this court, the learned trial judge too had considered this discrepancy in her judgment but she preferred to accept the explanation given by the witness under re-examination.

In addition to the three main grounds relied upon by the Appellant, the learned President's Counsel made submissions with regard to several other grounds on which the leave was granted by this court. He submitted the failure by the Trial Judge and their Lordships of the Court of Appeal to consider the Medical evidence placed before the trial court, which corroborates the

version given by the Appellant. He further referred to the dock statement made by the Appellant and the evidence of his two witnesses his wife and the son and submitted that both the Trial Judge and their Lordships of the Court of Appeal had failed to give adequate consideration and appropriate weightage to those evidences.

I cannot agree with the learned President's Council on the above submissions. As observed by me the learned trial judge had correctly analyzed the Medical Evidence and the dock statement and come to a correct conclusion. This is with regard to the injuries said to have received by the Appellant due to assault by several sticks and poles at his residence prior to his arrest. The learned trial judge as well as their Lordships of the Court of Appeal have considered the evidence given by his wife and his son and rejected them having given reasons for their rejection. I see no reason to interfere with those findings.

The failure by the officers of the Police Narcotic Bureau to take the productions before the Magistrate and keeping the productions in police custody for 05 days were also raised by the learned President's Counsel. Even though he drew our attention to section 431 of the Code of Criminal Procedure Act No 15 of 1979, he did not make submissions with regard to section 77A which was introduced by the amending Act No 13 of 1984 to the Poisons Opium and Dangerous Drugs Ordinance.

Section 77A grants the officers the power to submit productions taken into custody, to the Government Analyst without first submitting them to the Magistrate's Court in Narcotic Cases and as observed by this court the above provision is used when detections are carried out by the officers of the Police Narcotic Bureau. However as further observed by this court, the most important factor to be considered in a Narcotic Case is the inward journey and not whether the provisions of 77A or 431 is followed.

This factor was considered in several cases including in the case of ***Perera V. Attorney General 1998 (1) Sri LR 378*** by J.A.N. de. Silva (J) (as he was then) as follows;

> "The most important journey is the inwards journey because the final Analyst Report will depend on that"

In the absence of any challenge with regard to the inward journey by the learned President's Counsel, I see no basis to uphold his objection.

When considering the matters discussed in this judgment I observed that the Appellant is not successful in establishing the grounds on which the Special Leave had been granted by this court. I therefore make order dismissing this appeal.

Appeal dismissed, No costs.

Judge of the Supreme Court

Murdu N.B. Fernando PC J

I agree,

Judge of the Supreme Court

P. Padman Surasena J

I agree,

Judge of the Supreme Court

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI ANKA

In the matter of an application for leave to appeal in terms of Section 5 c (1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 (as amended).

1. Mapalagama Manage Nishantha Viraj,
   'Nihathamanee', Niyagama,
   Thalgaswala. (Minor)

SC Appeal No.90/2016
SC/HCCA/LA 324/12
SP/HCCA/GA/LA
Case No.14/2011
DC/GALLE Case No.10996/P

Plaintiff

By his next friend
Mapolagama Pathmini Sriyalatha,
'Nihathamanee', Niyagama, Thalgaswala.

Vs.

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
   Gurugodella Estate, Niyagama,
   Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
   Benthara Road,
   Elpitiya.

4. Sadini Maithree de Silva
   Dikwella Stores,
   Thalgaswela.

Defendants

AND

Mahagama Vidanalage Chandradasa,
'Rathna Radio Service'
Thalgaswala.

Petitioner

Vs.

Mapalagama Manage Nishantha Viraj,
'Nihathamanee', Niyagama,
Thalgaswala.

Plaintiff-Respondent

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
   Gurugodella Estate, Niyagama,
   Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
   Benthara Road,
   Elpitiya.

4. Sadini Maithree de Silva
   Dikwella Stores, Thalgaswela

Petitioner-Petitioner

Vs.

Mapalagama Manage Nishantha Viraj,
'Nihathamanee', Niyagama,
Thalgaswala.

Plaintiff-Respondent-Respondent

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
   Gurugodella Estate, Niyagama,
   Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
   Benthara Road,
   Elpitiya.

4. Sadini Maithree de Silva
   Dikwella Stores, Thalgaswela

1st to 4th Defendants-Respondent-Respondent

AND NOW BETWEEN

Mahagama Vidanalage Chandradasa,
'Rathna Radio Service'
Thalgaswala.

Petitioner-Petitioner-Petitioner

Vs.

Mapalagama Manage Nishantha Viraj,
'Nihathamanee', Niyagama,
Thalgaswala.

Plaintiff-Respondent- Respondent-Respondent

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
Gurugodella Estate, Niyagama,
Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
Benthara Road,
Elpitiya.

4. Sadini Maithree de Silva
Dikwella Stores, Thalgaswela

1st to 4th Defendants-Respondents-Respondent - Respondent

Before: Buwaneka Aluwihare, PC, J.

L.T.B.Dehideniya, J.

Murdu N.B. Fernando PC, J.

Counsels: Parakrama Agalawatta with Mohan Walpita and M.D.A.I. Gunathilake for the Petitioner-Petitioner-Appellant instructed by Lakni Silva.

Rohan Sahabandu, PC with Ms. Hasitha Amarasinghe for the Plaintiff-Respondent-Respondent-Respondent

Argued on: 30.05.2018

Decided on: 18.02.2019

L.T.B.Dehideniya J,

The Petitioner-Petitioner-Appellant (hereinafter some time called and referred to as the 'Appellant') has appealed to this court to set aside orders given by the District Court and the High Court in relation to a Partition action.

The Plaintiff-Respondent-Respondent (hereinafter some time called and referred to as the 'Respondent'), has instituted a partition action in the District Court of Galle, in respect of Lot No.3 of a land called Thalgaswala, Mathulana. This specific land includes the premises in which the appellant operates his business 'Rathna Radio Service'. Appellant states that, his father Mahagama Vidanalage Premadasa had been the monthly tenant of the said premises from about the year 1953 and the original landlord being Lokugamage Ariyadasa Karunatilaka. (Father of the 3rd Defendant Respondent). The appellant accentuates that his father, Mahagama Vidanalage Premadasa continued to stay as a monthly tenant after the death of Lokugamage Ariyadasa Karunathilaka and was not a party to the partition action and had no notice of the pendency of the partition action.

The learned district judge entered the final decree allotting 'Lot 3', where the business premises occupied by the Appellant was situated, to the Respondent. Fiscal has proceed to execute a writ of execution in respect of the subject matter of the case, but the resistance made by the appellant's father impeded the execution of the writ. The resistance was based on the fact that, 'he was the tenant of the premise'. This finally led to the institution of contempt of court proceedings against the appellant's father (Mahagama Vidanalage Premadasa). On 22.09.2008, the contempt of court proceedings were abated on the death of

Premadasa. The Appellant emphasizes his status as the 'statutory tenant' upon the death of Premadasa as there was a due maintenance of the contract of tenancy with the payment of necessary rents. The Appellant attorned to the (Plaintiff) Respondent, by letter dated 15.10.2009.

The Appellant made an application to the Rent Board of Galle, and sought a declaration that the (Plaintiff) Respondent is the 'statutory landlord' of the Appellant. The Respondent participated in the proceedings before the Rent Board, and was represented by a counsel. While the proceedings in the Rent Board were pending, the Respondent made an application to the District Court of Galle, for the re-issue of the writ of execution. The Appellant's contention is that, the mandatory procedure in the Section 52(2) (a) of the Partition Law had not been followed and further complains that the Respondent suppressed material facts including the Appellant's tenancy. Fiscal attempted to execute the writ on 26.11.2009 but the execution was aborted upon the representations of the Appellant. Consequently, the Respondent made an application against the Appellant for contempt of court. On 20.12.2009, the Learned District Judge has made an order for the service of charge sheet and summons on the Appellant, returnable on 10.02.2010. Though, the service was not effected, the Learned District Judge without ordering to re issue summons, re issued the writ of execution. The Appellant brought to the notice of court, about the non –service of summons and charges. As per the contention of the Appellant, the Respondent had acted *mala fide* in the execution of writ, suppressing material facts. On 17.05.2010, the Appellant filed an application in the District Court of Galle, and prayed that, he has a right to remain in the occupation of the premises, and the execution of the writ be stayed until the conclusion of the inquiry. He further sought, and prayed for declaration upon Appellant's entitlement to continue in occupation of the premises. Consequently, the Learned District Judge made an

order to stay the execution of writ and fixed the matter for inquiry. Consequently, the Respondent filed objections stating that, 'there are no legal provisions to have and maintain the said application of the Appellant under Section 52(2) of the Partition Law or Section 839 of the Civil Procedure Code. After considering the preliminary objections and the written submissions, the learned District Judge delivered the judgement dated 03.06.2011, and dismissed the application of the Appellant.

The Learned District Judge held that, Section 52(2)(a) of the Partition Law did not contain provisions under which the Appellant could seek relief, and there was no necessity for invoking the inherent jurisdiction of Court, in as much as an alternative remedy was available to the Appellant in the form of Section 328 of the Civil Procedure Code which provided a remedy for an ejected *bona fide* claimant. The Learned District Judge has further emphasized in the order that, it was risky to invoke the inherent jurisdiction of Court in respect of presumed contingencies.

The Appellant set an appeal to the High court, but the High Court delivered the judgement dated 27.06.2012, dismissing the appeal.

This Court granted leave to appeal to the Appellant on the following questions of law.

1) Whether the writ of execution (10996/P) of the District Court, Galle has wrongfully issued in contravention of the procedure laid down in Section 52 (2) of the Partition Law No: 21 of 1977 (amended).

2) Whether the remedy provided by Section 328 of the Civil Procedure Code is available only, to a person dispossessed of property by execution of writ

and not to a person such as the Petitioner who has been sought to be dispossessed by a writ issued contrary to the mandatory provisions of law.

3) Whether the only means available to the Petitioner to challenge the validity of the writ of execution was by invocation of the Inherent jurisdiction of Court.

4) Whether the judgements the High Court and the District Court are according to Law.

The submission made by the counsel for the Appellant, elaborates the Section 52(2) of the Partition Law No.21 of 1977 (as amended). As per the contention of the Appellant, Section 52(2) (a), affords a tenant in occupation of premises, in respect of which writ is sought to be executed, an opportunity of being heard as to why he should not be evicted. The Appellant insists on the fact, that along with the occurrence of above mentioned circumstances, he has a claim which had necessarily to be heard by the Court. The view of the Appellant is that, the Respondent recoursed to execute the writ while supressing the material facts by adhering to the Provisions of Section 52 (1) of the Partition Law. It is further submitted by the Appellant, that the Respondent could have sought to execute the writ only by having recourse to the procedure in Section 52(2) of the said Act and the Learned District Judge has erred himself when he made an order for the issue of writ without following the said procedure. The Appellant's perspective is that 'the only remedy' available to him in the face of repeated attempts of the Respondent to execute the writ without conforming to the procedure under Section 52(2) was to invoke the inherent jurisdiction of the Court. The Appellant further insists that the Learned District Judge has erred himself as he held that it was risky to invoke the inherent jurisdiction of Court in respect of a presumed future contingency.

The Learned District Judge and the High Court similarly held the view that, the Appellant could have resorted to the Section 328 of the Civil Procedure Code in the event of dispossession by execution of the writ. It has been submitted that, Section 328 of the Civil Procedure Code is available only to a person who has already been dispossessed of property by execution of writ and not to a person who confronted the situation such as the Appellant, who has been sought to be dispossessed by a writ issued contrary to the mandatory provisions of law. The Appellant has drawn the attention of the court to a Court of Appeal judgement, **Esabella Perera Hamine Vs. Emalia Perera Hamine [1990] 1Sri.LR 8**; where it has been held that,

> *'Section 52(2) of the Partition Law falls in to the category requiring naming of the Respondent. Section 52(2) (a) provides that, when it is sought to evict a person in occupation of land or house as a monthly tenant, he should be made a Respondent and the application has to disclose the material facts that entitle the applicant to secure such eviction. Section 52 (2) (b) requires that be heard before order is made- the principle of 'audi alteram partem' applies but breached. There was a failure to comply with Section 52(2) of the Partition Law. This makes the order nullity as the court had no jurisdiction. Hence, the order restoring the Respondent was correct and recourse to Section 328 of the Civil Procedure Code to recover the possession was not necessary.'*

The Appellant's contention is that, as the Respondent sought to have the writ executed by circumventing the mandatory provisions of Law by suppressing the material facts and misleading the court; the only remedy available to the Appellant to prevent the abuse of legal process was by invoking the inherent jurisdiction of Court.

The Respondent's contention in this regard is based on questions as to the applicability of certain provisions of law. The Respondent questions the applicability of Section 52 of the Partition Act to a third party or an alleged tenant. The Respondent states that Section 52 is applicable to a person who has been declared entitled to any land by any Final Decree or any person who has purchased rights in pursuance to a Final Decree to apply to Court for a declaration of possession of the land in question. The Respondent emphatically states that, the Appellant does not come under the category which the Section 52 defines, for three reasons; The Appellant alleges him to be a Tenant, he is not a party to the action and he does not have an entitlement to the corpus.

The submission made on behalf of the Petitioner- Respondent states that, according to section 52(2)(a)(b), 'if the person to be evicted is a Tenant- he should be made a Respondent, and if found to be a tenant after inquiry, the application will be dismissed and the tenant allowed to remain in occupation- who could make this application'. The Respondent's contention is that, 'the only person who could move under Section 52 is the one who got rights in respect of a portion of land or one who has purchased rights from one person-who had got a decree in his favour.' As the Respondent illustrates, the present application has been made by a person in occupation, alleging that he is a statutory tenant and seeks an order from the Court that, he is entitled to remain in possession. The contentions of the District Court and the High Court are similar stating that 'there

is no provision at all provided for such an application under section 52 for an alleged tenant to make an application under Section 52. The Respondent further emphasizes the fact, the courts did not make an error in Law in the contention of holding against the Petitioner.

The Respondent's stance is further positioned on the Inherent Jurisdiction of the Court. The Respondent further emphasizes the fact that, Inherent power of a court cannot be invoked to violate the express provisions, and as per the contentions of both the District Court and High Court, the section 338 is applicable. It is submitted that, a person who has a grievance in a partition action where a writ issued, when the fiscal seeks to evict him, he could resist if he has a claim to remain in possession. The Fiscal reports the matter under section 53 to the court, to punish the person for contempt of court. The Respondent emphasizes and directs the attention of this court to the Section 53(1) and states its applicability to a situation where an order for delivery of possession is given to the fiscal. Consequently, The Court holds an inquiry to ascertain the fact whether there is a contempt of Court. It is submitted by the counsel for the Respondent that, chapter 65 of the Civil Procedure Code, set out the procedures to be followed. It is emphasized that, the accused has a right to give evidence to show why he should not be dealt with for contempt of court. Section 797(2), specifies that if the court finds the accused is not guilty, it will dismiss the charge.

As the Respondent states, In **Esabella Perera Hamine Vs. Emalia Perera Hamine [1990] 1Sri.LR 8**; it has been stated that, Section 338 cannot be resorted to, as provision is made in the Partition Law- Section 52-to cater to a situation of a tenant. The ratio in that case is not that in every instance in a partition action-

section 52 should be resorted to evict person in possession /occupation –but it is only in cases where there is a tenant in occupation.

The Respondent illustrates by citing **Grisilda v. Baba Nona [2006] 2Sri LR253,** the inherent power could only be resorted in the circumstances, where there has been abuse of court process, where the court acted per in curiam, where there is manifest cheating or fraud, where the act of court has caused injury to a person and when there is present an incurable defect in the procedure. The Respondent emphasizes the fact that, inherent jurisdiction cannot overrule express provisions of the statutory Law. **Gunawardena v. Ferdinandis [1982] 1Sri L.R256,** where it has been stated that, Inherent powers are used, where there is no express provision in the code.

Section 52 of the Partition Act provides the procedure for *"Delivery of possession of land to parties and purchasers"*. The section reads thus;

> *(1) Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land :*
>
> *Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.*
>
> *(2)(a) Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as*

tenant for a period not exceeding one month who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.

(b) After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application;

otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue.

Under this section only two categories of persons seek Court's intervention in delivery of possession, i.e.

1) *declared to be entitled to any land by any final decree entered under this Law*

2) *every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court,*

They were authorized to move Court to put the mechanism of "delivery of possession" in to operation. The subsection 2 entered a pre-condition for the person applying for the writ of execution to inform by making him a Respondent "*any person in occupation of a land or a house standing on the land as tenant".*

In the present case the party who made the application for a writ of execution is the Respondent. He has not admitted the fact that the Appellant is a tenant of the premises. Therefore the pre-condition specified in the sub section 2 does not apply to the Respondent. He has made the application for a writ of execution without naming the Appellant as a respondent in the writ application.

Though the Appellant in the instant case claims that he is a monthly tenant, his tenancy cannot be declared in a final decree.

> Virasinghe V. Virasinghe and others [2002] 1 Sri LR 264 at 271
>
> *The clearly structured procedure of a partition action and the sanctity attaching to decrees that are entered in such an action, require that its scope should be restricted to the matters in respect of which under the law the decrees will have finality. A Court should desist from embarking on a trial as to claims in respect of which it is not empowered to enter a decree having a finality.*
>
> *In this instance the claims of the 4th defendant on the Indenture of Lease and compensation for improvements, have been validly brought within the partition action. But, the 4th defendant should not have been permitted to add another string to his bow by raising issues based on a monthly tenancy, being a matter in respect of which the Court could not enter a decree having finality.*

Appellant's contention it that his father was the original tenant and the writ of execution was originally issued against him. He resisted the fiscal and the writ was not executed and the contempt of Court procedure was abetted on the death of the father. Thereafter a writ of execution was issued against the Appellant and was also resisted by the Appellant. Contempt of Court proceedings are pending. The Appellant and his father established that they have a remedy.

The Appellant has no right to make an application under section 52 of the Partition Act and since he has an alternative remedy he cannot invoke the inherent power of the Court under section 839 of the Civil Procedure Code too.

I answer all questions of law in negative.

I dismiss the appeal subject to cost of this Court fixed at Rs. 25,000.00 and the Respondent is entitle to the costs of both lower courts too.

Judge of the Supreme Court

Buwaneka Aluwihare, 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 Leave to Appeal to the Supreme Court.

04. Galabada Kandaamage Kumarapala of Iddagoda Road, Matugama

DEFENDANT-RESPONDENT- APPELLANT

SC Appeal 93/2012

(SC HCCA LA no.443/2011

WP/HCCA KAL.no.77/2003 (F)

D.C./Matugama:749/P

Vs

Halpanadeniya Hewage Sepala alias Sepala Wijesundara of Iddagoda Road, Matugama

PLAINTIFF-APPELLANT-RESPONDENT

Before: Sisira J.de Abrew J,

Vijith K**.**Malalgoda, PC, J,

L.T.B Dehideniya J,

Counsels: S.N. Vijithsingh for the Defendant-Respondent-Appellant

C. Laddhuwahetti with Lakni Silva for the Plaintiff –Appellant-Respondent

Argued on: 04.04.2018

Decided on: 05.04.2019

L.T.B.Dehideniya, J.

The Plaintiff- Appellant -Respondent (hereinafter sometimes called and referred to as the 'Plaintiff'). instituted this partition action at the District Court of Mathugama seeking to partition the land called 'Matugamkandapaula'. The District Court delivered the judgement allocating 1/8 share to the Plaintiff and the balance 7/8 to the Defendant- Respondent- Appellant (hereinafter sometimes called and referred to as the 4th Defendant).

The Court issued the commission for final partition to the Court Commissioner who executed the commission and reported to court with this plan no: 9717 stating that a lot is lesser than the minimum extent that a land can be divided for the development purposes. The learned district judge, after considering this issue has come to the conclusion that, the land cannot be divided and ordered the Plaintiff to sell his portion to the 4th Defendant. The learned district judge came into this decision on two issues. One is that one lot is lesser than the permitted minimum extent of land that could be divided for development purposes. The second issue considered by the Learned District Judge, the inconvenience to the 4th Defendant, if the small piece of land is given to the Plaintiff.

The Plaintiff being aggrieved, appealed against and the Learned High Court Judge set aside the said order. The High Court decided that, the right of a person to hold property cannot be taken off without specific provision of law and there is no such law in operation. Further, High Court was of the view that the inconvenience of the 4th Defendant, should not deprive the Plaintiff from having title to property.

Section 32 (1) (f), of the Partition Law (as amended by Act No.17 0f 1997) provides that, the surveyor to report to court whether the partition is in conformity with the written law relating to the subdivision of land, for development purposes. The Commissioner by his report attached to final partition plan no: 9717, reported that the

Lot 4B, the smaller lot which was allocated to the Plaintiff, is not in conformity with the said law. The section reads thus,

> *32(1) The Surveyor shall make his return to the Commission, verified by affidavit, substantially in the form set out in the Second schedule to this Law, on or before the returnable date or the extended date (as the case may be) fixed under section 27, and together with such return he shall transmit to the court,*
>
> *(f) A certificate to the effect that the plan of partition is in conformity with the written law relating to the subdivision of land for development purposes.*

The Plaintiff's argument is that, there is no law preventing the division of the lots, into small extents. His argument is that, the regulations gazetted under the Urban Development Authority Law relates only to the height of the building and not to the extent of the land. He further argues that, without a specific legal provision, a person's right to have the property cannot be taken away. The 4th Defendant's contention is that, the regulations made under the Urban Development Authority Law 41 of 1978 has prevented a land is being divided in lesser lots than a certain amount.

The Urban Development Authority Law No.41 of 1978 was in operation when the Partition Amendment Act No. 17 of 1997 came into operation. Therefore, the Legislature enacted the Partition Amendment Act knowingly, that the Urban Development Authority Law is in operation.

Under Section 21 of the Urban Development Authority Law, the Minister may make regulations for the purpose of carrying out or giving effect to the principles of that law. Acting under this section, the Minister has published an extraordinary Gazette 392/9-1986, dated 10th March 1986 publishing regulations under the Urban Development Authority Law. Once a regulation is made by the Minister, and is

approved by the Parliament, it has the authority of a law passed by the Parliament. The Plaintiff has not challenged the validity of this Gazette notification.

The regulation 17 (1) of the regulations made under the Urban Development Authority Law No.41 of 1978, published in the extraordinary Gazette 392/9-1986 dated 10th March 1986, provides thus,

> *'The minimum extent and the minimum width of lots for different classes of buildings, not being the high-rise buildings, should be in conformity with the specification set out in Form 'C', of schedule (III) unless the Authority has stipulated a higher or lower minimum extent and /or higher or lower width of lots in a development Plan already approved for the area or proposed for the area.'*

The regulation 17 (1) refers to the minimum extent of land that could be divided for development purposes other than the high-rise buildings.

Schedule III, Form 'C', specifies the 'Specification as to lots' as follows,

Character of Building 1	Minimum site area (Square Meters) 2	Minimum width of area (Meter) 3
All buildings except those included below	150	6
Public Assembly buildings and Public buildings	300	123

It is evident that, the schedule specifies the 'minimum site area' as 150 square meters which is equivalent to 6 perches. This implies the fact that, if any portion of land is to be divided for development purposes, the extent of the specific portion should not be less than 6 perches. It is clear that, the extent of land which has been

allocated to the Plaintiff by the Partition action is lesser than the minimum extent (6 perches) which has been specified by the law. The Plaintiff's contention is that, the Regulation 17 of the regulations made under the Urban Development Authority Law No.41 of 1978 deals with the minimal extent needed with regard to the height of a building. This contention is incorrect as the Regulation 17 itself proves that, it is applicable to the 'minimum extent and the minimum width of lots for different classes of buildings'. There is no doubt on the applicability of the Regulation 17 to the case.

It is clear to this court that, the view of the learned District Judge is correct in relation to the case, in which he decided that, the land which has been allotted to the Plaintiff cannot be divided for the development purposes and ordered the Plaintiff to sell his portion of land to the 4th Defendant. The order of the Learned District Judge is in conformity with the law which is applicable to the subdivision of the lands. The view of the learned High Court judge prioritizing the title to the property by the Plaintiff is of secondary importance when considering the stance of the learned District Court judge which is lawful.

By considering the above facts, this court set aside the judgement of the High Court dated 29-09-2011 and affirms the order of the Learned District Court Judge.

Judge of the Supreme Court.

Sisira J.de Abrew Judge of the Supreme Court

I agree

Vijith K. Malalgoda PC, J. Judge of the Supreme Court

I agree

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

In the matter of an appeal

Athukoralage Mary Nona
Mahena, Horana.
(Deceased) Plaintiff.
Millawage Samarasinghe Wickramaarachchi
No. 197, Nandana,
Mahena, Horana.

Substituted Plaintiff.

SC Appeal100/2016
SC/(HC) CALA No.125/2015
WP/HCCA/ KAL/74/2008(F)
DC Horana Case No.3474/L

Vs

1. Jayapala Athukorala
2. Chandrasiri Athukorala
3. Kulapala Athukorala all of Mahena, Horana.

Defendants

AND BETWEEN

Millawage Samarasinghe Wickramaarachchi
No.197, Nandana,
Mahena, Horana.

Substituted Plaintiff-Appellant

Vs

1. Jayapala Athukorala

2. Chandrasiri Athukorala
3. Kulapala Athukorala all of Mahena, Horana.

Defendant-Respondents

AND NOW BETWEEN

Millawage Samarasinghe Wickramaarachchi
No.197, Nandana,
Mahena, Horana.

Substituted Plaintiff-Appellant-Petitioner-Appellant

Vs

1. Jayapala Athukorala
2. Chandrasiri Athukorala
3. Kulapala Athukorala all of Mahena, Horana

Defendant-Respondent-Respondent-Respondents

Before : Sisira J de Abrew J
V.K. Malalgoda PC J
P.Padman Surasena J

Counsel : H.Peiris for the Substituted Plaintiff-Appellant-Petitioner-Appellant
Thishy Weragoda with Sanjaya Marambe, Prathap Welikumbura and Sewwandi Marambe for the Defendant-Respondent-Respondent-Respondents

Argued on : 21.2.2019

Written Submission
Tendered on : 3.6.2016 by the Substituted Plaintiff-Appellant-Petitioner-Appellant.
14.7.2016 by the Defendant-Respondent-Respondent-Respondent.

Decided on : 3.4.2019

Sisira J de Abrew J

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) instituted action against the Defendant-Respondent-Respondent-Respondents (hereinafter referred to as the Defendant-Respondents) seeking, inter alia, a declaration that the Plaintiff-Appellant is the sole owner of the road described in the schedule to the plaint; for a declaration that the Defendant-Respondents have no rights to use the said road; and for an order preventing the Defendant-Respondents from using the said road. After trial the learned District Judge by his judgment dated 4.7.2008, dismissed the plaint. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 26.2.2015, dismissed the appeal and entered judgment in favour of the Defendant-Respondents permitting them (the Defendant-Respondents) to use the road in dispute on the ground of necessity. 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 20.5.2016 granted leave to appeal on questions of law stated in paragraphs 9(i) to 9(iv) of the petition of appeal dated 22.3.2015 which are set out below.

1. Did the District Court and the High Court erroneously hold that the action in D.C Horana case No.3474/L is bad in law because it was a ‘right of way action’ where the Plaintiff was obliged to establish the ownership of the dominant tenement in order to succeed?

2. Have the District Court and the High Court failed to realize that this was a vindicatory action in respect of Lot 5 in plan P1?

3. Has the High Court failed to realize that there was no cross appeal by the defendants to enable them to question the findings of the learned District Judge rejecting their claims in reconvention based on prescription and necessity?

4. In any event has the High Court erred in holding in favour of the defendants on the grounds of prescription and in the alternative, necessity?

The road in dispute is shown as Lot 5 in final partition Plan No.1793 in case No.10303/P in DC Panadura marked P1. As a result of Partition Decree (case No.10303/P in DC Panadura) the Defendant-Respondents became the owner of Lot 4 of the said Plan No.1793. Although the Plaintiff-Appellant became the owner of Lot 5 of Plan No.1793 as a result of the said Partition Decree, the said Partition Decree has not excluded the use of the road by others. There is no access road to Lot 4 of the said Plan No.1793 other than the road in dispute which is the Lot 5 in Plan No.1793. The Plaintiff-Appellant herself at page 116 of the brief has admitted that there was no other road to go to Lot 4 of plan No 1793 other than the disputed road.

When I consider all the above matters, I hold that the only access road to Lot 4 of the said Plan No.1793 is the disputed road which is shown as Lot 5 of the said Plan No.1793. The Defendant-Respondents are the owners of Lot 4 of the said Plan. Therefore I hold that the Defendant-Respondents are entitled to use the disputed road shown as Lot 5 in Plan No 1793 on the basis of necessity.

For the above reasons, I hold that the learned Judges of the Civil Appellate High Court were correct when they dismissed the appeal of the Plaintiff-Appellant and held that the Defendant-Respondents were entitled to use the disputed road.

For the above reasons, I answer the above questions of law in the negative. I affirm the judgment of the Civil Appellate High Court dated 26.2.2015 and dismiss the appeal of the Plaintiff-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

V.K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

P. Padman Surasena J

I agree.

Judge of the Supreme Court.

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

SC. Appeal No. 105/2018

SC Case: SC/HCCA/LA 254/17

HCCA Case No: SP/HCCA/TA/23/2015(F)

DC Case No: M/10351/2009

In the matter of an application for Special Leave to Appeal to the Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka from the Judgment dated 25th of August 2015 made by SP/HCCA/TA/23/2015(F).

1. Godawela Gamage Dulani Kamal Renuka

2. Kaushika Sandasara

3. Chamod Sandamal

All are at No. 10B, Kurunduwatta, Isadeen Town, Matara.

2nd and 3rd Plaintiffs are appearing by their next fried the 4th Plaintiff

4. Walpita Mudiyanselage Mahinda Kithsiri Walpita

No. 1/179, Borella Road, Godagama, Homagama.

Plaintiffs-Appellants-Petitioners

Vs.

1. Amarakoon Dissanayake Wasantha
   No. 277, Kuttikala, Padalangala.

2. Amarakoon Dissanayake Chandana
   No. 769, Viharagala, Sooriyawewa.
   Defendants-Respondents-Respondents

BEFORE : **SISIRA J. DE ABREW, J.**
PRIYANTHA JAYAWARDENA, PC. J. &,
P. PADMAN SURASENA, J.

COUNSEL : Kumar Dunusinghe for the Plaintiff-Appellant-Petitioners.

Shehan Gunawardane with Dulanjana Gamage instructed by S.A.G. Dharshana for the Defendant-Respondent-Respondents.

ARGUED &
DECIDED ON : 06.02.2019

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases.

This is an appeal against the judgment of the learned Judges of the Civil Appellate High Court of Tangalle. The learned Judges of the Civil Appellate High Court by their judgment dated 30.03.2017 affirmed the judgment of the learned District Judge dated 25.08.2015. Learned District Judge by the said judgment decided that the Plaintiff had not established the negligence of the 2nd Defendant who drove the vehicle No. SP HT 6182.

Being aggrieved by the said judgments of the learned Judges of the Civil Appellate High Court, the Plaintiff-Appellants have appealed to this Court. This Court by its order dated 12.06.2018 granted Leave to Appeal on questions of law set out in paragraph 8 (i) to (x) of the Petition dated 08.05.2017, which are as follows;

i. Have their Lordshiips in the High Court of Civil Appeal erred in law and in fact to observe that the 2nd Defendant was the driver of the vehicle bearing No. SP JT 8161 which was the Tipper halted on the road with the lorry actually driven by the 2nd Defendant.

ii. Have their Lordships in High Court of Civil Appeal erred in observing that Dilip Wedarachchi who is an eye witness has not made a contemporaneous police statement to corroborate the facts stated by him in his evidence, whereas the said witness is listed in the list of witnesses in the Magistrates Court proceedings marked as P5 which is invariably after a statement is made to Police.

iii. Have their Lordships in the High Court of Civil Appeal erred in law and fact by holding that the evidence of the said eye witness has failed the test of spontaneity and contemporanity as his evidence has been recorded

after 3 years, whereas the said eye witness has stated in the evidence in chief that in addition to making a police statement and being listed as a witness in the Magistrates Court he had given evidence at the Inquest which has not been contradicted in the cross examination.

iv. Have their Lordships in the High Court of Civil Appeal erred in law and in fact by misinterpreting P6, the police statement of the 2nd Defendant.

v. Have their Lordships in the High Court of Civil Appeal failed to evaluate the consistency of the eye witness and the inconsistency of the evidence of the 2nd Defendant in comparison to his answer and to his police statement.

vi. Have their Lordships in the High Court of Civil Appeal erred in law to evaluate the ingredients of Section 149(1) of the Motor Traffic Act which include the component of negligence to which the 2nd Defendant has voluntarily pleaded guilty.

vii. Have their Lordships in the High Court of Civil Appeal erred in law in the failure of considering the requirements of section 187 of the Civil Procedure Code.

viii. Have their Lordships in the High Court of Civil Appeal erred in finding that issues No. 5 and 6 have been answered in the negative on wrong findings.

ix. Have their Lordships in the High Court of Civil Appeal arrived at a wrong assumption that the deceased was under the influence of alcohol and was attempting to board the lorry driven by the 2nd Defendant whereas no such evidence was elicited in the evidence of the entire case.

x. Have their Lordships in the High Court of Civil Appeal come to unwarranted assertion that all the individuals assembled at the wedding at the time of the accident were under the influence of alcohol and as such people of Tangalle are proved to be a violent and a murderous mob which some times even is capable of drawing international wroth and attention and interventions.

Learned Counsel appearing for the Plaintiff-Appellants in the course of his submissions submitted to this Court that he is only canvassing questions of law set out in paragraph 8(vi) of the Petition of Appeal.

According to the facts of this case, Vehicle No. SP HT 6182 driven by the 2nd Defendant was stopped at Tangalle facing Kataragama. At the same time, another Vehicle bearing No. SP JT 8161 was also stopped facing Colombo due to traffic congestion. At this time the deceased person who was walking towards Kataragama decided to creep through the space between 02 Vehicles. When the deceased person was creeping through the space between 02 Vehicles, the 2nd Defendant started moving his Vehicle towards Kataragama. It has to be noted here that at this time the deceased person was in the middle of the road and between 02 Vehicles. According to the evidence led at the trial, the space between 02 Vehicles was 1 ½ – 2 feet. When the 2nd Defendant was moving his Vehicle towards Kataragama, the deceased person who was between 02 Vehicles got crushed and as a result he died.

The Attorney General has decided not to charge the 2nd Defendant under Section 298 of the Penal Code. The 2nd Defendant was not charged even under Section 151(3) of the Motor Traffic Act which reads as follows;

> " No person shall drive a Motor Vehicle on a High Way negligently or without reasonable consideration for other persons using the High Way"

Thus, the 2nd Defendant has not been charged for negligent driving under Section 151(3). On the instructions of the Attorney General, the 2nd Defendant was charged under Section 149(1) of the Motor Traffic Act which reads as follows;

> "notwithstanding anything contained in Section 148, it shall be the duty of the driver of every Motor Vehicle on a high way to take such action as may be necessary to avoid any accident."

From the above facts it can be concluded that the 2nd Defendant who drove the Vehicle No. SP HT 6182 was charged only for failure to avoid an accident for which he pleaded guilty in the Magistrate's Court. The learned District Judge after trial concluded that the said accident has not taken place due to the negligence of the 2nd Defendant. Learned Judges of the Civil Appellate High Court too affirmed the said judgment. According to the Post Mortem Report of the deceased person, stomach contents of the deceased person were having the smell of liquor. This shows that at the time of the accident, the deceased person had consumed liquor. As I pointed out earlier, at the time of the accident, the deceased person was in the middle of the road and was trying to walk through the space between the two Vehicles. (1 ½ – 2 feet)

When we consider all the above facts, we feel that the accident has taken place due to the complete negligence of the deceased person. Therefore, we agree with the conclusion reached by the learned District Judge and the learned High Court Judges.

Learned Counsel appearing for the Plaintiff-Appellants tried to advance an argument that when a person is found guilty under Section 149 (1) of the Motor Traffic Act, the said conviction would lead to the conclusion that the driver who drove the Vehicle was negligent in driving the Vehicle.

I now advert to this said question. Although the learned Counsel for the Plaintiff-Appellants tried to advance an argument, we are mindful of the fact that the 2nd Defendant was not charged under Section 298 of the Penal Code and/or under Section 151(3) [negligent driving] of the Motor Traffic Act. When we consider all the above facts, we are unable to agree with the contention advanced by the learned Counsel for the Plaintiff-Appellants. We hold that when a person is found guilty under Section 149(1) of the Motor Traffic Act, no conclusion can be drawn from such conviction that he had driven the Vehicle negligently. The fact that he was not charged for negligent driving under Section 151(3) of the Motor Traffic Act operates against such a conclusion.

For the aforementioned reasons, we answer the above question of law set out in paragraph 8(vi) of the Petition of Appeal in the negative.

Learned Counsel for the Plaintiff-Appellants did not make submissions with regard to the other questions of law and he submitted that he would confine to question of law set out in 8(vi) of the Petition of Appeal.

For the above reasons, we affirm the judgment of the learned Judges of the Civil Appellate High Court and dismiss this appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC. J.

I agree

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

I agree

JUDGE OF THE SUPREME COURT

NT/-

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 154P (3) (b) of the Constitution and in terms of provisions of the Industrial Disputes Act No. 43 of 1950 (as amended) from the order of the Provincial High Court of the Southern Province dated 4th June 2013.

SC APPEAL NO.106/2014
SC (LA) No.166/2013

HC (ALT) No: GL/HC/LT/AP/901/2012.

1. Mahagamage Chandramadu,
   Puwakdoola,
   Pnikahatha,
   Kahadawa.

2. K. Malini,
   Ellawatta,
   Gonadeniya,
   Udugama.

3. G.W. Chandana Wasantha,
   43A, Pnikahana,
   Kahaduwa.

4. D.J. Kaluarachchi,
   Halgahadola,
   Miriswatta,
   Kahaduwa.

5. D.G. Amitha Jayawathie,
   363/1, Alawattahena,
   Gonagalagoda,
   Thalgaswala.

6. A.G.S. Kumara.
   Polpalaketiya Scheme,
   Thalgaswala.

7. H.V.D. Udayangani,
   170 C, Mullgedarawila,
   Ogawa,
   Naranomita,
   Porawagama.

8. Renu Jagoda,
   Gurukanda,
   Aluthihala,
   Mapalgama. [central]

9. G.S. Kumara,
   Duwegoda,
   Porawagama,
   Pollewwa watta.

10. W.A.R. Mallika.
    "Sisila", Balagoda,
    Porowagama.

11. W.K. Ramani,
    "Sunny Stores", Poddiwala Handiya,
    Maththaka.

12. M.A. Neelangani.
    92/2, Gorakagastuduwa,
    Aluthihala, Mapalagama, Galle.

13. U.G.M. Gayanthi.
    Panangala West, Pananngala.

14. W.G.A.S.K. Prasanna,
    Polpalaketiya Scheme,
    Thalgaswala.

15. B.A. Ashoka.
    Godaamuna Junction,
    Pitigala.

16. K. P. Damayanthie.
    111/K, Annasigahalahena,
    Nagoda.

17. K. Vithanage.
    Galgodawatta,
    Marthupitiya,
    Maththaka.

18. D.A.A. Dilrukshi.
    Godapattiyegoda,
    Malwattahena,
    Mulana,
    Galle.

19. P. Dn Rupasinghe,
    169, Garaowita,
    Porawagama.

20. K.A. Bodipla,
    Mithuri Mawatha,
    Polpalaketiya,
    Thalgaswala.

21. H.S. Kumudini,
    Punchila,
    Katagoda,
    Udugama.

22. D.D. Sewwandhi,
    183/2, Aluthihala,
    Mapalagama Central.

23. K.K.G.J. Lasika,
    Nagoda,
    Galle.

24. M. Samarasinghe,
    "Dhammika Niwasa",
    Kumburuhena,
    Mapalagama.

25. G.L.H.N. Madhavi,
    Sanwardenegama,
    Podhiwala,
    Maththaka.

26. A.K. Samanthi.
    12/10,Dahaththewatta, Aluthihala,
    Mapalagama Central.

27. K.G.T. Erandhi.
    07/01, Guriwala,
    Horangalla,
    Thalgaswala.

28. H.H.P.R. Hewage.
    Rambukketiya Road,
    Marggoda,
    Maththka.

29. K.H.N. Samarasekara,
    384A, Thalagahahena,
    Thalawa Road,
    Wanduraba,
    Galle.

30. H. Suneetha.
    Maha gedara wattahena,
    Thalgaswala.

31. U.V.T.K. Kumari,[92/19/01B] 32,
    Athkam Niwasaya, Maraggoda,
    Maththaka.

32. K.A.T.W. Kumari,
    208/2, Delgahagedara,
    Manampitiya,
    Thalgaswala.

33. K.G.S. Dilrukshi,
    27A, Ambana,
    Kahaduwa.

34. A.G. Nandawathie,
    Porawagama,
    Katuketiya.

35. M.A. Sunethra.
    Ruukadahena,
    Kahaduwa.

36. M. Piyawathie.
    Agalum Kamhala Asala,
    Niyagama,
    Thalgaswala.

37. G.G. Mallika.
    Poddiwala,
    Maththka,
    Galagedara.

38. D. Kuragoda.
    1158, Annasigalahena,
    Ihala Nagoda,
    Nagoda.

39. K.B.S. Malkanthi.
    396, Rukadahena,
    Kahaduwa.

40. R.A.I.K. Dias.
    Serasinghe Watta,
    Athumale,
    Galle.

41. W.L.K. Gayantha.
    311A, Wathuruwila,
    Kahaduwa.

42. M.A.D. Chamari.
    Beligasyaya,
    Ambalana,
    Kahaduwa.

43. C.W. Seneviratne.
    118/1, Akulawila,

Horangalle,

Talgaswala.

44. H.K.I. Udayakanthi.
    115/24, Annasigala hena,
    Ihala Nagoda,
    Nagoda.

45. P.R. Jayangani.
    144/3, Parana Thanayamgoda,
    Kapalwila,
    Mapalagama,
    Galle.

46. M.K.L. Priyadharshini,
    Near the Transformer,
    Marakkoda,
    Maththka.

47. K.A. Shanthi.
    111, Annasigala hena,
    Ihala Nagoda,
    Nagoda.

48. A.D.A. Nimanthi.
    Thanabima,
    Polpalaketiya,
    Thalgaswala.

49. M.N. Pushpakumari.
    Maraggoda,
    Maththka.

50. M.A.J.S. Kumari.
    23, Pokunamulla,
    Ambana, Kahaduwa.

51. M.M.D. Sandamali.
    234/1, Thalawa Road,
    Horangalla,
    Thalgaswala.

52. H.P.G.L.D. Padmamala.
    45B, Polgodawatte,
    Nagoda.

53. T.G.S. Dilani.
    136A, Thalawa Road,
    Horangalla,
    Thalgaswala.

54. P.G. Badra,
    233A, Gamgedara,
    Nagoda,
    Galle.

55. M.G.S. Kumari.
    Rambukketiya Road,

Marakkagoda,
Maththaka.

56. K.A.L. Nandini.
Plantation housing scheme,
Galinda Division,
Thalgaswala.

57. T.I. Weerasekara.
186A, Aldosvilla,
Udawallivita Thalawa East,
Nagoda, Galle.

58. M.H.R. Samanmali.
378/2, Nawawadiya Kanda,
Malwattahena,
Nagoda,
Galle.

59. K.K.K. Maohari.
193A, Walakumbura,
Kappitiyagoda South,
Nagoda,
Galle.

60. K.A. Chandrawathie.
92/60, Marakgoda,
Poddiwala,
Maththaka.

61. K.A.S. Chaaminda.
    179, 01 Mile Post,
    Manampitiya,
    Thalgaswala.

62. M.M.D. Dilhani.
    Ela Ihala,
    Athumale.

63. G. Chandrawathi.
    Maliyagawatta,
    Aluthpahala,
    Mapalagama Central.

64. B.A.R. Awala.
    Delgahawatta,
    Pinikahana,
    Kahaduwa.

65. V. Yasawathie.
    "Yashodha",
    Thibbatuwawa, Kahaduwa.

66. D.M. Dissanayake.
    135/1, Aluthpahala,
    Mapalagama Central.

67. P.H.N.S. Kumara.

No.15, Athkamniwasa,
Marakgoda,
Maththaka.

68. J.A.P. Kanthilatha.
Kadruwaththa,
Niyagama,
Thalgaswala.

69. A.G. Kumudhini.
235, Aluthpahala,
Mapalagama Central.

70. P.K.D.N. Priyadarshini.
Yatalamaththa,
Galle.

71. U.G.M. Sudharshini.
33 Hill,
Miriswatta,
Kahaduwa.

72. A.B. Wickrama.
53A, Aluthihala,
Mapalagama Central.

73. P.K.D. Kumari.
257/6, Nawinna,
Mapalagama Central,

Galle.

74. A.G.A. Shobani.
    2/2, Kudamalana,
    Mapalagama Central.

75. P.A. Punchihewa.
    Mandakanda,
    Karandeniya.

76. R.V. Piyasekara.
    236/2, Wathurawawatta,
    Paranthanayamgoda,
    Galle.

77. M.G.J. Lakmali.
    No. 04, Ambana,
    Kahaduwa.

78. K.B.D.H. Jayasinghe.
    30/18, Adarshagama,
    Mapalagama.

79. J.N. Dilrukshi.
    130A, Hayahaula,
    Kiniyawala,
    Mathugama.

80. N.G.C. Malini.

Mulana,
Nagoda,
Galle.

81. A.H.S.M. Kumara.
"Suramya",
Porawagama.

82. D.C.B. Kariyawasam.
Horangalla Junction,
Horangalla,
Thalgaswala.

83. M.G. Priyadarshini.
64C, Panangalla West,
Panangalla,
Galle.

84. W.G.G. Lalitha Chandrani.
"Singha", Marakgoda,
Maththaka.

85. M.K.N. Priyaka.
76/2, Poddiwala,
Marakgoda,
Maththaka.

86. P.K. Samanthi.
298/1, Dolekanda,

Gonagala,
Thalgaswala.

87. W.C. Sanjeewani.
"Pritankara",
Malamura,
Mapalagama.

88. A.U. Matarage.
Dehigodawatta,
Aluthihala,
Mapalagama.

89. K.G. Sirimathi,
Madakadahena,
Waduweliwitiya North,
Aluthihala,
Mapalagama.

90. K. Damayanthie.
Millagaha Udumulla,
Udaweliwitathalawa,
Nagoda,
Galle.

91. A.K.N. Udayangani.
Moragalmulla,
Udagama,
Galle.

92. D.K. Gurusinghe.
    258B, Thoragahawila,
    Ruukadahena,
    Kahaduwa.

93. H.G.V. Banduwathi.
    Nabarawatta,
    Athkadura.

94. D.M.S. Hemasiri.
    16, Sanwardenagama,
    Poddiwala,
    Maththaka.

95. B.K. Sarath Kumara.
    38, Belgiyanugama,
    Waturawila,
    Kahaduwa.

96. K.H.G.S. Lakmal.
    199, Jambugahakanda,
    Guruwala,
    Horangalla,
    Thalgaswala.

97. W.A.T. Kumara.
    Kammellaeduwa,
    Gammaadegoda,
    Nagoda,

Galle.

98. I.D. Chandrika.
50/12, Ardarshagama,
Athumage.

99. A.K.N. Prasadika.
2017/2, Thalawa Road,
Horangalle,
Thalgaswala.

100. M.A.G.N.T. Roshani.
80, Gonithalawatta,
Porawagama.

101. T.T. Pushpakumari.
670, Welagedarawatta,
Kahaduwa.

102. K.L.L. Padmini.
"Sriyawasa", Miriswatta,
Kahaduwa.

103. D.P.M.M. Nishanthi.
91/A, Near Galalndala School,
Koralegama,
Panagala.

104. S.M.D.R.M.D. De Alwis.

224/39B, Horagahakanda,
Nagoda,
Galle.

105. J.A.A. Nilmini.
01/04, Halgahawala,
Opatha.

106. K.A.S. Chandrika.
50/40, Mapalagama,
Adarshagama,
Athumale,
Galle.

107. R.W. Rupasinghe.
25B, Meedigahawitawatta,
Udaweliwitiya,
Nagoda,
Galle.

108. K.A. Kanthi.
Bataaththegedara,
Eppala,
Panangala.

109. W. Shriyani.
48/1, Embulegedara,
Neluwa,
Galle.

110. R.S. Sampath.
Okandawatta,
Porawagama.

111. W. Anula.
285, Thiruwanaketiya,
Gonalagoda,
Thalgasketiya.

112. N.G.A. Priyanthika.
17, Udugamuwatta,
Niyagama.

113. A. Nandalal,
59, Galle Road,
Pareliya,
Thelwatta.

114. D.A.A. Kumara.
92/42, Rambukketiy Road,
Marraggoda,
Maththaka.

115. D.G. Kumudini.
School Road,
Waduwelivitiya North,
Kahaduwa.

116. N.H.K.G. Dinishika.

444/10, Waduwelivitiya North,
Kahaduwa.

117. K.B.W. Kumara.
273/1, Near Garment Factory,
Manampita,
Thalgaswala.

118. M.G.A. Nandani.
Galgodewatta,
Wehihena,
Maththaka.

119. G.D. Chandani.
385B, Thoragahawila,
Ruukadahena,
Kahaduwa.

120. A.G.L. Susantha.
Athula Mawatha,
Mapalagama Central.

121. I.G.T. Nilmini.
288A, Sekkugalawatta,
Dangahawita,
Karandeniya.

122. K. Padma.
301, Babilawatta,

Malamura,
Mapalagama.

123. R. Ganewatta,
Ginipanangoda,
Athumala.

124. K.B.N.K. Priyantha.
House 31, 2nd Stage,
Walakumbura,
Nagoda.

125. N.V. Prasangi.
Godellegedara,
Gonalagoda,
Thalgawala.

126. K.S. Sandalanka.
68, Deewara Gammanaya,
Thalgaswala.

127. P.M.I. Shanthi.
161C, Magurigalwila,
Kahaduwa.

128. S. Nilmini.
338C, Gonalagoda,
Nillamullawatta,
Thalgaswala.

129. W.G.N. Sanmanmali.
246/1, Polpalketiya Janapadaya,
Thalgaswala.

130. K.I. Pridharshini.
374, Suhada Mawatha,
Idipalegoda,
Pitigala.

131. W. Sriyani.
Kalukotha,
Manampitiya,
Thalgaswala.

132. H.S. Priyantha.
2, Athkam Niwasa,
Maraggoda,
Maththaka.

133. D.W. Nilmini.
336/2, Kuruminiyan Wetuna
Hena,
Gonalagoda,
Thalgaswala.

134. H.K.H. Priyangika.
Nayanahari,
Annasigalahena,
Nagoda,

Galle.

135. N.P. Gurusinghe.
Sinhale Gedara watta kade,
Ruukadahena,
Kahaduwa.

136. E.K.N. Pradeepika.
152, Galpallemulana,
Ankutuwala,
Maththaka.

137. D.Y. Nilanthie.
In front of Thurunuwa Asapuwa,
Gallinda,
Thalgaswala.

138. G.G.K. Mangalika.
176, Manampita,
Thalgaswala.

139. K.M.C. Samantha.
99B, Andurannawila,
Pinikahana,
Kahaduwa.

140. M.D.N. Ratnayake.
105A, Kanaththagewatta,
Aluthihala,

Mapalagama Central.

141. M. Sumanawathi.
Wandana Mulana,
Nagoda.

142. P.K.W. Kumara.
298/1, Dolekanda,
Gonalagoda,
Thalgaswala.

143. T.G.M. Priangika.
Pubudu Sevana,
Udalamaththa.

144. M.G.S. Priyadarshini.
"Wasana", Mihindu Mawatha,
Duwegoda,
Porowagama.

145. K.H.R. Damayanthi.
Ehawatta,
Kallapatha.
Thalgaspe.

146. K.H. Ranjini.
Near Garment Factory,
Niyagama,
Thalgaswala.

147. H.L.N. Dilrukshi.
"Kadamuduna",
Koralegama,
Panangala,
Galle.

148. K.K. Thushawathi.
271, Kurakkanduwa,
Kumbburuhena,
Mapalagama Central.

149. W.G. Roshani.
201D, Udaweliwitathalawa [East],
Nagoda,
Galle.

150. D.G. Nilanthie.
248, Polpalaketiya,
Thalgaswala.

151. C.S. Jayalath.
Aluthihala,
Mapalagama Central.

152. H.L.I. Lakmali.
383/1, Ellawatta, Katagoda North,
Udagama.

153. D.G.N. Deepika.

402A, Wedahunuhena,
Gonalagoda,
Thalgaswala.

154. K.H.G.D. Damayanthi.
53B, Ambana,
Kahaduwa.

155. G.L. Vineetha.
28, Gallidawatta,
Wattahena,
Thalgaswala.

156. M.G.T. Madumali.
Polpelaketiya,
Janapadaya,
Thalgaswala.

157. W.G.N.P. Kumari.
"Madushka",
Eppalagala,
Panangala.

158. N.G. Parindrani.
320, Galle Road,
Athumale.

159. G.M.M. Darshana.
Gallinda Kotasa, Near Garment
Factory, Thalgaswala.

160. U.L.R. Nishantha.
Kadamuduna, Koralegama,
Panangala.

161. K.H.S. Tharanga.
Diyamawaththa,
Kumburuhena,
Mapalagama.

162. K.B.R. Pushpakanthi.
Udaveliwitithalawa,
Nagoda,
Galle.

163. M.S. Rohana.
1st Mile Post,
Manampitiya,
Thalgaswala.

164. K.P.G.D. Sandamali.
10/1, Weliketiyegedara,
Wattahena,
Thalgaswala.

165. D.M. Priyadarshani.
Bovitiyamulla,
Urala,
Wanduraba.

166. K.E.J. Priyantha.
48, Aramagama,
Amugoda.

167. M.G.S. Chandana.
4th Mile Post,
Poddiwala,
Maththaka.

168. M.M.N. Shiromi.
111/1, Egodahawatta,
Niyagama,
Thalgaswala.

169. G.S. Dilhani.
364/1, Malwattahena,
Mulana,
Nagoda,
Galle.

170. H.V.N.P. Manjula.
156/1, Gammaddegoda,
Nagoda,
Galle.

171. U.V.I. Sandamali.
273A, Pinikahana Phala,
Kahaduwa.

172. D.P.U. Kumara.
118, "Sandamali",
Kuruwalathota,
Porawagama.

173. T.T. Pathmini.
105,Thuduwagoda,
Kahaduwa.

174. W.S.Pushpakumara.
Balagala,
Amugoda.

175. G. Karunadasa.
Kalukotha,
Thalgaswala.

176. K. Shriyakanthi.
Wadugoda,
Athkandura.

177. P.N. Malkanthi.
Udaweliwitathalawa,
Nagoda,
Galle.

178. B.L.A.S. Karunaratne.
302, Polhena,
Bowitiyamulla,

Urala,

Wanduraba.

179. U.N. Kumari.

205A, Bandaranayakapura,

Udalamaththa.

180. A.K. Priyantha.

Waduweliwitiya North,

Heenpanwila,

Kahaduwa.

181. T.S. Kumari.

160A, Magurugalwila,

Kahaduwa.

182. P.L..N. Thilina.

283, Polpalaketiya,

Thalgaswala.

183. K.G.W. Hemali.

136, Duwegedara,

Kappitiyagoda,

Nagoda.

184. K.G.T. Jagathsinghe.

Dharmadara Mawatha,

Pitigama.

185. A.M. Ranaweera.
205A, U.G.D. Ariyathilaka
Mawatha,
Walakumbura,
Nagoda.

186. K.L.G.S. Priyadarshani.
316/M, Hathhamula,
Waturawila,
Kahaduwa.

187. W.K.C. Kumari.
466, Dangaragana,
Udamulla,
Manampitiya,
Mitiyagoda.

188. J.A.S. Devika.
Indurupathwila,
Horangalle,
Thalgaswala.

189. R.S.W. Wickramasinghe.
Sinhagiri, Yatalamaththa,
Galle.

190. A. Thiruwelvi.
Thalgaswala watta,
Thalgaswala.

191. S.M. Samarasinghe.
Kammalgoda,
Mapalagama.

192. A.H.S. Premalatha.
Duwegoda,
Porawagama.

193. H.V.C.D. Gunasekara.
26, Poddiwala,
Maththaka.

194. M.K.R. Malkanthi.
Hikgahawitiya Gedara,
Koralegama,
Panangala.

195. K.H.G.S.D. Rangani.
Naibulana,
Bulana,
Nagoda.

196. Rasika Deepani Dissanayake.
371, Mahawatta, Waduwelipitiya,
Kahaduwa North.

197. N.N. Dias.
214A, Hagoda Agula,

Miriswatta,
Kahanduwa.

198. N.D. Gunasinghe.
214A, Hagoda Agula,
Miriswatta,
Kahanduwa.

199. P.H.N. Rohini.
32, Athkam Niwasa,
Maragoda,
Poddiwala,
Maththaka.

200. H.R. Kusumalatha.
Gangodawatta,
Kappitiyagoda,
Nagoda,
Galle.

201. H.G. Chandralatha.
Indipalegoda,
Pitigala.

202. K.G.A. Prasanna.
Janapadaya,
Polpalaketiya,
Thalgaswala.

203. N.V. Thilakaratne.
Kakiriwela,
Manampitiya,
Thalgaswala.

204. K.A.S. Anoma.
179, Manampitiya,
Thalgaswala.

205. D.K.P. Ranjini.
201, Kakiriwela,
Manampitiya,
Thalgaswala.

206. K.S.A. Lakmal.
37, Diyawara gammanaya,
Thalgaswala.

207. P.K.A. Dilrukshi.
c/o K. Ganewatta,
Kalukotha,
Thalgaswala.

208. S.P. Weerasinghe.
417, Pinikannawila,
Waduweliwitiya North,
Kahaduwa.

209. P.H.A. Swarnalatha.

Nugethotapara,
Divithuru,
Athkandura.

210.I.D.P. Shriyani.
50/33, Adarshagama,
Athumale.

211.M.G.A. Kumara.
266/4, Galkanda,
Manampitiya,
Thalgaswala.

212.M.B.C. Subhashini.
161, Karunwila,
Niyagama,
Thalgaswala.

213.K.B.N. Priyadharshani.
335A, Urugahuwela,
Kahaduwa.

214.H.V.S. Janaka.
195, Polpalaketiya,
Thalgaswala.

215.G. Sumanawathie.
58,Athumale,
Galle.

216. K.W.R. Sudarshini.
Thanabima,
Horangalle,
Thalgaswala.

217. P.K.K. Ganga.
Moratuwe Gedara,
Niyagama,
Thalgaswala.

218. H.G.L. Chaturi.
Godagama,
Aluthihala,
Mapalagama Centrral.

219. H.H.S. Mallika.
Bambarawana Road,
Maththaka.

220. M.A.G.I. Priyadharshini.
"Wasana", Mihindu Mawatha,
Duwegoda,
Porawagama.

221. E.D. Priyadharshini.
Diyakithulkanda,
Wattahena,
Thalgaswala.

222.J.M. Gurusinghe.
Hunnawila,
Thanabeddegama,
Athkandura.

223.T.L. Suneetha.
37, Adarsha Gammanaya,
Walamura,
Mapalagama Central.

224.M.G. Malini.
221, Kabaluwa,
Niyagama,
Thalgaswala.

APPLICANTS

-VS-

Paradigm Clothing [Private] Limited of No.107, Pallidora Road,
Dehiwala.

RESPONDENT

AND BETWEEN,

Paradigm Clothing [Private] Limited of No.107, Pallidora Road,
Dehiwala.

RESPONDENT-APPELLANT.

-Vs-

1. Mahagamage Chandramadu,
   Puwakdoola,
   Pnikahatha,
   Kahadawa.

2. K. Malini,
   Ellawatta,
   Gonadeniya,
   Udugama.

3. G.W. Chandana Wasantha,
   43A, Pnikahana,
   Kahaduwa.

4. D.J. Kaluarachchi,
   Halgahadola,
   Miriswatta,
   Kahaduwa.

5. D.G. Amitha Jayawathie,
   363/1, Alawattahena,
   Gonagalagoda,
   Thalgaswala.

6. A.G.S. Kumara.
   Polpalaketiya Scheme,
   Thalgaswala.

7. H.V.D. Udayangani,
   170 C, Mullgedarawila,
   Ogawa,
   Naranomita,
   Porawagama.

8. Renu Jagoda,
   Gurukanda,
   Aluthihala,
   Mapalgama. [central]

9. G.S. Kumara,
   Duwegoda,
   Porawagama,
   Pollewwa watta.

10. W.A.R. Mallika.
    "Sisila", Balagoda, Porowagama.

11. W.K. Ramani,
    "Sunny Stores", Poddiwala
    Handiya,
    Maththaka.

12. M.A. Neelangani.
    92/2, Gorakagastuduwa,
    Aluthihala, Mapalagama, Galle.

13. U.G.M. Gayanthi.
    Panangala West, Pananngala.

14. W.G.A.S.K. Prasanna,
    Polpalaketiya Scheme,
    Thalgaswala.

15. B.A. Ashoka.
    Godaamuna Junction,
    Pitigala.

16. K. P. Damayanthie.
    111/K, Annasigahalahena,
    Nagoda.

17. K. Vithanage.
    Galgodawatta,
    Marthupitiya,
    Maththaka.

18. D.A.A. Dilrukshi.
    Godapattiyegoda,
    Malwattahena,
    Mulana,
    Galle.

19. P. Dn Rupasinghe,
    169, Garaowita,
    Porawagama.

20. K.A. Bodipla,
    Mithuri Mawatha,
    Polpalaketiya,
    Thalgaswala.

21. H.S. Kumudini,
    Punchila,
    Katagoda,
    Udugama.

22. D.D. Sewwandhi,
    183/2, Aluthihala,
    Mapalagama Central.

23. K.K.G.J. Lasika,
    Nagoda,
    Galle.

24. M. Samarasinghe,
    "Dhammika Niwasa",
    Kumburuhena,
    Mapalagama.

25. G.L.H.N. Madhavi,
    Sanwardenegama,
    Podhiwala,
    Maththaka.

26. A.K. Samanthi.

12/10,Dahaththewatta, Aluthihala,
Mapalagama Central.

27. K.G.T. Erandhi.
07/01, Guriwala,
Horangalla,
Thalgaswala.

28. H.H.P.R. Hewage.
Rambukketiya Road,
Marggoda,
Maththka.

29. K.H.N. Samarasekara,
384A, Thalagahahena,
Thalawa Road,
Wanduraba,
Galle.

30. H. Suneetha.
Maha gedara wattahena,
Thalgaswala.

31. U.V.T.K. Kumari,[92/19/01B] 32,
Athkam Niwasaya, Maraggoda,
Maththaka.

32. K.A.T.W. Kumari,
208/2, Delgahagedara,

Manampitiya,
Thalgaswala.

33. K.G.S. Dilrukshi,
27A, Ambana,
Kahaduwa.

34. A.G. Nandawathie,
Porawagama,
Katuketiya.

35. M.A. Sunethra.
Ruukadahena,
Kahaduwa.

36. M. Piyawathie.
Agalum Kamhala Asala,
Niyagama,
Thalgaswala.

37. G.G. Mallika.
Poddiwala,
Maththka,
Galagedara.

38. D. Kuragoda.
1158, Annasigalahena,
Ihala Nagoda,
Nagoda.

39. K.B.S. Malkanthi.
396, Rukadahena,
Kahaduwa.

40. R.A.I.K. Dias.
Serasinghe Watta,
Athumale,
Galle.

41. W.L.K. Gayantha.
311A, Wathuruwila,
Kahaduwa.

42. M.A.D. Chamari.
Beligasyaya,
Ambalana,
Kahaduwa.

43. C.W. Seneviratne.
118/1, Akulawila,
Horangalle,
Talgaswala.

44. H.K.I. Udayakanthi.
115/24, Annasigala hena,
Ihala Nagoda,
Nagoda.

45. P.R. Jayangani.
    144/3, Parana Thanayamgoda,
    Kapalwila,
    Mapalagama,
    Galle.

46. M.K.L. Priyadharshini,
    Near the Transformer,
    Marakkoda,
    Maththka.

47. K.A. Shanthi.
    111, Annasigala hena,
    Ihala Nagoda,
    Nagoda.

48. A.D.A. Nimanthi.
    Thanabima,
    Polpalaketiya,
    Thalgaswala.

49. M.N. Pushpakumari.
    Maraggoda,
    Maththka.

50. M.A.J.S. Kumari.
    23, Pokunamulla,
    Ambana, Kahaduwa.

51. M.M.D. Sandamali.
    234/1, Thalawa Road,
    Horangalla,
    Thalgaswala.

52. H.P.G.L.D. Padmamala.
    45B, Polgodawatte,
    Nagoda.

53. T.G.S. Dilani.
    136A, Thalawa Road,
    Horangalla,
    Thalgaswala.

54. P.G. Badra,
    233A, Gamgedara,
    Nagoda,
    Galle.

55. M.G.S. Kumari.
    Rambukketiya Road,
    Marakkagoda,
    Maththaka.

56. K.A.L. Nandini.
    Plantation housing scheme,
    Galinda Division,
    Thalgaswala.

57. T.I. Weerasekara.
    186A, Aldosvilla,
    Udawallivita Thalawa East,
    Nagoda, Galle.

58. M.H.R. Samanmali.
    378/2, Nawawadiya Kanda,
    Malwattahena,
    Nagoda,
    Galle.

59. K.K.K. Maohari.
    193A, Walakumbura,
    Kappitiyagoda South,
    Nagoda,
    Galle.

60. K.A. Chandrawathie.
    92/60, Marakgoda,
    Poddiwala,
    Maththaka.

61. K.A.S. Chaaminda.
    179, 01 Mile Post,
    Manampitiya,
    Thalgaswala.

62. M.M.D. Dilhani.
    Ela Ihala,

Athumale.

63. G. Chandrawathi.
Maliyagawatta,
Aluthpahala,
Mapalagama Central.

64. B.A.R. Awala.
Delgahawatta,
Pinikahana,
Kahaduwa.

65. V. Yasawathie.
"Yashodha",
Thibbatuwawa, Kahaduwa.

66. D.M. Dissanayake.
135/1, Aluthpahala,
Mapalagama Central.

67. P.H.N.S. Kumara.
No.15, Athkamniwasa,
Marakgoda,
Maththaka.

68. J.A.P. Kanthilatha.
Kadruwaththa,
Niyagama,
Thalgaswala.

69. A.G. Kumudhini.
    235, Aluthpahala,
    Mapalagama Central.

70. P.K.D.N. Priyadarshini.
    Yatalamaththa,
    Galle.

71. U.G.M. Sudharshini.
    33 Hill,
    Miriswatta,
    Kahaduwa.

72. A.B. Wickrama.
    53A, Aluthihala,
    Mapalagama Central.

73. P.K.D. Kumari.
    257/6, Nawinna,
    Mapalagama Central,
    Galle.

74. A.G.A. Shobani.
    2/2, Kudamalana,
    Mapalagama Central.

75. P.A. Punchihewa.
    Mandakanda,

Karandeniya.

76. R.V. Piyasekara.
    236/2, Wathurawawatta,
    Paranthanayamgoda,
    Galle.

77. M.G.J. Lakmali.
    No. 04, Ambana,
    Kahaduwa.

78. K.B.D.H. Jayasinghe.
    30/18, Adarshagama,
    Mapalagama.

79. J.N. Dilrukshi.
    130A, Hayahaula,
    Kiniyawala,
    Mathugama.

80. N.G.C. Malini.
    Mulana,
    Nagoda,
    Galle.

81. A.H.S.M. Kumara.
    "Suramya",
    Porawagama.

82. D.C.B. Kariyawasam.
Horangalla Junction,
Horangalla,
Thalgaswala.

83. M.G. Priyadarshini.
64C, Panangalla West,
Panangalla,
Galle.

84. W.G.G. Lalitha Chandrani.
"Singha", Marakgoda,
Maththaka.

85. M.K.N. Priyaka.
76/2, Poddiwala,
Marakgoda,
Maththaka.

86. P.K. Samanthi.
298/1, Dolekanda,
Gonagala,
Thalgaswala.

87. W.C. Sanjeewani.
"Pritankara",
Malamura,
Mapalagama.

88. A.U. Matarage.
Dehigodawatta,
Aluthihala,
Mapalagama.

89. K.G. Sirimathi,
Madakadahena,
Waduweliwitiya North,
Aluthihala,
Mapalagama.

90. K. Damayanthie.
Millagaha Udumulla,
Udaweliwitathalawa,
Nagoda,
Galle.

91. A.K.N. Udayangani.
Moragalmulla,
Udagama,
Galle.

92. D.K. Gurusinghe.
258B, Thoragahawila,
Ruukadahena,
Kahaduwa.

93. H.G.V. Banduwathi.
Nabarawatta,

Athkadura.

94. D.M.S. Hemasiri.
    16, Sanwardenagama,
    Poddiwala,
    Maththaka.

95. B.K. Sarath Kumara.
    38, Belgiyanugama,
    Waturawila,
    Kahaduwa.

96. K.H.G.S. Lakmal.
    199, Jambugahakanda,
    Guruwala,
    Horangalla,
    Thalgaswala.

97. W.A.T. Kumara.
    Kammellaeduwa,
    Gammaadegoda,
    Nagoda,
    Galle.

98. I.D. Chandrika.
    50/12, Ardarshagama,
    Athumage.

99. A.K.N. Prasadika.

2017/2, Thalawa Road,
Horangalle,
Thalgaswala.

100. M.A.G.N.T. Roshani.
80, Gonithalawatta,
Porawagama.

101. T.T. Pushpakumari.
670, Welagedarawatta,
Kahaduwa.

102. K.L.L. Padmini.
"Sriyawasa", Miriswatta,
Kahaduwa.

103. D.P.M.M. Nishanthi.
91/A, Near Galalndala School,
Koralegama,
Panagala.

104. S.M.D.R.M.D. De Alwis.
224/39B, Horagahakanda,
Nagoda,
Galle.

105. J.A.A. Nilmini.
01/04, Halgahawala,
Opatha.

106. K.A.S. Chandrika.
50/40, Mapalagama,
Adarshagama,
Athumale,
Galle.

107. R.W. Rupasinghe.
25B, Meedigahawitawatta,
Udaweliwitiya,
Nagoda,
Galle.

108. K.A. Kanthi.
Bataaththegedara,
Eppala,
Panangala.

109. W. Shriyani.
48/1, Embulegedara,
Neluwa,
Galle.

110. R.S. Sampath.
Okandawatta,
Porawagama.

111. W. Anula.
285, Thiruwanaketiya,

Gonalagoda,
Thalgasketiya.

112. N.G.A. Priyanthika.
17, Udugamuwatta,
Niyagama.

113. A. Nandalal,
59, Galle Road,
Pareliya,
Thelwatta.

114. D.A.A. Kumara.
92/42, Rambukketiy Road,
Marraggoda,
Maththaka.

115. D.G. Kumudini.
School Road,
Waduwelivitiya North,
Kahaduwa.

116. N.H.K.G. Dinishika.
444/10, Waduwelivitiya North,
Kahaduwa.

117. K.B.W. Kumara.
273/1, Near Garment Factory,
Manampita,

Thalgaswala.

118. M.G.A. Nandani.
Galgodewatta,
Wehihena,
Maththaka.

119. G.D. Chandani.
385B, Thoragahawila,
Ruukadahena,
Kahaduwa.

120. A.G.L. Susantha.
Athula Mawatha,
Mapalagama Central.

121. I.G.T. Nilmini.
288A, Sekkugalawatta,
Dangahawita,
Karandeniya.

122. K. Padma.
301, Babilawatta,
Malamura,
Mapalagama.

123. R. Ganewatta,
Ginipanangoda,
Athumala.

124. K.B.N.K. Priyantha.
House 31, 2nd Stage,
Walakumbura,
Nagoda.

125. N.V. Prasangi.
Godellegedara,
Gonalagoda,
Thalgawala.

126. K.S. Sandalanka.
68, Deewara Gammanaya,
Thalgaswala.

127. P.M.I. Shanthi.
161C, Magurigalwila,
Kahaduwa.

128. S. Nilmini.
338C, Gonalagoda,
Nillamullawatta,
Thalgaswala.

129. W.G.N. Sanmanmali.
246/1, Polpalketiya Janapadaya,
Thalgaswala.

130. K.I. Pridharshini.

374, Suhada Mawatha,
Idipalegoda,
Pitigala.

131. W. Sriyani.
Kalukotha,
Manampitiya,
Thalgaswala.

132. H.S. Priyantha.
2, Athkam Niwasa,
Maraggoda,
Maththaka.

133. D.W. Nilmini.
336/2, Kuruminiyan Wetuna
Hena,
Gonalagoda,
Thalgaswala.

134. H.K.H. Priyangika.
Nayanahari,
Annasigalahena,
Nagoda,
Galle.

135. N.P. Gurusinghe.
Sinhale Gedara watta kade,
Ruukadahena,

Kahaduwa.

136. E.K.N. Pradeepika.
152, Galpallemulana,
Ankutuwala,
Maththaka.

137. D.Y. Nilanthie.
In front of Thurunuwa Asapuwa,
Gallinda,
Thalgaswala.

138. G.G.K. Mangalika.
176, Manampita,
Thalgaswala.

139. K.M.C. Samantha.
99B, Andurannawila,
Pinikahana,
Kahaduwa.

140. M.D.N. Ratnayake.
105A, Kanaththagewatta,
Aluthihala,
Mapalagama Central.

141. M. Sumanawathi.
Wandana Mulana,
Nagoda.

142. P.K.W. Kumara.
298/1, Dolekanda,
Gonalagoda,
Thalgaswala.

143. T.G.M. Priangika.
Pubudu Sevana,
Udalamaththa.

144. M.G.S. Priyadarshini.
"Wasana", Mihindu Mawatha,
Duwegoda,
Porowagama.

145. K.H.R. Damayanthi.
Ehawatta,
Kallapatha.
Thalgaspe.

146. K.H. Ranjini.
Near Garment Factory,
Niyagama,
Thalgaswala.

147. H.L.N. Dilrukshi.
"Kadamuduna",
Koralegama,
Panangala,

Galle.

148. K.K. Thushawathi.
271, Kurakkanduwa,
Kumbburuhena,
Mapalagama Central.

149. W.G. Roshani.
201D, Udaweliwitathalawa [East],
Nagoda,
Galle.

150. D.G. Nilanthie.
248, Polpalaketiya,
Thalgaswala.

151. C.S. Jayalath.
Aluthihala,
Mapalagama Central.

152. H.L.I. Lakmali.
383/1, Ellawatta, Katagoda North,
Udagama.

153. D.G.N. Deepika.
402A, Wedahunuhena,
Gonalagoda,
Thalgaswala.

154. K.H.G.D. Damayanthi.
53B, Ambana,
Kahaduwa.

155. G.L. Vineetha.
28, Gallidawatta,
Wattahena,
Thalgaswala.

156. M.G.T. Madumali.
Polpelaketiya,
Janapadaya,
Thalgaswala.

157. W.G.N.P. Kumari.
"Madushka",
Eppalagala,
Panangala.

158. N.G. Parindrani.
320, Galle Road,
Athumale.

159. G.M.M. Darshana.
Gallinda Kotasa, Near Garment Factory, Thalgaswala.

160. U.L.R. Nishantha.
Kadamuduna, Koralegama,
Panangala.

161. K.H.S. Tharanga.
Diyamawaththa,
Kumburuhena,
Mapalagama.

162. K.B.R. Pushpakanthi.
Udaveliwitithalawa,
Nagoda,
Galle.

163. M.S. Rohana.
1st Mile Post,
Manampitiya,
Thalgaswala.

164. K.P.G.D. Sandamali.
10/1, Weliketiyegedara,
Wattahena,
Thalgaswala.

165. D.M. Priyadarshani.
Bovitiyamulla,
Urala,
Wanduraba.

166. K.E.J. Priyantha.
48, Aramagama,
Amugoda.

167. M.G.S. Chandana.
4th Mile Post,
Poddiwala,
Maththaka.

168. M.M.N. Shiromi.
111/1, Egodahawatta,
Niyagama,
Thalgaswala.

169. G.S. Dilhani.
364/1, Malwattahena,
Mulana,
Nagoda,
Galle.

170. H.V.N.P. Manjula.
156/1, Gammaddegoda,
Nagoda,
Galle.

171. U.V.I. Sandamali.
273A, Pinikahana Phala,
Kahaduwa.

172. D.P.U. Kumara.
118, "Sandamali",
Kuruwalathota,
Porawagama.

173. T.T. Pathmini.
105,Thuduwagoda,
Kahaduwa.

174. W.S.Pushpakumara.
Balagala,
Amugoda.

175. G. Karunadasa.
Kalukotha,
Thalgaswala.

176. K. Shriyakanthi.
Wadugoda,
Athkandura.

177. P.N. Malkanthi.
Udaweliwitathalawa,
Nagoda,
Galle.

178. B.L.A.S. Karunaratne.
302, Polhena,
Bowitiyamulla,
Urala,
Wanduraba.

179. U.N. Kumari.
205A, Bandaranayakapura,

Udalamaththa.

180. A.K. Priyantha.
Waduweliwitiya North,
Heenpanwila,
Kahaduwa.

181. T.S. Kumari.
160A, Magurugalwila,
Kahaduwa.

182. P.L..N. Thilina.
283, Polpalaketiya,
Thalgaswala.

183. K.G.W. Hemali.
136, Duwegedara,
Kappitiyagoda,
Nagoda.

184. K.G.T. Jagathsinghe.
Dharmadara Mawatha,
Pitigama.

185. A.M. Ranaweera.
205A, U.G.D. Ariyathilaka
Mawatha,
Walakumbura,
Nagoda.

186. K.L.G.S. Priyadarshani.
316/M, Hathhamula,
Waturawila,
Kahaduwa.

187. W.K.C. Kumari.
466, Dangaragana,
Udamulla,
Manampitiya,
Mitiyagoda.

188. J.A.S. Devika.
Indurupathwila,
Horangalle,
Thalgaswala.

189. R.S.W. Wickramasinghe.
Sinhagiri, Yatalamaththa,
Galle.

190. A. Thiruwelvi.
Thalgaswala watta,
Thalgaswala.

191. S.M. Samarasinghe.
Kammalgoda,
Mapalagama.

192. A.H.S. Premalatha.

Duwegoda,
Porawagama.

193. H.V.C.D. Gunasekara.
26, Poddiwala,
Maththaka.

194. M.K.R. Malkanthi.
Hikgahawitiya Gedara,
Koralegama,
Panangala.

195. K.H.G.S.D. Rangani.
Naibulana,
Bulana,
Nagoda.

196. Rasika Deepani Dissanayake.
371, Mahawatta, Waduwelipitiya,
Kahaduwa North.

197. N.N. Dias.
214A, Hagoda Agula,
Miriswatta,
Kahanduwa.

198. N.D. Gunasinghe.
214A, Hagoda Agula,
Miriswatta,

Kahanduwa.

199. P.H.N. Rohini.
32, Athkam Niwasa,
Maragoda,
Poddiwala,
Maththaka.

200. H.R. Kusumalatha.
Gangodawatta,
Kappitiyagoda,
Nagoda,
Galle.

201. H.G. Chandralatha.
Indipalegoda,
Pitigala.

202. K.G.A. Prasanna.
Janapadaya,
Polpalaketiya,
Thalgaswala.

203. N.V. Thilakaratne.
Kakiriwela,
Manampitiya,
Thalgaswala.

204. K.A.S. Anoma.
179, Manampitiya,
Thalgaswala.

205. D.K.P. Ranjini.
201, Kakiriwela,
Manampitiya,
Thalgaswala.

206. K.S.A. Lakmal.
37, Diyawara gammanaya,
Thalgaswala.

207. P.K.A. Dilrukshi.
c/o K. Ganewatta,
Kalukotha,
Thalgaswala.

208. S.P. Weerasinghe.
417, Pinikannawila,
Waduweliwitiya North,
Kahaduwa.

209. P.H.A. Swarnalatha.
Nugethotapara,
Divithuru,
Athkandura.

210. I.D.P. Shriyani.

50/33, Adarshagama,
Athumale.

211.M.G.A. Kumara.
266/4, Galkanda,
Manampitiya,
Thalgaswala.

212.M.B.C. Subhashini.
161, Karunwila,
Niyagama,
Thalgaswala.

213.K.B.N. Priyadharshani.
335A, Urugahuwela,
Kahaduwa.

214.H.V.S. Janaka.
195, Polpalaketiya,
Thalgaswala.

215.G. Sumanawathie.
58,Athumale,
Galle.

216.K.W.R. Sudarshini.
Thanabima,
Horangalle,
Thalgaswala.

217. P.K.K. Ganga.
Moratuwe Gedara,
Niyagama,
Thalgaswala.

218. H.G.L. Chaturi.
Godagama,
Aluthihala,
Mapalagama Centrral.

219. H.H.S. Mallika.
Bambarawana Road,
Maththaka.

220. M.A.G.I. Priyadharshini.
"Wasana", Mihindu Mawatha,
Duwegoda,
Porawagama.

221. E.D. Priyadharshini.
Diyakithulkanda,
Wattahena,
Thalgaswala.

222. J.M. Gurusinghe.
Hunnawila,
Thanabeddegama,
Athkandura.

223.T.L. Suneetha.
37, Adarsha Gammanaya,
Walamura,
Mapalagama Central.

224.M.G. Malini.
221, Kabaluwa,
Niyagama,
Thalgaswala.

APPLICANTS- RESPONDENTS.

AND NOW BETWEEN,

Paradigm Clothing [Private] Limited of No.107, Pallidora Road,
Dehiwala.

RESPONDENT-APPELLANT-APPELLANT

-VS-

1. Mahagamage Chandramadu,
Puwakdoola,
Pnikahatha,
Kahadawa.

2. K. Malini,
Ellawatta,
Gonadeniya,

Udugama.

3. G.W. Chandana Wasantha,
   43A, Pnikahana,
   Kahaduwa.

4. D.J. Kaluarachchi,
   Halgahadola,
   Miriswatta,
   Kahaduwa.

5. D.G. Amitha Jayawathie,
   363/1, Alawattahena,
   Gonagalagoda,
   Thalgaswala.

6. A.G.S. Kumara.
   Polpalaketiya Scheme,
   Thalgaswala.

7. H.V.D. Udayangani,
   170 C, Mullgedarawila,
   Ogawa,
   Naranomita,
   Porawagama.

8. Renu Jagoda,
   Gurukanda,
   Aluthihala,

Mapalgama. [central]

9. G.S. Kumara,
   Duwegoda,
   Porawagama,
   Pollewwa watta.

10. W.A.R. Mallika.
    "Sisila", Balagoda, Porowagama.

11. W.K. Ramani,
    "Sunny Stores", Poddiwala
    Handiya,
    Maththaka.

12. M.A. Neelangani.
    92/2, Gorakagastuduwa,
    Aluthihala, Mapalagama, Galle.

13. U.G.M. Gayanthi.
    Panangala West, Pananngala.

14. W.G.A.S.K. Prasanna,
    Polpalaketiya Scheme,
    Thalgaswala.

15. B.A. Ashoka.
    Godaamuna Junction,
    Pitigala.

16. K. P. Damayanthie.
    111/K, Annasigahalahena,
    Nagoda.

17. K. Vithanage.
    Galgodawatta,
    Marthupitiya,
    Maththaka.

18. D.A.A. Dilrukshi.
    Godapattiyegoda,
    Malwattahena,
    Mulana,
    Galle.

19. P. Dn Rupasinghe,
    169, Garaowita,
    Porawagama.

20. K.A. Bodipla,
    Mithuri Mawatha,
    Polpalaketiya,
    Thalgaswala.

21. H.S. Kumudini,
    Punchila,
    Katagoda,
    Udugama.

22. D.D. Sewwandhi,
    183/2, Aluthihala,
    Mapalagama Central.

23. K.K.G.J. Lasika,
    Nagoda,
    Galle.

24. M. Samarasinghe,
    "Dhammika Niwasa",
    Kumburuhena,
    Mapalagama.

25. G.L.H.N. Madhavi,
    Sanwardenegama,
    Podhiwala,
    Maththaka.

26. A.K. Samanthi.
    12/10,Dahaththewatta, Aluthihala,
    Mapalagama Central.

27. K.G.T. Erandhi.
    07/01, Guriwala,
    Horangalla,
    Thalgaswala.

28. H.H.P.R. Hewage.
    Rambukketiya Road,

Marggoda,
Maththka.

29. K.H.N. Samarasekara,
384A, Thalagahahena,
Thalawa Road,
Wanduraba,
Galle.

30. H. Suneetha.
Maha gedara wattahena,
Thalgaswala.

31. U.V.T.K. Kumari,[92/19/01B] 32,
Athkam Niwasaya, Maraggoda,
Maththaka.

32. K.A.T.W. Kumari,
208/2, Delgahagedara,
Manampitiya,
Thalgaswala.

33. K.G.S. Dilrukshi,
27A, Ambana,
Kahaduwa.

34. A.G. Nandawathie,
Porawagama,
Katuketiya.

35. M.A. Sunethra.
    Ruukadahena,
    Kahaduwa.

36. M. Piyawathie.
    Agalum Kamhala Asala,
    Niyagama,
    Thalgaswala.

37. G.G. Mallika.
    Poddiwala,
    Maththka,
    Galagedara.

38. D. Kuragoda.
    1158, Annasigalahena,
    Ihala Nagoda,
    Nagoda.

39. K.B.S. Malkanthi.
    396, Rukadahena,
    Kahaduwa.

40. R.A.I.K. Dias.
    Serasinghe Watta,
    Athumale,
    Galle.

41. W.L.K. Gayantha.

311A, Wathuruwila,
Kahaduwa.

42. M.A.D. Chamari.
Beligasyaya,
Ambalana,
Kahaduwa.

43. C.W. Seneviratne.
118/1, Akulawila,
Horangalle,
Talgaswala.

44. H.K.I. Udayakanthi.
115/24, Annasigala hena,
Ihala Nagoda,
Nagoda.

45. P.R. Jayangani.
144/3, Parana Thanayamgoda,
Kapalwila,
Mapalagama,
Galle.

46. M.K.L. Priyadharshini,
Near the Transformer,
Marakkoda,
Maththka.

47. K.A. Shanthi.
    111, Annasigala hena,
    Ihala Nagoda,
    Nagoda.

48. A.D.A. Nimanthi.
    Thanabima,
    Polpalaketiya,
    Thalgaswala.

49. M.N. Pushpakumari.
    Maraggoda,
    Maththka.

50. M.A.J.S. Kumari.
    23, Pokunamulla,
    Ambana, Kahaduwa.

51. M.M.D. Sandamali.
    234/1, Thalawa Road,
    Horangalla,
    Thalgaswala.

52. H.P.G.L.D. Padmamala.
    45B, Polgodawatte,
    Nagoda.

53. T.G.S. Dilani.
    136A, Thalawa Road,

Horangalla,

Thalgaswala.

54. P.G. Badra,
    233A, Gamgedara,
    Nagoda,
    Galle.

55. M.G.S. Kumari.
    Rambukketiya Road,
    Marakkagoda,
    Maththaka.

56. K.A.L. Nandini.
    Plantation housing scheme,
    Galinda Division,
    Thalgaswala.

57. T.I. Weerasekara.
    186A, Aldosvilla,
    Udawallivita Thalawa East,
    Nagoda, Galle.

58. M.H.R. Samanmali.
    378/2, Nawawadiya Kanda,
    Malwattahena,
    Nagoda,
    Galle.

59. K.K.K. Maohari.
    193A, Walakumbura,
    Kappitiyagoda South,
    Nagoda,
    Galle.

60. K.A. Chandrawathie.
    92/60, Marakgoda,
    Poddiwala,
    Maththaka.

61. K.A.S. Chaaminda.
    179, 01 Mile Post,
    Manampitiya,
    Thalgaswala.

62. M.M.D. Dilhani.
    Ela Ihala,
    Athumale.

63. G. Chandrawathi.
    Maliyagawatta,
    Aluthpahala,
    Mapalagama Central.

64. B.A.R. Awala.
    Delgahawatta,
    Pinikahana,
    Kahaduwa.

65. V. Yasawathie.
"Yashodha",
Thibbatuwawa, Kahaduwa.

66. D.M. Dissanayake.
135/1, Aluthpahala,
Mapalagama Central.

67. P.H.N.S. Kumara.
No.15, Athkamniwasa,
Marakgoda,
Maththaka.

68. J.A.P. Kanthilatha.
Kadruwaththa,
Niyagama,
Thalgaswala.

69. A.G. Kumudhini.
235, Aluthpahala,
Mapalagama Central.

70. P.K.D.N. Priyadarshini.
Yatalamaththa,
Galle.

71. U.G.M. Sudharshini.
33 Hill,
Miriswatta,

Kahaduwa.

72. A.B. Wickrama.
    53A, Aluthihala,
    Mapalagama Central.

73. P.K.D. Kumari.
    257/6, Nawinna,
    Mapalagama Central,
    Galle.

74. A.G.A. Shobani.
    2/2, Kudamalana,
    Mapalagama Central.

75. P.A. Punchihewa.
    Mandakanda,
    Karandeniya.

76. R.V. Piyasekara.
    236/2, Wathurawawatta,
    Paranthanayamgoda,
    Galle.

77. M.G.J. Lakmali.
    No. 04, Ambana,
    Kahaduwa.

78. K.B.D.H. Jayasinghe.

30/18, Adarshagama,
Mapalagama.

79. J.N. Dilrukshi.
130A, Hayahaula,
Kiniyawala,
Mathugama.

80. N.G.C. Malini.
Mulana,
Nagoda,
Galle.

81. A.H.S.M. Kumara.
"Suramya",
Porawagama.

82. D.C.B. Kariyawasam.
Horangalla Junction,
Horangalla,
Thalgaswala.

83. M.G. Priyadarshini.
64C, Panangalla West,
Panangalla,
Galle.

84. W.G.G. Lalitha Chandrani.
"Singha", Marakgoda,

Maththaka.

85. M.K.N. Priyaka.
    76/2, Poddiwala,
    Marakgoda,
    Maththaka.

86. P.K. Samanthi.
    298/1, Dolekanda,
    Gonagala,
    Thalgaswala.

87. W.C. Sanjeewani.
    “Pritankara”,
    Malamura,
    Mapalagama.

88. A.U. Matarage.
    Dehigodawatta,
    Aluthihala,
    Mapalagama.

89. K.G. Sirimathi,
    Madakadahena,
    Waduweliwitiya North,
    Aluthihala,
    Mapalagama.

90. K. Damayanthie.
Millagaha Udumulla,
Udaweliwitathalawa,
Nagoda,
Galle.

91. A.K.N. Udayangani.
Moragalmulla,
Udagama,
Galle.

92. D.K. Gurusinghe.
258B, Thoragahawila,
Ruukadahena,
Kahaduwa.

93. H.G.V. Banduwathi.
Nabarawatta,
Athkadura.

94. D.M.S. Hemasiri.
16, Sanwardenagama,
Poddiwala,
Maththaka.

95. B.K. Sarath Kumara.
38, Belgiyanugama,
Waturawila,
Kahaduwa.

96. K.H.G.S. Lakmal.
    199, Jambugahakanda,
    Guruwala,
    Horangalla,
    Thalgaswala.

97. W.A.T. Kumara.
    Kammellaeduwa,
    Gammaadegoda,
    Nagoda,
    Galle.

98. I.D. Chandrika.
    50/12, Ardarshagama,
    Athumage.

99. A.K.N. Prasadika.
    2017/2, Thalawa Road,
    Horangalle,
    Thalgaswala.

100. M.A.G.N.T. Roshani.
    80, Gonithalawatta,
    Porawagama.

101. T.T. Pushpakumari.
    670, Welagedarawatta,
    Kahaduwa.

102. K.L.L. Padmini.
"Sriyawasa", Miriswatta,
Kahaduwa.

103. D.P.M.M. Nishanthi.
91/A, Near Galalndala School,
Koralegama,
Panagala.

104. S.M.D.R.M.D. De Alwis.
224/39B, Horagahakanda,
Nagoda,
Galle.

105. J.A.A. Nilmini.
01/04, Halgahawala,
Opatha.

106. K.A.S. Chandrika.
50/40, Mapalagama,
Adarshagama,
Athumale,
Galle.

107. R.W. Rupasinghe.
25B, Meedigahawitawatta,
Udaweliwitiya,
Nagoda,
Galle.

108.K.A. Kanthi.
Bataaththegedara,
Eppala,
Panangala.

109. W. Shriyani.
48/1, Embulegedara,
Neluwa,
Galle.

110. R.S. Sampath.
Okandawatta,
Porawagama.

111.W. Anula.
285, Thiruwanaketiya,
Gonalagoda,
Thalgasketiya.

112.N.G.A. Priyanthika.
17, Udugamuwatta,
Niyagama.

113.A. Nandalal,
59, Galle Road,
Pareliya,
Thelwatta.

114.D.A.A. Kumara.

92/42, Rambukketiy Road,
Marraggoda,
Maththaka.

115. D.G. Kumudini.
School Road,
Waduwelivitiya North,
Kahaduwa.

116. N.H.K.G. Dinishika.
444/10, Waduwelivitiya North,
Kahaduwa.

117. K.B.W. Kumara.
273/1, Near Garment Factory,
Manampita,
Thalgaswala.

118. M.G.A. Nandani.
Galgodewatta,
Wehihena,
Maththaka.

119. G.D. Chandani.
385B, Thoragahawila,
Ruukadahena,
Kahaduwa.

120. A.G.L. Susantha.

Athula Mawatha,
Mapalagama Central.

121. I.G.T. Nilmini.
288A, Sekkugalawatta,
Dangahawita,
Karandeniya.

122. K. Padma.
301, Babilawatta,
Malamura,
Mapalagama.

123. R. Ganewatta,
Ginipanangoda,
Athumala.

124. K.B.N.K. Priyantha.
House 31, 2nd Stage,
Walakumbura,
Nagoda.

125. N.V. Prasangi.
Godellegedara,
Gonalagoda,
Thalgawala.

126. K.S. Sandalanka.
68, Deewara Gammanaya,

Thalgaswala.

127. P.M.I. Shanthi.
161C, Magurigalwila,
Kahaduwa.

128. S. Nilmini.
338C, Gonalagoda,
Nillamullawatta,
Thalgaswala.

129. W.G.N. Sanmanmali.
246/1, Polpalketiya Janapadaya,
Thalgaswala.

130. K.I. Pridharshini.
374, Suhada Mawatha,
Idipalegoda,
Pitigala.

131. W. Sriyani.
Kalukotha,
Manampitiya,
Thalgaswala.

132. H.S. Priyantha.
2, Athkam Niwasa,
Maraggoda,
Maththaka.

133. D.W. Nilmini.
336/2, Kuruminiyan Wetuna
Hena,
Gonalagoda,
Thalgaswala.

134. H.K.H. Priyangika.
Nayanahari,
Annasigalahena,
Nagoda,
Galle.

135. N.P. Gurusinghe.
Sinhale Gedara watta kade,
Ruukadahena,
Kahaduwa.

136. E.K.N. Pradeepika.
152, Galpallemulana,
Ankutuwala,
Maththaka.

137. D.Y. Nilanthie.
In front of Thurunuwa Asapuwa,
Gallinda,
Thalgaswala.

138. G.G.K. Mangalika.

176, Manampita,
Thalgaswala.

139. K.M.C. Samantha.
99B, Andurannawila,
Pinikahana,
Kahaduwa.

140. M.D.N. Ratnayake.
105A, Kanaththagewatta,
Aluthihala,
Mapalagama Central.

141. M. Sumanawathi.
Wandana Mulana,
Nagoda.

142. P.K.W. Kumara.
298/1, Dolekanda,
Gonalagoda,
Thalgaswala.

143. T.G.M. Priangika.
Pubudu Sevana,
Udalamaththa.

144. M.G.S. Priyadarshini.
"Wasana", Mihindu Mawatha,
Duwegoda,

Porowagama.

145. K.H.R. Damayanthi.
Ehawatta,
Kallapatha.
Thalgaspe.

146. K.H. Ranjini.
Near Garment Factory,
Niyagama,
Thalgaswala.

147. H.L.N. Dilrukshi.
"Kadamuduna",
Koralegama,
Panangala,
Galle.

148. K.K. Thushawathi.
271, Kurakkanduwa,
Kumbburuhena,
Mapalagama Central.

149. W.G. Roshani.
201D, Udaweliwitathalawa [East],
Nagoda,
Galle.

150. D.G. Nilanthie.
248, Polpalaketiya,
Thalgaswala.

151. C.S. Jayalath.
Aluthihala,
Mapalagama Central.

152. H.L.I. Lakmali.
383/1, Ellawatta, Katagoda North,
Udagama.

153. D.G.N. Deepika.
402A, Wedahunuhena,
Gonalagoda,
Thalgaswala.

154. K.H.G.D. Damayanthi.
53B, Ambana,
Kahaduwa.

155. G.L. Vineetha.
28, Gallidawatta,
Wattahena,
Thalgaswala.

156. M.G.T. Madumali.
Polpelaketiya,
Janapadaya,

Thalgaswala.

157. W.G.N.P. Kumari.
"Madushka",
Eppalagala,
Panangala.

158. N.G. Parindrani.
320, Galle Road,
Athumale.

159. G.M.M. Darshana.
Gallinda Kotasa, Near Garment Factory, Thalgaswala.

160. U.L.R. Nishantha.
Kadamuduna, Koralegama,
Panangala.

161. K.H.S. Tharanga.
Diyamawaththa,
Kumburuhena,
Mapalagama.

162. K.B.R. Pushpakanthi.
Udaveliwitithalawa,
Nagoda,
Galle.

163. M.S. Rohana.
1st Mile Post,
Manampitiya,
Thalgaswala.

164. K.P.G.D. Sandamali.
10/1, Weliketiyegedara,
Wattahena,
Thalgaswala.

165. D.M. Priyadarshani.
Bovitiyamulla,
Urala,
Wanduraba.

166. K.E.J. Priyantha.
48, Aramagama,
Amugoda.

167. M.G.S. Chandana.
4th Mile Post,
Poddiwala,
Maththaka.

168. M.M.N. Shiromi.
111/1, Egodahawatta,
Niyagama,
Thalgaswala.

169. G.S. Dilhani.
364/1, Malwattahena,
Mulana,
Nagoda,
Galle.

170. H.V.N.P. Manjula.
156/1, Gammaddegoda,
Nagoda,
Galle.

171. U.V.I. Sandamali.
273A, Pinikahana Phala,
Kahaduwa.

172. D.P.U. Kumara.
118, “Sandamali”,
Kuruwalathota,
Porawagama.

173. T.T. Pathmini.
105,Thuduwagoda,
Kahaduwa.

174. W.S.Pushpakumara.
Balagala,
Amugoda.

175. G. Karunadasa.
Kalukotha,
Thalgaswala.

176. K. Shriyakanthi.
Wadugoda,
Athkandura.

177. P.N. Malkanthi.
Udaweliwitathalawa,
Nagoda,
Galle.

178. B.L.A.S. Karunaratne.
302, Polhena,
Bowitiyamulla,
Urala,
Wanduraba.

179. U.N. Kumari.
205A, Bandaranayakapura,
Udalamaththa.

180. A.K. Priyantha.
Waduweliwitiya North,
Heenpanwila,
Kahaduwa.

181. T.S. Kumari.
160A, Magurugalwila,

Kahaduwa.

182. P.L..N. Thilina.
283, Polpalaketiya,
Thalgaswala.

183. K.G.W. Hemali.
136, Duwegedara,
Kappitiyagoda,
Nagoda.

184. K.G.T. Jagathsinghe.
Dharmadara Mawatha,
Pitigama.

185. A.M. Ranaweera.
205A, U.G.D. Ariyathilaka
Mawatha,
Walakumbura,
Nagoda.

186. K.L.G.S. Priyadarshani.
316/M, Hathhamula,
Waturawila,
Kahaduwa.

187. W.K.C. Kumari.
466, Dangaragana,
Udamulla,

Manampitiya,
Mitiyagoda.

188. J.A.S. Devika.
Indurupathwila,
Horangalle,
Thalgaswala.

189. R.S.W. Wickramasinghe.
Sinhagiri, Yatalamaththa,
Galle.

190. A. Thiruwelvi.
Thalgaswala watta,
Thalgaswala.

191. S.M. Samarasinghe.
Kammalgoda,
Mapalagama.

192. A.H.S. Premalatha.
Duwegoda,
Porawagama.

193. H.V.C.D. Gunasekara.
26, Poddiwala,
Maththaka.

194. M.K.R. Malkanthi.
Hikgahawitiya Gedara,
Koralegama,
Panangala.

195. K.H.G.S.D. Rangani.
Naibulana,
Bulana,
Nagoda.

196. Rasika Deepani Dissanayake.
371, Mahawatta, Waduwelipitiya,
Kahaduwa North.

197. N.N. Dias.
214A, Hagoda Agula,
Miriswatta,
Kahanduwa.

198. N.D. Gunasinghe.
214A, Hagoda Agula,
Miriswatta,
Kahanduwa.

199. P.H.N. Rohini.
32, Athkam Niwasa,
Maragoda,
Poddiwala,
Maththaka.

200. H.R. Kusumalatha.
Gangodawatta,
Kappitiyagoda,
Nagoda,
Galle.

201. H.G. Chandralatha.
Indipalegoda,
Pitigala.

202. K.G.A. Prasanna.
Janapadaya,
Polpalaketiya,
Thalgaswala.

203. N.V. Thilakaratne.
Kakiriwela,
Manampitiya,
Thalgaswala.

204. K.A.S. Anoma.
179, Manampitiya,
Thalgaswala.

205. D.K.P. Ranjini.
201, Kakiriwela,
Manampitiya,
Thalgaswala.

206. K.S.A. Lakmal.
37, Diyawara gammanaya,
Thalgaswala.

207. P.K.A. Dilrukshi.
c/o K. Ganewatta,
Kalukotha,
Thalgaswala.

208. S.P. Weerasinghe.
417, Pinikannawila,
Waduweliwitiya North,
Kahaduwa.

209. P.H.A. Swarnalatha.
Nugethotapara,
Divithuru,
Athkandura.

210. I.D.P. Shriyani.
50/33, Adarshagama,
Athumale.

211. M.G.A. Kumara.
266/4, Galkanda,
Manampitiya,
Thalgaswala.

212. M.B.C. Subhashini.
161, Karunwila,
Niyagama,
Thalgaswala.

213. K.B.N. Priyadharshani.
335A, Urugahuwela,
Kahaduwa.

214. H.V.S. Janaka.
195, Polpalaketiya,
Thalgaswala.

215. G. Sumanawathie.
58,Athumale,
Galle.

216. K.W.R. Sudarshini.
Thanabima,
Horangalle,
Thalgaswala.

217. P.K.K. Ganga.
Moratuwe Gedara,
Niyagama,
Thalgaswala.

218. H.G.L. Chaturi.

Godagama,
Aluthihala,
Mapalagama Centrral.

219. H.H.S. Mallika.
Bambarawana Road,
Maththaka.

220. M.A.G.I. Priyadharshini.
"Wasana", Mihindu Mawatha,
Duwegoda,
Porawagama.

221. E.D. Priyadharshini.
Diyakithulkanda,
Wattahena,
Thalgaswala.

222. J.M. Gurusinghe.
Hunnawila,
Thanabeddegama,
Athkandura.

223. T.L. Suneetha.
37, Adarsha Gammanaya,
Walamura,
Mapalagama Central.

224.M.G. Malini.
221, Kabaluwa,
Niyagama,
Thalgaswala.

APPLICANTS- RESPONDENTS-RESPONDENTS.

BEFORE : **BUWANEKA ALUWIHARE, PC, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Mohamed Adamaly with Anoukshi Vidanagamage Attorneys-at-Law for the Respondent- Appellant- Appellant.

J.C. Weliamuna P.C. with Thushara de Silva, Pulasthi Hawamanne and Thilini Vidanagamage Attorneys-at- Law for the Applicants-Respondents-Respondents.

ARGUED ON : 28th February 2019 and 15th March 2019.

WRITTEN SUBMISSIONS : Applicant-Respondent-Respondent on 5th April 2019 and 2nd February 2015.
Respondent- Appellant-Respondent on 18th of August 2014.

DECIDED ON : 19th December 2019.

S. THURAIRAJA, PC, J.

The instant Appeal was filed by the Respondent-Appellant-Appellant, Paradigm Clothing [Private] Limited (hereinafter referred to as the 'Employer'/'Appellant') against the Judgment of the Learned Judge of the Galle High Court dated 04.06.2013, who had affirmed the Order of the Labour Tribunal, dated 24.09.2010

I find it pertinent to produce the material facts of the case, prior to addressing the issues before us.

The Applicants-Respondents-Respondents (hereinafter referred to as the 'Employees'/'Respondents') are residents of Niyagama and were employed as blue-collar workers at the Niyagama Branch of the Appellant Company. According to the submitted documents, the employees were granted their New Year's Holidays by the Employer from 08.04.2009 till 27.04.2009. During the period of the said holidays, the Employer posted letters of transfer dated 15.04.2009 (1st letter of transfer), transferring the Employees of the Niyagama factory to the factories at Dehiwala and Karandeniya with effect from 27.04.2019.

In the meantime, the Employer had sought a notice of injunction and an enjoining order from the District Court on 20.04.2009, against all the Employees (who were 413 in number) from entering the factories at Niyagama and Karandeniya, on the alleged basis of a reasonable suspicion that there could be a possibility of unrest. On 23.04.2009, an ex-parte enjoining order was granted by the District Court of Elpitiya, restricting the Employees from entering the said factories.

On 24.04.2009, a mediation process was attempted. During the said mediation process, the Employer suggested a slightly higher payment, if the Employees agreed to report at the new workplace and the Employer, upon Board Approval further agreed, that compensation could be paid to those who do not report to the new workplace. For that purpose, another meeting was fixed on 12.05.2009. However, the Employer posted letters of warning dated 30.04.2009 (2nd letter of transfer), in which it was notified that

an opportunity had been given to the Employees to report for duty at the relevant place of duty, on or before 11.05.2009 and it was further notified that, the services of any employee who fails to report for duty on or before the said date, would be terminated.

On 12.05.2009, as agreed to previously, both parties were present before the Commissioner of Labour, wherein it was informed that the employees were unwilling to report to the new workplace. Further, discussions were held to reopen the factory with 250 employees and for that, the Employer had to obtain approval of the Board. Therefore, another meeting was fixed on 15.05.2009 and on the said date, the Employees were present while the Employer was absent and unrepresented.

Upon notices being served on the Employees, they had appeared at the District Court of Elpitiya but the Employer was absent and unrepresented. Therefore, the enjoining order was dissolved. Thereafter, the Employer issued letters dated 19.05.2009 (3rd letter of transfer), in the form of a notice of vacation of post, stating that, the Employees would be treated as having vacated their posts, if they fail to report to duty by 01.06.2009.

Following the above events, the Employees had filed their respective Applications in the Labour Tribunal of Galle on 06.05.2009 against the Appellant, seeking reinstatement in service with back wages or in the alternative, compensation in lieu of reinstatement. The President of the Labour Tribunal of Galle consolidated the Applications and heard the matters together. The President of the Labour Tribunal held, by order dated 24.09.2010, that there was a constructive termination of employment and directed the Employer to pay Rs. 26,668,995/- in respect of all employees (breakdown of the details of payment were provided). The Applications before the Labour Tribunal were filed by 413 workmen, but the Order of the Labour Tribunal is limited to the 224 workmen who had participated in the Trial.

Aggrieved by the order of the Labour Tribunal, the Employer filed an Appeal dated 27.10.2010, before the High Court of Galle. After considering the submissions made by both parties, the Learned Judge of the High Court dismissed the Appeal on

04.06.2013 and further, awarded costs at the sum of Rs. 1000/- to each of the Respondents. Thereafter, the Employer had preferred the present Appeal before us.

Having heard the Counsel in support of the present Appeal, this Court had granted leave on the questions of law set out in paragraph 13(b), (e), (h), (l), (m) and (q) of the Petition dated 12.07.2013, which have been reproduced for easy reference.

> *"(b) Has the Learned High Court Judge erred in law in failing to appreciate the fact that the Transfer of the Respondents were prima facie lawful and justified?*
>
> *(e) Has the Learned High Court Judge erred in law and misdirected himself in holding that the Transfer of the Respondents amounts to constructive termination of their services, particularly when the same is not supported by reasons in the impugned order?*
>
> *(h) Has the Learned High Court Judge erred in law in holding that the Petitioner had acted mala fide in obtaining an enjoining order from the District Court of Elpitiya, especially in view of the finding by the Labour Tribunal that the Petitioner did so to safeguard the property of the Petitioner Company?*
>
> *(l) Has the Learned High Court Judge erred in law in failing to consider that, the Respondents had not proved their losses and/or established any basis for the award to them of compensation?*
>
> *(m) Has the Learned High Court Judge erred in law in failing to consider the established authorities of the superior courts as regards the grant of compensation, and, contrary to law awarded compensation 'mechanically' to all employees regardless of age, employability, skill etc. of the Respondents and affordability of the Petitioner?*

(q) Has the Learned High Court Judge erred in law in failing to make a just and equitable order?"

In addition to the aforesaid, the following question of law was raised by the Counsel for the Respondents on 02/07/2014.

"Is the Appellant entitled to any relief in these proceedings in view of the findings of fact made by the Learned Labour Tribunal President?"

Both Counsels have filed their written submissions and the matter was argued before us. The stance taken by the employees is that, their services were constructively terminated, but on the contrary, the Employer had submitted that, there was no termination and that, it was only a transfer order.

I find that, the Learned President of the Labour Tribunal, in his judgment made a specific finding that, the transfers were mala fide on 8 grounds (vide pages 3452 to 3456). The same has been reproduced for easy reference.

"i. The instant transfers were mass scale transfers without sufficient prior notice.

ii. Convenience of the workmen and individual issues of the individual workmen should have been considered individually and it is the duty of the employer to give a platform to submit appeals setting out their grievances.

iii. The employer has offered to pay Rs. 2000/- for those who have been transferred to Dehiwala, but the evidence show that, this amount is anyway not sufficient for accommodation and meals.

iv. In making transfers, the employer has not considered the financial challenges that might arise in respect of those employees, especially since the employees were earning very low salaries, approximately Rs. 6300/- a month.

v. Had there been a genuine economic reason to close down the factory, such closure would have been justified and the employer should have followed the Termination of Employment (Special Provisions) Act No. 45 of 1971;

vi. The Employer had made use of the New Year vacation to transfer employees and to resort to a District Court for Enjoining Order preventing them from entering the factory. It is very clear that, there was no actual evidence, but only reasonable suspicion that any disturbance would happen.

vii. The transfers were effected for a long distance, but sufficient notices were not given.

viii. The workmen had not been given any opportunity to appeal against the transfer."

As per the above findings, the President of the Labour Tribunal had stated that, the said transfers are tainted with malice and unfair labour practices and are therefore, unjustified.

The Counsel for the Appellant had contended that, the transfer was lawful since there was a specific clause in the letters of appointment, providing that the employment of the Respondents was transferable. It was further contended that, the letters of appointment were signed and accepted by the Respondents, thereby constituting a 'Contract of Employment' between the Appellant and each of the Respondents.

With regard to the above contention, I find it apposite to produce the relevant excerpts from the below-mentioned cases.

In the case of ***United Engineering Workers' Union v. Devanayagam, 69 NLR 289***, it was observed that-

"A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is ***not restricted by the terms of the contract of employment*** *in granting relief or redress."*

(Emphasis added)

In the case of ***National Radio Corporation v. Their Workmen 1963, (1) LLI 282 SC***, it was held that-

"Even if there is provision made in the contract of employment, if any transfer is done "mala fide" that transfer is not a legitimate transfer."

In the case of ***Ceylon Estates Staff's Union v. The Superintendent, Meddecombra Estate, Watagoda, Wattagoda, (1986) 1 calr 102/73 NLR 278*****,** it was observed that-

*"****There is of course no general principle that an employee is in all cases bound to accept such a transfer order*** *under protest, for there may be cases where the mala fides prompting such an order is so self-evident … **the right to transfer has been conceded as a right inherent in the employer** … the only grounds on which the transfer in this case has been resisted namely that **the exercise of the power** was not bona fide and that it **should not in any event harm the employee**, have not, as already observed, been proved."*

(Emphasis added)

In the aforesaid Judgment, Justice Weeramantry (as he was then) firmly established that although the employer has an inherent right to transfer an employee, it should not be mala fide and that, it should not in any event harm the employee.

I have observed that, the employees transferred from the Niyagama Factory had been prohibited from entering the premises of the Niyagama Factory and the

Karandeniya Factory, by virtue of the injunction that was obtained by the Employer. The Employer should have sought the injunction only if there was scope for reasonable suspicion that, there existed anxiety amongst the Employees such that it could have resulted in them indulging in a conduct that ought to have been restrained. However, I find that, there is no evidence of violence or industrial unrest among the Employees, some of whom have been employed for more than 10 years.

It is evident from the 3rd letter of transfer that, the Employer has stated that the Employees would be treated as having vacated their posts, if they fail to report to duty by 01.06.2009. I am of the view that, the concept of vacation of post involves two aspects- one, is the mental element i.e. the intention of the Employee to desert and abandon the employment and the second, is the physical absence i.e. the failure of the employee to report at the designated workplace, which in this case is the Factory at Dehiwala or Karandeniya. To constitute the mental element, it must be established that the Employee who had refrained from reporting at the work place was actuated by an intention to voluntarily vacate his employment.

Moreover, the view that the physical absence and the mental element must co-exist for there to be a vacation of post in law, was affirmed in the case of ***Nelson De Silva v. Sri Lanka State Engineering Corporation (1996) 2SLR 342(CA case)*** wherein, it was observed-

> *"A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So, to the physical failure to perform a contractual duty there must be added the intention to abandon future performance. A reasonable explanation may negative the intention to abandon. A bonafide challenge to the validity of an order is a satisfactory explanation for not complying with it. By challenging the order the complainant was affirming the contract not abandoning it."*

I find that, in the present case, there is no evidence of the presence of the mental element i.e. the intention of the Employee to desert and abandon the employment. Therefore, I am of the view that, in the given circumstances, the failure to comply with the letters of transfer does not amount to a vacation of post.

Moreover, I find that, the Employer has failed to comply with the legal provisions relating to the transfer and these transfers were made stealthily and without considering the economic and social hardships faced by the employees. With the given facts, it can be observed that the Employer-Employee relationship was seriously breached by the Employer. Accordingly, I conclude that the act of the Employer is deemed to be a constructive termination of service.

In light of the above analysation, I am of the view that, the learned High Court Judge has not erred in his observations regarding the questions of law, marked as (b), (e) and (h).

Answering the question of law marked as (l), I am of the view that, the Appellant Company has failed to prove its losses as a result of "Global Financial Downturn" before the Labour Tribunal. The Appellant produced Audited Accounts of Paradigm Clothing [Private] Limited as a whole and that cannot be considered as the separate Accounts of the Niyagama Factory. It is stated and observed that, in page 45 of the order of the Learned President of the Labour Tribunal,

> ".. ඒ අනුව සත්‍ය වශයෙන්ම දෙහිවල, කරන්දෙනිය, නියගම යන කර්මාන්තශාලා තුනම පාඩු ලැබුවේද? ඉන් එකක් පාඩු ලැබුවේද? යන්න සොයා ගැනීමට සාක්ෂියක් විනිශ්චයාධිකාරියට ඉදිරිපත් වී නොමැත."

Answering the questions of law (m) and (q), I am of the view that, the order of the President of the Labour Tribunal is just and equitable and well considered. In page 69 of the order of the Learned President of the Labour Tribunal stated that,

> "මෙහිදී සේවකයන්ගේ සේවා කාලය , වැටුප් සලකා බැලීමේදී විවිධ සේවා කාලයන් එනම්, මාස 11 සිට වසර 9,10 වැනි සේවකයන් සිටින බව පෙනේ."

It is evident that, the Learned President of the Labour Tribunal considered the age, salary and period of service of the employees while preparing the breakdown of compensation, which was considered and affirmed by the Learned High Court Judge.

For the reasons already enumerated by me, I answer the questions of law set out in paragraph 13, marked as (b), (e), (h), (l), (m) and (q) in the negative. Accordingly, I agree with the order of the Learned High Court Judge and the findings of the Learned President of the Labour Tribunal. Further, in response to the question of law raised by Counsel for the Respondents on 02.07.2014, as reproduced previously, I am of the view that, the Appellant is not entitled to any relief in these proceedings and therefore, answer the same in the negative.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC, J.

I have had the benefit of reading the judgement of his Lordship Justice Thurairaja PC. I am in agreement with the reasoning and the conclusions reached by his Lordship in this matter, in particular that the termination of employment of the workers (the Respondents) concerned, amounts to constructive termination and that it was unjust.

Lately, however, this court has observed that there had been failures on the part of the learned Presidents of the Labour Tribunals to adhere to well-settled principles in awarding compensation to Applicants, who invoke the jurisdiction of the Labour Tribunals.

It is in this context that leave was granted by this court on the following question of law:

> "*Has the Learned High Court Judge erred in law in* ***failing to consider the established authorities of the superior courts*** *as regards the grant of compensation, and, contrary to law awarded compensation 'mechanically' to all employees* ***regardless of age, employability, skill*** *etc. of the Respondents and* ***affordability of the Petitioner****?* " (Subparagraph "m" of paragraph 13 of the Petition, emphasis added).

In this backdrop, I wish to state my own observations on the aspect of awarding compensation by the Labour Tribunals.

The provisions of the Industrial Disputes Act, No.43 of 1950 equip the Labour Tribunals with broad powers for awarding relief in general, and compensation in particular, for unjust terminations.

Under powers vested with the Labour Tribunals to grant relief in general, **Section 31B(4)** of the Industrial Disputes Act provides that a Labour Tribunal may grant *"relief or redress"* to a workman **notwithstanding anything to the contrary in any contract of service** between him and his employer. Tambiah J. in ***Walker Sons & Co Ltd v. Fry*** 68 NLR 73 at page 113 stated that "*Relief may be given to a workman* ***although the employer has adhered to the terms of the contract and has fulfilled his legal obligation***" (emphasis added).

Further expanding the powers of a Labour Tribunal to grant relief, **Section 31C(1)** of the Industrial Disputes Act provides that when an application is preferred to a Labour Tribunal under the Act, a duty is imposed upon it to **make all such inquiries into that application and hear all such evidence**, and make a ***"just and equitable order".***

In the landmark case, ***Caledonian (Ceylon) Tea and Rubber and Estates Ltd v. Hillman*** [(1977) 79 (1) NLR 421] at page 429, Sharvananda J.(as he then was) has

encapsulated the gist of both these provisions as follows: *"[T]he question …is not whether the employment has been terminated in terms of the contract between the parties or according to law, but* ***whether the employee has … a claim, in justice and equity, to compensation or other benefit for the loss of career resulting from the termination*** *(emphasis added)."* In the above case, Sharvananda J. further stated that a Labour Tribunal is entitled to grant compensation in just and equitable terms, even where the termination is consequent to the exercise by the employer of his fundamental right to close down the business.

Therefore, it can be established at the outset that despite the claim by the Appellant Company that the Letters of Appointment (which are in effect the contracts of employment) of the workmen, contained their agreement to accept and obey any transfer order, the Labour Tribunal can order relief disregarding such contractual terms, if in its view, it is just and equitable to do so.

As regards the power of a Labour Tribunal to grant compensation in particular, **Section 33(1)(d)** of the Industrial Disputes Act provides that any award of the Labour Tribunal may contain decisions *"as to the payment by any employer of compensation to any workman, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid."*

Further, **Sections 33(5)** and **33(6)** respectively provide for a Labour Tribunal to make an order for compensation in lieu of reinstatement **if the workman so requests**, and as an alternative to reinstatement where the **Tribunal thinks fit so to do**.

The impugned Labour Tribunal order, refers (at page 49) to the letter dated 24.04.2009 issued by the Labour Commissioner (Labour Relations), marked 'A14', which contains the terms to which the two parties agreed consequent to a mediation process, including *inter alia* the agreement, that **those who do not wish to resume work upon the transfers will be paid compensation**. It is also mentioned in the order, that this fact was not contested by the Respondent Company (the 'Appellant' in the present case). The mediation process pursuant to which the parties agreed to pay and receive

compensation, did not specify the criteria for calculating the quantum, nor does the Industrial Disputes Act. However, jurisprudence in this regard, has introduced **several criteria** which should be taken into consideration in the assessment of the quantum of compensation.

I am firmly of the view that there is a duty cast on the learned Presidents of the Labour Tribunals to give due regard to the criteria when awarding just and equitable compensation.

In the case of ***The Ceylon Transport Board v. Wijeratne*** (1975) 77 NLR 481, this Court analysed the concept of compensation in detail and listed down several aspects that ought to be factored in, when determining the quantum of compensation. These include: *nature of the employer's business and his capacity to pay, the employee's age, the* ***nature of his employment, length of service,*** *seniority,* ***present salary,*** *future prospects, opportunities for obtaining similar alternative employment, his past conduct, manner of the dismissal, effect of the dismissal on future pension rights, any sums paid or actually earned or which should also have been earned since the dismissal took place* (emphasis added).

Quite apparently, 'quantum of compensation' involves a whole gamut of issues that range from the solvency of the employer, moral entitlement of the employee, to the immediate aftermath of termination. The reason for injecting such an expansive formula into this equation is to ensure that a Court in awarding compensation would not haphazardly disturb the business equilibrium. The field of labour law has striven at every step to offset the uneven bargaining power between the parties equitably; however 'equity' does not invite selective application of law, nor does it promote the interests of one party to the complete exclusion of the other.

The learned President of the Labour Tribunal has, (as stated on pages 69 and 71 of the LT order), incorporated **only** the distinctions among the employees in *length of service, terminal/present salary* and the *nature of employment (designation),* for the purpose of constructing the formula for calculating the amount of compensation

payable to each employee. The factors; O*pportunities for obtaining alternative employment, the nature of the employer's business, employer's ability to pay, employees' age* and the *manner of dismissal,* although **mentioned** in the order, have been conveniently overlooked by the learned President of the Labour Tribunal in determining the quantum of compensation.

I cite with approval the observations made in the case of ***Jayasuriya v. Sri Lanka State Plantations Corporation*** (1995) 2 Sri LR 379 at page 413, where it was held that "*it is not sufficient to recite a sort of litany of factors to which Presidents of Labour Tribunals who are making computations are supposed to respond… and be merely mentioned and left, as it were, in the air*". In the present case too, dismayingly, the learned President of the Labour Tribunal has limited herself to the mere itemization of the above factors, and failed to consider at all, several other key criteria in computing compensation.

The Appellant is a business establishment engaged in the manufacture of clothing for export. Necessarily, the success of the business is contingent upon market forces, to be precise the 'demand' for clothing in the overseas markets. The learned counsel for the Appellant in the course of his submissions contended that due to the global economic downturn in 2006, the orders placed with the Appellant for finished garments dwindled and as a result, manufacturing of garments had to be drastically reduced. The fact that the Appellant suffered losses during 2006-2008, albeit for different reasons, had been admitted to a certain extent by the Respondents, as per the LT order (page 47). It was in this backdrop, the learned counsel submitted, that the management of the Appellant company decided to close down the factory at Niyagama and to transfer the workforce of the said factory to their other two factories at Dehiwela and Karandeniya, with an offer of an additional allowance amounting to Rs. 2000 to each employee, in order to offset the additional expenses they may have to incur in reporting to work at far off places from their homes. Although many employees did take the offer, the Respondents refused to do so, and the Appellant had treated the

Respondent as having vacated their employment. These are factors, the learned President ought to have considered in arriving at the quantum of compensation to be ordered.

In this regard the case of ***Jayasuriya*** (supra) is of significance. The employee's duty to mitigate his/her loss was supported in that case, (at pages 411 and 412) where it was held that an **employee must mitigate his/her loss** by taking an offer of employment reasonably offered to him/her, acting as if he/she had no hope of seeking compensation from the previous employer. A similar practice of the U.K. Industrial Courts is reflected in ***Scottish and Newcastle Breweries plc v. Halliday*** [1986] ICR 577, where it was stated that the applicant employee is under a duty to mitigate his/her loss so far as possible, in the sense that he/she should take reasonable steps to obtain other employment. Whether in the present application the employees had breached this duty of mitigating their losses, is not known, due to the absence of evidence regarding employees' acceptance or refusal of alternative employment.

Similarly, the Labour Tribunal has overlooked Justice Vythialingam's criterion laid down in ***Wijeratne*** (supra), i.e. compensating the **loss of employment** and **legitimate expectations for the future in that employment**. In the present case, the workmen who unsuspectingly left the factory for the usual Sinhala New Year vacations had no knowledge of any urgent need to abruptly close down the factory wherein they were employed for many years, and entertained legitimate expectations of continuing to work there. The impact of these unfavourable circumstances on the employees should have been taken into account by the learned President of Labour Tribunal in computing the sum of compensation.

This Court held in the case of ***Jayasuriya*** (supra) that it is preferable to have compensation computed based on **specific headings and items of loss**. These headings are namely; **1) approximate computation of immediate loss** (loss of wages from the date of dismissal to the final judgment)**, 2) prospective future loss** and **3) loss of retirement benefits**. These factors were considered in that case as the *"data*

which is necessary to determine the orbit of every Tribunal, so as to prevent it from straying off its course" [page 409].

However, in the present impugned order by the Labour Tribunal, the LT had strayed away, by failing to accurately assess the immediate loss/actual financial loss suffered by the employees, which was claimed by the learned President as the sole basis for granting compensation [page 71 of the order]. In calculating financial loss, firstly, the **loss of earnings** has to be calculated from the date of dismissal to the final determination of the case. From this amount, the Tribunal should deduct any **wages or benefits paid** by the employer after termination, as well as **remuneration from fresh employment.**

It has been held that if the employee had obtained equally beneficial or financially better alternative employment, he should receive 'no compensation' at all, for he suffers no loss; if it's a less remunerative job, compensation should be 'reduced by such amount earned'. The whole basis of such quantification of immediate loss, was the principle that the '*employee is entitled to indemnity but not profit'*. [***Jayasuriya*** at page 411].

Similarly, in ***Liyanage v. Weeraman*** (SC 235/72 – SC Minutes of 31.01.1974), it was held that **the amount earned by a workman after his dismissal (through alternative employment)** is deductible from the compensation otherwise awardable to him.

Even though in ***Jayasuriya*** (supra) and ***Nidahas Karmika Saha Velenda Sevaka Vurthiya Samithiya v. Continental Motors Ltd***. ID 32 CGG 11,224 of 27.12.57 at para 5, it was noted that if an employee obtains equally beneficial or financially better alternative employment after dismissal, he should receive 'no compensation', as no loss is caused to the employee, the Industrial Courts of the U.K. have not gone to that extent. It was held in ***Fentiman v. Fluid Engineering Products Ltd*** [1991] ICR 570 that if an employee obtains new employment at a higher rate of pay, then the Industrial Tribunal

should calculate the compensatory award on the basis of the *loss suffered from the date of dismissal up to the date when the new employment commenced*.

In the present case, the Labour Tribunal has resorted to a mechanical formula of **3 months' salary for each year of service** in calculating compensation for all 224 Respondents. The employees' respective losses of earnings from the date of dismissal to the date of the LT order had not been calculated, nor has remuneration obtained from fresh employment been deducted from that sum, as no evidence had been adduced by the Applicants regarding the securing of alternative employment. Therefore, no mitigating effect on the employees' loss of earnings was considered, nor was it considered whether any unemployed worker remained so through a fault of his/her own.

As regards the absence of evidence on a key factor in calculating the immediate loss, such as the securing of alternative employment, in ***Jayasuriya*** (above), it was determined that the **burden is on the employee to adduce sufficient evidence to enable a Labour Tribunal to decide the loss**. But such failure to provide evidence should be considered against the employee, and not as a ground to award an enhanced amount of compensation, by disregarding any remuneration he/she earned from alternative employment. As the Employment Appeal Tribunal observed in ***Adda International Ltd. V Curcia*** [1976] 3 All ER 620, 624 as cited in ***Jayasuriya*** on page 415, "*The tribunal must have something to bite on and if an applicant produces nothing for it to bite on, he will have only himself to blame if he gets no compensation*". Therefore, the failure on the part of the employees to adduce such evidence, should have been factored in to prevent possible overcompensation or under-compensation.

In terms of Section **31C(1)** of the IDA, it is the duty of the Tribunal to make **all such inquiries** into the application and **hear all such evidence as it may deem necessary**, untrammelled by the rules of evidence and after adopting such procedure, to make such order as may appear to the Tribunal to be just and equitable. [***Wijeratne***, page 488]

Substantiating the above view, Nigel Hatch in **"Commentary on the Industrial Disputes Act of Sri Lanka" (1989)** at page 271, reiterates the procedure provided in Section 31C(1) of the IDA, and at page 272 states that *"the requirement to record… tendered evidence is no bar to the adjudicator* ***calling in addition any "necessary" evidence.****"* [emphasis added]

However, in the impugned Labour Tribunal order, it is deemed that the learned President had failed to make "all such inquiries" and call all "necessary" evidence, in order to avoid placing the employees in a more favourable position than they ought to be in. In the order, a question lingers as to whether the Labour Tribunal has not correctly calculated the actual financial loss and has not called for evidence of the reception or otherwise of alternative employment by the employees, and of the remuneration received by them after securing such employment.

The additional criteria of considering the **employee's advanced age,** and the type of work he was engaged in, which would render it improbable for him to obtain employment in the same capacity, was elaborated on in ***Raymond v Ponnusamy*** (SC 57/69 – SC Minutes of 10.12.1969). Accordingly, the **monetary value of a workman's balance work-span** has to be taken into account, which the learned President of the LT had apparently unheeded in the present case, but had only cursorily mentioned 'age' as a relevant consideration at Page 69 of the Order.

As the foregoing discussion of relevant criteria points out, any award of compensation must consider each employee separately and the tests must be applied to each employee, when deciding the loss that each has suffered. In this respect, there must be separate evidence relating to each Respondent. In the absence of such evidence, the Tribunal cannot award compensation as it cannot assume or hypothesize the loss that each has made.

In ***Jayasuriya*** (supra) at page 407, Dr. Amerasinghe J. stated that, *"while I respectfully agree that the amount of compensation should not be* ***"mechanically" calculated*** *and that Labour Tribunals have a* ***wide discretion, there is… no power***

conferred by the Legislature on Labour Tribunals to act without unhampered restraint" (emphasis added)**.** Although restraint must be accordingly exercised, it must be reiterated that in the instant case, the formula for compensation constructed by the learned President of the Labour Tribunal can be deemed a strictly mechanical formula through which **3 months' salary for each year of service** as compensation has been awarded to all 224 Respondents. Any consideration of the criteria **subjective** to each employee, discussed above in detail, is absent. Hence, compensation awarded in the present case- which was calculated mainly based on the past services of the employees- as pointed out by Alles, J. in **Uplands Tea Estates Ltd. Vs. The Ceylon Workers' Congress** (72 N. L. R. 68), was *more akin to the payment of gratuity than compensation.*

In calculating the 'actual financial loss' suffered by each employee for the purpose of indemnifying it, merely taking into consideration the three criteria; the *length of service, present salary* and the *designation*, may cause unfairness and inequity in the absence of consideration of the other criteria enumerated above.

In the case of ***Hayleys Ltd. v. de Silva*** (64 NLR 130 at page 131) Weerasooriya J. opined that, a similar duty is cast on the Industrial Court, as on the Labour Tribunal to *"take such decision or make such award as may appear to the Court just and equitable"* (which) *by necessary implication requires the Court to* ***consider and decide every material question involved in a dispute…*** *A failure on the part of the Industrial Court to consider and decide a question which the statute (IDA) requires the Court to decide* ***would be an error of law****"* (emphasis added). The failure of the learned President of the Labour Tribunal to consider the above criteria, which are subjective to each employee, in constructing the compensation formula, is therefore an omission of material concerns, leading to an error of law.

The High Court judgment, however, had simply affirmed the sums of compensation ordered by the learned President of the Labour Tribunal.

In these circumstances, it is clear that the Labour Tribunal has overlooked several of the established criteria, material to the computation of compensation, which could

either reduce and/or increase the sum awardable as compensation. As pointed out in ***Commissioner of Inland Revenue v. Fraser*** *(1*) (1940-1942) 24 TC 498 at 501, *"Court has always jurisdiction to intervene if it appears... that the Tribunal has made a finding for which there is no evidence"*.

It must also be borne in mind that as commendably observed in ***Jayasuriya*** (supra) at page 407, a Labour Tribunal in calculating the quantum of compensation is expected to, *"after a weighing together of the evidence and probabilities in the case…form an opinion of the nature and extent of the loss, arriving in the end at* ***an amount that a sensible person would not regard as mean or extravagant, but would rather consider to be just and equitable*** *in all the circumstances of the case"* (emphasis added).

Considering the above, I answer the question of law raised in paragraph "m" referred to above, in the affirmative. As I have stated above, the employees would legitimately be entitled to compensation and the only issue that is to be decided is the quantum of compensation applying the criteria referred to herein before.

Having answered the question in the affirmative, I make haste to observe that this litigation has run its course since 2012. The long delay attached to this case, taken together with the admission by the employer, that the Respondents are entitled to compensation, warrants that there be an end to the litigation with an outcome that serves justice to both parties. It is possible that the Respondents may be entitled to more compensation than what was awarded to them by a mechanical formula. It is also possible that the Appellant may have been able to contest that amount, had they adduced substantial evidence with regard to their capacity to pay. The absence of such evidence in the judgment is as much a failure by the respective parties as it is by the Labour Tribunal. However, taking into account the concerns of the Respondents and the fact that the Appellant business had several branches which speaks of the availability of the resources, I am of the view that it is reasonable, in the unique circumstances of this case, that the Appellant company pay Rs. 26,668,995/- to the Respondents minus the

accrued interest. Accordingly, I make order directing the learned President of the Labour Tribunal to have the monies deposited by the Appellant be paid to the Respondents (employees), and the interest accrued on the sum of Rs.26,668,995/- be paid to the Appellant.

Appeal dismissed subject to the variation referred to.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I have had the privilege of reading the judgment of His Lordship, Justice S. Thurairaja, PC and His Lordship, Justice Buwaneka Aluwihare, PC. I am in agreement with the reasoning and conclusion reached by His Lordship, Justice S. Thurairaja, PC in relation to the termination of the employment of the employees (Respondents). Further, I am in agreement with His Lordship, Justice Buwaneka Aluwihare, PC with the reasoning and conclusion on the matter of compensation.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal

Jayasooriya Kuranage Romold Dickson
Sumithra Perera.
New Road Wennappuwa.

Plaintiff

SC Appeal 110/2018
SC/HCCA/LA 481/2017
NWP/HCCA/KUR/198/2011(F)
DC Marawila Case No. 1727/S

Vs-

1. Jayasooriya Kuranage Padma Jenat Jasintha Perera.
   Kolinjadiya, Wennappuwa.

2. Jayasooriya Kuranage Awanthi Nisansala Madushani Perera

3. Thalahitigamage Dona Rupika Priyadarshani.
   Both of Sadasarana Mawatha,
   Dummalakotuwa

Defendants

AND

Jayasooriya Kuranage Awanthi
Nisansala Madushani Perera

2nd Defendant-Appellant

Vs

Jayasooriya Kuranage Romold Dickson
Sumithra Perera.

New Road Wennappuwa.

Plaintiff-Respondent

1. Jayasooriya Kuranage Padma Jenat
Jasintha Perera.
Kolinjadiya, Wennappuwa.

3. Thalahitigamage Dona Rupika
Priyadarshani.
Sadasarana Mawatha,
Dummalakotuwa, Dankotuwa

1st and 3rd Defendant-Respondents

AND NOW BETWEEN

Jayasooriya Kuranage Awanthi
Nisansala Madushani Perera

2nd Defendant-Appellant-
Petitioner-Appellant

Vs

Jayasooriya Kuranage Romold Dickson
Sumithra Perera.

New Road Wennappuwa.

Plaintiff-Respondent-

Respondent-Respondent

1. Jayasooriya Kuranage Padma Jenat Jasintha Perera.
Kolinjadiya, Wennappuwa.

3. Thalahitigamage Dona Rupika Priyadarshani.
Sadasarana Mawatha,
Dummalakotuwa, Dankotuwa

1st and 3rd Defendant-Respondents-Respondents- Respondents

Before: Sisira J. de Abrew, J
L.T.B.Dehideniya J &
S. Thurairaja PC, J

Counsel: M.C.Jayaratne PC with T.C.Weerasuriya A.M.Nilanthi Abeyratne, H.A.Nishari and H. Hettiarachchi for the 2nd Defendant-Appellant-Petitioner-Appellant.
Hilary Livera with Gange Livera for the Plaintiff-Respondent-Respondent-Respondent

Argued on : 1.3.2019

Written submission
tendered on : 21.2.2019 by the 2nd Defendant-Appellant-Petitioner-Appellant

Decided on: 3.4.2019

Sisira J. de Abrew, J

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the Defendants praying, inter alia, that Deed No.11489 dated 23.8.1994 attested by A.A.Madurapperuma Notary Public be declared null and void on the basis that the 2nd Defendant who is the daughter of the Plaintiff-Respondent failed and neglected to look after him. The 1st Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the1st Defendant-Respondent) prayed in her answer that that the 2nd Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 2nd Defendant-Appellant) was holding the property in dispute on a constructive trust on behalf of the Plaintiff-Respondent. The 1st Defendant-Respondent is the sister of the Plaintiff-Respondent and the 2nd Defendant-Appellant is the daughter of the Plaintiff-Respondent. The 2nd Defendant-Appellant moved for a dismissal of the action of the Plaintiff-Respondent.

The learned District Judge by her judgment dated 27.12.2011, held that the 2nd Defendant-Appellant holds the property in dispute on behalf of the Plaintiff-Respondent on a constructive trust which is the relief sought by the 1st Defendant-Respondent. The Plaintiff-Respondent did not appeal against the said judgment. Being aggrieved by the said judgment of the learned District Judge, the 2nd Defendant-Appellant appealed to the Civil Appellate High Court and the said court by its judgment dated 28.9.2017 affirming the judgment of the learned District Judge dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the 2nd Defendant-Appellant has appealed to this court. This court by its order dated 25.7.2018

granted leave to appeal on questions of law stated in paragraphs 9(b),(c) and (e) of the petition of appeal dated 8.11.2017 which are set out below.

1. Did their Lordships of the Civil Appellate High Court err in law by ignoring the principle enunciated in the case of Muthalibu Vs Hameed 52 NLR 97 whereas the Petitioner and the Plaintiff-Respondent-Respondent has a 'Loco Parentis' connection as the Plaintiff-Respondent-Respondent being the father of the Petitioner?

2. Did their Lordships of the Civil Appellate High Court err in law by not accepting the fact that the attendant circumstances establishing the case were verily proved that the said deed of transfer bearing No.11489 (P11) dated 23.08.1994 attested by A.A Madurapperuma, Notary Public, executed by the 1st Respondent-Respondent under the direction of the Plaintiff-Respondent-Respondent (Petitioner's father) was solely for the benefit, welfare and wellbeing of the Petitioner who was a minor, as at the time of said transfer.

3. Did their Lordships of the Civil Appellate High Court err in law by granting a relief as prayed for in the prayer (a) to the answer dated 22.11.2007 of the 1st Defendant-Respondent-Respondent, but in fact at the trial or thereafter she did not dare to raise an issue on her behalf and the learned District Judge of Marawila while dismissing the action of the Plaintiff-Respondent-Respondent granted a relief to a party who has not raised any issue in the trial?

The most important question that must be decided in this case is whether the2nd Defendant-Appellant holds the property in dispute on behalf of the

Plaintiff-Respondent on a constructive. I now advert to this question. The Plaintiff-Respondent, who is the owner of the property in dispute, by Deed No.339 (P7) attested by M.J.M.D. Jayasinghe dated 1.2.1987 transferred the property in dispute to his sister, the1st Defendant-Respondent. Later on 23.8.1994, the 1st Defendant-Respondent on the instructions of the Plaintiff-Respondent, by Deed No.11489 marked P11 attested by A.A Madurapperuma, Notary Public transferred the property in dispute to the 2nd Defendant-Appellant. It is undisputed that the possession of the property in dispute was not transferred to the 1st Defendant-Respondent or the 2nd Defendant-Appellant after the execution of Deeds Nos. 339(P7) and 11489(P11). According to the evidence of the Plaintiff-Respondent, he is in possession of the property in question. The 1st Defendant-Respondent in her evidence stated that the property in question was only nominally transferred to her and that she did not purchase the property although the consideration mentioned in Deed No.339 was Rs.30,000/- . According to her evidence, she did not pay the consideration mentioned in the deed. The Notary Public who attested the Deed No.339 too in his attestation states that the consideration did not pass in his presence. The 1st Defendant-Respondent in her evidence at page 94 further says that the property in question was transferred to her by the Plaintiff-Respondent by Deed No.339 for the purpose of obtaining a loan. From the above evidence, it is clear that the Plaintiff-Respondent has only nominally transferred the property in dispute to the 1st Defendant-Respondent and that he has not transferred the beneficial interest of the property in dispute to the 1st Defendant-Respondent.

Learned counsel for the 2nd Defendant-Appellant cited the judgment in the case of Muthalibu Vs Hameed 52 NLR 97 wherein Dias J (Swan J agreeing) held as follows:

> *It is a well settled principle of Equity, which is recognized by section 2 of the Trusts Ordinance, that where a father or person in 'loco parentis' purchases property in the name of his child or wife there is a strong initial presumption that such transfer was intended for the advancement of such child or wife, and the provisions of section 84 of the Trusts Ordinance do not apply to such transaction.*

It is seen in the said case (Muthalibu Vs Hameed 52 NLR 97) the father bought the property in the name of his son. Therefore the facts of the above case are different from the facts of the present case. Thus the principle enunciated in the Muthalibu Vs Hameed (supra) has no application to the present case. In order to answer the question whether the 2nd Defendant-Appellant holds the property in dispute on behalf of the Plaintiff-Respondent on a constructive trust, it is necessary to consider section 83 of the Trust Ordinance which reads as follows.

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

In Piyasena Vs Don Vansue[1997] 2SLR 311 Wigneswaran J held as follows.

"A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply."

The Plaintiff-Respondent in his evidence says that he did not transfer the beneficial interest of the property in dispute to the 1st Defendant-Respondent (sister of the Plaintiff-Respondent). As I pointed out earlier, the Plaintiff-Respondent has only nominally transferred the property in dispute to the 1st Defendant-Respondent. The 1st Defendant-Respondent too in his evidence, at page 92, admits that she did not purchase the property in dispute. Therefore from the evidence of the 1st Defendant-Respondent, it can be safely concluded that she has not become the owner of the property in dispute. At the time the Deed No.339 marked P7 was executed no consideration was paid by the 1st Defendant-Respondent to the Plaintiff-Respondent. The Plaintiff-Respondent continued to be in possession of the property in dispute even after the Deed No.339 marked P7 and the Deed No.11489 marked P11 were executed. This position was not disputed by the 2nd Defendant-Appellant. At this stage it is relevant to consider the judgment in the case of Ehiya Lebbe Vs A. Majeed 48 NLR 357 wherein the Dias J observed the following facts.

"Plaintiff, on P 1 of 1943, conveyed a certain land to the defendant. On the same day by P 2 non-notarial document, the defendant agreed to re-convey the land to the plaintiff on payment of the sum of Rs. 250 within two years. The defendant refused to re-transfer on tender of the money within the time. The

Commissioner found on the facts that when plaintiff executed P1,it was never in the contemplation of either party that the defendant was to hold the property as absolute owner but only till plaintiff's debt to the defendant of Rs. 250 was repaid." Dias J held as follows:

"In the circumstances the defendant was a trustee for the plaintiff in terms of section 83 of the Trusts Ordinance.

To shut out the non-notarial document P 2 would be to enable the defendant to effectuate a fraud and that section 5 (3) of the Trusts Ordinance would apply;"

Dias J at page 359 further held as follows:

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

In Fernando Vs Thamel 47 NLR 297 Howaed CJ observed the following facts.

"By notarial deed the plaintiffs conveyed a land to the defendant. On the same day the defendant gave the plaintiffs an informal

document by which he undertook to give a retransfer of the land within a period of three years on payment of a certain sum. There were circumstances tending to show that the transfer of the land was to be in trust and establishing fraud on the part of the defendant. It was proved that no money was paid by the defendant on the day of transfer, that he merely undertook to free the property from a mortgage which it was subject to, that the plaintiffs were reluctant to grant the transfer and only did so on an agreement to retransfer and that there was gross disparity between the price and the value of the property."

Howard CJ held as follows: *"The informal document was admissible to prove that the defendant held the property in trust for the plaintiffs."*

G.P.S. de Silva CJ in the case of Premawathi vs. Gnanawathi [1994] 2 SLR 171 held as follows:-

"An undertaking to reconvey the property sold was by way of a non-notarial document which is of no force or avail in law under section 2 of the Prevention of Frauds Ordinance. However the attendant circumstances must be looked into as the plaintiff had been willing to transfer the property on receipt of Rs. 6000/- within six months but could not do so despite the tender of Rs. 6000/- within the six months as she was in hospital, and the possession of the land had remained with the 1st defendant and the land itself was worth Rs. 15,000/-, the attendant circumstances

point to a constructive trust within the meaning of section 83 of the Trusts Ordinance. The "attendant circumstances" show that the 1st defendant did not intend to dispose of the beneficial interest."

In Dayawathi and Others vs. Gunaskera and Another [1991] 1SLR 115 the facts set out in the headnote are as follows:-

The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted, in his action to recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer."

This Court (His lordship Justice Dheeraratne) in the above case held as follows:

"(i) The Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial

interest in the property.

(ii) Extrinsic evidence to prove attendant circumstances can properly be received in evidence to prove a resulting trust."

In order to consider whether a transaction mentioned in a deed attested by a Notary Public is a genuine sale transaction or whether the transferee holds the property in question on a constructive trust on behalf of the transferor, the following matters would be relevant.

1. The transferor continued to remain in possession after the execution of the deed by which the transferee claims ownership of the property.
2. If the transferor paid the whole cost of the conveyance.
3. If the consideration expressed on the deed is utterly inadequate when compared to the actual value of the property at the time of the conveyance.
4. On the day of the conveyance, the transferee, by a non-notarial document, agreed to re-convey the property to the transferor on fulfillment of certain conditions stated in the said non-notarial document.
5. If the transferor did not intend to pass the beneficial interest in the property to the transferee.

If the court, on evidence, finds that one or more of the aforementioned matters have been established, court is justified in holding that transferee holds the property on a constructive trust on behalf of the transferor.

In the present case, the Deed No 339 marked P7 was executed by the Plaintiff-Respondent in the name of the 1st Defendant-Respondent and after the execution of the said deed the Plaintiff-Respondent continued to be in possession of the property in dispute. The consideration of the said deed did not pass.

When I consider all the aforementioned matters and the legal literature, I hold that the 1st Defendant-Respondent has not become the owner of the property in dispute by Deed No 339 (P7); that she was only a trustee of the property in dispute; and that the 2nd Defendant-Appellant has not become the owner of the property in dispute. It has to be noted here that the 1st Defendant-Respondent being the trustee of the property in dispute could not have transferred the property in dispute to the 2nd Defendant-Appellant and as such the 2nd Defendant-Appellant has not become the owner of the property in dispute on the strength of Deed No11489 marked P11.

When I consider all the aforementioned matters, I hold that Section 83 of the Trusts Ordinance applies to the facts of this case and that the 2nd Defendant-Appellant holds the property in dispute on behalf of the Plaintiff-Respondent on a constructive trust. For the above reasons, I answer the 1st and the 2nd questions of law above in the negative. Learned counsel for the 2nd Defendant-Appellant at the hearing before us submitted that he would not support the 3rd questions of law above.

For the aforementioned reasons, I affirm the judgment of the Civil Appellate High Court dated 28.9.2017 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.

S. Thurairaja J

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.

LANKA ORIX LEASING COMPANY LIMITED.
Presently of No. 100/1, Sri Jayawardenapura Mawatha, Rajagiriya.

PETITIONER

SC Appeal No. 113/2014
SC Appeal No: SC (HC) LA 67/2013
Case No. HC/ARB/1263/02

VS.

WEERATUNGE ARACHCHIGE PIYADASA
Carrying on business as Sole Proprietor under the name, style, and firm "Weeratunge Textile", of No. 12, Super Market, Hakmana.

RESPONDENT (DECEASED)

ELLEGODA GAMAGE KAMALA RANI WEERATUNGE
No. 12, Main Street, Hakmana.

SUBSTITUTED RESPONDENT

AND NOW BETWEEN

LANKA ORIX LEASING COMPANY LIMITED.
Presently of No. 100/1, Sri Jayawardenapura Mawatha, Rajagiriya.

PETITIONER/APPELLANT

VS.

WEERATUNGE ARACHCHIGE PIYADASA
Carrying on business as Sole Proprietor under the name, style, and firm "Weeratunge Textile", of No. 12, Super Market, Hakmana.

RESPONDENT-RESPONDENT (DECEASED)

ELLEGODA GAMAGE KAMALA RANI WEERATUNGE
No. 12, Main Street, Hakmana.

SUBSTITUTED RESPONDENT-RESPONDENT

BEFORE:	Nalin Perera, CJ. Priyantha Jayawardena, PC, J. Prasanna Jayawardena, PC, J.
COUNSEL:	Shanaka de Livera for the Petitioner-Appellant. Priyantha Alagiyawanna with Gevindu Senevirathne for the Substituted Respondent-Respondent.
ARGUED ON:	12th November 2018
WRITTEN SUBMISSIONS FILED:	By the Appellant, on 03rd June 2016 and 11th December 2018. By the Substituted Respondent-Respondent on 20th May 2015 and 11th December 2018.
DECIDED ON:	05th April 2019

Prasanna Jayawardena, PC, J,

This appeal arises out of an application made to the High Court of Colombo [exercising Civil Jurisdiction] under section 31 (1) of the Arbitration Act No. 11 of 1995 ["the Act"] to enforce an arbitral award.

The petitioner-appellant ["appellant"] is a Company which, *inter alia*, carries on Finance Leasing Business. On 26th February 1998, the appellant entered into a lease agreement with the respondent-respondent ["the respondent"]. By that lease agreement, the appellant, who was the owner of a motor vehicle, leased the motor vehicle to the respondent for a period of thirty months subject to the respondent's agreement and undertaking to pay 30 monthly lease rentals of Rs.13,134/-[plus BTT] to the appellant. The respondent also agreed and undertook to pay interest on the amount of any delayed lease rentals to the appellant. The respondent paid only a few monthly lease rentals. Thereafter, the respondent defaulted in paying the monthly lease rentals due to the appellant under the lease agreement. Therefore, the appellant terminated the lease agreement and demanded payment of the monies due thereunder. The lease agreement specified that, upon termination of the lease agreement due to non-payment of lease rentals, the respondent was bound and obliged to return the motor vehicle to the appellant [who was its owner] or pay the value of the motor vehicle to the appellant. Therefore, upon termination of the lease agreement, the appellant also demanded that the respondent return the motor vehicle to the appellant or pay its value to the appellant. The respondent did neither.

The lease agreement provided that a dispute arising out of the lease agreement should be resolved by arbitration. By a reference to arbitration dated 22nd September 2000, the appellant referred its claim against the respondent to arbitration. The claim was for the sum of Rs.618,107/- together with interest on *"the balance rentals receivable of Rs. three hundred and fifty-three thousand and one hundred and ninety seven rupees".* [Rs.353,197/-]. These were the monies due as at 20th September 2000 under the lease agreement. The appellant also claimed the return of the appellant's motor vehicle or, in the alternative, the payment of its value, being a sum of Rs.300,000/-.

In its statement of claim filed in the course of arbitration proceedings before the Arbitrator, the appellant stated that the sum due, as at 24th January 2001, was Rs. 667,487/- with interest on the aforesaid sum of Rs. 353, 197/- from 24th January 2001 until payment in full. The increase in the total sum due from Rs. 618,107/- to Rs. 667,487/-, is, obviously, due to the accrual of interest on the sum of Rs. 353,197/- during the period of a little more than four months from 20th September 2000 to 24th January 2001.

On 04th July 2001, the respondent appeared at the hearing of the arbitration. The proceedings of that day show that the Arbitrator had taken pains to ensure that the respondent, who had not retained an Attorney-at-Law to represent him, had a full understanding of the claim made against him by the appellant. The respondent has acknowledged that he received the statement of claim and was well aware of the monies claimed from him.

Thereafter, the appellant and the respondent have arrived at a settlement of the dispute in terms of which the respondent agreed that he is liable to pay the appellant the sum of Rs. 667,487/- together with interest on a sum of Rs. 353, 197/- from January 2001, until payment in full, and also that he was liable to pay the claimant the value of the vehicle leased to him, which was Rs. 300,000/-. It follows that upon payment of that sum of Rs. 300,000/-, the respondent was entitled to retain possession of the vehicle.

The Arbitrator has read and explained the aforesaid terms of settlement to the parties and, thereafter, entered an arbitral award on the lines of these terms of settlement.

Since the respondent did not comply with his obligations under the arbitral award, the appellant made an application dated 20th June 2002 to the High Court [exercising Civil Jurisdiction] for enforcement of the arbitral award. The application was made under section 31 of the Act.

The respondent filed a statement of objections praying that the appellant's application be refused on the following grounds: he claimed that the arbitral award was not in conformity with section 14 (a) and section 25 of the Act, that the arbitral award was not served on him; that he did not agree to the aforesaid terms of settlement; and that he was tricked into signing the settlement and subjected to injustice.

The inquiry into the appellant's application was decided upon written submissions filed by the parties.

It should be mentioned that the respondent did not make a separate application under section 32 of the Act seeking to set aside the arbitral award.

In his Order dated 16th July 2013, the learned High Court Judge rejected the objections raised by the respondent, holding that the respondent was not under any incapacity; that the respondent had received due notice; and that the respondent was well aware of the terms of settlement which were agreed on between the parties. While those factual findings of the learned High Court Judge are well supported by the documents before the court, the learned Judge has erroneously referred to section 34 (1) (a) (i) and

section 34 (1) (a) (ii) of the Act. These provisions of the Act are part of section 34 of the Act which deals with the circumstances in which the recognition or enforcement of a *foreign* arbitral award may be refused. Thus, these sections of the Act to which the learned Judge referred are irrelevant to the application before the High Court which deals with an arbitral award made in Sri Lanka. However, the reference to the wrong provisions of the Act does not take away from the fact that the learned Judge was correct when he held that the objections raised by the respondent had no substance.

Thereafter, the learned High Court Judge states in his Order that he wishes to consider whether the arbitral award was in conflict with the public policy of Sri Lanka as contemplated in section 34 (1) (b) (ii) of the Act. Here too, the High Court's reference to section 34 (1) (b) (ii) of the Act is misplaced and irrelevant because that provision of the Act deals with the grounds on which the High Court can refuse to enforce a *foreign* arbitral award and states that the High Court is entitled to refuse to enforce a foreign arbitral award if the recognition and enforcement of that award would be *"contrary to the public policy of Sri Lanka"*.

Nevertheless, the learned Judge went on to hold that the arbitral award was in conflict with the public policy of Sri Lanka based on his view that the interest awarded to the appellant exceeded the principal amount due and, therefore, the arbitral award contravened section 5 of the Civil Law Ordinance. On that basis, the High Court dismissed the appellant's application to enforce the arbitral award.

The appellant sought Leave to Appeal from this Court and was granted Leave to Appeal on the following questions of law which are reproduced verbatim:

(1) The Learned Judge of the High Court has not considered that this is a Leasing Transaction and not a Loan, and that the provisions of the Civil Law Ordinance have no application to this transaction.

(2) The Learned Judge of the High Court has not considered that No application has been made to set aside the Award by the Respondent within the requisite time of 60 days (section 32 (1) of the Arbitration Act of 1995).

The second question of law, though imprecisely framed, raises a central issue of whether the High Court had jurisdiction to set aside the arbitral award on the grounds that the arbitral award was in conflict with the public policy of Sri Lanka when the respondent had not made an application under section 32 (1) of the Act praying that the arbitral award be set aside.

As mentioned earlier, the appellant's application to enforce the arbitral award has been made under and in terms of sections 31 (1) to 31 (5) of the Act. There is no suggestion that the appellant has failed to comply with the procedural and other requirements specified in these sections.

In these circumstances, section 31 (6) of the Act specifies that:

"*Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in sections 33 and 34 of this Act, it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered.* "

Thus, it is clear that, where an applicant who seeks to enforce an arbitral award [either an arbitral award made in Sri Lanka or a foreign arbitral award] has filed an application under section 31 (1) and the Court is satisfied the applicant has complied with the requirements of section 31 (2) to section 31(5) of the Act, section 31 (6) of the Act requires the Court to file the arbitral award and give judgment and enter decree according to the arbitral award. It is also clear from section 31 (6) that the only instances in which the Court may refrain from recognizing and enforcing the arbitral award are:

(i) Where there is an application made by another party to the arbitration to set aside the arbitral award under section 32 of the Act and pending its determination; *or*

(ii) The Court sees cause to refuse the recognition and enforcement of the arbitral award under the provisions contained in section 33 and section 34 of the Act.

However, in the present case, the respondent has not made an application under section 32 of the Act to set aside the arbitral award and, therefore, ground (i) stated above will not apply. Section 33 and section 34 of the Act are irrelevant to the present case since they relate only to foreign arbitral awards and the arbitral award in the present case was made in Sri Lanka. Therefore, ground (ii) stated above will not apply either.

Consequently, the learned High Court Judge had no jurisdiction to set aside the arbitral award under the provisions of section 31 (6) of the Act in the course of determining the appellant's application made under section 31 (1) to enforce the arbitral award.

At this stage, it will also be useful to briefly examine the circumstances in which an arbitral award made in Sri Lanka may be set aside by a Court.

A party who wishes to set aside an arbitral award made in Sri Lanka must file an application under section 32 (1) and pray to have the arbitral award set aside. This must be done within sixty days of that party receiving the arbitral award - *vide:* section 32 (1)

Having filed an application under section 32 (1) praying to set aside the arbitral award, he may achieve that result under section 32 (1) (a) upon furnishing proof, to the satisfaction of the Court, of the existence of any one or more of the four grounds specified in section 32 (1) (a) (i) to section 32 (1) (a) (iv) - *ie:* that a party to the arbitration was under an incapacity, or had no notice of the appointment of the arbitrator, or the arbitral proceedings or that the arbitral award dealt with matters outside the scope of the arbitration, or that the composition of the arbitral tribunal was flawed, as more fully set out in these provisions.

As mentioned earlier, the learned High Court Judge has firmly rejected that any of these grounds existed and the respondent has not contested those determinations by the High Court. Therefore, no further consideration of these grounds is required.

An arbitral award made in Sri Lanka may also be set aside in the course of the determination of an application under section 32 (1) of the Act if the High Court is satisfied of the existence of either or both of the grounds specified in section 32 (1) (b) - *ie:* that the subject matter of the dispute is not capable of settlement by arbitration under the law in Sri Lanka as described in section 32 (1) (b) (i) and/or that the arbitral award is in conflict with public policy as described in section 32 (1) (b) (ii).

It should be mentioned that the High Court is entitled to set aside an arbitral award made in Sri Lanka in terms of section 32 (1) (b) (i) and/or section 32 (1) (b) (ii) of the Act either acting on an application made under section 32 (1) claiming that the arbitral award should be set aside in terms of section 32 (1) (b) (i) and/or section 32 (1) (b) (ii) of the Act or acting *ex mero motu,* but based strictly upon the material placed before the Court.

It is patently clear from a reading of section 32 (1) of the Act, that the Court could exercise that power conferred on it by section 32 (1) (b) (i) *and* section 32 (1) (b) (ii) of

the Act and set aside an arbitral award made in Sri Lanka *only* in the course of determining an application made under section 32 (1) of the Act which prays to set aside an arbitral award made in Sri Lanka.

Thus, in SOUTHERN GROUP CIVIL CONSTRUCTION (PVT) LTD vs. OCEAN LANKA (PVT) LTD [2002 1 SLR 190], in comparable circumstances, this Court held that an arbitral award made in Sri Lanka may be set aside on any of the grounds set out in section 32 (1) (a) or 32 (1) (b) of the Act *only* in cases where the party to the arbitration has made an application under section 32 (1) of the Act praying that the arbitral award be set aside.

Bandaranayake J, as she then was, held [at p.195-196] "*A plain reading of section 32 (1) reveals clearly that the opening paragraph applies to both sub paragraphs (a) and (b) of section 32 (1). The difference between the two sub paragraphs (a) and (b) is that the former requires an applicant to furnish proof of four situations, whereas the latter permits the High Court to find and arrive at a conclusion on the two situations which would enable an arbitral award to be set aside. However, for the High Court to find that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka or that the arbitral award is in conflict with the public policy of Sri Lanka, as stated in sub paragraph (b), it would be necessary for the party making an application for setting aside an arbitral award, to adduce necessary material for this purpose in his application filed in terms of section 32 (1).*

The words in sub paragraph (b) of section 32 (1), 'where the High Court finds' are clearly referable to the application made in terms of section 32 (1) and the material adduced in such application. A finding cannot be made by the High Court in terms of sub paragraph (b) of section 32 (1) other than on the averments of the application and the material contained therein. Therefore, I am of the view that the High Court was in error when it came to the finding that it has the power ex mere motu to set aside an award on the grounds stated in sub paragraph (b) of section 32 (1) even in the absence of material supporting such a finding being contained in the application.

The next question that has to be considered relates to the application of the time bar contained in the opening paragraph of section 32 (1). I have at the commencement of this judgment adverted to the distinction between the respective time periods with which applications could be made for recognition and enforcement on the one hand and to set aside an award on the other. The clear legislative intent in having a shorter time period for setting aside an arbitral award is to ensure that a challenge to the validity of the award should be made early and the party having the benefit of the award may take a longer time to enforce it. Such a distinction is not uncommon to our procedure regulating civil action. Even in the case of a decree of the District Court in a regular

action, a party seeking to challenge the validity of the decree has to file the notice of appeal within 14 days and the petition within 60 days, whereas in terms of section 337 of the Civil Procedure Code an application for enforcement could be made within 10 years. Therefore I am of the view that the time bar of sixty (60) days contained in section 32 (1) should be strictly applied and all grounds of challenge with supporting material including the material on the basis of which a party wishes the High Court to come to a finding in terms of section 32 (1) (b), be adduced by an applicant in terms of section 32 in the application.".

I wish to add that the requirement in section 32 (1) that an application made thereunder to set aside an arbitral award must be made within sixty days of the receipt of the arbitral award, necessarily means that a party who claims that he did not receive a copy of the arbitral award until he was served with notice of the other party's application under section 31 (1) to enforce the arbitral award, will be entitled to make an application under section 32 (1) to set aside the arbitral award within sixty days of being served with notice of the application to enforce the arbitral award.

In this connection, it may be mentioned that section 40 of the Act requires that an application under section 31 (1) to enforce an arbitral award must be by way of a petition with, *inter alia,* the arbitral award or a duly certified copy annexed thereto and that these documents must be served on the other party. Needless to say, in cases where an application under section 32 (1) to set aside an arbitral award is made only upon service of notice of an application for enforcement, the party who has made the application under section 32 (1) to set aside the arbitral award will have to satisfy the High Court that he had not received a copy of the arbitral award prior to service of that notice and that his application to set aside the arbitral award is made within sixty days of service of that notice.

In the present case, the respondent has not made an application under section 32 (1) of the Act to set aside the arbitral award at any stage - not prior to the appellant's application to enforce the arbitral award nor after notice of that application [together with a copy of the arbitral award] was served on the respondent. The fact that notice of the application under section 31 (1) to enforce the arbitral award [together with a copy of the arbitral award] was served on the respondent, is not in dispute.

In these circumstances, the learned High Court Judge was not empowered to set aside the arbitral award on the ground that the arbitral award was in conflict with the public policy of Sri Lanka, which is a ground set out in section 32 (1) (b) (ii) of the Act.

It should be mentioned here that the resolution of disputes by arbitration is a result of parties to a contract deciding that any disputes between them arising out of the contract

must be resolved by arbitral proceedings and by their choosing to be bound by an arbitral award entered in the course of such arbitral proceedings.

In these circumstances, the power of the High Court to set aside an arbitral award is necessarily confined to the power vested in the High Court within the four corners of the Act. The High Court cannot go on a voyage of its own and purport to set aside an arbitral award other than in the exercise of the powers expressly conferred on the Court by the Act.

For the reasons set out earlier, the second question of law question of law is answered in the affirmative. Consequently, this appeal has to be allowed.

In view of the aforesaid conclusion, there is no need to consider the first question of law.

The petitioner-appellant's appeal is allowed. The Order dated 16th July 2013 of the High Court is set aside. The High Court is directed to proceed to file the arbitral award dated 04th July 2001 and give judgment according to the award in terms of the provisions of section 31 (6) and other relevant provisions of the Arbitration Act. The parties will bear their own costs.

Judge of the Supreme Court

Nalin Perera CJ
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 for special leave to appeal from the Judgment dated 25.05.2010 of the Court of Appeal under and in terms of Article 128 of the Constitution and the Supreme Court Rules 1990.

Prof. Desmond Mallikarachchi,
No.118, Nivana, Kurundugahagoda,
Pilimathalawa.

Petitioner

SC Appeal No.120/2010
CA(Writ) Application No.25/2009

Vs

1. University of Peradeniya
2. Prof. H. Abeygunawardena, The Vice Chancellor,
3. Prof. A. Wickramasinghe,
4. Prof. P. W. M. B. B. Marambe,
5. Prof. K. Tuder Silva,
6. Prof. E. A. P. D. Amaratunge,
7. Prof. S. B. S. Abeyakoon,
8. Dr. W. I. Amarasinghe,
9. Prof. S. H. P. P. Karunaratne,
10. Prof. (Mrs.) P. Abeynayake,
11. Prof. K. N. O. Dharmadasa,
12. Prof. B. Hewavitharana,
13. Prof. (Mrs.) M. S. Chandrasekera,
14. Prof. A. D. P. Kalanasuriya,
15. Dr. S. D. Pathirana,
16. Dr. D. B. Wickramaratne,
17. Dr. P. Ramanujam,
18. Dr. Dushantha Madagedara,

19. Dr. Kapila Gunawardena,
20. Mr. D. Mathy Yogarajah,
21. Mr. W. L. L. Perera,
22. Mr. Mohan Samaranayake,
23. Dr. A. Kahandaliyanage,
24. Mr. Lionel Ekanayake,
25. Dr. S. B. Ekanayake,
26. Mr. L. B. Samarakoon,

1st to 26th Respondents of University of Peradeniya, Peradeniya.

27. S. K. Liyanage, 12/1A,
Andarawatta, Polhengoda,
Colombo 5.

<u>Respondents</u>

AND NOW IN APPEAL BEFORE YOUR LORDSHIPS' COURT

1. University of Peradeniya
2. Prof. H. Abeygunawardena, The Former Vice Chancellor,
3. Prof. A. Wickramasinghe,
4. Prof. P. W. M. B. B. Marambe,
5. Prof. K. Tuder Silva,
6. Prof. E. A. P. D. Amaratunge,
7. Prof. S. B. S. Abeyakoon,
8. Dr. W. I. Amarasinghe,
9. Prof. S. H. P. P. Karunaratne,
10. Prof. (Mrs.) P. Abeynayake,
11. Prof. K. N. O. Dharmadasa,
12. Prof. B. Hewavitharana,
13. Prof. (Mrs.) M. S. Chandrasekera,
14. Prof. A. D. P. Kalanasuriya,
15. Dr. S. D. Pathirana,

16. Dr. D. B. Wickramaratne,
17. Dr. P. Ramanujam,
18. Dr. Dushantha Madagedara,
19. Dr. Kapila Gunawardena,
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22. Mr. Mohan Samaranayake,
23. Dr. A. Kahandaliyanage,
24. Mr. Lionel Ekanayake,
25. Dr. S. B. Ekanayake,
26. Mr. L. B. Samarakoon,

1st to 26th Respondents-Petitioners of University of Peradeniya, Peradeniya.

Respondents-Petitioners

Vs.

Prof. Desmond Mallikarachchi, No.118, Nivana, Kurundugahagoda, Pilimathalawa.

Petitioner-Respondent

27. S. K. Liyanage, 12/1A, Andarawatta, Polhengoda, Colombo 5.

Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J.
H. N. J. Perera, J. &
Vijith K. Malalgoda, PC, J.

COUNSEL: J. C. Weliamuna, PC with Pulasthi Hewamanna, Thilini Vidanagamage and Khyati Wickramanayaka for the Respondent-Appellant.

K. G. Jinasena with M. H. C. Mallawarachchi and Bowala Harshani Lakmali for the Respondent-Respondent.

ARGUED ON: 21.03.2018

DECIDED ON: 25 .04. 2019

Aluwihare PC. J.,

The Respondents- Petitioners Appellants (hereinafter referred to as the "Appellants" were granted Special Leave to Appeal against the judgment of the Court of Appeal dated 25.05.2010. In the writ application, the Petitioner-Respondent (hereinafter referred to as the "Respondent") had sought *inter alia* a writ of Certiorari to quash the decision of the Governing Council of the University of Peradeniya to demote him from the post of Professor to that of Senior Lecturer-Grade I. The Court of Appeal granted the said relief to the Respondent by issuing a writ of Certiorari. Being aggrieved by this judgment, the Appellants—the University of Peradeniya and Others—have come before this Court, stating that the Court of Appeal had failed to consider and/or appreciate the question of proportionality; had failed to distinguish between the demotion of the Respondent to the grade of Associate Professor, and the revocation/annulment of the Respondent's promotion from the post of Senior Lecturer to Professor; had failed to give any reasons for quashing the decision to demote the Respondent to the post of Senior Lecturer-Grade I; had overstepped its lawful jurisdiction in not dismissing the Respondent's application inasmuch as the Governing Council of the

University had acted within its scope of disciplinary powers, had ignored the submissions of the Petitioners on the relevance of the alternative statutory remedy provided for by the Universities Act; had misdirected itself on the scope of the doctrine of reasonableness/ unreasonableness; had misdirected itself on the application of proportionality to the instant case.

Special Leave to Appeal was granted on the following questions of law: Sub-paragraphs (a) and (b) of paragraph 12 of the Petition of the Appellants which are reproduced below-

(a) Did the Court of Appeal err in granting prayer (c)- (by which the Respondent sought a writ of certiorari quashing the University's Governing Council's decision to demote the petitioner from the post of Professor to the post of Senior Lecturer- Grade I)- to the Respondent's Petition (A1) filed in the Court of Appeal, inasmuch as the Governing Council has acted within its disciplinary powers?

(b) Has the Court of Appeal misdirected itself on the application of proportionality to the instant case?

Factual matrix

The Respondent was the Professor of Philosophy of the 1st Appellant University of Peradeniya and an ex-officio member of the Senate, the University's academic authority. He had been appointed as the part time Director of the External Examination Branch of the Faculty of Arts of the University of Peradeniya with effect from 21st of January 2000. With effect from the 16th of August 2004 he had been appointed, the Head of the Department of Philosophy and Psychology of the Faculty of Arts of the same university. Around March 2004, one R. G. Piyasiri had been appointed to investigate an internal audit query and the investigation report

submitted by R. G. Piyasiri had shown financial improprieties on the part of the Respondent. Consequently, a charge sheet dated 09th November 2004 had been issued, stating certain irregularities/ financial improprieties that had taken place in the External Examination branch under the directorship of the Respondent. The charge sheet had also stated that the Respondent had acted negligently and/or fraudulently. An Inquiry Officer had been appointed to carry out an inquiry based on the said charge sheet. While the disciplinary inquiry was in progress the Vice Chancellor had requested the Respondent to step down from the post of the Head of Department stating that as there was a disciplinary inquiry against him he cannot hold the position of Head of Department. The Respondent had not complied with this request. Regardless, a junior academic member had been appointed as the Head of Department by the Vice Chancellor for a full period of three years rather than on a temporary basis. The Respondent alleges that this appointment was contrary to the Section 51 of the Universities Act and that this appointment was made at the instigation of certain administrative officers who were unhappy with steps he had taken to prevent the misuse of the facilities of the University and the submission of fraudulent claims during his tenure as the Director of the External Examinations Department. Consequently, the Respondent had filed Writ Application No. 202/2007 dated 24th February 2007 ('P5') in the Court of Appeal to obtain a writ of certiorari to quash the letter issued appointing one Dr. M. S. M. Anes to the post of Head of the Department of Philosophy and psychology of the University of Peradeniya and to obtain a writ of mandamus to appoint the Respondent as the Head of the said department.

Meanwhile, the Respondent had also applied for the post of Professor of Philosophy on 15th September 2005 and he had been awarded the position. On 31st January of the following year, the disciplinary inquiry which commenced pursuant to the aforesaid charge sheet ('P3') had been concluded. The Respondent however, had asserted that he had not been informed of its findings. On the 5th of October 2006 the 2nd Appellant, the then Vice Chancellor of the University, had informed the

Respondent via a letter ('P10') that the Council had found him guilty of four of the eight charges against him based on the investigation report and that he is warned to refrain from committing any acts of negligence of duty in the future. The Respondent states that he had requested the Vice Chancellor (2nd Appellant) to inform him the reasons for the findings. He states that he further made an appeal/ application to the University Services Appeal Board on 13th November 2006 to set aside the decision in 'P10'.

On the 15th of March 2007 another charge sheet containing another set of charges had been issued against the Respondent and he had denied all charges by his response dated 15th June 2007. While an inquiry regarding the said second set of charges was pending, he had been served with an amended statement of charges (marked 'P11'). At the inquiry the Respondent had *inter alia* raised two objections. a) That even though the 1st Appellant University had issued both the charge sheets marked 'P6' and 'P11' under the University Establishments Code it had not conducted a preliminary inquiry as required by Paragraph 8 of Chapter xxii of the same Code. Further, that approval had not been obtained from the Council under Section 45(2)(xii) of the Universities Act and that the 2nd Respondent had acted contrary to Section 34(4) of the same Act. b) That the appointment of the inquiry officer had been contrary to the provisions of the Establishment Circular No. UGC/HR/5/3/33(1) of 7th December 2004. He had also pointed out that whilst the inquiry was pending, on 29th January 2008, he had been promoted as a Professor, thereby becoming an ex-officio member of the Senate as well. The University had requested him to withdraw the Court of Appeal writ application 202/2007 as he had been promoted to the post of Professor and he had acceded to the request by withdrawing the said writ application on 20th August 2008.

On the 29th of October 2008, upon the report of the inquiring officer being tabled at the 370th meeting of the Governing Council, a sub-committee comprising of the 25th and 26th Appellants had been appointed to consider the matter. One of their

recommendations had been to demote the Respondent from the post of Professor to that of Senior Lecturer-Grade I. Based on that recommendation the Council at its 371st Meeting on 1st of November 2008 had decided to demote the Respondent to the grade of Associate Professor (per excerpts marked 'P19' and 'P20'). The Respondent had taken up the position that he had received reliable information that thereafter, at the 372nd Meeting of the Council held on 13th December 2008, the Council had, at the instigation of the 26th Appellant, decided to demote him to the post of Senior Lecturer-Grade I. The Respondent states that the 26th Appellant was not on good terms with him since he had, while he was the Director of External Examinations Department, rejected a claim made by the 26th Appellant pretending to be a consultant appointed by the UGC. He states that he had further learnt through reliable means that the 26th Appellant had volunteered to be a member of the Sub Committee which was appointed to examine the inquiry report submitted by the 27th Appellant.

On 14th January 2009 the Respondent by the Writ Application CA/Writ/25/2009 (marked 'A1') had sought a Writ of Certiorari quashing both the decision of the Governing Council to demote him to the post of Associate Professor and, the subsequent decision of the same Council to demote him to the post of Senior Lecturer-Grade I. The Respondent also sought an interim order (by paragraph (e') of the prayer to the writ application) preventing the 1st and 2nd Appellants to the present Application (1st and 2nd Respondents Petitioners to the initial Writ Application) from issuing the letter, demoting him from the post of Professor to Senior Lecturer-Grade I, until the final determination of the same writ application. The interim relief had not been granted but the Court of Appeal had issued notice on the Respondents on 17th February 2009.

In the Statement of Objections in respect of the said writ application filed by the Appellants dated 17 August 2009 (marked 'A2'), they had taken up the position that an audit query into the affairs of the External Examinations Branch had been

conducted with the assistance of the Auditor General's Department and based on the subsequent audit report of 26th June 2003 (marked 'R2') the Council had appointed R. G. Piyasiri to investigate and report. The investigation report (marked 'P7') submitted by R. G. Piyasiri had been the basis for the Council at its 349th meeting to decide to hold an inquiry against the Respondent. They have further stated that the charge sheet marked 'P3' had been issued with the Council's approval and that the charge sheets marked 'P6' and 'P11' had been issued after the findings of the audit report marked 'R2' had been approved by the Council (excerpts from the minutes of the 361st and 363rd meetings of the Council 'R4' and 'R5'). The Appellants had also stated that the inquiring officers had been appointed under the relevant provisions of the University Establishment Code with the approval of the Council and that the Council has the right to arrive at suitable decisions regarding the Respondent, based on the findings of the disciplinary inquiries. The Appellants had pointed out that issuing a letter of warning is not considered a disciplinary action as set out in paragraph 4:4 of Chapter XXII of the UGC Establishment Code. The Council had become aware that, as per the Government Establishment Code, promotions cannot be given to officers against whom formal charge sheets have been issued and that for that reason, the decision to promote the Petitioner had been annulled, as evidenced by the minutes of the 372nd Council meeting (marked 'R10').

In his Counter objections (marked 'A3') the Respondent had stated that no decision per 'R4' and 'R5' had been taken to issue the charge sheet ('P6' and 'P11') and therefore no decision had been taken in terms of the UGC Establishment Code by the Governing Council to conduct a disciplinary inquiry against the Petitioner. The Respondent had also stated that the decision taken by the previous Council to promote him to the post of Professor cannot be annulled on the recommendation made by a sub-committee of the Senate and that the Petitioners had violated the fundamental principles of Natural Justice by not issuing a 'show cause' letter to the Respondent. He had averred that the applicable circular was the Public

Administration Circular 59/91 dated 13th December 1991 (marked 'P23') read with UGC Communication Circular No. 69 (marked 'P22') and Establishments Circular Letter No. 3/1992 (marked 'P24') and therefore the University had deviated from the procedure of disciplinary actions approved by the UGC.

At the hearing of the case before the Court of Appeal, the Respondent had averred that both the charge sheets (marked 'P3' and 'P6', 'P11') were contrary to the Universities Act, the same having been issued without obtaining approval from the Governing Council. The Respondent had further averred that the 1st Petitioner University had failed to act in terms of the Government Establishments Code which the University Grants Commission (UGC) had adopted by Public /Administration Circular No. 59/91 dated 13th December 1991 (marked 'P 26') which provides that "all public officers are required to comply with the provisions stipulated in Part I and Part II of the Establishment/ Code." Therefore, the Respondent had argued that the two charge sheets were illegal, had no force in law and the inquiry conducted and its report were bad in law and not binding on the Petitioner. He had stated that the decisions to demote him are illegal, unreasonable and are in contravention of the Universities Act and the disciplinary rules adopted by the UGC and the principles relating to demotions.

The Appellants in turn had submitted that all steps were taken with the approval of the disciplinary authority, i.e. the Governing Council, and that no illegality, irrationality or procedural impropriety had taken place and that the Petitioner has an alternative remedy provided by the Universities Act in as much as he was entitled to appeal to the University Services Appeal Board. The Court of Appeal had delivered its judgment issuing a Writ of Certiorari quashing the decision to demote the Respondent to the position of Senior Lecturer Grade I but had not granted the other relief sought by the Respondent, namely the quashing of the Council's decision to demote the Respondent to the Post of Associate Professor, the quashing

of the Council's decision to impose an additional punishment to charge Rs. 53, 250.00 from the Respondent.

The decision of the Governing Council of the Appellant University

The first disciplinary inquiry on the charge sheet 'P3' should not be a concern for this court since following the consideration of the inquiry report the Council had decided that issuing a letter of warning to the Respondent was a sufficient measure and no other disciplinary action had been taken.

Then it has to be considered whether the Council was correct in changing their original decision to demote the Respondent to the post of Associate Professor. The excerpt from the Minutes of the 372nd Meeting of the Council held on 13th December 2008 (marked 'R10') reveals the basis for the Council's decision to annul the promotion of the Respondent to the position of Professor. It had been noted by the Vice Chancellor that as confirmed by the letter No. UGC/HR/6/3/16 dated 24th November 2008 the provisions of the Government Establishments Code are applicable to matters for which specific provisions have not been made in the Establishments Code of the UGC and Higher Educational Institutions/Institutes. Accordingly, Paragraph 14:12 of Chapter XLVIII of the Government Establishments Code becomes applicable. The said provision stipulates that "when a formal charge sheet has been issued against an officer for disciplinary action, granting him/her salary increments, promotions, foreign trips and scholarships, study leave with pay, loans and advances, no pay leave locally and abroad and secondment should forthwith be suspended until the final outcome of the inquiry" This means that the Council could not have granted the promotion to the Respondent in the first place. Accordingly, the decision of the Council to annul the promotion of the Respondent to the Post of Professor is not *prima facie* illegal.

However, the Appellants have not placed the said letter No. UGC/HR/6/3/16 dated 24th November 2008 before this Court. Instead Commission Circular No. 911 dated 14th May 2009 (marked 'P34') is produced. According to 'P34' the

decision that the Government Establishments Code should apply in all cases where the UGC Establishments Code makes no provisions, has been made on 19th February 2009 at the UGC'S 774th meeting. In that case, when the Respondent was promoted on the 1st of February 2008 there was no such existing decision. The Circular cannot be applied to the Respondent's promotion retrospectively. Since the Appellants have failed to produce a document that bears evidence that the decision to apply the Government Establishments Code to situations of *casus ommissus* was taken before the decision to promote the Respondent to Professorship, their contention cannot stand. The Council has erroneously applied the circular in that they applied it retrospectively.

To substantiate his contention that the University was in deviation from the procedure of disciplinary actions approved by the UGC the Respondent refers to the documents marked 'R4', 'R5', 'P22', 'P23' and 'P24'. Out of them, 'R4' and 'R5' are extracts from the Minutes of the 361st Council Meeting held on 10th November 2007 and 363rd Council Meeting held on 17th August 2009 respectively. 'R4' states *inter alia* that after considering the draft charge sheet the Council decided to give authority to the Vice-Chancellor to issue the same after effecting necessary amendments. Section 147 of the Universities Act defines a 'Teacher' as "a Professor, Associate Professor, Senior Lecturer, Lecturer and Assistant Lecturer, and the holder of any post declared by the Ordinance to be a post, the holder of which is a teacher." Section 45(2)(xii) of the Universities Act states that the Council shall appoint persons to, suspend, dismiss or otherwise punish persons in the employment of, the University, subject to the proviso that "except in the case of Officers and teachers, these powers maybe delegated to the Vice Chancellor." Accordingly, the Respondent has correctly averred that he falls into the category of 'Teacher' and therefore his disciplinary authority, the Council of the University of Peradeniya, cannot delegate its powers regarding him, to the Vice Chancellor. However, 'R4' and 'R5' records that the charge sheet 'P6' and the amended charge sheet 'P11' had been perused by the Council at the 361st and 363rd Council

Meetings respectively and the Vice Chancellor had been given the authority to issue 'P6' and the Registrar had been given instructions to issue 'P11' to the Respondent. Therefore, the Respondent's contention that as the Vice Chancellor served the charge sheet on him while it is the Council that can issue a charge sheet to him cannot hold ground. The Vice Chancellor was merely the means through which the decision was communicated to him. The decision per se was taken by the Council itself.

The Public Administration Circular 59/91 (marked 'P23') which made any violation of any provisions of the Establishments Code and instructions in any Public Administration Circular by any Public Officer a punishable offence under Schedule A of Part II of the Establishments Code has been adopted by the UGC by Establishments Circular Letter No. 3/1992 (marked 'P24'). The UGC was empowered to do so by UGC Communication Circular No. 69 of 3rd April 1980 (marked 'P22') which stated that the UGC and Higher Educational Institutions are Public Corporations and that regarding Circulars and Circular Letters containing decisions and instructions which deal with the management of internal affairs of the UGC and the Higher Educational Institutions, the provisions of the Universities Act No. 16 of 1978 would supersede those instructions. Where such instructions are not inconsistent with the provisions of the Universities Act No. 16 of 1978 it is open to the UGC and the Higher Educational Institutions to adopt and to act upon any such instructions.

The charge sheets marked 'P3' and 'P6', 'P11' have been issued under Paragraphs 2:2:4 and 4:1:2 of Chapter XXII of the University Establishments Code. The Respondent has drawn the attention of court to the documents marked 'P22' – 'P24' to demonstrate that the said University Establishments Code had not been approved by the UGC at the time the charge sheets were issued. In addition, it has been pointed out that in its Statement of Objections dated February 2006 (marked 'P26') in the application no. CA 585/2005 the University of Peradeniya itself has taken

up the position that the UGC Establishments Code per its foreword "is only a guide to the regulation of the administration of Higher Education Institutions". The Respondent argues that according to the decision made by UGC Communication Circular No. 69 of 3rd April 1980 (marked 'P22') the provisions of the Establishments Code are applicable to the Respondent and that the Appellants had however framed the charges under the provisions of the UGC Establishments Code which had not been in operation officially until the issuing of the UGC Circular No. 911 dated 11th May 2009. The Respondent therefore argues that the failure to frame charges in terms of the provisions of the Government Establishments Code renders the charge sheet a nullity.

The Appellants state that the Respondent's above submission- that the charge sheet itself is a nullity on the basis that it was not issued under the Government Establishments Code- cannot be relied on by the Respondent due to the fact that the Respondent had participated at the inquiry held under the UGC Establishments Code. The Respondent had however objected to the inquiry on the grounds of improper procedure and inapplicability of the UGC Establishment Code as recorded in page 1 of the Formal Inquiry Report marked 'P27'. He had also stated that he is appearing at the inquiry on the expectation of challenging this inquiry before a court of law (vide page 5 of 'P27').

Furthermore, the Appellants point to the Minutes of the 371st Meeting of the Council confirmed on 13th December 2008 (marked 'R10') where it was stated that the Council decided to promote the Respondent on the basis that a person is innocent until he or she is proven guilty by an appropriate administrative/legal mechanism. The assumption had been that there was no specific provision applicable regarding promotions pending disciplinary action. The minutes state that a decision had been taken by the Council to approve the promotion subject to initiation of appropriate action if he was found guilty in the case pending. Countering this position, the Respondent points out that no such condition was

mentioned in the letter of promotion nor in the agreement between the petitioner and the University. In the absence of any proof that it was in fact conveyed to the Respondent that his promotion was approved subject to the condition that appropriate action would be taken if he was subsequently found guilty in the pending case, the Respondent's version has to be accepted.

Preliminary Inquiry

The purpose of a preliminary inquiry under the Government Establishments Code as set out in Paragraph13:1, Chapter XLVIII is "to find facts as are necessary to ascertain the truth of a suspicion or information that an act of misconduct has been committed by an officer or several officers, and to find out and report whether there are, prima facie, sufficient material and evidence to prefer charges and take disciplinary action against the officer or officers under suspicion." It is further stated that "The primary task of an officer or a Committee of Officers conducting a preliminary investigation is the recording of statements of relevant persons, examination of documents and records, obtaining of originals or certified copies thereof…and making their observations and recommendations on matters found out by them regarding the act of misconduct committed." As per Chapter 13:12 of Chapter XLVIII the officer conducting the preliminary investigation is expected to prepare a draft charge sheet as per Appendix 5 of the Government Establishments Code.

The Appellants reject the Respondent's contention that no preliminary inquiry was held, by force of the report විධිමත් විනය පරීක්ෂණය (marked 'R6') tendered by Inquiring Officer one S. K. Liyanage, which includes an inquiry report, a summary of the evidence given, notes of the inquiry and the documents tendered by the two parties. This report goes over and above the scope of the purpose for which a preliminary report is drawn. It presents an analysis of each of the seven charges against the Respondent and gives a verdict that the Respondent is guilty of all the charges except Charges 5 and 6. The conclusion that the report is more than a

preliminary report is further consolidated by the fact that the Council at its 370th Meeting on 11th November 2008 appointed a Sub-Committee to study the report and give their recommendations, which Sub-Committee later recommended that the Respondent be demoted to the post of Senior Lecturer-Grade I.

The document dated 04. 06. 2004 and marked 'P7' is an inquiry conducted by R. G. Piyasiri which can be considered a Preliminary Inquiry given that 'P7' gives information on the errors and irregularities that were identified based entirely on an examination of the documentation on payments regarding the series of seminars held for the undergraduates on April 20, 21, 27, 28, May 11, 12 and June 1 and 2. Further a recommendation had been made that disciplinary action should be taken against the Respondent and several other members of the staff for committing the errors and irregularities identified in 'P7'. The Statement of objections of the Appellants in the present case in the writ application before the Court of Appeal at Paragraph 13 state that based on the Audit Query the Council had appointed R. G. Piyasiri to carry out an investigation and report to the Council. The Council had then decided to hold an inquiry against the Respondent based on the charges recommended by R. G. Piyasiri. In addition, the inquiry had not been conducted by S. K. Liyanage who conducted the Formal Inquiry.

Doctrine of Proportionality

The excerpt from the Minutes of the 370th Council Meeting held on 27th September 2008 (marked 'R7') indicate that the Vice Chancellor was of the opinion that as the Director of External Examinations the Respondent "should not alone shoulder the responsibility for these acts, as there were responsible officers down in the line to assist and advise him in carrying out duties of this nature." The Recommendation of the Sub Committee appointed by the University Council (marked 'R8') includes a finding by the Committee members that "although the charge sheet indicates the charges as 'grave offences' we find that these were more

due to negligence and incompetence on the side of Dr. D. Mallikarachchi" and "that this anomaly could have been avoided if the Senior Administrative Officers and Senior Finance Officers … had advised Prof. D. Mallikarachchi regarding the consequences of payments without following proper procedures." Notwithstanding these observations, the recommendation for the reversion of the position of Prof. D. Mallikarachchi to the next lower post of Senior Lecturer-Grade I was made based on considerations of "his position, maturity, level of responsibility and all the circumstances surrounding the commission of offences."

The punishment recommended by the Sub Committee was the demotion of the Respondent to the level of Senior Lecturer-Grade I. The annulment was carried out because it later came to the knowledge of the Council that the UGC Establishments Code rather than the Government Establishments Code had been relied on erroneously and that if not for that error, the promotion could not have been awarded in the first place. In addition, an order barring the Respondent from applying for a promotion again within the span of the next 2 years from the date of the Council meeting i.e. 13th December 2008 was also made.

However, the letter dated 11th May 2009 titled 'Promotion to the Grade of Professor-The Council Decision on the Disciplinary Inquiry' sent by the Vice Chancellor to the Respondent states that the Council unanimously decided to debar the Respondent from applying for the next promotion for two years with effect from the date of the previous application for post of Professor i.e. 26th September 2005.

Whereas the recommendation to demote him to the Senior Lecturer grade would have been disproportionate given the grounds the Sub- Committee itself has mentioned in their recommendation 'R8', demotion to Associate Professor is the punishment meted out and proportionate.

A 2-year bar from the date of the Council meeting would have been disproportionate given that the Respondent was 64 years of age at the time of the

Council decision meaning that a 2-year bar would effectively prevent the Respondent from applying for the post of Professor before his retirement.

This would not have been the least intrusive manner, especially in the context that the Respondent had already been awarded the Professorship having obtained high marks, he had held the post from 1st February 2008 onwards, had agreed to withdraw the Writ application he had filed challenging his removal from the post of Head of Department given that he was awarded the Professorship. However, it appears that the final punishment that was meted out to the Respondent was changed for the bar to run from 2 years from the initial application for the post of Professor.

Wade and Forsyth in 'Administrative Law' explains that in challenging the proportionality of a decision one aspect that has to be considered is the 'necessity question' or whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. "…the 'necessity question' is interpreted as requiring only 'whether a less intrusive measure could have been used without unacceptably compromising the achievement of objective' rather than 'no more than is necessary to accomplish the objective'." (vide page 307 and 308, 11th Edition).

The Court of Appeal has held that the Respondent's position about the non-holding of an inquiry is not strictly correct and that disciplinary action could be taken against the Respondent, but it has also held that "the punishment should not be too harsh or excessive to make it disproportionate." Given that the University Council was fully aware of the Respondent's capabilities and entitlement to be appointed as Professor, the decision to deprive him of the Professorship was considered by the Court of Appeal to be excessive and too harsh. For the reasons I

have set out earlier in the judgement I see no need to interfere with the above decision of the Court of Appeal and further reiterate its position that "punishment should in all cases be commensurate with the seriousness of the offence committed."

As such I answer both questions of law on which Leave to Proceed was granted in the negative and being mindful of the just and equitable jurisdiction this court is endowed with, hold that the quashing of the decision to annul the Respondent's promotion to Professorship by the Court of Appeal should not be overturned.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J. PERERA

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 Appeal

Ranepura Hewage Kusumawathi
No. 33 Sobitha Mawatha
Wadduwa.

Plaintiff

SC Appeal 121/2016
SC/HCCA/LA App.No. 383/2014
WP/HCCA/COL/33/2012 Rev.
DC Colombo Case No. 6693/SPL

Vs-

1. Bartleet Financial Services Ltd.
   2nd Floor, Bartleet House
   Colombo 2.

Defendant

BETWEEN

Bartleet Finance PLC (formally known as
Bartleet Financial Services Ltd.)
2nd Floor, Bartleet House
Colombo 2.

Defendant-Petitiner

Vs

Ranepura Hewage Kusumawathi

No. 33 Sobitha Mawatha
Wadduwa.

Plaintiff-Respondent

PRESENTLY BETWEEN

Bartleet Finance PLC (formally known as
Bartleet Financial Services Ltd.)
2nd Floor, Bartleet House
Colombo 2.

Defendant-Petitioner-Appellant

Vs

Ranepura Hewage Kusumawathi
No. 33 Sobitha Mawatha
Wadduwa.

Plaintiff-Respondent-Respondent.

Before: Sisira J. de Abrew, J
Murdu Fernando PC, J &
S. Thurairaja PC, J

Counsel: Romesh de Silva PC with Kaushalya Nawaratne , Mokshini Jayamanna
and Dakshitha Devapura for the Defendant-Petitioner-Appellant
Mano Devasagayam with Sujeewa Dhanayake for the
Plaintiff-Respondent-Respondent

Argued on : 9.7.2019

Written submission
tendered on : 9.8.2016 by the Defendant-Petitioner-Appellant
6.8.2017 by the Plaintiff-Respondent-Respondent

Decided on: 8.8.2019

Sisira J. de Abrew, J
This is an appeal against the judgment of the Civil Appellate High Court dated 1.7.2014 wherein the learned Judges of the Civil Appellate High Court affirmed the order of the District Judge of Colombo dated 28.1.204 wherein he fixed the matter for ex-parte trial. Being aggrieved by the said judgment of the Civil Appellate High Court the Defendant-Petitioner-Appellant has appealed to the court. This court by its order dated 14.6.2016 granted leave to appeal on questions of law set out in paragraphs 41(a),(b),(c) and (e) of the Petition of Appeal dated 11.8.2014 which are set out below.

1. 41 (a)(i) - Has the learned trial Judge made a grave procedural error in fixing DC Colombo Case No.6693/Spl for ex-parte trial on 28.1.2004?

2. 41(a)(ii) – In any event, did the learned trial Judge not have jurisdiction to fix DC Colombo Case No.6693/Spl for ex-parte trial on 28.1.2004?

3. 41(a)(iiI) – If so, are the proceedings in Case No.6693/Spl subsequent to 28.1.2004, a nullity?

4. 41(b)(i) – Are the circumstances pleaded in the Petition of the Petitioner filed in WP/HCCA/COL/33/2012/RA constitute special and/or extraordinary circumstances shocking the conscience of court warranting

the exercise of revisionary jurisdiction by Their Lordships of the High Court of Civil Appeal in favour of the Petitioner?

5. 41(b)(ii) – Do the circumstances pleaded in the Petition ex facie establish that a positive miscarriage of justice has been caused to the Petitioner due to fundamental procedural error caused due to the Order of the learned trial Judge in fixing the DC Colombo Case No.6693/Spl for ex-parte trial on 28.1.2004?

6. 41(b)(iii) – If so, have Their Lordships of the High Court of Civil Appeal erred in law in holding that the Petitioner is not entitled to exercise revisionary jurisdiction due to the alleged delay on the part of the Petitioner?

7. 41(c) – Was the Respondent bound and obliged in law to establish the case against the Petitioner on a balance of probability, even in an ex-parte trial?

8. 41(e) – Is the judgment of Their Lordships of the High Court of Civil Appeal dated 1.7.2014, contrary to well established legal principles?

Facts of this case may be briefly summarized as follows.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed a case in the District Court of Colombo moving court to issue an interim injunction and an enjoining order preventing the Defendant-Petitioner-Appellant (hereinafter referred to as the Defendant-Petitioner) selling the bus bearing Registration Number 62-4959. The learned District Judge by order dated 3.10.2003 refused to grant an interim injunction and fixed

the matter for answer on 3.12.2003. On 2.12.2003 the Plaintiff-Respondent filed a motion requesting permission of court to file an amended plaint on 3.12.2003. The learned District Judge on 2.12.2003 made an order to file the motion and mention on 3.12.2003. It has to be stated here that no amended plaint was filed on 2.12.2003. The journal entry dated 3.12.2003 carried the following matters. *"Amended plaint is being filed. Objections (if any) and answer on 28.1.2004."* According to the above journal entry the answer should be filed on 28.1.2004. On 28.1.2004, the learned District Judge accepted the amended plaint and fixed the case for ex-parte trial. The journal entry dated 28.1.2004 carries the following material. *"Objection and answer – No (not filed). The defendant is absent. No legal representation for the defendant. Amended plaint is accepted. Case is fixed for ex-parte trial. Ex-parte trial is fixed for 5.3.2004."* There is nothing to indicate that the amended plaint was accepted on 3.12.2003. According to the above journal entry the amended plaint was accepted only on 28.1.2004. What is the basis on which that the learned District Judge on 28.1.2004 fixed the case for ex-parte trial? If the answer had been filed when the case was called on 28.1.2004, the learned District Judge could not have fixed the case ex-parte trial even if the Defendant-Petitioner was absent and unrepresented. If the answer had been filed when the case was called on 28.1.2004, it would have been the duty of the learned District Judge to fix the case for trial even if the Defendant-Petitioner was absent and unrepresented. Then what was the basis on which the case was fixed for ex-parte trial when it was called on 28.1.2004? It appears that the basis was the failure to file the answer. Could the Defendant-Petitioner have filed the answer on 28.1.2004? Since the amended plaint has been accepted by

court on 28.1.2004, the Defendant-Petitioner could not have filed an answer on the amended plaint on 28.1.2004. Since the court has accepted the amended plaint on 28.1.2004, it was the duty of court to have given an opportunity to the Defendant-Petitioner to file an answer on the amended plaint. But the learned District Judge did not give this opportunity to the Defendant-Petitioner and fixed the case for ex-parte trial. Therefore it is seen from the above material that the answer on the amended plaint was not due on 28.1.2004. The learned District Judge on 28.1.2004 could not have fixed the case for ex-parte trial even on the basis that the Defendant-Petitioner was absent and unrepresented because the acceptance of the amended plaint has taken place only on 28.1.2004. When the amended plaint is accepted, the original plaint does not exist. Then it becomes the duty of court to act under Section 55 of the Civil Procedure Code and serve summons on the defendant if the defendant is absent in court. If the defendant is present in court, the court should give him an opportunity to file his answer on the amended plaint. The learned District Judge has not taken the above steps. Therefore it is seen from the above material that the District Court has not fixed a date to file answer on the amended plaint. The learned District Judge on the day that the amended plaint was accepted without fixing a date to file an answer, has fixed the case for ex-parte trial which is wrong. At this stage it is relevant to consider section 84 of the Civil Procedure Code which reads as follows.

> If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed (or the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the

> answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix.

Under Section 84 of the Civil Procedure Code, the court is empowered to fix a case for ex-parte trial if the defendant fails to file his answer on or before the day fixed for the filling of the answer or on or before the day fixed for the subsequent filing of the answer. This is one of the grounds discussed in Section 84 of the Civil Procedure Code. After the amended plaint was accepted, did the court fix a date for filing of the answer? The answer is clearly in the negative. It has to be noted here that after accepting the amended plaint on 28.1.2004, the court without fixing a date to file the answer, fixed the case for ex-parte trial. There was no opportunity for the Defendant-Petitioner to file his answer on the amended plaint since the court has failed to fix a date for the answer on the amended plaint. Therefore the argument that the Defendant-Petitioner has failed to file his answer on or before the day fixed for filing of the answer or on or before the day fixed for the subsequent filing of the answer cannot be accepted. For the above reasons I hold that the Defendant-Petitioner has not violated Section 84 of the Civil Procedure Code; that the learned District Judge on 28.1.2004 could not have fixed the case for ex-parte trial; and that the order made by the learned District Judge on 28.1.2004 fixing the case for ex-parte trial without giving an opportunity for the defendant to file his answer is wrong, a nullity and has violated a fundamental rule. Failure by the District Court to give an opportunity for the Defendant-Petitioner to file his answer upon acceptance of the amended plaint is a violation of a fundamental rule.

For the benefit of the trial Judges and legal practitioners of this country I would like to set down here the following guidelines.

1. When an amended plaint is accepted by court, the court cannot on the same day fix the case for ex-parte trial on the basis that the defendant is absent or he did not file the answer.

2. When an amended plaint is accepted by court, the court must give an opportunity for the defendant to file his answer.

3. When an amended plaint is accepted by court, it becomes the duty of court to summon the defendant if he is absent in court because the amended plaint has to be considered as a new plaint.

Learned President's Counsel for the Defendant-Petitioner admitted in court that the application filed by the Defendant-Petitioner to purge the default under Section 86(2) of the Civil Procedure Code has been rejected by the District Court. For the aforementioned reasons, I hold that the order made by the District Court on 28.1.2004 fixing the case for ex-parte trial is wrong and a nullity.

The learned District Judge took up the ex-parte trial and delivered the judgment dated 20.4.2004 giving relief prayed for in paragraph (a) of the amended plaint. Then the learned District Judge by the said judgment ordered the Defendant-Petitioner to pay a sum of Rs.1,344,192/- and Rs.3000/- per day from 4.12.2003 until vehicle bearing registration No.62-4959 is returned to the Plaintiff-Respondent. The learned District Judge by the said Judgment dated 20.4.2004 has not granted the other reliefs claimed by the Plaintiff-Respondent.

The reliefs claimed by the Plaintiff-Respondent that he (the Plaintiff-Respondent) is the registered owner of the vehicle bearing registration No. 62-4959 and that the order compelling the Defendant-Petitioner to hand over the said vehicle to the Plaintiff-Respondent were not granted.

It is undisputed that the Plaintiff-Respondent purchased the vehicle on a hire purchase agreement signed with the Defendant-Petitioner and that the Defendant-Petitioner seized the said vehicle from the possession of the Plaintiff-Respondent as he failed to pay the monthly installments. This has been admitted by the Plaintiff-Respondent in her evidence. The interim injunction claimed by the Plaintiff-Respondent in her original plaint directing the Defendant-Petitioner not to sell the above vehicle was rejected by the learned District Judge by his order dated 3.10.2003. Learned President's Counsel for the Defendant-Petitioner submitted that the Defendant-Petitioner sold the vehicle since the above relief claimed by the Plaintiff-Respondent had been rejected by court and as such the said vehicle is not in the possession of the Defendant-Petitioner. Learned President's Counsel for the Defendant-Petitioner submitted that in terms of the ex-parte judgment of the District Court, the Defendant-Petitioner has to give Rs.3000/- per day to the Plaintiff-Respondent until the vehicle is returned to the Plaintiff-Respondent but the Defendant-Petitioner is not in a position to hand over the vehicle since it has been sold. Thus it is seen that if the ex-parte judgment of the District Court dated 20.4.2004 is affirmed, the Defendant-Petitioner has to pay Rs.3000/- per day to the Plaintiff-Respondent without any terminal date. This ex-parte judgment of the District Court dated 20.4.2004 has been delivered as a result of the order of the District Court dated 28.1.2004 fixing the case for ex-parte trial.

I have to ask the question whether the order dated 28.1.2004 and the ex-parte judgment dated 20.4.2004 shock the conscience of court. I have to answer this question in the affirmative. If an order or a judgment of the trial court shocks the conscience of court, the appellate court should, in revision, interfere with such an order or judgment. This view is supported by the following judicial decisions.

Bank of Ceylon Vs Kaleel and Others [2004] 1 SLR 284 at page 287(CA) it was held as follows.

> *"In any event, for this Court to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words the order complained of is of such a nature which would have shocked the conscience of Court."*

Vanik Incorporation Ltd Vs Jayasekara [1997] 2 SLR 365 (CA) Justice Edussuriya held as follows.

> *"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

The learned Judges of the Civil Appellate High Court have concluded that failure on the part of the learned District Judge to give an opportunity for the Defendant-Petitioner to file an answer has caused a grave injustice but refused to intervene with the order of the learned District Judge on the ground of delay on the part of the Defendant-Petitioner. I note that the revision application has been filed in the Civil Appellate High Court after eight years of the order fixing

the case for ex-parte trial. As I pointed out earlier, the Defendant-Petitioner, in terms of the ex-parte judgment, has to pay Rs.3000/- per day to the Plaintiff-Respondent without any terminal date. As a result of a judgment or an order in the lower court if a party in a case has to make payments without a terminal date, delay in seeking revisionary jurisdiction of the Appellate Court should not operate as a bar for the Appellate Court to exercise its revisionary jurisdiction. This view is supported by the judgment of the GPS de Silva CJ in the case of Gnanapantithen and Another Vs Balanayagam and Another [1998] I SLR 391 wherein His Lordship held as follows.

> "*There was a total want of investigation of title. The circumstances were strongly indicative of a collusive action. In the result, there was a miscarriage of justice in the case, and the appellants were entitled to a revision of the judgment of the District Judge notwithstanding delay in seeking relief.*
>
> *The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and. exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal."*

I have earlier held that the order of the learned District Judge fixing the case for ex-parte trial is a nullity. If an order of lower court is a nullity, the Appellate Court should interfere with such an order in the exercise of its revisionary jurisdiction. In the present case the Civil Appellate High Court having observed the fact that failure on the part of the learned District Judge to give an opportunity for the Defendant-Petitioner to file his answer has caused grave injustice to the Defendant-Petitioner refused to intervene on the ground

of delay. When I consider all the aforementioned matters, I hold that the learned Judges of the Civil Appellate High Court were wrong when they refused to interfere with the order of the learned District Judge dated 28.1.2004. For the above reasons, I hold that the judgment of the Civil Appellate High Court dated 1.7.2014 is wrong and should be set aside.

For the aforementioned reasons, I exercising the appellate powers of this court, set aside the order of the learned District Judge dated 28.1.2004 fixing the case for ex-parte trial. Since I set aside the said order of the learned District Judge, the ex-parte judgment of the District Court dated 20.4.2004 should also be set aside and is hereby set aside. Since the order dated 28.1.2004 of the learned District Judge fixing the case for ex-parte trial is set aside, the judgment of the Civil Appellate High Court dated 1.7.2014 which has the effect of affirming the said order of the District Court is also set aside.

I direct the learned District Judge to give an opportunity to the Defendant-Petitioner to file his answer on the amended plaint and proceed with the trial without delay.

The Defendant-Petitioner in his petition of appeal filed in this court has moved for an order to return the money that the he has paid to the Plaintiff-Respondent in terms of the ex-parte judgment dated 20.4.2004. Since we set aside the ex-parte judgment dated 20.4.2004 the payments made in terms of said judgment should also be returned by the Plaintiff-Respondent to the Defendant-Petitioner. We are unable to determine the amount paid by the Defendant-Petitioner to the Plaintiff-Respondent as the relevant material has not been attached to the petition of appeal. Therefore we cannot state the amount in this

judgment. The Defendant-Petitioner is entitled to recover the amount he had paid to the Plaintiff-Respondent in terms of the ex-parte judgment. The learned District Judge at the end of the main trial is directed to calculate this amount on the evidence led before the District Court and make an appropriate order. I would like to state here that this judgment should not be considered as a licence to cure defects in cases where there is delay in seeking revisionary jurisdiction of the Appellate Court because each case must be considered on its own merit.

In view of the conclusion reached above, I answer the above questions of law as follows.

The questions of law set out in paragraph 41(a) (i) and (ii) of the petition of appeal are answered in the affirmative.

The questions of law set out in paragraph 41(a)(iii) of the petition of appeal are answered as follows. "The orders of the learned District Judge dated 28.1.2004 and 20.4.2004 are wrong."

The questions of law set out in paragraph 41(b)(i) are answered as follows. "The orders of the learned District Judge dated 28.1.2004 and 20.4.2004 shock conscience of court."

The questions of law set out in paragraph 41(b)(ii) and (iii) are answered in the affirmative.

The question of law set out in paragraph 41(c) does not arise for consideration.

The question of law set out in paragraph 41(e) is answered as follows. The judgment of the Civil Appellate High Court dated 1.7.2004 is wrong.

The order of the learned District Judge dated 28.1.2004 fixing the case for ex-parte trial is set aside.

The ex-parte judgment of the District Court dated 20.4.2004 is set aside.

The judgment of the Civil Appellate High Court dated 1.7.2014 is set aside.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

S. Thurairaja 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) (Amendment) Act No. 54 of 2006.

David Chandrasena Nanayakkara (deceased)
No. 92, Sunanda Mawatha,
Welegoda, Matara.

Plaintiff

Case No: SC/L/A/ 293/2013.
HCCA Case No. SP/HCCA/MA/29/2010
DC. Case No. P/12141.
S.C. APPEAL NO.123/13

Susantha Nanayakkara,
No. 92,
Sunanda Mawatha,
Welegoda, Matara.

Substituted Plaintiff

1. Mitiyala Kankanamage Jimona (Deceased)
Epitawatta, Welegoda.

1A. Mallika Vidanaarachchige Gunaseeli
Epitawatta, Welegoda.

2. Jayasinghe Arachchige Jayasinghe
(Deceased)
No.30, Sunanda Mawatha,
Welegoda, Matara.

2A. Jayasinghe Arachchige Shantha Rohana,
No. 1/30,

Ananda Mawatha,
Welegoda, Matara.

3. Jayasinghe Arachchige Edi
(Deceased)
No. 1/30,
Welegoda, Matara.

3A. Chandralatha Panditharathna (Deceased)
No. 1/30,
Vidanearachchigewatta, Welegoda,
Matara.

3B. Jayasinghe Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4. Devundara Liyanage Sugathadasa.
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4A. Devundara Liyanage Nimal,
Vidanearachchigewatta,
Welegoda, Matara.

5. Jayasin Arachchgie Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.
New: Sirisunanda Mawatha,
Welgoda, Matara.

6. Mirissa Hewage Wijedasa,

7. Mirissa Hewage Bandusena,
Both are at: No. 134,
Abhaya Mawatha,
Borupana Road, Rathmalana.

8. Parana Hewage Seetha Nona,
Welegoda, Matara.

9. Bandula Nanayakkara,
Perakoratuwa,
Walgama, Matara.

10. Aruna Kumudu Nanayakkara,
Perakoratuwa,
Walgama, Matara.

11. Parana Hewage Susan Nona,

12. Ananda Nanayakkara,

13. Keerthi Nanayakkara,

14. Mahinda Nanayakkara,

15. Asoka Nanayakkara,
All are at: No. 14,
Market Side, Anuradhapura.

16. Hewa Manage Aminona.

17. Dharmapriya Nanayakkara,
Both are at: No. 92,
Welegoda, Matara.

18. Subawickrama Malika Vidana Arachchige
Upul Nishantha.

19. Subawickrama Malika Vidana Arachchige

Gunasiri.
Both are at: No. 34/1,
Epitawatta, Welegoda, Matara.

Defendants

And

Susantha Nanayakkara,
No. 92,
Sunanda Mawatha,
Welegoda, Matara.

Substituted Plaintiff – Appellant

Vs.

1A. Malika Vidanaarachchige Gunaseeli
Epitawatta, Welegoda.

2A. Jayasinghe Arachchige Shantha Rohana.
No. 1/30, Ananda Mawatha,
Welegoda, Matara.

3B. Jayasinghe Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4A. Devundara Liyanage Nimal,
Vidanearachchigewatta,
Welegoda, Matara.

5. Jayasin Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.
New: Siri Sunanda Mawatha,

Welegoda, Matara.

6. Mirissa Hewage Wijedasa,

7. Mirissa Hewage Bandusena,
Both are at: No. 134,
Abhaya Mawatha,
Borupana Road,
Rathmalana.

8. Parana Hewage Seetha Nona,
Welegoda, Matara.

9. Bandula Nanayakkara,
Perakoratuwa,
Walgama, Matara.

10. Aruna Kumudu Nanayakkara,
Perakoratuwa,
Walgama, Matara.

11. Parana Hewage Susan Nona,

12. Ananda Nanayakkara,

13. Keerthi Nanayakkara,

14. Mahinda Nanayakkara,

15. Asoka Nanayakkara,
All are at: No. 14, Market Side,
Anuradhapura.

16. Hewa Manage Aminona.

17. Dharmapriya Nanayakkara,

Both are at: No. 92,

Welegoda, Matara.

18. Subawickrama Mallika Vidana Arachchige Upul Nishantha.

19. Subawickrama Malika Vidana Arachchige Gunasiri.
Both are at: No. 34/1,
Epitawatta, Welegoda, Matara.

Defendant – Respondents

And Now Between

Susantha Nanayakkara,
No. 92, Sunanda Mawatha,
Welegoda, Matara.

Substituted Plaintiff- Appellant- Petitioner

Vs.

1A. Malika Vidanaarachchige Gunaseeli
Epitawatta, Welegoda.

2A. Jayasinghe Arachchige Shantha Rohana.
No. 1/30, Ananda Mawatha,
Welegoda, Matara.

3B. Jayasinghe Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4A. Devundara Liyanage Nimal,
Vidanearachchigewatta,
Welegoda, Matara.

5. Jayasin Arachchgie Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.
New: Siri Sunanda Mawatha,
Welegoda, Matara.

6. Mirissa Hewage Wijedasa,

7. Mirissa Hewage Bandusena,
Both are at: No. 134,
Abhaya Mawatha,
Borupana Road,
Rathmalana.

8. Parana Hewage Seetha Nona,
Welegoda, Matara.

9. Bandula Nanayakkara,
Perakoratuwa,
Walgama, Matara.

10. Aruna Kumudu Nanayakkara,
Perakoratuwa,
Walgama, Matara.

11. Parana Hewage Susan Nona,

12. Ananda Nanayakkara,

13. Keerthi Nanayakkara,

14. Mahinda Nanayakkara,

15. Asoka Nanayakkara,
All are at: No. 14,
Market Side, Anuradhapura.

16. Hewa Manage Aminona.

17. Dharmapriya Nanayakkara,
Both are at: No. 92,
Welegoda, Matara.

18. Subawickrama Malika Vidana Arachchige
Upul Nishantha.

19. Subawickrama Malika Vidana Arachchige
Gunasiri.
Both are at: No. 34/1,
Epitawatta, Welegoda, Matara.

Defendant – Respondent - Respondents

Before : L.T.B. Dehideniya, J
S. Thureiraja, PC, J
E.A.G.R. Amarasekara, J.

Counsel : Shiran Ananda with Ruwini Dantanarayana for the
Substituted Plaintiff-Appellant-Appellant
Upul Kumarapperuma with Muzar Lye for the 2A
Defendant – Respondent – Respondent.
Gamini Premathilake with Sunil Wanigatunga &

Samanthi Rajapaksha for the 3B Defendant – Respondent - Respondent.

Argued On : 06.02.2019

Decided On : 14.11.2019.

E.A.G.R. AMARASEKARA, J

The original Plaintiff (Hereinafter sometimes referred to as the Plaintiff) instituted a partition action in the District Court of Matara to partition a land of 31.29 perches, named and described as divided Lot B of Amukanatte Watta Alias Vithane Arachchige Watta of plan no 2156 dated 27.03.1899 made by J.A Byser, Licensed Surveyor. The Plaintiff's position in his plaint as well as in his amended plaint was that the aforesaid plan was made by the then co-owners to amicably partition the land called Amukanatte Watta alias Vithane Arachchige Watta and as a result original owner described in the amended plaint, namely Don Andiris Nanayakkara was given the said lot B and became the original owner by prescriptive possession (vide paragraph 3 of the amended plaint dated19.01.1998). As per the pedigree of the original plaint, only the plaintiff and the 1st defendant have title to the land to be partitioned. The other Defendants starting from the 2nd Defendant onwards are defendants who were made parties to the case after the filing of the original plaint. However, the Plaintiff had filed an amended plaint later on with an amended pedigree giving rights to some of the defendants named in the caption among 8th to 16th defendants. This indicates that the Plaintiff was not personally aware of the complete pedigree that he relied upon at the time he filed the original plaint. The

preliminary survey and evidence establish that some of the defendants, namely original 2nd and 3A defendants, who do not gain any right under the plaintiff's pedigree, lived within the purported corpus and claimed certain buildings and plantations within it without any counter claim from the Plaintiff or anyone who has rights as per the purported pedigree of the amended plaint. The plaintiff had not explained or revealed their presence in the corpus in any manner in his amended plaint. This shows that the Plaintiff filed the action concealing possible claimants to the corpus.

1st Defendant, later on the substituted 1a Defendant, 2nd Defendant and 3rd Defendant, later on the 2nd Defendant and substituted defendants for the 3rd defendant(3A Defendant and 3B Defendant) and 4th Defendant (who bears the respective Defendant Respondent numbers in the caption to this appeal and hereinafter sometimes may be referred to as 1st Defendant, 1a Defendant, 2nd Defendant, 3rd Defendant, 3A Defendant and 3B defendant and 4th Defendant when necessary) had filed their respective statements of claims or amended statements of claims. Though the parties had raised points of contests on several occasions, on their request the trial was commenced de novo on the points of contest recorded on 15.08.2000. As per the said proceedings, no admission was recorded and but the points of contests raised by the parties indicate that while the 1a Defendant relied on the stance taken by the Plaintiff, the 4th Defendant claimed and or wanted to exclude lot 3 of plan No. 2480 dated 20.06.1986 from the purported subject matter of the action.

The 2nd Defendant and the 3rd Defendant including the Substituted Defendants for the 3rd Defendant challenged the corpus which was sought to be partitioned as

an undivided portion of a larger land and accordingly their position was that it cannot form the subject matter of the present partition action. They also contested the pedigree of the plaintiff while relying on a pedigree commencing from an original owner named Jasin Arachchige Babun Appu to a larger land of 2 acres in extent and further claimed prescriptive title to the said land.

Though a right of way was also claimed by the 1A Defendant in his statement of claim, no point of contest was raised in that regard and it appears that alleged right of way does not fall within the purported corpus proposed to be partitioned by the plaint.

Subsequent to the institution of the action, when the preliminary survey was carried out, it was evidenced that, though the Northern, Eastern and the Southern boundaries of the purported corpus of partition was shown by the Plaintiff as it appears on the ground, the purported west boundary was ascertained only by superimposing the plan No.2151 dated 27.03.1897, marked as “P 6” of the appeal briefs. It should be noted that the number of the old plan used for the superimposition differs from the number given in the plaint or the amended plaint which is No. 2156. The Preliminary plan No.2787 of Mervin Wimalasooriya, Licensed Surveyor and its report marked as X and X1 in the brief, thus depicts the purported corpus to be partitioned with the help of the said superimposition. The said preliminary plan and report also evidenced that some of the buildings within the purported corpus extend beyond the superimposed western boundary. It is also evidenced from the said report that no one, who gets title or rights according to the plaintiff’s pedigree or 1st Defendant’s pedigree, had claimed plantation, buildings or possession of any part before the commissioner. As per the said report

the age of the said plantation at the time of survey ranged from 4 to 70 years. All these plantations and the buildings were claimed by 2nd and 3rd defendants who were new claimants at the preliminary survey. Hence, the preliminary survey itself shows that the purported corpus was not in existence as a separate land on the ground at the time of survey and it was enjoyed by the people in possession with the adjoining lot to the west as part of one unit; Only the superimposition of the " P 6" gave it a separate identity on the Preliminary plan.

The Plaintiff had led the evidence of one Piyabandu Nanayakkara, one of his predecessors of title, who was born around 1942 as per his age given while giving evidence and one Wilson, a coconut plucker, who said to have plucked coconut in the purported corpus. The Plaintiff had closed his case relying on the documents marked as P1 to P6. The 2a Defendant had given evidence in support of his case and closed his case reading in evidence the documents marked as 2v1 to 2v24 while the 3rd Defendant closed his case relying on the documents marked 3v1 to 3v13 without calling any witnesses. The other Defendants had not led any evidence at the trial.

Learned District Judge delivered his judgment dated 16.12.2009 dismissing the plaintiff's action. As per the reasons given by the learned District judge it appears that he had come to the conclusion that even though there is a plan surveyed and drawn in 1897, the plaintiff failed in proving the existence of the purported land to be partitioned as described in the plaint. In other words, learned District Judge was in doubt whether there was a proper partition of the larger land terminating the co-ownership and giving a separate identity to the purported partitioned portion as described in the plaint. Thus, the Plaintiff failed in proving that the land sought

to be partitioned is a properly divided portion from the bigger land which could be considered as a new unit devoid of the co-ownership that existed with regard to the larger land that was there prior to the partition.

Being aggrieved by the said judgement of the Learned District Court Judge the Substituted Plaintiff preferred an appeal to the High Court holden in Matara exercising civil appellate jurisdiction. The High Court affirmed the judgement of the District Court stating and reasoning as follows;

- *The learned District Judge dismissed the partition action on the ground that the land sought to be partitioned is not a divided portion of a larger land.*
- *The main issues to be considered were;*
    1. *Whether the land described in the schedule to the plaint and the land surveyed and shown in the preliminary plan was a divided portion of a larger land;*
    2. *Or after preparing the plan No. 2151 which was marked as "P6", the intended parties agreed to divide the land shown in plan no. 2151(P6) and had possessed the land as shown in the division in plan no.2151 for more than 10 years.*
- *Western boundary of the proposed corpus of the present partition action was not a defined boundary and it was identified by superimposing the plan no.2151(P6) and there is no evidence to show that the surveyor had taken steps to demarcate the undefined Western boundary with boundary marks which could not be easily removed as laid down in S. 18 (1) of the partition Law No. 21 of 1977.*

- *The surveyor who prepared the preliminary plan marked as "X" had not certified that he surveyed the correct land to be partitioned. The surveyor had failed to demarcate the undefined boundary correctly for the action to continue (It should be noted that as per section 18(1)(a)(iii) of the Partition Act, the Commissioner should state in his report whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint).*
- *The Plaintiff failed in proving that, after preparing the plan marked as 'P6' (purported amicable partition plan No. 2151), the allottees possessed the land as demarcated by 'P6' for more than 10 years. {In this regard the learned High Court Judge had highlighted* ***Dona Cecilia V Cecilia Perera (1987) 1 SLR 235, Abeysinghe V Abesinghe 46 NLR 509*** *to indicate that a undivided portion of a larger land cannot be partitioned but where a land was divided by the co-owners who acquiesced in the division and possessed their divided lots exclusively showing an intention to partition the land permanently and not just for convenience of possession, they can, with ten years of possession, acquire prescriptive title to their respective lots.}*

Being aggrieved by the said judgement of the High Court of Civil Appeal, the Substituted Plaintiff sought leave to appeal from this Court and leave to appeal was granted on the following questions of law;

(I). Did the honourable High Court err and/or misdirect and/or non-direct in law when interpreting the ratio of **Dona Cecilia v Cecilia Perera 1987(1) SLR 235**?

(II). Did the honourable High Court in affirming the judgement of the Learned District Judge err in law in holding that, the mere preparation of plan NO. 2151 was not enough to validly give effect to an amicable partitioning of a larger land unless such plan was followed by the execution of partition deeds? – (vide written submissions of the 2A Defendant Respondent Respondent dated 06.03.2019 and 08.04.2014 and written submissions of the Substituted Plaintiff Appellant Appellant dated 07.11.2013).

It appears that the position of the Substituted Plaintiff Appellant Appellant (hereinafter sometimes referred to as the Substituted Plaintiff) is that, by the time the Plan 'P6" was prepared, there were 5 co-owners and they amicably partitioned the land in accordance with the said plan marked as ' p6' and placed their signatures to the said plan after it was prepared. On some occasions he submits that those facts were not in dispute- vide paragraph 5.01(i) of his written submission dated 07.11.2013. However, it is clear that there was a corpus dispute as well as a dispute with regard to the pedigree. As per the plaint and the amended plaint, purported corpus sought to be partitioned is lot B of plan no. 2156 dated 27.03.1987 made by J. A. Byser, Licensed Surveyor. The amended plaint states that the larger land shown in that plan had been amicably partitioned by the then five co-owners, namely Jasin Arachchige Babun Appu, Don Andrias Nanayakkara Police Officer, Kumareppurama Arachchige Diyonis, Kumarapperuma Arachchige Andiris and Kumarapperuma Arachchige Karolis and thereafter, said Andiris Nanayakkara Police Officer came in to the possession of the aforesaid lot B and became the original owner of said lot B. As said before the position of the 2nd and 3rd defendant is that what is sought to be partitioned is a portion of a larger land and the original owner of the said land including the portion shown as land sought to

be partitioned in the preliminary plan was Jasin Arachchige Babun Appu who had prescriptive title to the same. No admission was recorded at the trial stating that the 5 persons named in "p6" (Plan No 2151) or in the plaint as aforesaid were the original owners of the larger land and they amicably partitioned the larger land in accordance with the said plan marked as 'P6". Hence, the substituted Plaintiff's position that it was not disputed that there were 5 co-owners to the larger land and they amicably partitioned is factually incorrect. Thus, the burden was on the plaintiff to prove that the above named 5 persons were the co-owners of the larger land and they amicably partitioned the larger land as per the said plan 2156(as per the plaint) or plan marked as P6 dated 27.03.1987. In this regard the Plaintiff had called one of his predecessors in title, namely one Piyabandu Nanayakkara who was born around 1942. Surely, he could not have any personal knowledge of the people or their possession to the larger land in 1897 as it was many years prior to his birth. No deed of partition of the larger land or cross conveyance after the purported partition plan was produced in evidence. No deed referring to such amicable partition executed by any of the said purported 5 co-owners was submitted in evidence. Even though the deeds marked as P1 to P4, which were written after 80 to 93 years from the making of P6, refer to a divided lot B, they do not refer either to plan No.2156 or 2151 or any amicable partition plan. In contrast, the deed marked as 1v1,1v2 and 1v3 through the plaintiff's witness, which were written in between 1957 and 1962 to prove the pedigree relied by the plaintiff and to give shares of the purported land to be partitioned to the 1st defendant do not refer to the amicable partition as per the aforesaid plan No.2151 marked as "P6" but to a different amicable partition of 1/3 share to the west and 2/3 share to the east and those deeds relates to a land of about ½ an acre. These deeds (1v1,1v2 &1v3)

indicate that at the time they were written the people in the plaintiff pedigree did not consider P6 as a partition plan or the purported lot B of P6 (plan No.2151) or plan No 2156 as a land with a separate identity or existence. The other witness of the Plaintiff was the coconut plucker who was 54 years old when he gave evidence in 2007.He did not relate any evidence with regard to the amicable partition of the larger land and on the other hand he cannot possess any personal knowledge of such partition that purportedly had taken place in 1897. However, if there was evidence to show that it was only the people who get rights under the plaintiff's pedigree are in possession of the land identified as the land sought to be partitioned by the superimposition of the old plan, the court below could have presumed that there had been an amicable partition some time ago in the past as stated in the plaint, but the preliminary survey report marked as X1 shows neither the plaintiff nor anyone who gets rights under the plaintiff's pedigree claimed any rights to the plantation or the buildings in the purported corpus. There is nothing in that report to assert that anyone who gets right under the plaintiff's pedigree possesses any part of the purported corpus. The aforesaid witness of the plaintiff had casually stated that the contesting defendants were given their planter's share and they are licensees of his grandfather. No planter's share agreement or any other agreement relating to plantation were submitted in evidence. He had not stated when the contesting defendant came to the land as licensees or under any other agreement. However, he had further admitted that his knowledge with regard to the land was about 30 years. The X1 report shows that the contesting defendants had claimed plantation which are 60-70 years old without any counter claim. Thus, this witness cannot have any personal knowledge with regard to how the contesting defendants came to the land. On the other hand, the plaintiff had

not taken any stance in his amended plaint that the contesting defendants are licensees or reside there under any other agreement. If it is the true position the Plaintiff could have revealed it and shown the contesting defendants' rights in his amended plaint. This seems to be a new stance based on an afterthought.

The coconut plucker was called to state that he plucked coconut in the purported land for the Plaintiff, but he could not identify the purported land by its name or boundaries. He does not know who reside there in the purported corpus. He speaks of a land with one house and a garage but as per plan marked X and its report X1 there are number of buildings which includes at least 2 houses and no garage was shown or described therein. Thus, the coconut plucker's evidence does not support the plaintiff's stance with regard to the identity of the purported corpus. On the other hand, the reports of the plans made and produced in evidence in this case confirms the possession of the 2nd and 3rd defendants or their successors.

The substituted Plaintiff relies on the aforesaid old plan No.2151 marked as P6 during the trial and its superimposition on the preliminary plan marked as X. As mentioned before, the plaint and the amended plaint in describing the purported corpus sought to be partitioned refers to a plan No.2156 of the same surveyor bearing the same date. This is indicative of the fact that either there is a defect in the plaint as well as in the amended plaint in describing the old plan and the purported corpus to be partitioned or wrong plan had been used to do the superimposition. This itself stands against the substituted plaintiff's position that the corpus was properly identified. It is true P6 (plan no.2151) contains the names of the 5 persons referred to by the Plaintiff as the co-owners of the larger land and it had allocated the five allotments to the said 5 persons. However, it is worthy to

note that in the copies given to the brief only 3 of them had signed while one appeared to have placed a mark, indicating only four of them had consented to the proposed partition by “P6”. It appears that the purported original owner of the plaintiff pedigree to the purported corpus sought to be partitioned, namely Don Andris Nanayakkara had not signed or placed his mark on “P6” expressing his consent to the proposed partition and allocation of lots in “P6”.

Furthermore, “P6” plan is only a graphical representation of a partition of a larger land which can be done even in an office of a Surveyor. To give separate identity to separate lots depicted therein one has to demarcate boundaries on the ground as per the prepared plan. The witnesses of the plaintiff who were born after many decades of the making of “P6” cannot have any personal knowledge to say such demarcation was done on the ground and the relevant person came into the possession of the lot allotted to such person. Thus, the witnesses of the plaintiff were not capable of asserting that the purported original owner came into the purported corpus sought to be partitioned in this action. As there are other persons, namely who claim under 2nd and 3rd Defendants, who do not get rights under the plaintiff’s pedigree, are now in possession in the purported corpus sought to be partitioned and the witnesses of the Plaintiff are not capable witnesses to prove that they came into possession under or through persons found in the plaintiff’s pedigree, there was not sufficient material before the courts below even to presume that there had been an amicable partition and the original owner in the Plaintiff’s pedigree came and possess the purported corpus sought to be partitioned in this action as a separate block of land.

On the other hand, the learned High Court Judges have correctly found that even for the present action there is no evidence to show that superimposed boundary was demarcated on the ground and it is only by superimposition the surveyor has shown the purported corpus. It is essential to demarcate the boundary found by superimposition on the ground. Otherwise, the persons affected by the new boundary line will not get notice of the new boundary to claim or assert their rights or challenge the finding of the surveyor by the said superimposition. In this action this court observe as said before that there is difference between the old plan number referred in the amended plaint and the plan used for superimposition.

What have been stated above demonstrates that;

- There was no acceptable evidence to establish that the 5 persons referred to in the purported amicable partition plan marked as P6 were the co-owners of the larger land at the time the said plan was made.
- There was no acceptable evidence to establish that all 5 persons referred to in the said plan consented to the amicable partition depicted by the said plan.
- There was no acceptable evidence to establish that the boundaries were laid on the ground as per the aforesaid amicable partition and the purported original owner of the purported corpus sought to be partitioned as per the plaint started possessing it as a portion of land with a separate identity.
- There is no acceptable evidence, even for the present partition action, that the boundary found by purported superimposition was demarcated on the ground to identify the corpus sought to be partitioned on the ground.

- The plan used for superimposition bears a different number when compared to the number used in the amended plaint to describe the corpus sought to be partitioned.

Hence it is the view of this court that there was no sufficient material before the courts below to establish a separate existence of the corpus sought to be partitioned and the identity of the same. Thus, this court cannot find fault with the lower courts dismissing the Plaintiff's action.

However, the Substituted Plaintiff strenuously argue that the learned High Court Judges erred;

- In applying and interpreting the ratio decidendi of **Dona Cecilia Vs Cecilia Perera (1987) 1 SLR 235** to the case at hand and,
- In holding that mere preparation of plan 2151 was not enough to validly give effect to an amicable partitioning of a larger land unless such plan was followed by the execution of partition deeds.

The Substituted Plaintiff's contention appears to be that when all the co-owners sign the amicable partition plan made for the larger land, neither the execution of a partition deed nor 10 years prescriptive possession is needed to terminate the co-ownership to the respective lots allocated by the amicable partition plan. In other words, an amicable partition plan signed by all the co-owners of the larger land itself is sufficient to terminate co-ownership among them in relation to each lot allocated by that amicable partition plan.

Now it is pertinent to look at the ratio of the aforesaid **Dona Cecelia and Cecilia Perera** case. The following extract from the aforesaid judgment will highlight the issue which was to be decided in that case and the decision.

" The only matter argued before us was that there was no proof of an amicable division of the land in 1935 as depicted in plan 205, It was submitted that all the co-owners at the time had not signed the plan signifying their consent to the division of the land into the lots A,B and C. The case of ***Githohami V. Karanagoda (1954) 56 NLR 250*** *was strongly relied on by learned counsel for the appellant. There it was held that a plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession. When a land is amicably partitioned among co-owners it is usual to execute cross deeds among themselves or at least the co-owners should sign the partition plan.*

In that case apart from the plan, there was no evidence to show that the land was in fact partitioned on the occasion the plan was prepared. There was also no evidence that all the co-owners had acquiesced in the preparation of the plan, nor were aware of its preparation. Besides, the evidence of exclusive possession led in the case was insufficient to establish a prescriptive title in the co-owners to their several lots. Learned counsel also cited the case of ***Dias Vs Dias (1959) 61 NLR 116****, which held that where a co-owner conveys his interest by reference to a particular portion or Koratuwa of which he has been in possession the deed can be considered as effective in law to convey his undivided interest in the whole land. But in that case the division took place without the knowledge of all the co-owners.*

Separate possession on the grounds of convenience cannot be regarded as adverse possession for the purpose of establishing prescriptive title. In ***Simpson V Omeru Lebbe (1947) 48 NLR 112*** *relied upon by counsel for the appellant, there was no documentary evidence of any division of the land as in the present*

case, and on the other hand, according to the 3rd Defendant all the co-owners of the land were present at the time of the plan was made. They were herself and her husband Jusey, Isebella, Ushettige Cecilia Perera and Theodorisa. The 3rd Defendant and her husband were allotted Lot A, Jeramias Lot B, and others Lot B. The Plaintiff's vendors on P1 were not called to testify to the contrary. The learned trial judge has accepted the 3rd Defendant's evidence and found that there was an amicable division of the land in 1935.That finding has not disturbed by the court of appeal. After the division, live fences were erected along the boundaries separating one lot from the other. At the time the preliminary plan X was prepared in 1968, the surveyor found fences separating the lots and has depicted them in the plan. This evidence has been accepted by the learned trial judge. Although the plan 205 was not signed by the co-owners the evidence clearly showed that they were present and were aware of the division of the land and acquiesced in it. Thereafter they had possessed their divided lots exclusively and had taken the produce. Everything pointed to an intention on their part to partition the land permanently and not just for convenience of possession.

Where land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over 10 years."

The above quoted passages from the **Dona Cecilia Vs Cecilia Perera** decision shows that the issue that had to be decided in the said case was whether there was an amicable division of the land in 1935 as per a plan marked in that case when all the co-owners had not signed the partition plan to signify their consent to the division as well as when there was no partition deed written in accordance with the said plan. The court had decided that there was evidence to show the co-owners were present and aware when the plan was made and they after the division had erected fences to separate the lots which fences were found by the surveyor when preparing the preliminary plan for that case. It also appears that the exclusive

possession of divided lots and enjoyment of the produce of such divided lots were also established in that case. As such this court in that case had decided that, even though the co-owners did not sign the partition plan, the co-owners were present, aware of the division and they acquiesced in it. Thus, other evidence available had been taken into account to consider the consent, agreement, knowledge or acquiescence of the division by the co-owners when they have not signed the plan or executed a partition deed. Had they signed the plan it could have been considered as a consent or agreement to or acknowledgement of the division proposed by the plan or an overt act or something similar to that to commence adverse possession from there onwards. The issues of law proposed at the case at hand concern with whether mere placing of signatures on the purported partition plan by co-owners itself terminates the co-ownership without a partition deed or cross conveyance or ten years prescriptive possession of relevant lots.

The placing of a co-owner's signatures on a partition plan may evidence his consent or agreement to the division proposed by the said plan or his acknowledgment of the same but it cannot establish whether the boundaries set out in the plan were demarcated on the ground and parties commenced possession of units of land separated in accordance with the said amicable partition plan.

Section 2 of the Prevention of Fraud ordinance reads as follows;

" No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting such object, or establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovables property, and no notice, given under the provisions of the Thesawalamai Pre-emption

Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same ,or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

Due to the provisions of the aforesaid section, any agreement to transfer or renounce once co-ownership rights in relation to an immovable property has to be in writing and executed before a notary. In the case at hand there was no notarially executed instrument renouncing or transferring the co-owned rights in the divided lots allocated to one of the co-owners by the other co-owners. In other words, there was no cross conveyances or a partition deed. If there was such an instrument or instruments, the co-ownership should have extinguished with the execution of such instrument. However, mere signatures of the co-owners placed on a plan does not falls within the instrument, writing or deed executed by a notary as contemplated in Section 2 of the Prevention of Fraud Ordinance. Thus, such placement of signatures itself is not sufficient to terminate co-ownership in relation to the divided portions depicted in the plan. Such placement of signature can only be construed as co-owner's expression of consent and willingness to transfer or renounce their rights in relation to the lots allocated to the other co-owners but such plan itself cannot be construed as an instrument or writing renouncing or transferring such co-owned rights.

One other mode of acquisition of rights is prescription. As far as another co-owner's rights are concerned following extracts from the judgment **Githohamy Vs Karanagoda (1954) 56 NLR 250** is relevant.

" The possession of a co-owner would not become adverse to the rights of other co-owners until there is an act of ouster or something equivalent to ouster. In the absence of ouster possession of one co-owner ensures to the benefit of other co-owners. It was so held by the Privy Council in ***Corea Vs Iseris Appuhamy [1(1911) 15 NLR 65]****. It is true that ouster can be presumed from exclusive possession in special circumstances as we decided in the case of* ***Tillekeratne V Bastian [2(1918) 21NLR 12****]. The special circumstances which was recognized in that case was the fact that the co-owner who claimed a prescriptive title was proved to have excavated valuable plumbago on the land during a lengthy period of time. Such excavation of plumbago during a protracted period would naturally diminish the value of the land. Therefore, if the other co-owners did not protest when the land was being possessed in a manner that its value would be considerably diminished, it is fair to presume an ouster, but if a co-owner only takes the natural produce of the trees for a long time no such presumption would arise."*

Accordingly a placement of signature on an amicable partition plan by a co-owner consenting to the partition can be treated as an expression against his own rights as a co-owner and exclusive possession of each allottee of the allotment given to such allottee there onwards can be considered as adverse to the co-ownership rights that existed to the larger land and ten years of such possession will give prescriptive title to the allotted lot. In other words, special circumstances of signing of the amicable partition plan and starting exclusive possession of the allotted lot can be considered as the overt act or its equivalent, the starting point of the adverse possession. On the other hand, as decided in the aforesaid **Dona Cecilia V Cecilia Perera** case even where the co-owners did not sign the partition plan other evidence may provide material to decide the starting point of adverse possession of allotted lots. As stated in **Ponnambalam V Vaitialingam (1978-79) 2 Sri. L.R 166** the question whether a co-owner has prescribed to a particular divided lot as

against the other co-owners is one of fact, to be determined by the circumstances of each case.

In the case at hand there was no acceptable evidence before the lower court judges to conclude that after the making of purported amicable partition plan, division by demarcation of the boundaries was done on the ground as well as the purported original owner of the purported corpus to be partitioned started possession to the exclusion of others.

The Substituted Plaintiff in his written submission dated 7th November 2013 has stated that there are other modes of acquisition under Roman Dutch Law such as Occupatio and Accession which does not involve conveyance as contemplated by Section 2 of the Prevention of Fraud Ordinance. This appears to be in support of his argument that as co-owners have signed the plan there is no need of a notarially executed deed or evidence of prescriptive title. However, the Plaintiff while filing his amended plaint, neither had pleaded any other mode of acquisition under Roman Dutch Law nor he had led evidence in that regard. In his amended plaint dated 19.01.1998 at paragraph 3, the plaintiff had clearly relied on an amicable partition and prescriptive title acquired by the purported original owner of his pedigree, namely Andris Nanayakkara. The Plaintiff failed in proving prescriptive title of the said purported original owner as pleaded in his amended plaint.

For the forgoing reasons this court cannot hold that the Learned High Court Judges erred or misdirect or non-direct them in interpreting the Ratio of aforesaid case **Dona Cecilia V Cecilia Perera** as well as erred in holding mere preparation of a partition plan No.2151 was not enough to validly give effect to an amicable

partitioning of a larger land unless such plan was followed by the execution of partition deeds since there was no acceptable evidence to prove prescriptive title. Thus, afore mentioned issues of laws are answered in the negative. Furthermore, for the reasons elaborated above it is clear that the Plaintiff failed in proving the existence and identification of the purported corpus sought to be partitioned. Hence this appeal is dismissed with costs.

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree.

Judge of the Supreme Court

S. Thureiraja, 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 in terms of section 5 (c) 1 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

Rajamany Widow of Ramasamy
Oppilamany Ganeshanathan
Kandar Madam,
Vannar Ponnai,
Jaffna.

Presently of 110/1, 5th Lane,
Colombo 03.

Appearing by her Attorney,
Thurairajah Sukumar of Madagal Road,
Pandetteruppu,
Jaffna.

Plaintiff

SC Appeal 125/2013

SC/HCCA/LA 194/2011
HC/NP/HCCA/JAF/107/2010
DC/ Jaffna Case No. 695L

Vs,

Vairamuthu Kovindapillai
No. 62, Palam Road,
Kandar Madam,
Jaffna.

Defendant

And between

Vairamuthu Kovindapillai
No. 62, Palam Road,
Kandar Madam,
Jaffna.

Defendant-Appellant

Vs,

Rajamany Widow of Ramasamy
Oppilamany Ganeshanathan
Kandar Madam,
Vannar Ponnai,
Jaffna.

Presently of 110/1, 5th Lane,
Colombo 03.

Appearing by her Attorney,
Thurairajah Sukumar of Madagal Road,
Pandetteruppu,
Jaffna.

Plaintiff –Respondent

And now between

Vairamuthu Kovindapillai
No. 62, Palam Road,
Kandar Madam,
Jaffna.

Defendant-Appellant-Appellant

Vs,

Rajamany Widow of Ramasamy
Oppilamany Ganeshanathan
Kandar Madam,
Vannar Ponnai,
Jaffna.

Presently of 110/1, 5th Lane,
Colombo 03.

Appearing by her Attorney,
Thurairajah Sukumar of Madagal Road,
Pandetteruppu,
Jaffna.

Plaintiff-Respondent-Respondent

Before: **Sisira J. De. Abrew J**
Vijith K. Malalgoda PC J
L.T.B. Dehideniya J

Counsel: Dr. Sunil Cooray with S. Kumarasingham,

for the Defendant-Appellant-Appellant

Mano Devasagayam with Umali Rajapakse instructed by K. Kaneshayogan

for the Plaintiff-Respondent-Respondent

Argued on: **13.11.2018**
Decided on: **07.02.2019**

Vijith K. Malalgoda PC J

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent) had instituted action in the District Court of Jaffna praying inter alia a declaration that the Respondent is the owner of the Premises No. 62 Palam Road, Kandar Madam, Jaffna and ejectment, against the Defendant-Appellant-Appellant (hereinafter referred to as the Appellant).

Whilst moving for a dismissal of the said action the Appellant had taken up the position before the District Court that, he moved to the said premises in May 1989 as a tenant for a monthly rent of Rs. 300/- which is in excess the authorized rent under the provisions of the Rent Act, but continued to pay the said rent until July 2003.

Since the premises is governed by the Rent Act and the Appellant had spent over Rs. 75,000/- for urgent repairs, it was agreed with the Respondent to deduct the amount spent for repairs and the excess rent paid to him.

The trial before the District Court proceeded with 36 issues raised by parties and the learned District Judge by his judgment dated 09.07.2010 allowed the plaint by granting prayer (a) and (b) of the plaint.

Being aggrieved by the said decision of the District Court, the Appellant appealed to the Civil Appellate High Court of the Northern Province holden in Jaffna.

By its order dated 29.04.2011, the Civil Appellate High Court of the Northern Province had dismissed the said appeal subject to cost and the present appeal is preferred by the Appellant against the said order of the Civil Appellate High Court of the Northern Province on several grounds of appeal as averred in paragraph 26 of the Special Leave to Appeal Application filed before this Court on 8th June 2011.

This court on 01.10.2013 had granted Special Leave on the following question of Law.

> Did the Civil Appellate High Court err in its finding that the Rent Act has no application to the premises in suit?

As referred to above the Appellant had mainly relied on the ground that the premises in question is governed by the provisions of the Rent Act No. 07 of 1972. During the trial before the District Court, on behalf of the defendant, the Appellant had given evidence and marked document from D1 to D6. However when analyzing the above evidence the learned District Judge had concluded that, the Appellant had failed to establish that the property in question is situated within an area which comes under the provisions of the Rent Act, and proceeded to consider the other grounds raised by the parties.

The same position was once again raised before the Civil Appellate High Court of the Northern Province by the Appellant, and the Hon. Judges of the Civil Appellate High Court had considered the said issues and concluded that,

"The counsel for the Appellant mainly depended on section 2(a) of the Act. I cannot agree with the contention of the counsel for the Appellant because section 2(a) clearly states that the Rent Act shall be in operation in every area in which Rent Restriction Act was in force immediately prior to 1st day of March 1972. No evidence on this matter was placed before the District Court during the trial nor was this court convinced that the Rent Restriction Act was in force immediately prior to the 1st day of March 1972."

In the said context the Hon. Judges of the Civil Appellate High Court too had concluded that the Appellant had failed to establish that the property in question is situated within an area which comes under the provisions of the Rent Act No.7 of 1972.

However when the present application was filed before the Supreme Court, the Appellant had tendered additional documents which were not placed before the District Court and the Civil Appellate High Court. Even though the learned counsel for the Respondent objected for considering fresh evidence in appeal, it appears that this court had permitted fresh documents being produced before court at the support stage.

When submitting that the property in question is governed by the provisions of the Rent Act No.7 of 1972 the Appellant had heavily relied on section 2 (1) of the said Act which reads as follows;

Rent Act No.7 of 1972

Section 2 (1) This Act shall be in operation-

(a) In every area in which the Rent Restriction Act No 29 of 1948 was, by virtue of the provisions of section 2 of that Act and by virtue of any notification made under that section, in force immediately prior to the 1st day of March 1972 and

(b) In every other area for the time being declared by the Minister, by Notification published in the Gazette, to be an area in which this Act shall be in operation.

Section 2 of the Rent Restriction Act No. 29 of 1948 referred to above in section 2 of the Rent Act No.7 of 1972 reads as follows;

Rent Restriction Act No.29 of 1948

Section 2 (1) This Act shall be in operation

(a) In every area in which the Rent Restriction Ordinance No.60 of 1942 was, by virtue of any proclamation under section 2 of that ordinance, in force immediately prior to the 1st day of January 1949

(b) In every other area for the time being declared by the Minister by Notification published in the Gazette, to be an area in which this Act shall be in operation.

Section 2 of the Rent Restriction Ordinance 60 of 1942 referred to above in section 2 of the Rent Restriction Act 29 of 1948 reads as follows;

Rent Restriction Ordinance No.60 of 1942

Section 2 (1) The Governor may from time to time, by proclamation published in the Gazette, declare that this Ordinance shall be in force in any area specified in the proclamation and appoint the date on and after which the Ordinance shall be in force in such area.

(2) so long as the proclamation under sub-section (1) is in force in respect of any area, this Ordinance shall subject as hereinafter provided, apply to all premises in such area which are used or occupied or intended to be used or occupied, whether in their entirety or in separate parts, for the purpose of residence or for the purpose of any trade, business undertaking, profession, vocation or employment, or for any other purpose whatsoever; provided, however, that the Governor may, by Order Published in the Gazette, exempt any specified premises or premises of any specified class or description from

> the operation of this Ordinance or of any specified provision thereof; and so long as such order is in force, this Ordinance or such specified provisions thereof, as the case may be, shall not apply in the case of the premises specified in the order or of premises which are of any class or description so specified.

For the first time in the proceedings of the present case, the Appellant had tendered the proclamation said to have been published by the Governor of Ceylon under the above provision of the Rent Restriction Ordinance, along with the Leave to Appeal Application marked 6A.

In the said proclamation, which contained in the Extraordinary Gazette No. 9733 dated Thursday 10th July 1947, identified the Administrative limits of Jaffna Urban Council as an area comes within the provision of the Rent Restriction Ordinance 60 of 1942.

As revealed before us, other than the proclamation made under Rent Restriction Ordinance 60 of 1942, no other proclamation was made either under Rent Restriction Act No.29 of 1948 or under Rent Act No. 07 of 1972. However as submitted by the learned counsel for the Respondent, a significant change had taken place with regard to the functions of the Jaffna Urban Council in the year 1948 when the Jaffna Urban Council was made a Municipality Council by Government Gazette No 9,843 dated Friday 19th March 1948.

In the absence of a fresh proclamation made either under the Rent Restriction Ordinance declaring Jaffna Municipal limits under the said Ordinance or under section 2 (1) (b) of the Rent Restriction Act No. 29 of 1948, the learned Counsel for the Respondent argued that the provisions of the Rent Act No.7 of 1972 has no application with regard to the premises in question before us.

During the arguments before us the learned Counsel for the Respondent relied on the decision in ***C.A. Samarakoon Vs. A.H.K. Jayawardena (1953) 55 NLR 239*** and argued that in the absence of a fresh proclamation made after the issuance of Government Gazette 9,843 declaring Jaffna

Municipality to come within the provisions of Rent Restriction Ordinance, the premises in question, No, 62, Palam Road, Kandar Madam, Jaffna is not Governed by the provisions of the Rent Act 7 of 1972.

As observed by this court, *Swan J* had considered the matters before his lordship as follows;

> "The simple question is whether the area in which the premises were situated came within the operation of the Rent Restriction Ordinance No 60 1942, by virtue of any proclamation under section 2 of that ordinance……
>
> ……..By notification published in Gazette No 9,773 of the 10th July 1947, the Notification in Gazette 9,084 was cancelled and a new list of areas brought within the operation of the Rent Restriction Act was published. In that list we once again find reference to the area within the administrative limits of the U.C. Kotte. Gazette 7,910 of the 4th March 1932, published a list and gave the boundaries of the areas in which Urban Councils were established.
>
> There we have reference to the administrative limits of the Kotte Urban Council which are described by physical metes and bounds. In my opinion there can be no question that the area brought within the operation of the Rent Restriction Act 1948 by virtue of section 2 (a) was the area within the boundaries mentioned in the notification of Gazette No. 7,910 perhaps it was a casus omissus on the part of the authorities not to have notified that the Rent Restriction Act of 1948 would apply to the administrative limits of U.C. Kotte, as extended from the beginning of 1951. But upon an interpretation of section 2 (a) of the Rent Restriction Act I have come to the conclusion that in the absence of a notification under section 2 (b) the Rent Restriction Act does not apply to the extended limits…."

Referring to the above decision, the Appellant submitted that there are no extended limits, when it refers to the Jaffna Urban Council, as against the Jaffna Municipal Council. The Appellant had

submitted Government Gazette 9,843 dated Friday 19th March 1948 marked XX1, under which the Jaffna Municipal Council was declared. In the said Gazette the metes and bounds of the Jaffna Municipal Council had been identified and, "Kantherimadam" had been identified as ward 9 of the said Municipal Council.

However I cannot agree with the submission of the learned Counsel for the Appellant, since what is before this court is only the metes and bounds of the Jaffna Municipal Council, which was declared in the year 1948. In the absence of the metes and bounds of the Jaffna Urban Council as at 10th July 1947 when the proclamation under section 2 of the Rent Restriction Ordinance was issued, this court is unable to agree with the submissions of the Appellant before this court.

With regard to the accepting of additional evidence before this court, the Appellants having relied to several decisions by Appellate Courts, including ***Jayakody Vs. Silva 44 NLR 379, Edirisinghe Vs. Cassim 46 NLR 334, Samarawickrama Vs. Sebastian (1971) 74 NLR 101*** had argued that our courts have taken judicial notice of Gazette Notifications without the said Notifications being produced before Court and in the said circumstances this court should consider the Gazette Notification that has come by way of fresh evidence and be acted upon in the present appeal.

I am not inclined to accept the said argument as it is, but considering the fact that this court, prior to the present case being supported for leave on 01.10.2013 had permitted the Appellant to file fresh material in order to support his position, observe that no prejudice has caused to the Respondent by allowing the Petitioner to file fresh material in appeal.

As revealed before us the Appellant had filed the first set of fresh documents including the proclamation made under section 2 of the Rent Restriction Ordinance by the Governor of Ceylon marked P 6A on 08th June 2011.

However as further revealed before us, Appellant was ejected from the said premises, i.e. No. 62 Palam Road, Kandar Madam, Jaffna on 22nd August, ten weeks after the said papers were tendered

before the Supreme Court, but the Appellant had failed to tender the copies of the said document before the District Court of Jaffna for the learned District Judge to consider them at the time he decided to eject the Appellant. When considering all these matters I see no merit in the appeal before us. I therefore answer the question of Law raised in the present appeal in favour of the Respondent and dismiss the appeal with costs.

Judge of the Supreme Court

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 an application for Special Leave to appeal in terms of Section 14 (2) of the Maintenance Act No. 37 of 1999 as amended read with Article 127 of the Constitution.

Dona Ahangama Anoma Kanthi Liyanage,

Wijaya Mahal, Nikatenna,

Galagedara.

APPLICANT

SC Appeal 126/2014

SC Spl. LA Application No. 74/14

HC No. AP 13/2011

MC Kandy No. M 5240

Vs

Chandana Thilaka Karunapala,

No. 250D, Kandekumbura,

Galagedara.

RESPONDENT

AND BETWEEN

Dona Ahangama Anoma Kanthi Liyanage,

Wijaya Mahal, Nikatenna,

Galagedara.

APPLICANT-APELLANT

Vs

Chandana Thilaka Karunapala,

No. 250D, Kandekumbura,

Galagedara.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Chandana Thilaka Karunapala,

No. 250D, Kandekumbura,

Galagedara.

RESPONDENT-RESPONDENT-PETITIONER

Vs

Dona Ahangama Anoma Kanthi Liyanage,

Wijaya Mahal, Nikatenna,

Galagedara.

APPLICANT-APELLANT-RESPONDENT

BEFORE: Buwaneka Aluwihare PC J.

Vijith K. Malalgoda PC J.

Murdu N. B. Fernando PC J.

COUNSEL: Sajeevi Siriwardhena for the Respondent-Respondent-Appellant.

Dr. Jayampathi Wickremaratne, PC with Pubudini Wickremaratne for the Applicant- Appellant-Respondent.

ARGUED ON: 12/10/2018

DECIDED ON: 15/11/2019

Aluwihare PC J.

The instant Appeal arises from an order relating to an application for the payment of maintenance to a spouse. The Applicant-Appellant-Respondent (hereinafter sometimes also referred to as "the Applicant") made an application to the Magistrate's Court for maintenance for the child born out of her marriage to the Respondent-Respondent-Petitioner-Appellant (hereinafter sometimes also referred to as "the Respondent-Appellant") and for herself. On 28th March 2008, When the Maintenance Application No. M-3938 was taken up before the Court, the parties had entered into a settlement. The settlement was to the effect that the Respondent-Appellant would pay Rs. 15,000/- as maintenance for the child, with Rs. 3,000/- out of the said amount to be deposited in the Bank Account of the child and the remainder to be handed over to the Applicant. Consequent to the said settlement the Applicant had withdrawn the application for Maintenance for herself. Four months after the aforesaid settlement was entered, on 28th July 2008 the Applicant, by a fresh application (Application No.M-5240) sought to obtain maintenance for herself in a sum of Rs. 25,000/-. The learned Magistrate, by order dated 18th February 2011, held that the Applicant is a spouse who *"is capable of maintaining herself in terms of Section 2 (1) of the Maintenance Act"* and proceeded to dismiss her application for maintenance.

Aggrieved by the said order, the Applicant appealed to the Provincial High Court on the grounds that the Learned Magistrate had wrongfully interpreted, both the Section 2 of the Maintenance Act and the principles of law relating to the granting of maintenance under the Act. The High Court by its order dated 28th March 2014, ordered the Respondent-Appellant to pay Rs. 20,000/- as maintenance to the Applicant with effect from 28th July 2008, the date on which the maintenance application was originally filed in the Magistrate's Court. The quantification of compensation was based on the consideration that the Respondent required Rs. 10,000/- to pay the monthly rent for the house she and the child were living in and that a further Rs. 10,000/- would be needed for the Applicant to maintain the same standard of life that she maintained while living with the Respondent-Appellant. Aggrieved, the Respondent-Appellant moved this Court seeking to set aside the decision of the Provincial High Court.

Leave to appeal was granted on the following questions of law;

1. Did the High Court err in law by reversing the order of the Learned Magistrate on facts, when the analysis of the facts by the Learned Magistrate was not perverse?
2. Did the High Court err in law by failing to consider that the Respondent **(the Applicant)** had failed to adhere to new grounds for claiming maintenance after the dismissal of an earlier application for maintenance bearing No. M-3938?
3. Did the High Court err in law in failing to consider the capacity of the Respondent **(the Applicant)** to earn her living and the Petitioner's means? (The emphasis is mine.)

In answering the questions, which this court is called upon to do, consideration of Sections 2 of the Maintenance Act (hereinafter also referred to as the "Act") would be necessary. **Section 2 (1) of the Maintenance Act No. 37 of 1990** reads as follows:-

"Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit having regard to the income of such person and the means and circumstances of such spouse. Provided, however, that no such order shall be made if the applicant, spouse is living in adultery or both the spouses are living separately by mutual consent."

Hence, by the operation of the proviso to section 2 (1), even in instances where an Applicant had established that the spouse is unable to maintain herself or himself, the Applicant would not be entitled to a favourable order of maintenance, if;

(a) the Applicant was living in adultery;
or

(b) the Applicant and the Respondent were living separately by mutual consent;

In terms of the provisions of the Act, in every application made for maintenance, there is a primary duty cast on the Magistrate to address his or her mind to the statutory disqualifications referred to above before making an order either in granting or refusing maintenance. Whilst in relation to "(a)" above, the Respondent may have to adduce material to satisfy the court that the spouse (the applicant) is living in adultery, in relation to (b), however, the policy of the Maintenance Act demands that the Magistrate plays a pro- active role rather than a passive one in arriving at his decision.

The first question of law on which leave was granted is, whether the High Court erred in law by reversing the order of the Learned Magistrate on facts, where, it was contended that, the analysis of the facts by the Learned Magistrate cannot be said perverse.

The Magistrate in refusing the application of the Applicant for maintenance, had observed that the Applicant has not submitted any evidence to substantiate the allegation that the Respondent- Appellant had either ill-treated her or he committed adultery. "ඉල්ලුම්කාරිය සිය ඉල්ලුම් පත්‍රයෙන් වගඋත්තරකරු කෲර සහගත ලෙස තමාට සැලකූ බවත් ඔහුගේ අනියම් ප්‍රේම සම්බන්ධතාවයක් නිසාත් තමා වගඋත්තරකරුගෙන් වෙන් වී ජීවත් වන බව ප්‍රකාශ කළත් අධිකරණයේ සාක්ෂි දෙමින් එකී කරුණු 2 සම්බන්ධයෙන් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නොමැත." The Magistrate has further observed that the Applicant is living separately from the Respondent-Appellant due to a minor disagreement over where they should reside. Therefore, the Magistrate has concluded that she has been living separately since 2003 for reasons not revealed to the Court and that the Respondent-Appellant has not refused or neglected to pay the maintenance ordered under case No. M-3938 (in respect of the child).

The Magistrate made a fundamental error when she concluded that the Applicant had not placed **any evidence** on the aspect of "ill treatment" or "adultery", the main reasons the Applicant had asserted, for living separately. The learned Magistrate had overlooked the fact that the Applicant had filed an affidavit along with the Petition in compliance with Section 11 of the Act and it is trite law that the contents sworn to, in an affidavit, is evidence.

In terms of Section 11 of the Act, the Magistrate is required to issue summons on the person against whom the Application is made, **only in instances where the Magistrate is satisfied that the facts set out in the affidavit are sufficient**. In the instant case, the Magistrate having considered the affidavit of the Applicant, had thought it fit to issue summons on the Respondent-Appellant.

In terms of Section 11, once summons is issued, the burden shifts to the person against whom the Application is made, **to appear and show cause.**

The procedure that should be adopted by the Magistrate when deciding to issue summons, is succinctly elaborated by Justice R.B. Ranarjah in an article, under the

title "Maintenance". His Lordship states that, *"The procedure a Magistrate should follow upon the Defendant* ***(Respondent)*** *appearing on summons is, when he admits marriage to the Applicant, to inquire from him whether he is inviting the Applicant to live with him on his undertaking to maintain her. Where the Defendant* ***(Respondent)*** *offers to do so, the Magistrate should then inquire from the Applicant whether she is prepared to accept the Defendant's offer. If the reply is in the affirmative, the court should do whatever possible for a successful reconciliation. Where the Applicant refuses to accept the* ***offer of the husband,*** *the Magistrate on the evidence placed before the court, consider the reasons for the refusal given by her."*

In the instant case no such *offer* did forth come from the Respondent- Appellant.

In paragraph 7 of the affidavit of the Applicant, she had sworn to the effect that: *"Due to acts of cruelty and illicit love affair on the part of the Respondent- I live separately".* Hence it would be reasonable to conclude that, when it was decided to issue summons on the Appellant Respondent, the said decision was taken only upon the magistrate having formed the view, that the facts set out in the affidavit of the Applicant were sufficient to have a summons issued.

In terms of the Proviso to Section 2 of the Act, the Magistrate only needs to be satisfied that the Applicant and the Respondent-Appellant was not living separately by **'mutual consent'**. The old Maintenance Ordinance, which was repealed when the new Act came into operation in 1999, however, carried an additional disqualification in instances where the applicant (wife) **without sufficient reasons** refuses to live with her husband. One of the grounds for the magistrate to reject the application for maintenance was that the Applicant was living separately due to "minor disagreements" over the house they were living in. Under the provisions of the Act, the nature or the gravity of the disagreement for living separately is immaterial as the disqualification for maintenance under Section 2 (1) of the Act has to stem only from a separation that is '*mutual*'.

The Respondent-Appellant had given evidence under oath at the Inquiry but had not refuted the assertion referred to in paragraph 7 of the Applicant's affidavit referred to above, nor has he, in the course of his testimony, challenged the assertions made by the Applicant and as such, the said assertions made by the Applicant remain unassailed. Furthermore, under cross examination, the Applicant had stated that she was engaged in business prior to her marriage and that she transferred the business to the Appellant Respondent. After the business was transferred, the Appellant Respondent did not allow her to attend to any matters relating to the business.

As observed earlier as well, when considering the scheme of granting maintenance in terms of the provisions of the Act, other than the two instances referred to in the Act where if the spouse is disqualified from obtaining maintenance, the Magistrate is vested with wide discretion in granting maintenance to a spouse.

The Magistrates, however, should exercise caution in drawing inferences and should avoid doing so, in the absence of any material to arrive at conclusions. In the instant case, the learned Magistrate in her order has also misdirected herself by holding that, the Applicant could have engaged in some employment by leaving the child with her mother. However, no evidence had been led at the inquiry with regard to the capacity of the Applicant's mother to look after the child. The age of the Applicant's mother, her condition of health, her willingness to take the additional responsibility to look after a young girl are matters the court ought to have considered before drawing such an inference. Bereft of any such material, I do not think the Magistrate was justified in drawing the inference that the child could have been entrusted to the Applicant's mother, to be looked after. The High Court Judge has correctly observed that the Magistrate has also erred in stating that the Applicant's mother or her sisters could take care of the child while the Applicant engages in some form of employment.

Another matter that ought to have been considered was, the fact that the Applicant is a single parent who was encumbered with the duties of a father as well as those of a mother in bringing up a young girl.

The fact that both the Applicant and the child were suffering from illnesses had been conceded by the Respondent-Appellant. Given her ill health and the necessity of looking after the child after school and attending to matters that are ancillary to her education in the best interests of the child, the High Court has decided that the Applicant is unable to engage in full-time employment and therefore the Respondent-Appellant is liable under the provisions of the Act to pay maintenance.

The learned Magistrate had failed to consider any of these matters before refusing the Application of the Applicant for maintenance and I am of the view that the learned High Court judge was justified in reversing the order of the learned Magistrate and the order of the learned High Court Judge cannot be considered as perverse.

The second question of law that the Court is called upon to answer is whether, after the dismissal of the earlier application for maintenance No. M-3938, the Applicant could have maintained the present action without adducing evidence with regard to change of circumstances. It was contended on behalf of the Respondent-Appellant that the Applicant withdrew the earlier application for maintenance on her behalf (Case No. M3938) and that the Applicant pleaded similar grounds as in Case No. M3938 in her subsequent maintenance application, which is germane to the case before us.

With regard to an application for maintenance, the prerogative is with the spouse in deciding as to whether the spouse wishes to avail herself of the provisions of the Act to obtain maintenance. It must be noted that the Applicant, initially having asked for an order for maintenance for the child as well as for herself, did not

pursue the application for maintenance on her behalf in Case No. M3938 when the Respondent-Appellant agreed to pay maintenance for their child.

Thus, the issue is, in view of the withdrawal of the initial application for maintenance, whether the Applicant could have filed a fresh application subsequently. It was contended on behalf of the Respondent-Appellant that a fresh application can only be permitted if new grounds are averred. Although the learned Counsel for the Appellant-Respondent relied on the provision embodied in Section 8, the provisions of the Act, however, do not stipulate such a restriction. In terms of the said provision (Section 8), the Magistrate is empowered to make an alteration in the allowance already ordered, upon **proof of a change in the circumstances**.

As held in the case of **Anna Perera v Emaliano Nonis and Justina v Arman 12 NLR 263**, the policy of the then Maintenance Ordinance was that applications for maintenance should not be disposed of otherwise than upon adjudication on the merits. As referred to earlier, M-3938 was disposed of without adjudicating on the merits. On the other hand, it is the prerogative of the applicant to decide as to whether maintenance should be asked for and if so when.

The learned counsel for the Respondent- Appellant drew the attention of the Court to **Section 8 of the Maintenance Act** which states that; ***"On the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Act and on proof of a change in the circumstances of any person*** *for whose benefit or against whom an order for maintenance has been made under this Act, the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit: Provided that such cancellation or alteration shall take effect from the date on which the application for cancellation or alteration was made to such Court, unless the Magistrate for good reasons to be recorded, orders otherwise."* Accordingly, it was argued that the burden of establishing new and changed circumstances, is on the Applicant.

The Respondent- Appellant's contention that where a change of circumstances has not been adduced, the Applicant is barred from obtaining maintenance by a fresh application on the principle of *res judicata,* in our view, is not the correct position of the law in relation to application for maintenance.

This position was elaborated in the case of **Ranjith v Piyaseeli (2006) 2 SLR 325)**

The Court held;

> *"Provisions of Sections 34, 207 and 406 of the Civil Procedure Code, which embody* ***the principles of Res Judicata will not apply to maintenance proceedings.***
>
> *The Maintenance Act does not contemplate decrees. It deals with orders. Therefore, an order made under the Maintenance Act is not a decree that comes under the expression all "decrees" in section 207. Unlike in section 188 of the Code, the Maintenance Act does not provide that after the judgment is pronounced, a decree be drawn up by the court.*

In application M-3938, the Applicant has not referred to any expenses she had to incur for medication and has stated that she is living with her child at her parents' house. However, the Magistrate has observed that in application M-5240 (marked 'P1') she has stated that she is incurring more than Rs. 4,500/- as medical expenses for herself and is currently living in a rented house (at Paragraph 8 of 'P1'), thereby indicating a change of circumstances. Considering the above, this Court is of the view that the second question on which leave was granted also should be answered in the negative.

In any event Section 8 of the Maintenance Act has no application here as it can only be invoked by *any person receiving or ordered to pay a monthly allowance under the provisions of this Act.* The applicant was not *a person receiving a monthly allowance* as referred to in the provision of the Law.

The final question is whether the High Court erred in law in failing to consider the capacity of the Applicant to earn her living and the sufficient means of the Respondent-Appellant.

The learned Counsel for the Respondent-Appellant drew the attention of this court to the principles laid down in the case of **Fonseka v Candappa 1988 2 SLLR 11.**It has been held that *"It becomes a question of law, where the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or the conclusions rest mainly on erroneous considerations or is not supported by sufficient evidence."*

This court is also mindful of the decision in the case of **Collettes Limited v Bank of Ceylon 1984 2 SLLR 253** where the special circumstances when a higher Court has the jurisdiction to revise the findings of fact of a lower Court were recognized. It was observed that ordinarily, with regard to a finding of a lower Court, a higher Court will not "*… interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings."*

Bearing in mind the principles laid down in the cases referred to above, I now proceed to consider whether the High Court erred in law in the considerations it made regarding the Applicant's capacity to earn a living and the Respondent-Appellant's means.

The High Court has observed that although the Respondent-Appellant, has conceded that he is earning an income of Rs. 50,000/-. (Page 17 of the proceedings of 08 March 2010 before the Magistrate) he had subsequently (on 07 June 2010)

stated that he has lost employment due to Tandon Lanka Pvt. Ltd. where he was employed being closed down. The learned Magistrate had been of the opinion that even though he has lost his employment, as a mechanical engineer he would have no difficulty finding new employment. In fact, he had admitted in evidence, that he has the potential to find work. According to his evidence, he had been involved in developing 'memory chips' for computers. It is common knowledge that there is a great demand for experts in the field of Information Technology (IT) in Sri Lanka, and the learned Magistrate, in my view, was justified in drawing such an inference in terms of Section 112 of the Evidence Ordinance. The Applicant in her evidence had stated that the Respondent-Appellant does private work during his free time in repairing computers and makes an income of about Rs. 100,000/- a month. The Respondent-Appellant, however, has denied that he earns such an income.

A reading of Section 2 (1) shows that the Act contemplates the payment of maintenance by a spouse who has 'sufficient means'. It is sufficient that if the Respondent spouse has some mode of income or has funds at his disposal to pay maintenance to the Applicant spouse, without having to forgo funds necessary for his expenses. Going by the evidence placed at the inquiry, if the Applicant is to be believed, the Respondent-Appellant had been earning a considerable sum through computer repairs and it appears that he is in a position to pay the sum of Rs. 20,000/- ordered by the High Court, and still be left with sufficient means to provide for himself at the same time. It is also pertinent to note that even though the Respondent-Appellant had stated that he lost employment, he has not made any application declaring a difficulty to pay maintenance for the child, which he could have done in terms of Section 8 of the Act, if he had lost his income.

On whom does the burden of proof lie, regarding the 'sufficient means' of the Respondent spouse, is another relevant consideration when answering the third question of law. I wish to cite with approval, the observation made in relation to Section 11 of the Act in the case of **Ruhunuge Sirisena v Hewa Kankanamage**

Pushpa Rajani SC Appeal No 117/2010 SC Minutes, 08. 05. 2013 Their Lordships held that *"…Section 11 of the Maintenance Act places the burden of proof on the Respondent to show cause why the application should not be granted. In other words the burden of proof of showing that the Respondent does not have sufficient means is on the Respondent."*

In the instant case, refusal by the Magistrate to grant maintenance to the Applicant was not because the Respondent-Appellant had no capacity to pay, but on the basis that the Applicant is a healthy person who had the capacity and possessed the requisite experience to engage in a business and therefore 'not a person who is unable to maintain herself' in terms of the Act.

The learned Magistrate in fact had rejected the assertion of the Respondent-Appellant that he was not employed. "වග උත්තරකරු ඉංජිනේරු උපාධියක් ලබාගෙන ඇති උගත් අයෙක් වන අතර එකී ආයතනය වසා දැමීම නිසා දැනට රැකියාවක් නොකරන්නේය යනුවෙන් කරනු ලබන තර්කය පිළිගත නොහැක." (Page 8 of the Order) Therefore, even though the High Court has not referred to the loss of employment of the Respondent-Appellant nor his income through computer repairs, upon considering the evidence adduced regarding the financial situation of the Respondent-Appellant, I see no reason to alter the order to pay Rs. 20,000/- made by the High Court. It is to be noted that both the Applicant and the child were living in rented premises at a monthly rent of Rs.10, 000/-. It is also to be noted that not only the Applicant, but the child also needs decent living space for herself as well.

The learned High Court Judge had weighed a number of facts admitted in evidence in deciding whether the Applicant had the capacity to earn a living. The Applicant being compelled to stay with the child and having to attend to her various needs, primarily her educational pursuits and matters attendant to it, were held as justifiable reasons for the Applicant's inability to engage in any employment. Therefore, there was no failure on the part of the learned High Court Judge to consider the Applicant's capacity to earn an income or to be gainfully employed.

In view of the above, the Court is of the view that the third question on which leave was granted also should be answered in the negative.

Accordingly, the Appeal is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDU N. B. 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 for Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 130/2016
SC (SPL) LA No. 61/2016
CA No. CA (PHC) APN 74/2014
HC Kandy No. 160/2000

The Democratic Socialist Republic of Sri Lanka.

Complainant.

Vs.

Kathaluwa Weligamage Amararathne.

Accused.

AND

Thisantha Mahendra Vittachchi,
No. 302/71, Gangewatta,
Mahara, Gampola.

Petitioner.

Vs.

1. Kathaluwa Weligamage Amararathne.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents.

AND NOW BETWEEN

Kathaluwa Weligamage Amararathne,
No. 113,
Angammana,
Gampola.

Accused 1st Respondent Petitioner.

Vs.

1. Thisantha Mahendra Vittachchi,
No. 302/71, Gangewatta,
Mahara, Gampola.

Petitioner-Respondent.

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

2nd Respondent Respondent.

Before: BUWANEKA ALUWIHARE PC. J.
PRASANNA JAYAWARDENA PC. J.
L.T.B DEHIDENIYA J.

Counsel: Anil Silva P.C with Nandana Perera for the Accused 1st Respondent Appellant

Dharmasiri Karunaratne for the Petitioner Respondent

Varunika Hettige DSG for Attorney General

Argued on: 29.10. 2018

Decided on: 17.07.2019

Aluwihare PC. J.,

The Accused-1st Respondent-Petitioner-Appellant (hereinafter referred to as the "Accused-Appellant") was indicted before the High Court of Kandy for the offence of the murder of one Henry Peter Vittachchi on or about the 8.8.1997, an offence punishable under Section 296 of the Penal Code.

The Accused-Appellant pleaded not guilty and accordingly the matter went to trial and formal recording of evidence commenced on 22.06.2006. By the 14th March 2014 the prosecution had led evidence of 5 witnesses, including a purported eye witness Prabath Manjula Vittachchi, who was a student of 17 years at the time of the incident.

On the said date (i.e.14.03.2014) however, the Accused -Appellant withdrew his initial plea of not guilty and pleaded guilty to the offence of culpable homicide not amounting to murder on the basis of 'a sudden fight and provocation' and the learned State Counsel informed the Court that the said plea of the Accused-Appellant was acceptable to the State. Both the learned Counsel for the Accused -Appellant, and the learned State Counsel made their respective submissions, to assist the Court to determine the appropriate sentence.

Thereafter, the learned High Court Judge, imposed a sentence of two (2) years rigorous imprisonment on the Accused-Appellant, which sentence was suspended for a period of 15 years, additionally a fine of Rs. 5000 was imposed, default of which would earn a further sentence of 6 months.

Aggrieved by the said sentence imposed by the learned High Court Judge, a son of the deceased, Mahendra Vittachchi (present Petitioner-Respondent) moved

the Court of Appeal by way of revision and urged the Court to revise the sentence imposed on the Accused-Appellant on the basis that the sentence imposed was not commensurate with the gravity of the offence.

The Court of Appeal by its order dated 11.03.2016 set aside the sentence imposed on the Accused-Appellant by the learned High Court Judge and in lieu, imposed a sentence of 6 years rigorous imprisonment plus a fine of Rs.10,000/- and a term of 6 months RI in default.

The present appeal is against the enhancement of sentence.

Special Leave to Appeal was granted on the following questions of law;

(a) Is the judgment contrary to law?

(b) In the circumstances of this case, the Petitioner Respondent could not have filed an application in Revision and therefore is the enhancing of the sentence of the Petitioner contrary to law?

(c) Did the failure of the Learned Judges of the Court of Appeal to consider that the sentence is to take effect about 18 years after the incident, contrary to law, when it is a factor that has always been taken into account in determining an appropriate sentence?

(d) Did the Learned Judges of the Court of Appeal fail to consider that the deceased had only one stab injury which too was a mitigating factor in the circumstances of this case?

(e) Did the Learned Judges of the Court of Appeal misdirect themselves in enhancing the sentence without considering the fact that the Petitioner was intoxicated to such an extent that he could not have formed a murderous intention?

(f) Although the Learned Judges of the Court of Appeal have stated that in imposing an appropriate sentence, the point of view of the accused as well as the interests of the society should be taken into account, in deciding the

sentence, did the failure to consider matters favourable to the Petitioner amount to a miscarriage of justice?

Before I deal with the impugned order of the Court of Appeal and the respective submissions made on behalf of the Accused-Appellant, and the Respondents, it would in my view be pertinent to refer to the facts of this case.

The eyewitness, Prabath Manjula Vittachchi, a grandson of the deceased, Henry Vittachchi was a member of the household of the deceased at the time relevant to the incident. Witness had said that around 8.00 in the evening, while studying, he heard someone abusing his grandfather in foul language, from the direction of the road. According to the witness, he had heard the words to the effect "උඹලා ඔක්කොම බාවනවා", (all would be killed) and his grandfather being referred to as "නාකියා" (old man). At this point his grandfather had said from the house "Amare, if you have consumed alcohol, go home without shouting". Witness had said that his grandfather referred to the Accused-Appellant as 'Amare', as he happened to be his son-in-law. After this, the abusing had worsened and had become louder. Then the deceased had said that he will telephone the police if the Accused-Appellant was not to cease shouting. Thereafter the situation had quietened down. Then his grandfather had gone to his room and his uncle who also had come out of his room hearing the commotion, also had retired to his room. The witness had reverted to his books.

After a lapse of about ten minutes, the shouting had recommenced and someone had started banging on the front door. As the witness turned towards the door, the door had collapsed and the Accused-Appellant had walked in. At this point the deceased was seen standing in the corridor. The Accused-Appellant had rushed towards the deceased and had stabbed him with a weapon the witness describes as a "නියන"(chisel). Upon receiving the stab injury, the deceased had collapsed and through fear this witness had jumped out of a window and had run to an uncle's house nearby to relate the incident and to get help.

Although it had been suggested on behalf of the Accused-Appellant that there was a scuffle between the Accused-Appellant, the deceased, and an uncle of his,

the witness had refuted the suggestion and had said that there was no such scuffle. It had also been suggested that the incident happened in the course of a fight, but the witness again had rejected the suggestion and had said that no fight took place, "පොරකෑමක් සිදු වුනේ නැහැ සීයාට අනින වෙලාවේ මම එනන හිටියා".

It should be noted that the defence had failed to mark any significant contradictions or omissions in the course of the cross-examination of the witness save for a solitary contradiction which is not in any way significant.

The Judicial Medical Officer who conducted the post-mortem of the deceased Henry Vittachchi had testified to the effect that the deceased had sustained one injury to the chest which had penetrated the right Atrium of the heart. He opined that the injury was necessarily a fatal one and no amount of medical care could have prevented his death.

In their submissions before this Court, it was the position of the Petitioner-Respondent, Mahendra Vittachchi that, according to the evidence of the eyewitness who testified before the High Court (witness No.1 Manjula Vittachchi) the Accused -Appellant who was armed with a chisel, had gained entry to the house by crashing through the door of the house where the deceased lived, and had stabbed the deceased. The broken parts of the door through which the Accused-Appellant had gained entry was not an item that formed part of the list of productions in the indictment that was presented to the Court by the Prosecution, but was only added to the list in the course of the trial.

It was also the position of the Petitioner-Respondent that he too sustained an injury and Dr. Seneviratne who testified at the trial had produced the Medico-Legal report pertaining to the injury sustained by the Petitioner -Respondent. It reveals that he too had sustained a grievous injury, although the prosecution had failed to frame a charge in relation to that injury, in the Indictment.

Although it may not be directly relevant to the issues at hand, I would be remiss if no reference is made to the following matters which I feel that trial Judges

should be mindful of, in the discharge of the onerous duties bestowed upon them.

Recording of evidence at the trial in this case commenced on 22.06.2006 and by August 2008, a number of witnesses had testified on behalf of the prosecution. Due to non-availability of some exhibits (productions) the case had gone down on a number of occasions, the main item being the broken door panel which was missing. Even by mid-2009 it was not available. I wish to observe that the prosecution had repeatedly moved for dates to secure the missing 'door panel', unnecessarily delaying the early conclusion of the trial.

In my view, in the context of the case, the non-production of a door panel would not have prejudiced the prosecution case in any way, in light of the evidence of the eye witnesses which could easily have been corroborated through the observations made by the investigating officer. The prosecution had failed to appreciate this fact and as a result the case was dragged on, for no justifiable reason. The learned High Court Judge too had failed to appreciate the insignificance of the missing production and had granted a number of dates to explore the possibility of securing the missing 'door panel'.

When the case came up on **19.05.2010** (four years after the trial commenced) the prosecution moved that the case be taken off the trial roll and a mention date be granted to explore the possibility of concluding the case without going through the entire trial. The Court granted a 'mention date' which was **16.06.2010**.

On the 16.06.2010, again the prosecution raised the issue of misplaced productions, but nothing was stated about concluding the case, and the matter was fixed for inquiry pertaining to the missing productions for **27.10.2010**.

Proceedings of 27.10.2010 are not briefed, but the matter had been called on **10.2.2011** relating to missing productions, and the inquiry was put off for **14.06.2011**. Again on 14.06.2011 no inquiry took place, but the matter was re-fixed for trial on **19.10.2011**.

On 19.10.2011, the defence made an application for a date to consider the possibility of concluding the case by way of a "short cut", meaning a 'plea for a lesser offence', and the Court granted the application and the matter was re-fixed for **14.12.2011,** on which date again the same application was made, and the Court allowed it and re-fixed the matter for **21.03.2012**.

On 21.03.2012 the defence Counsel intimated to the Court that the matter is being discussed with the Attorney General's Department and moved for a further date and the Court granted time and the case was fixed for **22.05.2012**. On 22.05.2012 again the same application was made and a further date was granted and the trial was fixed for **05.06.2012.** The same process of application and re-fixing the matter was repeated on 05.06.2012 and thereafter on 07.06.2012 and 06.07.2012 as well.

On the **6th July 2012**, the matter went down again for the **24th October 2012**. On the 24th October, both Counsel moved for a further date for the same purpose, and the Court granted the application and the matter was fixed for the **21.11.2012**. On 21st November a further date was moved by the learned defence Counsel and the matter was fixed for the **12th February 2013**.

On the12th of February 2013, the learned State Counsel informed the Court that the file had been referred to his supervising officer to obtain instructions with regard to the acceptance of a plea for a lesser offence, and moved for further time and the case is re-fixed for trial on **03.04.2013**.

On 3rd April, the learned State Counsel informed the Court that the matter can be fixed for trial and accordingly, the matter was fixed for trial on **27.06.2013**. On that date the learned high Court judge had been on official leave and the matter having been mentioned on 01.08.2013, was re-fixed for **08.10.2013,** on which date the Accused-Appellant had been absent.

When the matter was finally called on the **14th March 2014,** which was **six years after the last witness for the prosecution had testified**, the Accused-Appellant withdrew his initial plea of not guilty, and pleaded guilty to culpable homicide not amounting to murder on the basis of both 'provocation and

sudden fight'. As referred to earlier, by this date, evidence of five main witnesses had been concluded and with the evidence of a few more witnesses, the case for the prosecution could have been closed.

Both the learned State Counsel and the learned Counsel for the Accused-Appellant made submissions and the learned High Court Judge sentenced the Accused-Appellant as aforesaid. It was the sentence imposed by the learned High Court Judge that was impugned before the Court of Appeal, and the present proceedings before this Court relate to the order of Court of Appeal.

I have to reiterate that the reference made above to the process that took place before the High Court is not of much significance in deciding the questions of law in relation to which Special Leave to appeal was granted. I wish, however, to express my displeasure at the manner in which the learned defence Counsel and several State Counsel who represented the prosecution have handled this case. Counsel, being officers of the Court had both an ethical and a professional duty towards Court to ensure that this matter was concluded without delay, but instead they had made a mockery of the process of administering justice.

I find that several prosecution witnesses, including the witness No. 1 whose evidence was concluded, had been present on many of the days this matter was called before the Court. It is disheartening to note that the Court as well as the Counsel who represented the parties had paid scant regard to the inconveniences caused to the witnesses by having them summoned before the Court, disrupting their daily routines and whatever occupations they were engaged in, for no ostensible purpose.

It must be stressed that Judges have a duty by the public to ensure that unnecessary hardships are not caused to the public by having them summoned before the Court on days their presence is not required and to ensure that they are released no sooner their evidence is recorded.

In the present case, in particular, as briefly alluded to earlier in this judgment, the testimonies of the witnesses clearly established what transpired on the day of the incident. In view of such cogent evidence, there could not have been any

difficulty in deciding whether the incident fell within any of the special exceptions enumerated under section 294 of the Penal Code.

It is the imposition of the enhanced sentence by the Court of Appeal that is impugned in these proceedings.

Questions of law

Of the questions of law reproduced on page 4 of this judgment, the question (a) is of a general nature. At the hearing of the appeal, no specific argument was put forward as to the illegality of the judgement and as such I answer the question of law raised in paragraph (a) in the negative.

As regards the question (b), the principle is, a Court vested with revisionary jurisdiction would interfere with any judgement or order, if the illegality or the impropriety of such judgement or order, shocks the conscience of the Court.

Section 364 of the Code of Criminal Procedure Act empowers the Court of Appeal to exercise revisionary jurisdiction even *ex mero motu*, subject however, to the limitations stipulated in Section 364(3) of the Code. In answering the question raised in paragraph (b), I do not think one needs to go beyond Section 364 of the Code of Criminal Procedure Act. For the sake of clarity, Section 364 of the Code is reproduced below: -

> "The Court of Appeal may call for and examine the record of any case, whether already tried or pending trial in the High Court or Magistrate's Court, for the purpose of satisfying itself as to the **legality or propriety of any sentence** or order passed therein or as to the regularity of the proceedings of such court."

Questions of law referred to in sub-paragraphs (c), (d) and (e) relate to factual matters which the Accused-Appellant alleges that the Court of Appeal ought to have considered before deciding to enhance the sentence and as such I wish to address them together.

It was argued that 18 years had elapsed since the incident had occurred and that, that factor ought to have been considered by their Lordships of the Court of Appeal. Earlier in this judgement, I have referred to the reasons for the delay in concluding the case early and the party of the deceased (aggrieved party) had not contributed in any way to the alleged delay. Her Ladyship Justice Malini Gunaratne had quite correctly referred to the principles laid down in the cases of ***A.G v. Mendis*** **1995 (1) S.L.R 138** and the case of ***Dhananjoy Chatterjee v. State of W.B*** **(1994) 2 SCC 220** where the Courts held that "the Courts must not only keep in view the rights of the criminal, but also the rights of the victim of crime and the society at large while considering the imposition of an appropriate punishment."

I do not think the Accused-Appellant can take advantage of the general delay which is unfortunately prevalent in the system of administration of justice. Furthermore, as referred to earlier, the Accused-Appellant had largely contributed towards that delay, initially by electing to challenge the allegation leveled against him by proceeding to trial and in mid-stream, wanting to withdraw his earlier plea of not guilty by expressing his desire to plead guilty to a lesser offence.

From that point onwards, the case had meandered without any aim or purpose for six long years. Considering the above, I hold that, even had the Court of Appeal considered the lapse of time since the date of offence, still the Court would not have decided differently. Accordingly, I answer the question of law raised in sub-paragraph (c) also in the negative.

It was also pointed out that the Court of Appeal had failed to consider the fact that the deceased had sustained only a solitary injury, which the learned President's Counsel submitted, should have been considered as a mitigatory factor.

The injury, however, cannot be considered in isolation, but the Court is required to consider the other circumstances as well. According to the medical evidence, the injury was a necessarily fatal injury and had penetrated the left Atrium of

the heart. As referred to earlier, the Accused-Appellant had come armed and having crashed through the door, had sought the deceased and had stabbed him in the chest. Thus, the aggravating factors, in particular the conduct of the Accused-Appellant, cumulatively far outweigh the fact that the deceased had sustained only a single injury. In the circumstances, I answer the question raised in sub-paragraph (d) also in the negative.

It was also contended that the Court of Appeal misdirected itself by its failure to consider as to whether the Accused-Appellant was capable of forming the requisite *mens rea* of the offence of murder, by reason of 'intoxication'. It must be pointed out that the Accused-Appellant's plea was on the basis that the incident happened in the course of a 'sudden fight' and under 'provocation', and at no point did the Accused -Appellant take up the position that he should benefit from Section 79 of the Penal Code, as such there was no requirement on the part of the Court of Appeal to consider 'intoxication'.

On the other hand, even when invoking the Section 79 of the Penal Code in a situation of voluntary intoxication, the burden is on the accused to establish that the degree of intoxication was such that he was incapable of knowing the nature of the act he was committing or that it was either wrong or contrary to law. This was elaborated by Justice S.N. Silva (as he then was) in ***Dayaratne v. The Republic of Sri Lanka*** **(1990) 2 S.L.R. 226** where his Lordship stated, "the accused has to establish that at the material time, his state of intoxication was such that he did not know what he was about or that he imagined the act to be something contrary to its true nature. If the accused succeeds in proving that at the material time, he did not have the capacity to form a murderous intention…Section 79 will apply and he would be imputed the knowledge of a sober man, resulting in a conviction for the offence of culpable homicide."

As there was no material placed before Court to that effect, I hold that the Court of Appeal did not misdirect itself on that issue and accordingly, I answer the question of law raised in sub-paragraph (e) also in the negative.

The final question of law raised on behalf of the Accused-Appellant was that the Court of Appeal, in deciding an appropriate sentence, failed to take into account the mitigatory factors in favour of the defence.

The only significant mitigatory factors placed before the High Court on behalf of the Accused Appellant were that, he expressed regret and remorse over the incident and that he and the deceased being members of an extended family, the relations have normalized. It was also stated that he is a father of three children and now leads a peaceful life.

This assertion of the Accused-Appellant, as regard to the good relations between the parties now seems to be in doubt, as it was one of the children of the deceased who filed the revision application before the Court of Appeal.

Unlike the majority of cases where the Court has to rely on the statements made by witnesses, or by the accused to the police and/or depositions of witnesses made at the non-summary inquires, in the instant case, the Court had the advantage of the testimony of an eyewitness who gave a detailed description of the events that took place on the day in question.

As I have referred to earlier, the witness had been subjected to lengthy cross-examination and had come out unscathed. In applying the yardsticks of assessing the credibility of a witness, namely tests of contemporaneity, consistency and probability, the defence had not been able to make the slightest dent of the evidence of the eyewitness. Furthermore, his evidence is corroborated through the independent evidence of the Judicial Medical Officer and the recovery of the chisel in the course of the investigation.

In the light of this evidence, I do not think the Court is justified in coming to any other inference, as to the manner in which the incident occurred, other than the inferences drawn based on the evidence placed before the Court.

I also wish to observe that the state had failed to objectively assess the evidence before accepting the plea for a lesser offence. It is abundantly clear that after the initial incident (of abuse) the Accused-Appellant had returned home and

had come armed with a weapon with the intention of attacking the deceased and the evidence is clearly indicative of pre-meditation on the part of the accused-Appellant. The incident, in my view, comes nowhere near the exceptions under Section 294 of the Penal Code.

At the hearing of this matter, it was submitted by the learned DSG that the 2nd Respondent, the Attorney General, was relying on the written submissions filed on behalf of the AG before the Court of Appeal. The written submissions, at its best are scanty and carry just a bare statement: *"There was evidence of provocation which led to a fight"*. The written submissions do not say what that evidence was, presumably because there was no evidence of either of those factors.

The salient features of grave and sudden provocation are that ***"the provocation is not sought or voluntarily provoked by the defender as an excuse for killing"*** (First proviso to Exception 1 to Section 294 of the Penal Code). In the instant case, if there was an act of provocation, it emanated from the Accused-Appellant, and it was incorrect on the part of the 2nd Respondent to say that "there was evidence of provocation".

On the other hand, an offender can benefit from a sudden fight, only if *"without premeditation in a sudden fight ….and without the offender having taken undue advantage",* he causes the act that brings about the death of the victim. (Exception 4 to Section 294 of the Penal Code).

The 2nd Respondent also complains that the Petitioner-Respondent had suppressed facts by not producing the medical report of the Accused-Appellant along with the petition. It is to be noted that the application before the Court of Appeal was filed by an aggrieved party who was not a party to the High Court case and as such, under the provisions of the Code of Criminal Procedure Act, the aggrieved party would not have been entitled to copies of proceedings or the documents.

The 2nd Respondent had lost sight of the above fact and as this case was based on an Indictment filed by the Attorney General, it should have been the duty of

the Hon. Attorney General to place that material before Court, which had not been done.

For the reasons set out above, I answer the question of law raised in sub-paragraph (f) also in the negative. Accordingly, I dismiss the Appeal and direct the learned High Court Judge to implement the sentence imposed by the Court of Appeal forthwith.

Appeal Dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA 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 Appeal under and in terms of Section 5(1) of the High Court of provinces (Special Provisions) Act No. 10 of 1996 read with Article 154H of the Constitution of the Democratic Socialist Republic of Sri Lanka and Chapter L VIII of the Code of Civil Procedure.

Kekul Kotuwage Don Aruna Chaminda,
No. 17/, Ethgala,
Kochchikade.

PLAINTIFF.

SC/ **Appeal No: 134/2018**
CHC/ 275/13 MR.

Vs

Janashakthi General Insurance Limited,
No. 46, Muththaiya Road,
Colombo. 2.
And
No. 55/72, Vaxhaul Street, Colombo 2.

DEFENDANT

AND NOW BETWEEN

Kekul Kotuwage Don Aruna Chaminda,
No. 17/, Ethgala,
Kochchikade.

PLAINTIFF – APPELLANT.

Vs.

Janashakthi General Insurance Limited,
No. 46, Muththaiya Road,
Colombo 2.
And,
No. 55/72, Vaxhaul Street, Colombo. 2.

DEFENDANT – RESPONDENT.

Before : Prasanna Jayawardena PC, J.
L.T.B. Dehideniya, J
E.A.G.R. Amarasekara, J.

Counsel : J.M. Wijebandera with Shalani Chandrasena and Sharin Shehani for the Plaintiff – Appeallant.
Rajindra Jayasinghe instructed by Heshan Mamuhewa for the Defendant – Respondent.

Argued On : 29.04.2019

Decided on : 09.10.2019

E.A.G.R. Amarasekara, J.

The Plaintiff – Appellant (hereinafter referred to as the Plaintiff) instituted an action in the Commercial High Court of the Western Province against the Defendant Respondent (hereinafter referred to as the Defendant) seeking relief as prayed for in the plaint dated 23.08.2013. The cause of action was based on the refusal of payment on a demand made upon an insurance policy that existed between the parties. Even

though there was no objection but instead an admission with regard to the jurisdiction of the Commercial High Court in the answer as well as at the commencement of the trial, the Defendant during the trial, relying on a purported arbitration clause, withdrew the admission and raised certain issues with regard to the jurisdiction of the Commercial High Court. The Learned High Court Judge pronounced his order on 17/03/2017 dismissing the plaint while answering the said issues in favour of the Defendant. The High Court was of the view that it lacks jurisdiction to hear and determine this matter in terms of Section 5 of the Arbitration Act. Being aggrieved by the said order the Plaintiff filed a leave to appeal application in this court. This court by its order dated 10/09/2018 granted leave to appeal on the following questions of law, which are reproduced in verbatim;

> "a) Has the Learned High Court Judge erred in law in ordering to dismiss the plaint on the basis of lack of jurisdiction after the jurisdiction was admitted by parties by way of pleading as well as by recording admissions?
>
> b) Should not a party be permitted to withdraw from admission of jurisdiction, after submitting to trial?
>
> c) Is the question of jurisdiction raised by issue number 17 and 18 one falls to the categories of latent lack of jurisdiction that is deemed to be waived off by admissions and/or subsequent conduct of parties?
>
> d) Has the Defendant in the circumstances of this case acquiesced and/or waived of the right to object to the jurisdiction?"

Plaintiff in his plaint inter alia stated that,

- The Plaintiff was the registered owner of the vehicle bearing registration number WPKT1690.
- The plaintiff obtained a Comprehensive Insurance Policy bearing number VCSP 2012-5006 from the Defendant Company which was operative from 29th March 2012 to 28th March 2013.
- Plaintiff duly paid agreed premiums as per the agreement.
- While the said policy was valid and in force, the said vehicle met with an accident on or around 8th February 2013 at Anamaduwa.
- As a result of the said accident, total and/or extensive damage was caused to the said vehicle and its accessories. It was determined that it was not possible to restore the vehicle to its original condition and the vehicle was condemned causing a total loss.
- The aforesaid damage/loss which was estimated as Rs.13 million was covered by the insurance policy and the Defendant was bound to indemnify the plaintiff.
- As a result of the said incident, a friend of the Plaintiff died and the Plaintiff suffered injuries and was unconscious.
- The Plaintiff was hospitalized till 19th of February 2013.
- When the Plaintiff recovered consciousness, he informed the Defendant company about the accident and the damage caused.
- When the Plaintiff submitted the insurance claim to the Defendant, the Defendant refused to entertain or admit the claim by letter dated 6th March 2013 for the following purported reasons;
    - That the driver of the vehicle who drove the vehicle at the time of the accident (the Plaintiff) had consumed liquor.

  - That the driver of the vehicle (the Plaintiff) failed to inform the Defendant or the Police about the occurrence of the accident immediately after the accident.
- The reasons given by the Defendant to reject his claim were baseless and had been arrived at without proper investigation or any materials. Thus, the repudiation of the claim was illegal and unlawful.
- The Plaintiff had not consumed any alcohol at the time of the accident.
- The Defendant, in breach of the insurance policy, wrongfully failed and neglected to make due and effective payment.

In the body of the plaint, the Plaintiff marked the insurance policy and its schedule as P2 and P3, but he failed to submit the entire policy along with the plaint even though section 50 of the Civil Procedure Code states as follows;

"*If a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or copy thereof to be filed with the plaint*."

Thereafter, the Defendant filed the answer and admitted;

- The jurisdiction of the court.
- That upon the request of the Plaintiff, the Defendant issued the Insurance Policy bearing number VCSP 2012-5006 for the vehicle bearing the registration number WP KT – 1690.
- That the said insurance Policy was operative from 29th March 2012 to 28th March 2013 and the Plaintiff duly paid the agreed premiums as per the agreement.
- The refusal of the claim made by the Plaintiff.

The Defendant company further averred that;

- The Plaintiff failed and neglected to produce the Insurance Policy with the plaint even though the schedule of the said Insurance Policy was marked as P2 and P3 and annexed to the Plaint.
- On or around 8th February 2013, the Defendant was informed that the said vehicle met with an accident. However, as soon as the accident occurred, the Plaintiff failed to inform the Defendant company or the Police about the said accident.
- The Plaintiff failed to oblige or comply with the terms, conditions and clauses of the Insurance Policy.
- The Defendant came to know that the Plaintiff drove the vehicle having consumed intoxicating liquor which directly or impliedly caused the accident, and thus is not liable to indemnify the plaintiff.
- The Plaintiff failed to produce the Insurance Policy which is the base for the current action and thus, do not comply with the procedure laid down in Section 50 of the Civil Procedure Code.
- The purported declarations and/or statements made by the Plaintiff in support of obtaining a benefit under the said policy are incorrect and/or false.
- The action of the Plaintiff be dismissed.

The contents of the plaint indicate that the plaintiff had averred the vehicle number as well as the policy number. Other than the failure to annex the entire policy with the plaint, there is no material to indicate that the Plaintiff misled the Defendant through his plaint. It can be presumed that the Defendant being the insurer had a copy of the Insurance policy. The Defendant Company had not pleaded that it did not have the

policy with it. In that backdrop, it is clear that the Defendant made the aforesaid admissions in the answer with a knowledge to what such admissions relate. The Defendant company itself had referred to the policy number and the vehicle number in its admissions. As such, by no stretch of imagination it can be presumed that such admissions in the answer were made due to a mistake or a misrepresentation. There is no material to establish or no allegation that there was fraud, duress or undue influence that caused to make such admissions. Hence, it is pertinent to note that the Defendant Company failed to raise an objection to the jurisdiction under Section 5 of the Arbitration Act No. 11 of 1995 on the first occasion it had and instead it admitted the jurisdiction.

Thereafter the matter was fixed for trial and the parties suggested their issues and admissions in writing-*vide pages 128 to 137 of the appeal brief*. Even there, the Defendant admitted the Jurisdiction of the Commercial High Court and his admissions refer to the vehicle number and the policy number. The learned high court judge recorded the admissions of the case as per the suggestions made by the Defendant-*vide page 140 of the brief*. Thus, as per the proceedings dated 03.10.2014 before the learned High Court judge, the following were among the admitted facts.

- The jurisdiction of the court.
- Paragraphs 1,4 and 5 of the Plaint.
- The Defendant issued Policy of Insurance bearing number VCSP 2012-5006 in favour of Dr. D.A.C. Kekuluthotuwage in respect of vehicle bearing number WP KT – 1690.
- The said Policy provided a comprehensive cover and was valid from 29th March 2012 until 28th March 2013.
- The Premiums in respect of the said policy were paid in full.

- The schedule to said policy had been annexed to the plaint and marked as P2 and P3.
- On or around 8th February 2013, The Defendant was informed that the said vehicle had met with an accident.
- The Defendant repudiated and /or rejected the Plaintiff's claim made under the said policy by letter dated 6th March 2013 marked P4 with the Plaint.

Thus, it is clear that the Defendant Company had admitted the jurisdiction of court to hear and determine the action for the second time and those admissions were made with reference to the relevant Insurance Policy including its number. The officers of the Defendant company who instructed to make these admissions including the jurisdiction should have known the contents of the policy. Therefore, there is no material to indicate that these admissions were made for the second time due to any mistake, misrepresentation, fraud, duress or undue influence etc., which could vitiate or dilute the strength of the admissions made. The statements made through an answer and as well as proposed admissions to a court of law have to be considered as responsible statements. Thus, for the second time the Defendant evaded raising an objection to jurisdiction based on Section 5 of the Arbitration Act.

As said before, the Plaintiff had not submitted the entire insurance policy with the plaint and has only annexed its schedules. However, the Plaintiff had submitted the entire insurance policy with a motion dated 9th September 2014. The Defendant objected to the insurance policy being marked in evidence and the learned High Court Judge granted permission under Section 54 of the Civil Procedure Code to receive it in evidence by his order dated 15.12.2015. It appears that the Defendant did not challenge this order in a higher forum. For the sake of argument, even if it is

considered that the defendant was not aware of the document it was being sued upon till the said motion was filed, the Defendant could have raised the objection to jurisdiction based on that document when the court granted permission to receive it in evidence. The Defendant neglected or failed to do so.

The facts related above show that the Defendant admitted the jurisdiction several times on his own or did not object to jurisdiction when it had the opportunity to do so. Thus, there was no reasonable ground to allow the Defendant to withdraw the admissions made in respect of the jurisdiction. The delay in withdrawing the admission, at a much later stage, indicates that it may be due to an afterthought.

Subsequent to recording of admissions and issues, the Commercial High Court proceeded with the trial and recorded evidence on 09.06.2016 and 10.06.2016 and in the midst of the cross examination on 10.06.2016, the Defendant marked conditions No.3 and 7 of P2 (Insurance Policy) as V3 and V4 respectively.V4 is the arbitration clause, and relying on the same the Defendant moved to raise issues as to whether the court is precluded from trying this case in view of the arbitration clause contained in the insurance agreement. (The Plaintiff in his petition to this court has stated that during the cross examination the defendant marked as V1 and V2, the insurance policy agreement and moved to raise issues but that claim seems to be factually incorrect. As per the proceedings of the lower court, what were marked as V1 and V2 are a statement and a copy of a letter respectively). Thereafter, on behalf of the Defendant, the counsel had withdrawn the admission No.1 already made at the commencement of the trial which acknowledged the jurisdiction of the Commercial High Court. Furthermore, the defendant had raised issues No.17 and 18 challenging the jurisdiction of the Commercial High Court and the Plaintiff had raised issue No.19

as a counter issue challenging the ability of the Defendant to object to the jurisdiction at that juncture, when it had already admitted jurisdiction.

The court below had considered them as preliminary issues and the parties filed their written submissions. Subsequently, the Learned High Court Judge pronounced his order dated 17/03/2017 dismissing the plaint on the basis that the High Court lacks jurisdiction to hear and determine this matter due to the existence of the said arbitration clause. Being aggrieved by the said order the Plaintiff prayed for leave to appeal in this court and this court granted leave on the issues of law mentioned above.

Since these preliminary issues were raised relying on Section 5 of the Arbitration Act, it is worthwhile to see what it provides. The said section reads as follows;

'*where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement,* ***the court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction*** *in respect of such matter*' (emphasis added).

It is clear that the bar or limitation imposed by the said section on the trial court is contingent. Unless there is an objection the court has jurisdiction. There is no total prohibition on exercising jurisdiction. The section imposes a prohibition to exercise already existing jurisdiction when there is an objection as per Section 5 of the Arbitration Act and the Arbitration agreement. Thus, there was no total want of jurisdiction and with the admission of jurisdiction the trial court was fully clothed with jurisdiction.

In the case of **P. Beatrice Perera Vs The Commissioner of National Housing 77 N.L.R. 361 at p. 366**, the distinction between **'patent'** and '**latent'** want of jurisdiction was discussed as follows. "……. *Lack of competency may arise in one of two ways. 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 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or 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 waiver 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 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 or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction. ……"*

Similarly in **Lily Fernando v Ronald (alias R. A. Vanlangenberg) 75 NLR 231** this court held that where in an action instituted in a district court, the defendant has not denied in his answer the territorial jurisdiction of the court, section 71 of the Court

Ordinance precludes him from raising such objection subsequently by moving to amend the answer. In his judgment Weeramantry J held as follows;

"*This is a type of action and a claim for relief which would undoubtedly fall within the jurisdiction of a District Court. It is only on the basis that the cause of action falls outside the territorial limits of its jurisdiction that it is sought to be urged that this particular Court lacks jurisdiction to hear this particular suit. It will be seen then that such, a case is completely different from cases of total and absolute want of jurisdiction in a particular Court or Tribunal, as where a matter exclusively within the purview of the District Court comes before the court of requests or a matter clearly outside the jurisdiction of a Tribunal is brought before it. In such cases, unlike in the present, no amount of submission to the jurisdiction can confer on the court or Tribunal a jurisdiction it altogether lacks. The case before us is rather one where the Court is spared the trouble of satisfying itself of the facts on which its jurisdiction depends, for the party by his conduct is taken to have accepted those facts, thus dispensing with the need for an inquiry into their existence. This would appear to be the principle underlying the section. So also, it would appear that English law by virtue of a similar principle, a defendant is considered to waive an objection to the jurisdiction if, knowing the facts, he enters an unconditional appearance to the writ."*

At this stage it is appropriate to refer to section 39 of the Judicature Act which reads as follows,

"*Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court but such court shall be taken and held to have jurisdiction over such action, proceeding or matter;*

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court in having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

However, the above proviso has no relevance to the case at hand since the trial court had jurisdiction at the time of filing the case and it loses the jurisdiction only if and when there is an objection to exercise its jurisdiction using the arbitration clause.

The Court of Appeal in several cases had held that objection to jurisdiction must be taken at the earliest opportunity and if no objection is taken the matter is within the plenary jurisdiction of the court- vide **Jaladeen V Rajaratnam (1986) 2 SLR 201**, **David Appuhamy V Yassassi thero (1987) 1 SLR 253, Paramasothy V Nagalingam (1980) 2 SLR 34,** and failure to take such objection was treated as a waiver -vide **Navaratnasingham V Arumugam and another, (1980) 2 SRI. L.R. 01 (CA), Edmund Perera v Nimalaratne and Others (2005) 3 SLR 68**

This court also held that "*even on restrictive interpretation of section 39 of the Judicature Act the petitioner is estopped in law from challenging the jurisdiction of the Magistrate Court as the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest opportunity implies a waiver of any objections to jurisdiction*". Vide- **Don Tilakaratne V Indra Priyadarshanie Mandawala** (2011) 2 SLR 260.

In this regard E.R.S.R Coomaraswamy comments as follows'

"*Can a party by admitting expressly or by implication the jurisdiction of a court confer Jurisdiction on the court where none exists? Spencer Bower and Turner say that not even plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal, and the same results cannot be achieved by conduct or acquiescence by the parties. These cases are described as cases of a total or patent want of Jurisdiction.*

On the other hand, where nothing more is involved than a mere irregularity of procedure or, for example, non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive the defect, or to be estopped by conduct from setting it up, no new Jurisdiction is thereby impliedly created and no existing jurisdiction extended beyond its existing boundaries, the estoppel will be maintained and the court will have jurisdiction. These are cases of partial or latent want of jurisdiction. Thus, parties can waive inquiry by the court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained, as where the market value of the property mentioned in the plaint exceeds the limits of the pecuniary jurisdiction of the court, but the parties allow the trial to proceed on the merits, it would be an implied admission that the market value was within the pecuniary jurisdiction of the Court.

In Sri Lanka also, this distinction between a patent want of jurisdiction and a latent want of jurisdiction has been drawn. ……

……It is submitted that the disability laid down by section 39 can only be availed of in case of partial or latent want of jurisdiction and not of a total or patent want of jurisdiction, though the section appears to be absolute in its terms" {**E R S R Coomaraswamy, The Law of Evidence, Volume 1 -2nd Edition, 2012 Reprint, Stamford Lake Publication, pages 131 & 132**}

Moreover, Sections 76 and 75 (d) of the Civil Procedure Code requires with regard to an answer that "*If the defendant intends to dispute the averment in the plaint as to the jurisdiction of the court, he must do so by a separate and distinct plea, expressly traversing such averments"* and there shall contain "*a statement admitting or denying the several averments of the plaint"*. In the case at hand the Defendant had admitted the jurisdiction of court to hear and determine the action in his answer.

Explanation 2 of section 150 of the Civil Procedure Code states that "*no party can be allowed to make at the trial a case materially different from that which he has placed on record"*.

Section 58 of the Evidence Ordinance provides that "*no fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing ,or which ,before the hearing ,they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings"* ; However, the court has a discretion to require the facts admitted to be proved otherwise than by such admission. In the present case the trial court had jurisdiction and any prohibition to exercise the jurisdiction would arise only with the objection to the jurisdiction as per section 5 of the Arbitration Act. The issue is whether a defendant can withdraw his admission of jurisdiction as he wishes at a later stage and object to jurisdiction.

In **Mariammai V Pethrupillai 21 NLR 200** this court held that "*if a party in a case makes an admission for whatever reason, he must stand by it; it is impossible for him*

to argue a point on appeal which he formally gave up in the court below". However, in **Solomon Ranaweera v Solomon Singho 79 (ii) NLR 136** it was held that a mistaken admission in law is not binding on such party.

This court in **Uvais V Punyawathie (1993) 2 SLR 46** expressed as follows;

"*It is sometimes permissible to withdraw admission on question of law but admission of facts cannot be withdrawn. Quite apart from any question of estoppel or prejudice, to permit admission to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleading and issues. Section 75 not only requires a defendant to admit or deny several averments of the plaint but and to set out in detail, plainly and concisely the matters of fact and law and the circumstances of the case upon which he means to rely for his defence; sections 46(2) and 148 oblige the court upon the pleadings or upon the contents of the documents produced, and after examination of the parties if necessary, to ascertain the material propositions of fact or law upon which the parties are at variance, and thereupon to record the issues on which the right decision of the case depends; section 150 explanation (2) prohibits a party from making at the trial, a case materially different from that he has placed on record and which his opponent is prepared to meet; the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings."*

As per section 146 of the Civil Procedure Code, parties, when they are in agreement as to what question of fact or law to be decided between them, can state to court the same in the form of an issue. When parties are not in agreement with regard to the issues of law and fact to be decided in the action, the court shall raise issues after ascertaining upon what material propositions of fact or of law the parties are at variance. In the same

manner if certain material propositions of fact and or of law are admitted by the parties before it through their pleadings, answers to interrogatories etc., the court can record them as admissions. Thus, one can still argue that admissions represent the mutual agreement or the meeting of minds of the parties with regard to the undisputed facts or law of the case before court and, as such, fraud, mistake, misrepresentation, duress, undue influence etc., when proved would still be a ground to allow the withdrawal of an admission.

As per Section 58 of the Evidence Ordinance quoted previously in this decision, formal admissions are binding on the parties who made them and need not be proved unless the court in its discretion require them to be proved. Discretion of court has to be used judiciously. It should be used only when the justice demands it and there are reasonable grounds to use it. Fraud, mistake, misrepresentation, duress, undue influence may fall among such grounds. Even a collusive admission (for e.g. Collusive admission with regard to the pedigree in a partition case) may compel a judge to use such discretion.

E.R.S.R Coomaraswamy discusses the formal and informal admission and their effect in the following manner;

"*The admissions contemplated by Section 58 are formal admissions or judicial or express admissions. They must be distinguished from informal or extra Judicial or casual admissions, which are referred to in Sections 17(1), 18 to 21 and 31 of the Evidence Ordinance, and which can be testified to at the trial by witnesses.*

The following points of distinction may be drawn between formal admissions and informal admissions:

(a) *Judicial admissions are in English Law fully binding on the party who makes them. They constitute a waiver of proof and can be made the foundation of the rights of the parties. Extra judicial or informal admissions are however, binding only partially and not fully, except in cases where they operate as, or have the effect of, estoppel, in which case they are fully binding and may constitute the foundation of the rights of the parties.*

Although that is the position in English Law, the proviso to Section 58 provides that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. In view of this proviso and Section 31 of the ordinance, the position seems to be that in Sri Lanka, in the absence of some rule of pleading to the contrary or of the operation of the rule of estoppel, when persons make admissions, they are not concluded by them, and even if they are formal admissions, they can withdraw them for good reason, such as misapprehension of fact or law. The policy of the law favours the investigation of truth by all expedient methods and, therefore, the doctrine of estoppel will not be extended beyond the reasons on which it is founded."

....……

"The effect of formal admissions has been considered in the last subsection. They may bind a party conclusively unless the court acts under the proviso to Section 58. They dispense with the necessity for proof, but they are binding only in the particular litigation for which they are made." {**E R S R Coomaraswamy, The Law of Evidence, Volume 1, 2nd Edition, 2012 Reprint, Stamford Lake Publication, pages 126 &127**}

The facts, provisions of law, decided cases and authorities related above lead this court to following assertions:

1. When there is total or patent lack of Jurisdiction, parties cannot confer jurisdiction on the court or extend jurisdiction it has by agreement, acquiescence, waiver or by conduct etc.
2. When it is contingent or latent lack of jurisdiction it can be cured by agreement, acquiescence, wavier, inaction or by any other manner of conduct which indicates that parties subject themselves to the authority of the relevant court etc.
3. Once latent lack of jurisdiction is cured by agreement, acquiescence, wavier or conduct, such party is estopped from denying the Jurisdiction of the Court.
4. Objection to latent lack of Jurisdiction must be raised at the earliest opportunity. Otherwise the court shall be taken and held to have jurisdiction over the action and no party who ought to have objected at the first opportunity is entitled to object thereafter.
5. However, if it appears in the course of the proceedings that the action, proceeding or matter was intentionally brought in a court in having no jurisdiction and with previous knowledge of the want of jurisdiction of such court, the judge is entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void.
6. Parties are bound by formal admissions they make in an action and they need not be proved again in that action.
7. However, mistaken admissions in law can be withdrawn if the Court decides that the circumstances of the case warrant permitting such withdrawal.
8. As a rule, admissions on facts cannot be allowed to be withdrawn but on certain occasions for good reasons, a court

may, using its discretion, allow to withdraw or require the parties to prove such admitted facts by other means. In such situations the court must act judiciously and such reasons may relate to instances of mistake, misrepresentation, fraud, duress, undue influence, collusion etc. when such grounds caused a considerable influence to make such admission.

9. No party can be allowed to make at the trial a case materially different from that which he has placed on record.
10. Section 5 of the Arbitration Act does not create a total want of jurisdiction in the relevant trial court which generally has the power to hear the action. It bars or creates a limitation on the exercise of jurisdiction when there is an objection to exercise its jurisdiction on the ground that there is an arbitration agreement over the same subject. Thus, the jurisdiction of the court is contingent on whether there is an objection or not.

In applying above principles to the case at hand, this court conclude as follows;

- The Commercial High Court had jurisdiction to hear this case as the case was based on a commercial transaction and the claim was within the monetary jurisdiction of the Court.
- There was no bar or limitation to exercise that jurisdiction as there was no objection to the jurisdiction, based on the arbitration clause, either by way of a motion prior to filing answer or in the answer. Instead, the Defendant admitted jurisdiction in his answer as well as in his proposed admissions, thus in the recorded admissions. As the insurer, the Defendant should have the original or copy of the insurance agreement and, therefore, the Defendant could not have been misled with regard to the contents of the agreement.

- Even for the sake of argument if it is considered that the Defendant did not see the agreement sued upon at the time of filing answer, then the objection to jurisdiction should have been raised at least at the time the court permitted the agreement as evidence but, waiving its right to object, the Defendant proceeded with the trial and, during the cross examination on a subsequent date withdrew the admission of jurisdiction and belatedly raised the issues objecting to jurisdiction.
- Whether one objects or consents to, or subjects himself without objection to a jurisdiction is a matter of fact and not law. The admission of jurisdiction by the Defendant, or subjecting itself to the jurisdiction of the court without objection, was an admission of the factual position that the Defendant did not have any objection to the Jurisdiction of the Commercial High Court.
- As such, the Defendant could not have withdrawn the admission of Jurisdiction at a belated stage.
- The Defendant should have the original of the Insurance policy. The Defendant, not only once but twice, voluntarily admitted Jurisdiction by answer as well as by proposed admissions. Again, the Defendant participated in recording admissions through its attorney- at- law. As such there cannot be a mistake on the Defendant's part.
- The Plaintiff has given the policy number as well as the vehicle number in his plaint even though he failed to attach a copy of the entire policy by inadvertence with the plaint. That defect was cured later on. The Defendant could not have been misled with such inadvertence as it should have the original of such policy. Therefore, there cannot be any misrepresentation on the part of the Plaintiff that influenced the Defendant to make an admission in respect of the Jurisdiction.
- There was no material to establish fraud, duress, undue influence or collusion between the officers of the Defendant and the Plaintiff etc.

- As such, the learned High Court Judge erred in allowing the Defendant to withdraw its admission of Jurisdiction; allowing new issues challenging the Jurisdiction, and answering them in favour of the Defendant.
- The Commercial High Court had jurisdiction from the very inception of the case and exercised it without objection. It is obnoxious to the administration of justice if one is allowed to raise an objection to the jurisdiction at a later stage when it is not a case of patent lack of Jurisdiction.

This court also observes that the Defendant tried to argue that the insurance policy marked by the Plaintiff is not the correct version of the insurance policy. However, it is pertinent to note that the issues relating to the impugned order of the Learned High Court Judge dated 17.03.2013 does not contain such an issue – *vide proceedings dated 10.10.2016 and the order dated 17.03.2013*. This court should not engage on an issue of fact which was not brought before the lower court to adjudicate. Anyway, this court observes that the Defendant had taken such a stance when it objected to P2, the insurance policy being received in evidence- *vide proceedings dated 24.06.2015*, but it has never raised an issue on that basis. On the other hand, if the Defendant takes up the aforesaid position, it cannot also take up the position that this matter must first be referred for arbitration due to an arbitration clause contained therein - *vide issue No.17*.{ It appears that the plaintiff's position was that P2 is the policy given to him by the Defendant – *vide proceedings dated 24.06.2015*}. The Defendant while denying P2 as the correct Policy cannot argue that the matter has to be resolved by Arbitration due to the arbitration clause contained therein. It is well settled law that a party cannot be permitted to blow hot and cold in the same action. – vide **Padmini V Jayaseeli (2004) 3 SLR 13, Hemawathie Sahabandu Vs Gunasekara (2006) 2 SLR 208, Kandasamy Vs Gnanasekaran (1983) 2 SPLR 01 (SC)** *and* **Ranasinghe Vs Premawardena (1985) 1 Sri LR 63 (SC)**. Thus, the Defendant cannot be allowed to approbate and

reprobate and allowed to say that P2 is not the agreement and yet parties must abide by the arbitration clause in P2.

It must be recorded here that even though this court permitted the parties to file written submissions within one month from the date of argument, they have not filed written submissions within the time given which lapsed on the 29th of May. However, this court observes that belatedly the Defendant had tendered written submissions, with a date stamp bearing the date 26.07.2019 on it, when the judgment was in its draft stage. It reached my chambers only on 26.08.2019. No extension for time was moved. As such, this court shall not encourage or entertain such belated filing of submissions. However, in the said written submissions the Defendant's counsel argues that objections to the Jurisdiction are raised as legal issues and can be raised even when it is not pleaded and at any time including in appeal. In this regard he has referred to '**A Commentary on Civil Procedure Code and Civil Law in Sri Lanka' by U.L. Majeed** and to **Farquharson v Morgan {(1984) 63 L.J.K. B 474}**. This is said without referring to whether the lack of Jurisdiction is Patent or Latent. The said submission is only true with regard to a Patent lack of Jurisdiction. In **Baby V Banda (1999) 3 Sri L R 416,** it was held that if the want of jurisdiction is patent and not latent, objection can be taken at any time. The case laws and legal texts quoted above in this judgment clearly indicate that when it is latent want of jurisdiction the objection has to be taken at the earliest opportunity. As this court has addressed the other contentions in the said belated written submission, there is no need to reiterate the matters referred to in said written submissions.

For the foregoing reasons, this court decides to answer the above questions of law on which leave was granted in the affirmative and set aside the order of the learned High

Court Judge of the Commercial High Court of Colombo dated 17.03.2017 dismissing the plaint in Case No: HC (Civil) 275/2013. It is hereby determined that the Commercial High Court has jurisdiction to proceed with the trial and accordingly learned High Court Judge is directed to decide the case on its merits.

The Plaintiff is entitled to the costs of this appeal.

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 a Special Leave to Appeal application under Articles 127 (1) and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Ranathunga Arachchilage Ranjith Chandrathilake
No. 13, Wijaya Mawatha,
Veyangoda.

Accused

NOW BETWEEN

Ranathunga Arachchilage Ranjith Chandrathilake
No. 13, Wijaya Mawatha,
Veyangoda.

Accused –Appellant

Vs.

The Attorney General

SC Appeal 134/2019

SC [Spl] LA No. 318/2018

Court of Appeal Case No. 241/2017
HC Colombo Case No. HC 7821/2015

Attorney General's Department

Colombo 12

Complainant- Respondent

AND NOW BETWEEN

Ranathunga Arachchilage Ranjith Chandrathilake

No. 13, Wijaya Mawatha,

Veyangoda.

Accused –Appellant- Petitioner

Vs.

The Attorney General

Attorney General's Department

Colombo 12

Complainant- Respondent- Respondent

BEFORE : **BUWANEKA ALUWIHARE PC, J.,**
P PADMAN SURASENA, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Nihara Randeniya for the Accused-Appellant-Petitioner
Riyaz Bary, SSC for the Complainant-Respondent-Respondent

ARGUED ON : 15th of November 2019

WRITTEN SUBMISSIONS : Accused - Appellant- Petitioner - 4th September 2019
Complainant- Respondent- Respondent - 13th November 2019

DECIDED ON : 18th December 2019.

S. THURAIRAJA, PC, J.

The Accused-Appellant, Ranathunga Arachchige Ranjith Chandrathilaka (hereinafter sometimes referred to as Appellant) was indicted at the High Court of Colombo on three counts namely, Section 367 of the Penal Code to be read with Section 3 of the Offences against Public Property Act and Section 395 of the Penal Code.

The indictment was read and explained to the Appellant and he pleaded not guilty. When the trial commenced, the prosecution led the evidence of Mayadunna Mudiyanselage Chandrasiri Mayadunna, Walimuli Nishantha Amaranath, Hettiarachchige Sampath Sri Lal Harischandra, Sabhadevan Parameswaran, Inspector of Police Aththaragama, Sub-Inspector of Police Premanath and closed the case. Being convinced of a prima facie case being established, the trial court called the defence. The Appellant opted to make a statement from the dock.

Upon hearing the submissions of both counsel, the learned High Court Judge delivered the order and found the Appellant not guilty on the 1st and 2nd counts and found guilty on the 3rd count. Both the prosecuting and defence counsel were invited to make submissions before sentencing the Appellant and the learned trial judge, after giving reasons, imposed 5 years rigorous imprisonment and a fine of Rs. 50 000/- in default 4 year's rigorous imprisonment.

Being aggrieved with the said conviction and the sentence, the Appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal after giving reasons.

Being dissatisfied with the said Judgment of the Court of Appeal, the appellant preferred an appeal to this Court. On the 24th of July 2019, after the learned Counsel made submissions in support of his appeal, this Court granted leave on the following question of law.

(i) Whether the sentence imposed by the learned High Court Judge is excessive?

Heard the submissions of both counsel and considered the written submissions filed by both parties. The Counsel for the Appellant submitted the following factors to be considered in favour of the Appellant.

a) The Appellant is a first offender

b) Married and has school going children

c) Sole breadwinner

The Appellant is not challenging the conviction and submissions were made regarding the quantum of the sentence only. The Senior State Counsel submitted to Court that the conviction is well-founded and that in the given circumstances, sentence is reasonable.

I carefully perused the proceedings before the original court – namely the High Court. Considering the evidence before the Court and the reasons stated by the learned judge, I find that the conviction is well-founded. Therefore I am not inclined to interfere with the said conviction.

Regarding the sentence, the learned trial judge before passing the sentence had invited both Counsel to make their submissions. The Appellant had submitted the same submissions before the learned trial judge. After considering their submissions, the learned High Court judge had imposed the sentence stated above.

Considering the submissions, I find that the Appellant was an employee attached to the Sri Lanka Rupavahini Corporation as a technical officer and he was found guilty on selling copper transmission cables that probably belonged to the said Corporation, to a scrap metal dealer. The said vendor gave evidence to the fact that he had dealt with the Appellant on several occasions with regard to similar cables.

I have observed that when those who work in government institutions are found guilty on criminal offences, they plead 'first offender' as a mitigating factor. It is obvious that a person in government service cannot be a convicted criminal.

Therefore, a plea of 'first offender' should not be acceptable. It is the duty of government employees to protect their institutions. Acts causing loss to state property especially at their institution cannot be pardoned or condoned.

In view of the fact that the offence of habitually dealing with stolen items punished under Article 395 of the Penal Code carries a maximum punishment of 20 years Rigorous Imprisonment, I find the imposition of 5 years Rigorous Imprisonment by the learned trial judge to be reasonable. The reasons of the learned trial judge were expressed after hearing the evidence of all witnesses before him. Further he is the best judge to evaluate the deposition and demeanour of all witnesses and the Accused. In this case, I have no reason to interfere with the sentence.

Considering all of the above, I answer the question of law in the negative.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE PC, J.,

I agree.

JUDGE OF THE SUPREME COURT

P PADMAN SURASENA, 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 Leave to Appeal application in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No.54 of 2006.

In the matter of Testamentary Estate of Kanapathi Pillai Kandiah Pillai of No. 79, Halpe Mawatha, Kandana.

SC APPEAL NO.142/2018
SC (H.C.C.A./L.A No.525/2016)

H.C. Civil Appeal No.
WP/HCCA/GAM/08/2013.

Kandiahpillai Shanmuganathan (Deceased) of 'Guildford', Halpe Mawatha,
Kandana

PETITIONER

Joseph Sri Rogers Shanmuganathan,
No.13 1/1, 55th Lane, Wellawatte,
Colombo 06.

Presently at No.24, St. Augustine's Avenue, Wembley, Middlesex,
United Kingdom.

SUBSTITUTED PETITIONER

Vs

1. Kandiahpillai Vythilingam,
   No. 23, Rajasthan,
   Halpe Mawatha,
   Kandana.

2. Kandiahpillai Sivasubramaniam,
   Kandana.

3. Kandiahpillai Muthurajah,
   Karainagar.

4. Kandiahpillai Thambiyah alias Kandiahpillai Thangarajah,
   Karaiagar.

   4a. Kandiahpillai Muthurajah,
   Karainagar.

5. Kandiahpillai Thanaluxmi,
   Karainagar.

6. Kandiahpillai Punithawathi,
   Karainagar.

7. Kandiahpillai Sundarambal,
   Karainagar.

8. Nesaratnam.(Deceased)
   (widow of Kanapathipillai Kandiahpillai),
   Kandana

9. Velupillai Aivapatham,
   Hunupitiya,
   Wattala.

10. Velupillai Paramasothi,
    Prince Street,
    Colombo.

11. Nallamma Vartharajah.
    Kandana.

12. Velupillai Nadarajah,
Dik-Oya.

RESPONDENTS

AND

Joseph Sri Rogers Shanmuganathan,
No.13 1/1, 55th Lane, Wellawatte,
Colombo 6.
Presently at No.24, St. Augustine's Avenue, Wembley, Middlesex,
United Kingdom.

SUBSTITUTED PETITIONER – PETITIONER

-**VS**-

1. Kandiahpillai Vythilingam,
No. 23, Rajasthan,
Halpe Mawatha,
Kandana.

2. Kandiahpillai Sivasubramaniam,
Kandana.

3. Kandiahpillai Muthurajah,
(should read as Kandiahpillai Thambiyah) alias
Kandiahpillai Thangarajah,
Karainagar.

4. Kandiahpillai Thambiyah alias
Kandiahpillai Thangarajah,
Karaiagar.

4a. Kandiahpillai Muthurajah,
Karainagar.

5. Kandiahpillai Thanaluxmi,
   Karainagar.

6. Kandiahpillai Punithawathi,
   Karainagar.

7. Kandiahpillai Sundarambal,
   Karainagar.

8. Nesaratnam (Deceased).
   Kandana.

9. Velupillai Aivapatham,
   Hunupitiya,
   Wattala.

10. Velupillai Paramasothi,
    Queen Street,
    Colombo.

11. Nallamma Vartharajah.
    Kandana.

12. Velupillai Nadarajah,
    Dik-Oya.

RESPONDENTS- RESPONDENTS

AND NOW BETWEEN,

Velupillai Nadarajah,
Formerly, Dik-Oya and presently at No.186/14, Karunathar Lane, Point Pedro Road,
Jaffna.

12TH RESPONDENT-RESPONDENT-APPELLANT

-**VS**-

Joseph Sri Rogers Shanmuganathan,
No.13 1/1, 55th Lane, Wellawatte,
Colombo 6.

Presently at No.24, St. Augustine's Avenue, Wembley, Middlesex,
United Kingdom.

SUBSTITUTED PETITIONER-PETITIONER- RESPONDENT

1. Kandiahpillai Vythilingam
   (Deceased),
   No. 23, Rajasthan,
   Halpe Mawatha,
   Kandana.

2. Kandiahpillai Sivasubramaniam
   (Deceased),
   Kandana.

3. Kandiahpillai Muthurajah,
   Now at No.20A, 3/1, Station Road, Colombo 06.

4. Kandiahpillai Thambiyah alias Kandiahpillai Thangarajah,
   Karaiagar.

4a. Kandiahpillai Muthurajah,
   Now at No.20A, 3/1, Station Road, Colombo 06.

5. Kandiahpillai Thanaluxmi,
   Now at No.26/9,

Karuwapulam Lane,
Kokuvil.

6. Kandiahpillai Punithawathi,
   Neelippanthanai, Karainagar.

7. Kandiahpillai Sundarambal,
   Neelippanthanai, Karainagar.

8. Nesaratnam (Deceased).
   Kandana.

9. Velupillai Aivapatham,
   Now at No.20A, 3/1, Station Road,
   Colombo 06.

10. Velupillai Paramasothi
    (deceased),
    Queen Street,
    Colombo.

11. Nallamma Vartharajah .
    (deceased)
    Kandana.

RESPONDENTS- RESPONDENTS-RESPONDENTS

BEFORE : **BUWANEKA ALUWIHARE, PC, J.**
VIJITH K. MALALGODA, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : N.R. Sivendran with D. Jayasuriya and A. Ranasinghe for the 12th Defendant-Respondent-Appellant.

Dr. S.F.A. Cooray for the Substituted Petitioner-Petitioner – Respondent.

C. Hewamannge for the 3rd Respondent-Respondent-Respondent.

M.A. Sumanthiran, PC, with K. Pirabakaran for the 5th -7th Respondent-Respondent- Respondent.

ARGUED ON : 29th April 2019.

WRITTEN SUBMISSIONS: Substituted Petitioner-Petitioner – Respondent on 08th October, 2018.

12th Defendant-Respondent-Appellant on 9th October, 2018.

DECIDED ON : 11th September 2019.

S. THURAIRAJA, PC, J.

The Appellant preferred this against the Judgment of the High Court of the Western Province holden in Gampaha (hereinafter referred to as the "High Court") in a Testamentary Case bearing No. WP/HCCA/GAM/08/2013. This judgment will be confined to the issues in appeal.

Velupillai Nadarajah is the 12th Respondent- Respondent-Appellant, Velupillai Nadarajah. He had obtained letter of Administration at the Testamentary Case bearing No. 4356/T in the District Court of Negombo and filed the list of Inventory. Parties concerned had disputed to the same and raised their objections. The District Court had ordered on 6/10/1998 and all the parties agreed to dispose this matter on written submissions and the same had being stated at the journal entry. Since, it is directly involved with the question of appeal it is reproduced below for easy reference.

"එබැවින් විමසිමකින් තොරව පාර්ශවකරුවන්ට ලිඛිත දේශනා ගොනු කරන ලෙසටත් එලෙස පාර්ශවකරුවන් ඉදිරිපත් කරන ලිඛිත දේශනා මත නියෝගය දීමට පාර්ශවකරුවන් එකඟ වෙයි.

ඒ අනුව පාර්ශවකරුවන්ට ලිඛිත දේශනා ගොනු කිරීමට අවවාද කරමි.

ලිඛිත දේශනා-1998.10.06 "

(Reproduced of journal entry dated 14th August 1998)

(Emphasis added)

Subsequently, Kandiahpillai Shanmuganathan, the original petitioner had died and his son, Joseph Sri Rogers Shanmuganathan substituted in the said testamentary action. He submitted to Court that, there are disputes regarding the inventory. Therefore, he made an application to re-inquire the matter and to submit oral evidence. The 12th Respondent- Respondent – Appellant objected and by order dated 1/3/2013 Learned District Judge decided not to allow the fresh submissions.

Being unsatisfied with the said decision Substituted Petitioner-Petitioner–Respondent appealed to the Provincial High Court of Gampaha and order dated 21/09/2016 the Learned Judges of the Civil Appellate Court allowed the appeal and dismissed the order of the District Judge and allowed the Substituted Petitioner-Petitioner–Respondent to lead oral and/documentary submissions.

Being aggrieved with the said order of the Provincial High Court 12th Respondent-Respondent – Appellant preferred this appeal and leave granted on the following questions of law set out in paragraph 76 (a) and (c) of the Petition dated 28th October 2016.

(a) *Have their Lordship of the Provincial Civil Appellate High Court of the Western Province Holden in Gampaha erred in law when they failed to appreciate that the Substituted Petitioner-Petitioner-Respondent's father the original petitioner having accepted that no oral evidence is required*

with regard to the inquiry into the determination of the Inventory, Substituted Petitioner-Petitioner- Respondent was not thereafter entitled to take a different stand;

(c) *Have their Lordships of the Provincial Civil Appellate High Court of the Western Province Holden in Gampaha erred in law when they failed to appreciate that the Substituted Petitioner-Petitioner- Respondent is not entitled to deny and is estopped in law from taking a contrary and/or inconsistent position to that of the Original Petitioner to whom he succeeded.* (*Sic erat scriptum)*

Considering the aforementioned questions of law, this Court has to decide whether a substituted party in an action can deny the acceptance of the original party in a court of law. Further, is the substituted party estopped from taking a contrary or inconsistent position to that of the original party to the action?

In terms of Section 395 of the Civil Procedure Code Act reads as follows:

"In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action."

In terms of Section 395, on the death of a sole plaintiff, the legal representative may be substituted by the Court on his application, if the right to sue survives. It is observed that, the Substituted Petitioner- Petitioner- Respondent substituted in the name of the original petitioner namely, Kandiahpillai Shanmuganathan.

It is my considered view that, the parties substituted will get the same rights, privileges and responsibilities as the original party. This is subject to the provisions of

the respective law as stated above. Further, I am of the view that, when the original party agreed to certain arrangements before the Court, the substituted party is estopped and bound by the said arrangements. Legal representative must continue litigation on the cause of action sued by the deceased.

I find support for this view in Sarkar's Law of Civil Procedure 8th edition volume 2 at page, 1148, where the following observations have been made on the Indian Order XXII Rule 2 of which the second part is identical with ours (S. 395):

> "***Pleas available to a Legal Representative***- *The legal representative can only prosecute the cause of action as originally framed; similarly a defendant cannot raise any defence which he could not have raised against the deceased plaintiff himself [Shamchand v. Bhyaram, 22 C 92; Subbaraya v. Manicka, 19 M 345; Md Naindu v. Ummanakani, A 1930 M 593]. If the original plaintiff did not raise the objection regarding the pecuniary jurisdiction before the trial court at any stage, his legal representatives cannot raise that question for the first time before the appellate court [Shioprasad v. Smt. Mohanabai, A 1989 Bom 349, 352].*
>
> *Legal representative has merely right to continue the suit and he cannot make any claim to which the original plaintiff was not entitled [Gurdial Singh v. Gurdev Singh, AIR 1991 P & H 240, 241].*
>
> (Emphasis added)

Gurdial Singh v. Gurdev Singh, AIR 1991 P H 240, (1992) 101 PLR 111, it was held that,

> *"There is no quarrel with the proposition that legal representative has merely Tight to continue the suit and he cannot make any claim to which the original plaintiff was not entitled to..."*

In these circumstances, I am of the view that the order made by the District Court on 1/3/2013 is correct. Accordingly, I allow the appeal and set aside the order of the Learned High Court Judge dated 21/09/2016 and direct the District Court to proceed as per the order dated 1/3/2013.

It is also observed that, this case was instituted in 1966 which is more than 53 years ago hence, I further direct the Learned Judge of the District Court to expeditiously conclude and the parties are directed to corporate with the Learned District Judge to conclude this case as earliest as possible.

Appeal allowed.

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 Appeal against the judgment of the Provincial High Court of the Western Province (Civil Appeal) Holden in Gampaha.

Balasuriya Lekamlage Somawathie,
No: 225, Makewita, Ja-ela

Plaintiff

-Vs-

1) Severinus Dilano Ranjith Alles,
Central Mail Exchange,
Parcels Division, Sri Chittampalam
Gardiner Mawatha, Colombo 01.

2) Jayakody Arachchige Noyel
Jayakody,
226A, Makewita, Ja-ela.

Defendants

S.C. Appeal 144/2011
SC/HCCA/LA NO: 351/2010
High Court of (Civil Appeal)
WP/HCCA/GPH/22/2003(F)
DC Gampaha Case No. 42902/L

AND BETWEEN

Balasuriya Lekamlage Somawathie,
No: 225, Makewita, Ja-ela
Presently at: No.219/A, Makewita,
Ja-ela.

Plaintiff-Appellant

-Vs-

1) Severinus Dilano Ranjith Alles,
Central Mail Exchange,
Parcels Division, Sri Chittampalam
Gardiner Mawatha, Colombo 01.

2) Jayakody Arachchige Noyel
Jayakody,
226A, Makewita, Ja-ela.

Defendants-Respondents

AND NOW BETWEEN

Balasuriya Lekamlage Somawathie,
No: 225, Makewita, Ja-ela
Presently at: No.219/A, Makewita,
Ja-ela.

Plaintiff-Appellant-Appellant

-Vs-

1) Severinus Dilano Ranjith Alles,
Central Mail Exchange,
Parcels Division, Sri Chittampalam
Gardiner Mawatha, Colombo 01.

2) Jayakody Arachchige Noyel
Jayakody,
226A, Makewita, Ja-ela.

Defendants-Respondents-Respondents

Before: Sisira J de Abrew, J.,
L.T.B. Dehideniya, J. and
Murdu N.B.Fernando, PC J.

Counsel: Manohara de Silva PC with H. Munasighe for Plaintiff-Appellant-Appellant
S.N. Vijithsingh for 1st and 2nd Defendants-Respondents-Respondents

Argued on: 14.05.2018

Decided on: 05.12.2019

Murdu N.B. Fernando, PC J.

The Plaintiff-Appellant-Appellant came before this Court being aggrieved by the judgment of the Civil Appellate High Court of the Western Province holden at Gampaha ("High Court") dated 17-09-2010. The High Court by the said judgment upheld the decision of the District Court of Gampaha dated 28-03-2003.

This Court on 26-08-2011 granted Leave to Appeal on four Questions of Law. The 1st and 2nd Questions of Law were raised on behalf of the Plaintiff-Appellant-Appellant ("The Plaintiff/Appellant"), whereas the 3rd and 4th Questions of Law were raised on behalf of the Defendants-Respondents-Respondents ("The Defendants"). The said Questions of Law (in verbatim) are as follows: -

1) Was the 2nd Defendant-Respondent-Respondent a *bona fidae* purchaser for valuable consideration for the purpose of Section 98 of the Trust Ordinance?

2) Did the learned Judge of the High Court of Civil Appeal err in holding that on all the circumstances of this case, there was no trust arising under Section 83 of the Trust Ordinance with respect to the deed P5?

3) Did the 2nd Defendant- Respondent-Respondent have any notice of the alleged trust at the time the transaction embodied in P 13 was entered into the purpose of Section 98 of the Trust Ordinance?

4) In any event, in the absence of a prayer for a relief directly against the 2nd Defendant-Respondent and without making a person called Lionel as a party, could the Petitioner have succeeded in the action filed in the District Court?

The Plaintiff instituted action against the Defendants in the District Court of Gampaha and prayed among other relief, for a Declaration,

(i) that the 1st Defendant was holding the subject matter of this application ("the land") as a trust on behalf of the Plaintiff; and

(ii) that the 2nd Defendant is holding "the land" as a trust on behalf of the Plaintiff and the 2nd Defendant obtained the title to the land from the 1st Defendant, subject to the trust on behalf of the Plaintiff.

If I may refer to the facts in brief, the Plaintiff became the owner of the land in issue, in the year 1987 and transferred the land to one B.A. Lionel upon Deed No 2273 dated 23-03-1991. The Plaintiff's position before this Court was that the land was transferred by the Plaintiff to B.A. Lionel as security for a loan obtained by the Plaintiff, reserving the beneficial right to herself. In 1994, B.A. Lionel requested re-payment of the loan and the Plaintiff was not in a position to pay back the loan.

Thereafter, the 1st Defendant paid the sum due to B.A. Lionel and B.A. Lionel transferred the land to the 1st Defendant by Deed No 146 dated 03-03-1994 ("P5"). The Plaintiff's contention before this Court was that the 1st Defendant held the land in trust for the Plaintiff and the beneficial rights were with the Plaintiff and the Plaintiff continued to live in the land in suit bearing No 225, Makewita, Ja-Ela until she was dispossessed by the 2nd Defendant.

The position of the 2nd Defendant before the trial court was that he was a *bona fidae* purchaser. He purchased the land from the 1st Defendant upon Deed No 4599 dated 03-09-1996 ("P13") for valuable consideration and took possession of the land on the said date without any encumbrances and in November 1996, built a parapet wall.

The Plaintiff went before the Magistrate Court of Gampaha in January 1997, and filed a private plaint under Section 66 the Primary Court Act against the 2nd Defendant seeking an order to restrain the 2nd Defendant from disturbing the Plaintiff's peaceful possession of the land in suit. Whilst this application was pending, on 19-02-1997 the Plaintiff alleged, she was dispossessed from the land and the Magistrate Court by an Order dated 02-06-1997 restored the possession.

The 2nd Defendant went before the High Court of Gampaha being aggrieved by the said Order and on 20-02-1998, the High Court set aside the said Order of the Magistrate Court on the basis that a breach of the peace had not occurred for the Plaintiff to go before the Magistrate Court. The Plaintiff appealed to the Court of Appeal against the said Order and on 28-02-2000, the Court of Appeal dismissed the appeal and affirmed the Order of the High Court and held that the Court of Appeal was unable to accept on the material submitted that the land in suit was subjected to a mortgage or that the Plaintiff was in possession of the land in suit at the time the private plaint was filed. No appeal was lodged against the said Order.

On 25-06-1998, whilst the above stated appeal to the Court of Appeal was pending the Plaintiff filed the District Court case from which the instant appeal lies and moved for a declaration that the beneficial interest in the land in issue was with the Plaintiff.

On 28-03-2003, the learned District Judge dismissed the plaint and made Order that the 2nd Defendant is entitled to the land in suit and to evict whosoever is in the land and obtain vacant possession of the land. This Order was upheld by the Civil Appellate High Court of Gampaha on 17-09-2010. Being aggrieved by the said Order the Plaintiff is now before this Court.

We have heard the Counsel for the Appellant and the Respondents and on the arguments presented to this Court, the question that requires our determination is whether the evidence adduced at the trial is sufficient to establish a 'Constructive Trust' in favour of the Plaintiff by the Respondents, (the 1st Defendant and/or the 2nd Defendants) in terms of the provisions of the Trusts Ordinance.

Chapter 1X of the Trusts Ordinance refers to 'Constructive Trusts' and covers many categories of Constructive Trusts. A transfer without disposal of the beneficial interest is envisaged in Section 83 of the Trusts Ordinance.

The sections reads as follows: -

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

Thus, for a transferee to establish a Constructive Trust, evidence should be furnished to satisfy a Court that it can be reasonably inferred from the 'attendant circumstances' that the transferee did not intend to part with the beneficial interest.

Section 83 of the Trusts Ordinance and the term 'attendant circumstance' has been extensively analysed by our Courts and categorically held that leading of parole evidence pertaining to attendant circumstances, to prove a Constructive Trust does not offend the principles laid down in the Evidence Ordinance and the Prevention of Fraud's Ordinance.

Thus, in **Muttammah Vs Thiyagaraja (1960) 62 NLR 559 at Page 564,** Basnayake CJ stated as follows:-

> "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 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." (emphasis is added)

In the same judgment at page 571 H.N.G. Fernando J., (as he then was) observed as follows:-

> "The Plaintiff sought to prove the oral promise to re-convey not in order to enforce that promise but only to establish an 'attendant circumstance' from which it could be inferred that the beneficial interest did not pass".

The above dicta was followed by Dheeraratne J, in **Dayawathie and others Vs Gunasekara and another [1991] 1 SLR 115** when he held that extrinsic evidence to prove 'attendant circumstances' has been property received in evidence at the trial.

Similarly, GPS de Silva CJ in **Premawathie Vs Gnanawathie [1994]2 SLR 171** and Sripavan J (as he then was) in **Balasubramanium and another Vs Krishnapillai and another S.C. Appeal 28/2008 decided on 24-05-2012** and Thilakawardane J in **Kulasuriya Vs Gunathilake S.C. Appeal 157/2011 decided on 04-04-2014** and more recently by Sisira J. de Abrew J in **Fernando Vs Fernando S.C. Appeal 175/2010 decided on 17-01-2017** and Prasanna Jayawardena, PC J in **Sudarshani Vs Somawathie S.C. Appeal 173/2011 decided on 06-04-2017** held that attendant circumstances would depend on the facts of each case and the burden of proof lies on the person who claims a Constructive Trust to prove that it cannot be reasonably inferred from the attendant circumstances that the said party intended to part with the beneficial interest in the land.

Thus, in the instant appeal, for the Plaintiff to succeed in appeal, the Plaintiff should have placed relevant evidence before the trial court for the court to reasonably infer from the attendant circumstances, that the beneficial interest was still with her.

The Plaintiff placed evidence before the trial court that the property was transferred in 1991 to B.A. Lionel by way of a notorially executed deed. The property thereafter changed hands twice. From B.A. Lionel to the 1st Defendant and from the 1st Defendant to the 2nd Defendant, by P5 and P13 in 1994 and 1996. Thus, the Plaintiff should have led evidence

pertaining to attendant circumstances, in order for the trial judge to reasonably infer that the beneficial interest was still with her when the District Court action was filed in the year 1998.

The conveyance by which the plaintiff transferred the property to B.A. Lionel in 1991, and P5 & P13 by which the 1st Defendant obtained title from B.A. Lionel and transferred the property to the 2nd Defendant respectively, were absolute transfers without any conditions attached. No evidence was led with regard to re-conveyance of the property to the Plaintiff or that it was subjected to a mortgage. Notaries who executed the deeds did not give evidence. No evidence was led to suggest that the beneficial interest was with the Plaintiff and there was an understanding verbally or in writing between the parties to re-convey the land after a certain event or on a given date to the Plaintiff.

The Plaintiff's only assertion was that she continued to live in the land in suit even after she conveyed title in 1991 to B.A. Lionel until she was dispossessed by the 2nd Defendant. In her evidence before the trial court she stated that she obtained a sum of money from B.A. Lionel and the land in suit was kept as a security and therefore B.A. Lionel held the land in trust and in favour of the Plaintiff; that she could not re-pay the loan and the 1st Defendant redeemed it at her request, knowing her financial situation whilst living in the premises as a boarder under the Plaintiff; the 1st Defendant paid the consideration on her behalf and therefore the 1st Defendant held the land in trust and in favour of the Plaintiff; that the said trust continued even when the property was transferred to the 2nd Defendant and though she is not a party to P5 and P13, she continued to have the beneficial interest in the land in suit.

The Plaintiff marked in evidence the electoral registers and assessment registers but did not lead evidence nor call witnesses to substantiate that she physically possessed and lived in the land in suit during the relevant period, i.e. consequent to relinquishing her title to the land in 1991, the transfer of the property to the 1st Defendant in 1994 and thereafter to the 2nd Defendant in 1996. Her evidence that she became aware of the construction of the parapet wall and the fact that the 2nd Defendant had installed a family at the land in suit from neighbours, contradicted her position that she lived in the land in suit.

The 1st Defendant in his evidence categorically denied that the Plaintiff had any interest in the land in suit. His case was that he purchased the land from B.A. Lionel and not from the Plaintiff and at the time of purchase, the Plaintiff was not living in the premises nor had possession of the land. He went onto explain that there were two lands bearing No 219 A and 225 Makewita, 300 yards apart and the Plaintiff lived and conducted her Cadju business at No 219 A, whereas he lived at No 225 when he was employed in Colombo. He purchased the property bearing No 225 without any encumbrances, and upon his transfer he sold the land

bearing No 225 to the 2nd Defendant and the said transfer (P13) was an outright transfer and therefore denied that the Plaintiff had any beneficial interest in the land in suit.

The contention of the 2nd Defendant before Court was that he was a *bona fidae* purchaser of the land in suit and went into immediate occupation of the property and denied that the Plaintiff had any beneficial interest in the land in suit. At the time the 2nd Defendant gave evidence before the trial court the appellate process of the Section 66 application had been concluded. The 2nd Defendant in his evidence produced cheques and payment receipts to substantiate that the land was purchased for valuable consideration and in good faith, since it neighboured a property belonging to his father wherein a furniture venture had been set up.

Having analyzed the evidence led at the trial, the learned District Judge came to the finding that the 1st Defendant by P5, purchased the property from B.A. Lionel as an outright sale; that the evidence led does not suggest that the 1st Defendant held the land in trust for the Plaintiff as it was not purchased from the Plaintiff; the Plaintiff did not have a beneficial interest in the land in suit; the 1st Defendant did not convey the land to the 2nd Defendant subject to a trust as suggested by the Plaintiff; a trust was not created by either the 1st and/or the 2nd Defendant nor existed in favour of the Plaintiff and came to the conclusion that the 2nd Defendant was a *bona fidae* purchaser. It is observed that the judgment did not refer to Section 83 of the Trusts Ordinance or to the term attendant circumstances *per se* but discussed the facts which preceded and followed the transfer and the change of hands of the property from one to another.

The High Court considered the provisions of Section 83 and 98 of the Trusts Ordinance and upheld the said judgment. The High Court observed that the 2nd Defendant was a *bona fidae* purchaser and held that from the attendant circumstances led in evidence by the Plaintiff, that the Court cannot infer that the Plaintiff had a beneficial interest in the land in suit.

Having carefully considered the attendant circumstances pertaining to the transfer of the property in the instant appeal, which preceded and followed the transfer of the land in suit which are not too removed in point of time, I am in agreement with the judgment of the District Court and the High Court, that it cannot be reasonably inferred that the Plaintiff intended to retain the beneficial interest in the property in question, when she transferred the property to B.A. Lionel as security for a loan obtained way back in 1991.

In coming to the said conclusion, I have considered especially the fact that the transferor of P5 was not the Plaintiff but B.A. Lionel and in view of the provisions of Section 83 of the Trusts Ordinance, if a Constructive Trust was created, the transferee, i.e. the 1st Defendant must hold the property for the benefit of the owner B.A. Lionel and not for the benefit of the Plaintiff. In view of the evidence led it clearly manifests that the 2nd Defendant is a *bona fidae*

purchaser who purchased the property in good faith and for valuable consideration. Therefore, I hold that the attendant circumstances relied on by the Plaintiff is inadequate to justify her claim, that she has a benefial interest in the land in suit. Thus, the trial court was not in error in its findings and the High Court correctly upheld the said judgment.

In the above circumstances, I answer the 2nd Question of Law, namely,

> "Did the learned Judge of the High Court of Civil Appeal err in holding that on all the circumstances of this case, there was no trust arising under Section 83 of the Trust Ordinance with respect to the deed P5?"

in the negative and in favour of the Respondents.

Let me now, move onto the 1st Question of Law raised before this Court, which is as follows: -

> "Was the 2nd Defendant-Respondent-Respondent a *bona fidae* purchaser for valuable consideration for the purpose of Section 98 of the Trust Ordinance?"

Section 98 of the Trusts Ordinance reads as follows: -

> "Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration, or create an obligation in evasion of any law for the time being in force."

This provision clearly lays down that the rights of the transferee shall not be impaired if the purchaser has purchased the property in good faith and for valuable consideration.

The 2nd Defendant, as stated earlier gave evidence and relied on documents to establish his *bona fidaes* in purchasing the land in suit and substantiated that the land was purchased for valuable consideration and in good faith.

This evidence was accepted by the trial Judge and upheld in appeal by the High Court. I see no reason to reject the said evidence. The property passed on to the hands of two others, before the 2nd Defendant became the owner of the property. Thus, the contention that the Plaintiff still has a beneficial interest in the land purchased by the 2nd Defendant as a *bona fidae* purchaser, has no merit and for the aforesaid reason, I answer the 1st Question of Law raised before this Court in the affirmative, in favour of the Respondents.

The 3rd Question of Law raised by the Respondents before this Court is as follows: -

> "Did the 2nd Defendant- Respondent-Respondent have any notice of the alleged trust at the time the transaction embodied in P 13 was entered into the purpose of Section 98 of the Trust Ordinance?"

In view of the answers given to the 1st and the 2nd Questions of Law, that the 2nd Defendant is a *bona fidae* purchaser and a Constructive Trust was not created in favour of the Plaintiff, this question does not merit an answer from this Court.

However, for completeness let me go back to Section 98 of the Trusts Ordinance, which refers to the rights of a *bona fidae* purchaser not been impaired if the transaction was in good faith and for valuable consideration. The Counsel for the Appellant in his written submissions emphasised the fact that the sale between the 1st Defendant and the 2nd Defendant cannot fall into the realms of a *bona fidae* transaction as the 2nd Defendant ought to have had 'notice' of the Trust and relied on the definition of 'notice' as found in section 3(k) of the Trusts Ordinance.

This Court at this juncture does not wish to go on a voyage of discovery to ascertain whether the 2nd Defendant had notice and whether it was sufficient, especially since it is a disputed fact. The trial Judge has analyzed the evidence led before him and had come to a conclusion that the 2nd Defendant is a *bona fidae* purchaser. The said finding was upheld by the High Court. I do not wish to disturb the said finding. Hence, I answer the 3rd Question of Law in the negative in favour of the Respondents.

The 4th Question of Law which is as follows, raised by the Respondents is a consequential question.

> "In any event, in the absence of a prayer for a relief directly against the 2nd Defendant- Respondent and without making a person called Lionel as a party, could the Petitioner have succeeded in the action filed in the District Court?"

This Court has already held that a Constructive Trust was not created and hence in my view an answer to this question is not required.

However, I wish to refer to Sections 65 and 66 of the Trusts Ordinance which provide for a beneficiary of a trust to follow the trust property into the hands of even a stranger and obtain a declaration pertaining to the trust property. This Court has upheld the said principle and made orders accordingly. **Dayaratne Vs Gunasekara** (supra) and **Balasubramanium Vs Krishnapillai** (supra) are two instances in which such orders had been made by our Courts.

With regard to the instant appeal, this Court had already come to a finding that the attendant circumstances in this case do not amount to creation of a trust in favour of the Plaintiff and that the Plaintiff has no beneficial interest in the land in suit. Hence, I do not wish to go on an academic exercise to answer the 4th Question of Law raised before this Court, other than simply say, that in view of the findings of this Court, the question does not merit an answer.

For the aforesaid reasons, I uphold the Order of the Provincial High Court of the Western Province holden at Gampaha dated 17-09-2010 and the Judgment of the District Court of Gamapaha dated 28-03-2003.

Appeal is dismissed with costs fixed at Rs. 25,000/=

Judge of the Supreme Court

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 an appeal

Jayakody Arachchige Chandramali,
Kahatagahamulla,
Dodangaslanda.

Plaintiff

SC Appeal 146/2010
SC (Spl) L.A No.29/2010
C.A.(LA) No.337/2002
DC Puttalam Case No.909/L

Vs

1. Meerayadeen Mohamed Riyaldeen,
   No.15/2, Castle Street,
   Colombo 4.

2. Solamon John Vincent,
   No.28/2, Bishop Road,
   Wattala.

Defendants

AND BETWEEN
Jayakody Arachchige Chandramali,
Kahatagahamulla,
Dodangaslanda.

Appearing by her power of Attorney holder

Liyanage Don Marcus Stanly Nanayakkara,
Newtown
Dodangaslanda

Plaintiff-Appellant

Vs

1. Meerayadeen Mohamed Riyaldeen,
   No.15/2, Castle Street,
   Colombo 4.

2. Solamon John Vincent,
   No.28/2, Bishop Road,
   Wattala.

Defendant-Respondents

AND NOW BETWEEN

Jayakody Arachchige Chandramali,
Kahatagahamulla,
Dodangaslanda.

Appearing by her power of Attorney holder

Liyanage Don Marcus Stanly Nanayakkara,
Newtown
Dodangaslanda

Plaintiff-Appellant-Petitioner-Appellant

Vs

1. Meerayadeen Mohamed Riyaldeen, **(Deceased)**
   No.15/2, Castle Street,
   Colombo 4.

1(a). Shima Rushana Shararaff
   No.24, 40th Lane
   Wellawatta.

Substituted 1a Defendant-Respondent-Respondent-Respondent

2. Solamon John Vincent,
No.28/2, Bishop Road,
Wattala.

Defendant-Respondent-Respondent-Respondent

Before : Sisira J de Abrew J
Prasanna Jayawardena PC J
V.K. Malalgoda PC J

Counsel : Rohan Sahabandu President's Counsel with Hasitha Amarasinghe for the Plaintiff-Appellant-Petitioner-Appellant
M.Y.M. Faiz for the Substituted 1a Defendant-Respondent-Respondent-Respondent

Argued on : 10.9.2018

Written Submission
Tendered on : 11.2.2011 by the Plaintiff- Appellant-Petitioner-Appellant
18.4.2011 by the Substituted 1a Defendant-Respondent-Respondent-Respondent

Decided on : 6.3.2019

Sisira J de Abrew J

The learned District Judge by his order dated 15.8.2002,

1. disallowed the application of the Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) to produce documents P10 and P10(a),

2. disallowed the application of the Plaintiff-Appellant to call witness Devayani Kalinga, the Post Mistress of Museum Post Office, Colombo,
3. disallowed the application of the Plaintiff-Appellant to call witness Velupillai Sri Skandarajah, the Chief Post Master of Puttalam Post Office, Puttalam, and
4. disallowed the application of the Plaintiff-Appellant to recall Wanigasekara, the Notary Public who had already given evidence.

Being aggrieved by the said order of the learned District Judge, the Plaintiff-Appellant filed an application for leave to appeal in the Court of Appeal and the Court of Appeal by its judgment dated 12.1.2010 affirming the order of the learned District Judge dismissed the appeal of the Plaintiff-Appellant. Being aggrieved by the said judgment of the Court of Appeal, the Plaintiff-Appellant has appealed to this court. This court by its order dated 1.11.2010 granted leave to appeal on questions of law stated in paragraph 12 (e) and 12 (f) of the Petition of Appeal dated 23.2.2010 which are set out below.

1. Did the Court of Appeal and the District Court err in law in not appreciating that in the interest of justice the plaintiff has a right to recall the Notary Public as the impugned documents were produced from the custody of an official witness and when those documents were originated from the said Notary Public?
2. Did the Court of Appeal and the District Court err in law, as P10 and P10(a) were produced subject to proof and these documents were tendered by an official witness, to call the Post Mistress and other witnesses in the interest of justice?

The Plaintiff-Appellant filed action against the 1st and the 2nd Defendants seeking a declaration of title and to evict the 1st Defendant from the land described in the schedule to the plaint.

The 2nd Defendant by Deed No.974 dated 11.2.1995 attested by Wanigasekara the Notary Public transferred the land in dispute to the Plaintiff-Appellant. However the same Defendant by Deed No.3237 dated 9.8.1995 attested by M.B.I. Muhammed the Notary Public transferred the same land in dispute to the 1st Defendant. The land in dispute is in Puttalam District. The Deed No.3237 was registered in the Land Registry in Puttalam District on 4.9.1995.

Learned President's Counsel (PC) for the Plaintiff-Appellant submitted the following facts.

"Wanigasekara the Notary Public practicing in the District of Colombo had sent the original Deed No.974 with a covering letter (P10) addressed to the Registrar Land, Puttalam to register the said deed. However later Wanigasekara the Notary Public discovered that said Deed No.974 had not been registered in the Land Registry, Puttalam. Thereafter, Wanigasekara the Notary Public obtained a certified copy of the 2nd copy of Deed No.974 from the Land Registry, Colombo and got it registered in the Land Registry, Puttalam on 6.9.1995."

It has to be noted here that the 1st Defendant's deed (Deed No.3237) was registered in the Land Registry, Puttalam on 4.9.1995 and that the Plaintiff-Appellant's deed (Deed No.974) was registered in the Land Registry, Puttalam on 6.9.1995.

When Sumathipala Hettiarachchi, the Registrar Land Puttalam gave evidence, the Plaintiff-Appellant moved to mark a letter sent by Wanigasekara the Notary Public to the Registrar Land Puttalam as P10 and the envelope as P10(a). Although the 1st

Defendant objected to this application, the learned District Judge did not make an order on the objection. In order to prove P10 and P10(a), the Plaintiff-Appellant made an application to call Devayani Kalinga, the Post Mistress of Museum Post Office, Colombo and Velupillai Sri Skandarajah, the Chief Post Master of Puttalam Post Office, Puttalam. This application was refused by the learned District Judge on the ground that they were not listed in terms of Section 121 of the Civil Procedure Code (CPC) prior to the commencement of the trial. The application to recall Wanigasekara the Notary Public to produce the documents P10 and P10(a) was also refused by the learned District Judge on the following grounds.

1. The evidence of Wanigasekara the Notary Public has already been concluded.
2. The documents P10 and P10(a) should have been produced at the initial stage when Wanigasekara the Notary Public gave evidence.
3. P10 and P10(a) had already been refused.

Learned PC for the Plaintiff-Appellant contended that the application to produce P10 and P10(a) should have been allowed under Section 175(2) of the CPC. Section 175(2) of the CPC reads as follows.

> *"A document which is required to be included in the list of documents filed in court by a party as provided by section 121 and which is not so included shall not, without the leave of court, be received in evidence at the trial of the action:*
>
> *Provided that nothing in this subsection shall apply to documents produced for cross-examination of the witness of the opposite party or handed over to a witness merely to refresh his memory."*

The Plaintiff-Appellant filed three lists of witnesses and documents. The 1st list was filed on 20.8.1996. The trial commenced on 21.11.1996. After commencement of the trial, the Plaintiff-Appellant filed two lists of witnesses and documents on 9.12.1996 and 26.7.2002. The Plaintiff-Appellant failed to include documents P10 and P10(a) in any one of the abovementioned lists. When the aforementioned matters are considered it can be concluded that documents P10 and P10(a) have not been listed.

According to the Plaintiff-Appellant, Wanigasekara the Notary Public had sent the letter P10 in the envelope P10(a) to the Registrar Land Puttalam requesting him to register the Deed No.974 but it had not been registered. Therefore it was within the knowledge of the Plaintiff-Appellant that documents P10 and P10 (a) would be required to prove the case. Thus the Plaintiff-Appellant knowing that the said documents would be required to prove his case, has not listed them. These facts demonstrate that the Plaintiff-Appellant was highly negligent in prosecuting his case. Further the Plaintiff-Appellant could have sought permission of court to produce them when Wanigasekara the Notary Public was giving evidence. It has to be noted here that Wanigasekara the Notary Public is the author of the said documents. If a party intends to produce a document under Section 175 of the CPC, he has to first obtain leave of court. In my view, leave under Section 175 of the CPC cannot be granted when a party is highly negligent in prosecuting his case.

For the above reasons, I hold that the learned District Judge was correct when he refused the application to produce P10 and P10(a).

Now I turn to then question whether the refusal by the learned District Judge to recall Wanigasekara the Notary Public is correct. Learned PC for the Plaintiff-Appellant in this connection relied on Section 165 of the CPC which reads as follows.

> *"The court may also in its discretion recall any witness, whose testimony has been taken, for further examination or cross- examination, whenever in the course of the trail it thinks it necessary for the ends of justice to do so."*

As I pointed out earlier, the fact that P10 and P10 (a) were necessary to prove the case of the Plaintiff-Appellant was within his knowledge. But he did not list them. I have earlier held that the learned District Judge was correct when he refused the application to produce P10 and P10(a). If these documents cannot be produced, no purpose would be served in recalling Wanigasekara the Notary Public. Further in my view Section 165 of the CPC cannot be utilized to cover up negligence of parties. Wanigasekara's evidence was concluded on 26.6.2000. The application to recall Wanigasekara the Notary Public was made in August 2002. Parties must be ready with their cases and the courts are not expected to grant postponements of cases due to the negligence of parties. If these types of postponements are granted, the principle that 'there must be finality in litigations' enunciated by Sansoni CJ in H.A.M. Cassim Vs Government Agent Batticaloa 69 NLR 403 would be violated. It is an accepted principle in law that appointments of courts are definite. This view is supported by the judgment of Justice Amarasinghe in the case of Jinadasa Vs Sam Silva [1994] 1SLR 232 wherein His Lordship held as follows.

> *"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."

For the above reasons, I hold that the learned District Judge was correct when he refused to recall Wanigasekara the Notary Public and the Court of Appeal was correct when it affirmed the said order of the learned District Judge.

The next question that must be considered is whether the refusal by the learned District Judge to call Devayani Kalinga, the Post Mistress of Museum Post Office, Colombo, and Velupillai Sri Skandarajah, the Chief Post Master of Puttalam Post Office, Puttalam was correct. They were required to prove that the envelope P10(a) had been sent to the Registrar Land Puttalam. I have earlier held that the refusal by the learned District Judge to permit the production of P10 and P10(a) was correct. Learned PC for the Plaintiff-Appellant relied on Section 175(1) of the CPC which reads as follows.

"No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party as provided by section 121:

Provided, however, that the court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid,

Provided also that any party to an action may be called as a witness without his name having been included in any such list."

It has to be noted here that the Plaintiff-Appellant made an application to call these two witnesses in order to prove P10 and P10(a). I have earlier held that the refusal

by the learned District Judge to produce P10 and P10(a) was correct and that documents P10 and P10(a) were not listed due to the negligence of the Plaintiff-Appellant. Therefore this court cannot hold that there were special circumstances to call the above two witnesses. The words 'interest of justice' in section 175 (1) of the CPC, in my view, does not cover negligence of parties. When I consider all the above matters, I hold that the learned District Judge was right when he refused to call the two witnesses. For the above reasons I answer the above questions of law in the negative.

For the above reasons, I hold that the Court of Appeal was correct when it dismissed the appeal of the Plaintiff-Appellant. For the aforementioned reasons, I affirm the judgment of the Court of Appeal dated 12.1.2010 and dismiss the appeal of the Plaintiff-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

V.K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

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

SC APPEAL NO.146/2016

Supreme Court Application No. SP/LA/78/2016
Court of Appeal Appeal No. CA (PHC) 56/2014
High Court (W.P) No HCWA 07/2012 (Writ)

In the matter of an application for the special Leave to Appeal.

B. Nanda Sulochana Perera
No. 32/2,
Abeysinghapura,
Periyamulla,
Negombo.

Petitioner

Vs.

1. D.D. Upul Shantha de Alwis
   Commissioner of Co-operative Development and Registrar of Co-operative Societies, Western Province.
   P.O.Box 444,
   Duke Street,
   Colombo 01.
2. Negombo Multi-Purpose Co-operative Society Ltd.
   No. 358, Main Street,
   Negombo.

Respondents

AND THEN,

B. Nanda Sulochana Perera
No. 32/2,
Abeysinghapura,
Periyamulla,
Negombo.

Petitioner-Appellant

Vs.

1. Commissioner of Co-operative Development and Registrar of Co-operative Societies,
   (Western Province).
   P.O.Box 444,
   Duke Street,
   Colombo 01.

2. Negombo Multi-Purpose Co-operative Society Ltd.
No. 358, Main Street,
Negombo.

Respondents-Respondents

AND NOW BETWEEN

B. Nanda Sulochana Perera
No. 32/2,
Abeysinghapura,
Periyamulla,
Negombo.

Petitioner-Appellant-Petitioner

Vs.

1. Commissioner of Co-operative Development and Registrar of Co-operative Societies,
(Western Province).
P.O.Box 444,
Duke Street,
Colombo 01.
2. Negombo Multi-Purpose Co-operative Society Ltd.
No. 358, Main Street,
Negombo.

Respondents-Respondents-Respondents

BEFORE : **SISIRA J DE ABREW, J.**
S. THURAIRAJA, PC, J AND
E.A.G.R. AMARASEKARA, J

COUNSEL : Mahanama de Silva with K.N.M. Dilrukshi for the Petitioner-Appellant-Petitioner

Viraj Dayarathne PC, ASG with Chaya Sri Nammuni, SSC for the 1st Respondents-Respondents- Respondents.
Rex Fernando for the 2nd Respondents-Respondents-Respondents

ARGUED ON : 26th June 2019.

Written Submission On: Petitioner – 25th August 2016

Respondents – 3rd July 2018

DECIDED ON : 26th July 2019.

S. THURAIRAJA, PC, J

Background

The Petitioner-Appellant-Petitioner (hereinafter referred to as "the Petitioner") originally filed an application in the Provincial High Court within the jurisdiction of the Western Province praying for a Writ of Prohibition, prohibiting the 1st Respondent-Respondent-Respondent (hereinafter referred to as the "1st Respondent") from declaring the election of the petitioner to the committee of the Periyamulla Pradeshikaya of the 2nd Respondent-Respondent-Respondent (hereinafter referred to as the "2nd Respondent") as invalid.

The petitioner stated in the Petition filed in the High Court that he is a member of the 2nd Respondent Co-operative society and that he holds a savings account in the Rural Bank and had obtained a loan of Rs. 200,000/- on 24/08/2002 for which he had mortgaged his property by Mortgage Bond No. 02/04 dated 24/08/2002. Later the Petitioner had been sent a Letter of Demand to pay a sum of Rs. 178,290/-, which had been marked and annexed to the Petition in the High Court (marked as 'P2').

The Petitioner had failed to honour the Letter of Demand and the matter had been referred for arbitration. At the conclusion of the Arbitration, the Arbitrator had ordered the Petitioner to pay the outstanding sum of Rs. 178,290/-. The Petitioner had paid the said sum and had obtained the aforesaid Mortgage Bond released on 9/11/2006.

On 5/01/2008, the Petitioner had been elected as a member of the Periyamulla Pradeshikaya of the 2nd Respondent.

The Petitioner states that the Head Quarters Inspector, Minuwangoda Zone of the Co-Operative Department by letter dated 16/03/2008 had required that the Petitioner be present for an inquiry to be held on 02/04/2008. At the inquiry, the Petitioner had been informed that he is disqualified from contesting/ being elected as a member of the Co-Operative Society since he had defaulted in payment of the loan for more than three months. The Petitioner produced documents in proof of the full settlement of the said loan and the release of the Mortgage Bond. Further, he also informed that under the circumstance, the petitioner was not disqualified for election. The petitioner states that the matter ended thereafter.

The Petitioner states that at the election held in October 2011, the Petitioner was elected as a member of the Negombo Municipal Council.

On the 19th of November 2011 the Petitioner was re-elected to the Periyamulla Pradeshikaya of the 2nd Respondent. The 1st Respondent by letter dated 23/05/2012 (marked as 'P5') required the Petitioner to show cause as to why a decision under Section 60(2) of the Co-Operative Societies Statute No. 03 of 1998 of the Western Provincial Council should not be taken to disqualify him. By letter dated 05/06/2012 sent under register cover, the Petitioner informed the 1st Respondent that he had settled the said loan at the time of election and further informed him the relevant facts and circumstances.

The learned Judge of the High Court held against the Petitioner and did not issue Writ as prayed for. Being aggrieved by the decision of the learned Judge of the High Court, the Petitioner appealed to the Court of Appeal seeking to set aside the judgment of the High Court.

After hearing both parties, the Court of Appeal held that the Rule 21(i)(e) of the Co-Operative Societies Rules 1973 is in fact a disqualification even though the money had been repaid and upheld the decision of the High Court. The Petitioner being aggrieved by the decision of the Court of Appeal dated 28/03/2016 sought special Leave to Appeal from the Supreme Court.

The Petitioner had invoked the jurisdiction of this Court with respect to the following substantial questions of law which through a Special Leave to Appeal, [Supreme Court Application No. SP/LA/78/2016] was granted:

a) Has the Court of Appeal erred in law in deciding the matter?
b) Has the Court of Appeal misinterpreted Rule 21(i)(e) of the Co-Operative Societies Rules 1973 and if so, should the order made by the Court of Appeal be set aside?

Interpretation of Rule 21(i)(e) of the Co-Operative Societies Rules 1973

In the case *of* ***Eyston v Studd (1574), 2 Plowd. 463***, it was observed-

> "*The law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.*"

As Lady Hale reveals in ***R v. Secretary of State for Justice, [2017] UKSC 81***, it was observed that-

> "The goal of all statutory interpretation is to discover the intention of the legislation, gathered from the words used in the statute in the light of their context and purpose."

Hence, to interpret a statute and its subsequent regulations or rules, which are enacted for the purpose of carrying out or giving effect to the principles and provisions of the law, is to find the proper meaning so that it may be applied to a particular case.

Subordinate legislation is considered to have the force of law as if they had been enacted as an Act of Parliament as per Section 17(1)(e) of the Interpretation Ordinance. Section 17(1) of the Interpretation Ordinance states that,

> *where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules:*
>
> *(e) all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in the Ordinance or Act of Parliament.*

In this instance, it can be seen that the Co-Operative Societies Rules, 1973 is properly gazetted under an Extraordinary Gazette No. 93/5 dated 10th January 1974.

The Attorney General, in this case, had provided two interpretations for Rule 21(i)(e) of the Co-Operative Societies Rules, 1973 which are polar opposites to each other. These two interpretations need to be thoroughly considered in order to identify the correct interpretation of Rule 21(i)(e).

Rule 21(i)(e) of the Co-Operative Societies Rules, 1973 is reproduced as follows:

> 21. (i) *A member of a registered society shall be disqualified from being elected, as a member of the committee of management or of a regional or a branch committee -*
>
> (e) *If he is, in respect of any loan received by him, in default to the society or to any other registered society or to a liquidator, for a period not exceeding three months or is in default in any other respect to that society or to any other society or to any liquidator;*

First Interpretation provided by the Attorney General

According to the first interpretation provided by the Attorney General Rule 21(i)(e) is not ambiguous and therefore not liable/ and should not be open for interpretation.

Lopes LJ at page 310 in ***R v. City of London Court Judge (1892) 1 QB 273*** stated-

> "I have always understood that If the words of an Act are unambiguous and clear, you must obey those words however absurd the result may appear."

In a subsequent case, ***R v. Wimbledon Justices, ex parte Derwent (1953) 1 QB 380***, Lord Goddard CJ at page 384 observed that-

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

In the case of ***Nasiruddin and Ors. v. Sita Ram Agarwal (2003) 2 SCC 577***, the Indian Supreme Court held as follows:

> *"In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising there from."*

It can be seen that in line of authorities, when considering the view of Sathyaa Hettige P.C. J, in ***Arattana Gedera Susiripala v. Commissioner of Elections and others SC Appeal No. 75/2010*** [decided on 12th February 2014], it has been observed that-

> *"the function of the court is to find out and declare the intention of the Legislature and not to add words to a statute. It is also not the function of the Court to drop the vital part of the statutory provisions in the section but to obey the statutory provisions. It has to be given the true meaning intended by the legislature."*

The Learned counsel for the 1st Respondent submits that the period of three months is clearly a reference to a delay of instalments or the period within which such money

should be paid as stipulated. This is not a reference to a period of three months preceding election. If that were the case, the words "preceding" would clearly be included in the provision, as in the Local Authorities Elections Ordinance. Furthermore, the provisions clearly refer to a period exceeding three months. There can be no provision that would have an ambiguous period of time if such time was a reference to the preceding time to an election.

Both the Attorney General and the Court of Appeal was of the view that since the word 'preceding' had not been included in Rule 21(i)(e), that it was not the intention to refer to the preceding three months and but a reference to three months after the money was due. This has led to the view that there was no obscurity or ambiguity in the wording of the Rule 21(i)(e) of the Rules.

The learned counsel for the 1st Respondent argued that if a potential office bearer cannot or has not wilfully repaid the loan taken by him, he cannot be held to be responsible with the hard-earned money of the people. Hence, this leads to the assumption that the disqualification bar should be applied permanently since it prevents the many occasions where a potential candidate repays a loan just prior to elections.

Second Interpretation of the Attorney General

The Attorney General in his succeeding second interpretation with respect to the disqualification bar of Rule 21(i)(e) stated that-"*the clause in question is in present tense and read with clause 21(i) which states that he will be disqualified from being elected, would mean that the* three-month *period is counted backwards from the time of the election*." As per this elucidation, it shows that the Rule in question is ambiguous in nature.

As pointed out in **Nasiruddin and Ors.** (Supra) –

> *"A Court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is a well-known principle that in a given case*

the Court can iron out the fabric but it cannot change the texture of the fabric."

It is the duty of the Court to consider the whole document while interpreting a provision rather than considering the single clause on its own. This is because, it is similar to reading a book on fiction, where in order to understand the next chapter one must read the previous chapters. Hence in interpreting Rule 21(i)(e), this court accentuates the rule mentioned in Rule 21(i)(d) of the same set of Rules. Rule 21(i)(d) is reproduced as follows:

21. (i) *A member of a registered society shall be disqualified from being elected, as a member of the committee of management or of a regional or a branch committee –*

(d) *if within the three years immediately preceding he has either been convicted of any offence involving moral turpitude or has been sentenced to a term of imprisonment of three months or more;*

(Emphasis added)

As stated in this rule, the words "three years immediately preceding" shows that the disqualification is not applied for a lifelong period but for a 3 years period prior to an election. In Rule 21(i)(d), it mentions any offence involving *"moral turpitude"*. The term *"moral turpitude"* has been defined in **Merriam Webster** as-

"an act or behaviour that gravely violates the sentiment or accepted standard of the community".

In the written submission, the learned counsel for the 1st Respondent stated at paragraph 44 *"the rationale for disqualification is that the Co-Operative Societies is to handle the money and affairs of the impoverished and therefore, complete honesty and transparency of office bearers is essential."*

Maxwell on the **Interpretation of Statutes (12th Edition) 1969** at page 1 says that "*Statute law is the 'will of the Legislature'*." Further in ***State of Jharkhand v Govind Singh (2005) 10 SCC 437***, the Indian Supreme Court held that

> *"a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or sententia legis of the legislature."*

The object of all interpretation is to discover the intention of Parliament or the drafter of any legislation or regulation, but the intention must be deduced from the language used, for it is well-accepted that the beliefs and assumptions of those who frame such legislations cannot make the law. Taking into consideration the intention of the legislature, it could be seen that the purpose of the disqualification clause (Rule 21) was to ensure that a person who is elected to a committee maintains the highest standard of the community. Hence, such requires the show of honesty and transparency to ensure that there is no conflict of interest.

Rule 21(i)(e) was enacted to ensure that the elected person maintains the highest integrity and upholds the standards of the community while carrying out the duties of the office he or she is elected to. However, when comparing this rule with Rule 21 (i)(d), it can be seen that such disqualification cannot be applied lifelong. Where a person who commits an offence of moral turpitude is only barred for 3 years as per Rule 21 (i)(d), a person who has defaulted for more than 3 months but has subsequently repaid such amount should not be unfairly scrutinized, since the reasons for defaulting could arise due to personal issues as well.

This Court is of the view that the disqualification mentioned in Rule 21(i)(e) should be applicable for a period of three months preceding the date on which the person's qualification for being elected is raised as an issue.

For the reasons set out earlier, I set aside those parts of the judgment of the Provincial High Court and Court of Appeal which refer to the questions of law raised

in this case, and to which I answer affirmatively. We direct the 1st Respondent to consider the qualification of the petitioner accordingly. We allow the appeal and order no cost.

Appeal allowed.

JUDGE OF THE SUPREME COURT

SISIRA J DE ABREW, J

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J

I agree.

JUDGE OF THE SUPREME COURT

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

SC/Appeal 154/2010

H.C. Galle Case No.2136

CA No. 125/08

SC/SPL/LA No.100/2010

In the matter of an Application for Special Leave to Appeal

The State

Complainant

~Vs~

Devunderage Nihal

Accused

~ AND BETWEEN~

Devunderage Nihal

Accused~Appellant

~Vs~

The Attorney General

Complainant~Respondent

~AND NOW BETWEEN~

The Attorney~General

Complainant~Respondent~Petitioner

~Vs~

Devunderage Nihal

Accused~Appellant~Respondent

BEFORE:	Eva Wanasundera, PC, J Buwaneka Aluwihare, PC, J & Sisira J. De Abrew, J
COUNSEL:	Jayantha Jayasuriya, PC, SASG with Ms. A. Jinasena,SDSG for the Complainant-Respondent- Appellant. Rienzie Arsecularatne, PC with Udara Muhandiramge, Namal Karunaratne, Nimeshika Patabandige and Thejitha Koralage for the Accused-Appellant-Respondent.
ARGUED ON:	26.10.2015
DECIDED ON:	03.01.2019

Aluwihare, PC J.,

In this matter Special Leave to Appeal was granted on the questions of law raised in paragraph 8 of the petition dated 14th June, 2010. The questions are reproduced verbatim below:

A. Is the judgment of the Court of Appeal *contrary to law and to the weight of the evidence led in the case*?

B. Did the Court of Appeal unnecessarily burden the prosecution by holding that "*in drug related offences where raids are conducted by trained officers, it is fair to require for corroboration*?"

C. Did the Court of Appeal err in holding that "*where the raids are conducted by trained officers, corroboration is required as it is only then that the defence would have the opportunity to challenge the veracity or the*

credibility of the prosecution witnesses to contradict the version of the prosecution?"

D. Did the Court of Appeal misdirect itself and adduce an extra burden on the prosecution by holding that *"the prosecution should provide the defence with the opportunity to contradict the witnesses for the prosecution?"*

E. Has the Court of Appeal drawn an adverse inference and thereby misdirected itself by holding that "*the officials conducting raids are more often than not resourceful in strategy and inevitably experienced with a lot of ingenuity and cunning?"*

F. Is the view expressed by the Court of Appeal that *"a witness may bear the stamp of innocence, yet he may turn out to be a calculated liar, especially so when such witness happens to be a trained senior police officer"* a misconception when the facts in the instant case are not supportive of such a conception and contention?

G. Did the Court of Appeal misdirect itself by holding that *"it was a little difficult to understand how the trial judge could be satisfied with the evidence of only one of the main witnesses who really took part in the arrest of the appellant especially in drug related offences where police officers are the key witnesses?"*

For the purpose of the record it must be said, that initially there had been no response from the Accused-Respondent to the notices issued by this Court and Special leave had been granted *ex-parte*. After the matter was fixed for hearing as well, the Accused had not responded to the notices and the hearing also had taken place *ex-parte*. Having considered the submissions made on behalf of the Hon. Attorney General (Appellant) the Court delivered its judgment on 12th May, 2011 by which, the judgment of the Court of Appeal was set aside and the judgment of the High Court had been affirmed. The Accused-Respondent, however by way of a motion sought permission of the Court to have the matter re-opened and re-argued for the reasons set out in the motion. This Court having entertained the motion by its order dated 17.07.2013 re-fixed the matter,

for a fresh hearing and accordingly set aside the judgment of this court referred to above.

As the matter was re-argued before the present bench, I do not wish to refer to the judgment delivered by this court in the matter on 12.05.2011.

The Accused-Appellant-Respondent (hereinafter referred to as the "Accused") was indicted before the High Court under Section 54A(d) of the Opium, Poisons and Dangerous Drugs Ordinance for being in possession of 9.91 grams of Heroin. The learned Judge of the High Court convicted the Accused and aggrieved by the judgment the accused appealed to the Court of Appeal and by its judgment dated 04-05-2010 the court set aside the judgment of the High Court and acquitted the accused.

It was against the said judgment that the Hon. Attorney-General moved this court by way of Special Leave to Appeal.

The facts, albeit briefly are as follows:
On 27th-January 2000, at dawn, a team of police officers attached to Habaraduwa Police Station led by Sub Inspector Jayamanne was patrolling the area of Unawatuna. Evidence of Sub Inspector Jayamanne was that he received a tip-off from an informant about the accused who was said to have been in possession of Heroin.

The information received by Sub Inspector Jayamanne also revealed the location of the accused and Sub Inspector Jayamanne along with Sergeant Punchihewa had proceeded to the given location of the accused, having stationed the other police officers of his team at various points to prevent the Accused escaping in the event the information was correct. As anticipated the Accused had taken to his heels and Sergeant Punchihewa had managed to apprehend the suspect having given chase. Upon being searched, the police had recovered a parcel from a pocket of the pair of shorts the accused was wearing at the time. The parcel had contained a powder which had weighed 18.6 grams and the Government Analyst had identified 9.91 grams of pure Heroin in that powder. This evidence was presented before the Court by the prosecution and the accused made a dock statement admitting the arrest by the Police Officers but denied he had a parcel

containing heroin in his pocket. The learned High Court Judge found the Accused guilty and having proceeded to convict the Accused, imposed life imprisonment on him.

At the hearing of this appeal, on behalf of the State, the learned ASG strenuously argued that their Lordships of the Court of Appeal in deciding to set aside the conviction and the sentence imposed on the accused, erred when their Lordships held that ***"it is difficult to understand how a trial judge could be satisfied with the evidence of only one of the main witnesses who really took part in the arrest of the accused, especially in drug related offences where police officers are the key witnesses"***.

It was the contention of the learned Additional Solicitor General that in holding so their Lordships lost sight of a fundamental principle of evidence, that is, "*evidence is to be weighed and not counted*". The learned ASG argued that in evaluating evidence of the witnesses, a trial judge is entitled to reject the evidence of a witness or witnesses as the case may be, if he is of the opinion that they are not creditworthy and at the same time, is entitled to act on the evidence of a single witness if in the opinion of the judge, the evidence is credible. The learned ASG went on to argue that this principle is part of our law of evidence and Section 134 of the Evidence Ordinance explicitly lays down that ***"no particular number of witnesses shall in any case be required for the proof of any fact".***

The learned ASG submitted that the observation of the Court of Appeal; ***" […] how a trial judge could be satisfied with the evidence of only one main witness who really took part in the arrest […]*** , is obnoxious to the evidentiary provision referred to above.
It was the contention of the learned ASG that the observation of the Court of Appeal referred to above, places an additional burden on the prosecution to corroborate the evidence of a Police Officer who conducts a raid in a drug related offence, in order to secure a conviction.

In fairness, it must be stated that their Lordships of the Court of Appeal had referred to the principle that there is no necessity for a party to summon more than one witness to prove a fact. Their Lordships also had been mindful of the fact that, what matters is "*not the quantity or the volume but the quality of the evidence"*, the principle laid down in Section 134 of the Evidence Ordinance.

Thus, it appears that the Court of Appeal had been very much alive to the evidentiary principles.

The learned ASG however, took objection to a passage in the judgment of the Court of Appeal, which he submitted, in context, runs against the grain of the evidentiary provision referred to above.

The relevant passage of the judgment is reproduced below:

> *"In fact, as a matter of inveterate practice, more than prudence, especially in drug-related offences, where raids are conducted by trained officers, it is fair to require corroboration. It is only then the defence will have the opportunity to challenge the veracity or the credibility of the prosecution witnesses and thus contradict the prosecution version. More than corroboration I am concerned about the fact that the defence should be provided with the opportunity to contradict the witnesses. To obtain Contradictions interse is the only way out for an innocent accused. To mark contradictions per se, where trained and experienced government officials such as police Officers give evidence, is seemingly impossible and is a task next to impossibility in view of the fact that an official conducting a raid is more often than not is resourceful in strategy and inevitably an experienced officer with a lot of ingenuity and cunning."*

I shall now deal with the issue as to the reasoning, as it appears to me, for their Lordships to hold that corroboration is required to convict an accused in instances where the raid is conducted by trained officers.

In the present case, as far as the facts are concerned, the evidence is that it was Reserve Police constable 18123 Punchihewa and SI, Jayamanne who gave chase to the accused when he was fleeing. It is also in evidence that it was P.C. Punchihewa who managed to catch up with the Accused first and apprehend him.
According to the evidence of S.I. Jayamanne, he had received information about the location of the Accused while they were out on duty and when he approached the place, he had seen the Accused seated under a Kithul tree and as

they were approaching the Accused had started to run. He and P.C Punchihewa had given chase and P.C. Punchihewa had managed to catch up with him and had overpowered him. The witness also had reached them almost immediately after and had brought the Accused under control. The witness had then searched the accused and had retrieved five packets wrapped in Polythene from the pocket of the pair of shorts the Accused was attired at the time. The packets had contained a brown coloured powder. The witness had said in his evidence that from the texture and the smell, he identified the powder as heroine. The Accused had then been taken to the police vehicle that had been parked a short distance away and had brought the Accused to the police station to attend to the other formalities relating to the detection.

During the course of the trial, the prosecution as stated above led the evidence of S.I. Jayamanne (who held the rank of Inspector of Police at the time he testified before the High Court) but the prosecution, however, did not lead the evidence of P.C. Punchihewa who is said to have caught up with the accused first when he fled. In addition to S.I. Jayamanne, the prosecutor also had led the evidence of P. C. Ranasinghe, another member of the team, which arrested the accused and he had been stationed with two other officers at another location, with instructions to apprehend the suspect, had he come in their direction while fleeing. After being so stationed, about 1 ½ hours to 2 hours later S.I. Jayamanne had informed them to come to the location where the police vehicle was parked.

It appears that S.I. Jayamanne and P.C. Ranasinghe were the only witnesses who had testified as far as the arrest of the Accused was concerned, of the team of officers who went on this raid. In so far as this detection was concerned, other than the evidence of S. I. Jayamanne there is no other evidence.

It is in this backdrop, I presume that their Lordships opined that ***"Where raids are conducted by trained officers, it is fair to require corroboration",*** *as it is then that the defence would have the opportunity to challenge the veracity or credibility of the prosecution witnesses to contradict the version of the prosecution"*

At this point I wish to state that the questions of law framed by the Appellant are rather vague. The question referred to in sub-paragraph (a) of paragraph 8 of

the Petition is, "*Is the Judgment of the Court of Appeal contrary to law and to the weight of the evidence led in the case*."

In order to answer this question, I am at a loss to understand what "law" the Appellant had in mind. As such this Court is not in a position to answer that question.

The questions raised in sub paragraph (b) to (g) are equally vague as none of them refers to any positive rule of law.

The main argument on behalf of the Appellant was that, the pronouncements made by the Court of Appeal:

i. Is obnoxious to Section 134 of the Evidence Ordinance with regard to the burden of proof [sub- paragraph (g)],

ii. Requiring corroboration for a conviction of an offence based on a raid, is contrary to the accepted evidentiary principles governing proof. [sub- paragraph (c)]

iii. There is no legal requirement or a burden on the prosecution to provide the defence, with an opportunity to contradict the prosecution witnesses [sub paragraph (d)]

Thus, I will only proceed to answer the above questions.

As regards the question No.(i) referred to above, it was contended on behalf of the Appellant that one of the reasons for the Court of Appeal to set aside the conviction was that, only one witness, namely S.I. Jayamanne, testified with regard to the arrest of the accused. Our attention was drawn to the portion of the judgment where their Lordships opined ***"it was a little difficult to understand how the trial judge could be satisfied with the evidence of only one main witness who really took part in the arrest of the appellant (accused) especially in drug related offences where Police officers are key witnesses"***

The learned Additional Solicitor General argued that the law does not require a particular number of witnesses to prove a fact and drew our attention to the wording of the Section 134 of the Evidence Ordinance which says:

"*No particular number of witnesses shall in any case be required to the proof of any fact.*"

It was pointed out by the use of the words "in any case" in the said provision the legislature intended to apply this principle across the board to all cases, irrespective of the nature of the case.

Sir John Woodruff and Syed Amir Ali (Law of Evidence1st edition, Vol. I page 601 – 603) says that:

> *" It is open to the court to accept the evidence of a police officer and to convict the accused on the basis thereof, if the evidence of the police officer is trustworthy and reliable. If the court feels that the uncorroborated testimony of the police officer by itself is capable of inspiring confidence there is nothing forbidding the court from acting upon the same. The law does not require that such evidence should be corroborated. In prosecution under the prevention of Corruption Act 1947, the testimony of police officials cannot be rejected merely because they are interested in the success of the prosecution. In another case, the investigation officer was not investigated. This cannot be said to have prejudiced the defence […]*
>
> *A court cannot reject the evidence of witnesses, merely because they are government servants, who, in the course of their duties or even otherwise might have come into contact with investigating officers and who might have been requested to assist the investigating agencies. Even in cases where officers who, in the course of their duties, generally assist the investigating agencies, there is no need to view the evidence with suspicion as an invariable rule. […]*
>
> *The evidence of witnesses cannot be judged on the basis of their being officials, and non-officials simply because they are officers, they cannot be said to be interested or uninterested. The merit of the evidence is to be considered and not the persons who come to depose. […]*
>
> *The credibility of public officers should not be doubted on mere suspicion and without acceptable evidence. Presumption that person acts honestly applies as much in favour of Police as of other*

persons. It is not proper judicial approach to distrust and suspect them without proper ground. There is no principle of law that without corroboration by independent witnesses, their testimony cannot be relied upon. […]

Duly corroborated evidence of a food inspector in a case of Food Adulteration Act should not be discarded. […]

Investigating officer's statement, if reliable, can be relied upon. […]

The evidence of an official witness has to be weighed in the same scale as any other testimony. […]

In appreciation of evidence, the responsible officer was examined to prove that the documents were prescribed. Failure to produce the messenger and the receptionist did not affect the credibility of the statement of the responsible officers. Documents were held to have been presented as alleged. […]"

The opinion expressed above appears to have been based on the decisions in the cases of *Manoj Bahu v. State of Maharastra 1993 (3) Bom. CR 673, State Vs. Bhikambhai Kalidas 1985 (2) GLR 745, State v. Raghunath Baxi 1985 Gij LR (SC), State of Uttar Pradesh v.Dr.G.K Gosh 1983 2 Crimes (SC) , Shyam Narayan Singh v.State of Bihar 1993 Cr.LJ 772, State of Gujarat v. Raghunath AIR 1985 SC 1092, Banshidar Maharana v.State of Bihar 1993 1Pat LJR 31, Lila Krishnana v. Mani Ram Godara AIR 1985 SC 1073, Karamajith Singh v. State (Delhi Admin) AIR 2003 SC 1311, State of Maharastra v. Gopal Amrut (1989) 3 Bom CR 464, Dharman v. NC Sirinivasan AIR 1990 Mad.14 (1989), Ajith Singh v. Sate of Punjab 1982 Cr.L J 522.*

It is to be noted that the Section 134 of the Indian Evidence Act is identical to that of Section 134 of our Evidence Ordinance.

In the case of *Vadivelu Thevar Vs. State of Madras SIR S C 614* the Indian Supreme Court observed :-

"On a consideration of the relevant authorities and the provisions of the IEA 1872, the following propositions may be safely stated as firmly established:

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example, in the case of a child witness whose evidence is that of an accomplice or of an analogous character. (Emphasis is mine)
(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon the facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon a plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence, has categorically laid it down that 'no particular number of witnesses shall, in any case, be required for the proof of any fact'. The Legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses."

In the instant case the State Counsel may have decided against calling P.C. Punchihewa to testify during the trial to avert duplication of evidence and also to save time of the court as examination of Punchihewa would not have achieved any material purpose for the reason that both S.I. Jayamanne and P.C Punchihewa had reached the Accused within a few seconds of each other. On the other hand, P.C. Punchihewa could not have added anything additional to the

evidence of S.I. Jayamanne as far as the unraveling of the incident was concerned.

In this context, the failure to call P.C. Punchihewa to testify, in my view, could not have given rise to an adverse inference; that is, had the prosecution called Punchihewa that evidence would have been unfavourable to the prosecution.

This issue was exhaustively discussed in the case of ***King Vs. Chalo Singho 42 NLR 269*** as well as ***Walimunige John Vs. State 76 NLR 488*** and also the decision of the Indian Supreme Court in the case of ***Mulluwa Vs. State of Madhya Pradesh, AIR 1976 SC 198***,

In the case of ***Chalo Singho*** (supra) Justice Soertsz stated;

> *"It must, therefore, be regarded as well-established law, that a prosecutor is not bound to call all the witnesses on the indictment or to tender them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a judge might interfere to ask him to call a witness or to call a witness as a witness of the court. It must, however, be said to the credit of prosecuting Counsel today, that if they err at all in this matter, they err on the side of fairness".*

This issue again was considered in the context of Section 114 of the Evidence Ordinance in the case of ***Walimunige John*** (supra) in that, if the prosecution in their discretion does not choose to call such a witness, could the presumption be drawn that his evidence, if given, would be unfavourable to the case of the prosecution. Justice G. P. A. Silva held that;

> "*The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.*

" The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the 'prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."

In this backdrop, when the Court of Appeal said ***"it is difficult to understand how the trial judge could be satisfied with the evidence of only one of the main witnesses […]",*** the court, by implication, laid a proposition that in cases of Police detection, the evidentiary rule embodied in Section 134 of the Evidence Ordinance will have no application.

This court is mindful of the fact that the witnesses testify before the trial judge and it is the trial judge who would have the benefit of observing the demeanour and the deportment of the witnesses. It is the trial judge who would have the benefit of observing the manner in which a witness faces the cross examination. Hence, in the absence of any other infirmities, having considered all these matters, if the trial judge forms the opinion that the witness is credible, I do not think the trial judge has any other option other than to accept the evidence and to act on it.

Hypothetically, if the rationale of their lordships of the Court of Appeal expounded in this case is applied, when a single Police officer whilst on duty acts on a tip off that a person is engaged in an illegal activity, takes action and apprehends the person so engaged in the illegal activity with a prohibited substance, no prosecution can be brought about against the person who was engaged in the said illegal activity, as there would be no other witness to corroborate the police officer who made the detection.

R Vs. Arnough (1973) 21 WIR CA of Jamaica is a classic case that falls in to the scenario referred to.

A Police Officer asked a third party to obtain some cannabis for him. The third party arranged for the accused to deliver it to the officer at a later date. When he did so, he was charged with a number of offences (relating to the prohibited substance). The accused claimed that the officer by soliciting the offence, became an accomplice, whose evidence required corroboration. It was held that although the officer may have acted illegally, he was no accomplice. The court held that **his evidence was admissible and did not require corroboration**.

As such, I hold that the Court of Appeal erred when the Court of Appeal said that *"it is difficult to understand how the trial judge could be satisfied with the evidence of only one witness*."

The second issue that this court is called upon to address is whether corroboration is mandatory to establish an offence based on a detection, resulting from a police raid.

The Jamaican case ***Arnough*** (supra) again is the proposition, that corroboration is not *a sine qua non* relating to police detections.

Lyris Silva Vs. Karunaratne 48 NLR 310 was a case where a Price Control Inspector induced one of his colleagues to act as a decoy. The decoy was given a rupee note and went to the bakery of the accused and asked for a pound loaf of bread. The decoy's version was, the accused gave him a loaf and after taking the rupee note, gave him 65 cents change when the control price of a loaf of bread was 25 cents. There was no corroboration of this statement of the decoy by any of the other witnesses. The rest of the raiding party came up later and found the loaf and the 65 cents in the decoy's possession. The accused took up the position that he gave 75 cents in change to the decoy not sixty-five cents as claimed by the decoy.

The questions that came up before the court were, whether the decoy was an accomplice, and if he was an accomplice, whether his evidence on the material points as to whether the decoy was given 75 cents or 65 cents, has been corroborated by independent evidence.

Delivering the decision, Dias J stated that ***"I am of opinion that in this case the witness (decoy) cannot be regarded as an accomplice. While his evidence does not need corroboration nevertheless, it must be probed and accepted with great caution".***

I see some similarities in the case of ***Lyris Silva*** (supra) and the present case. According to the evidence after the accused was arrested, five packets containing a powder are alleged to have been recovered from the Accused. These five packets were later submitted to the Government Analyst and upon its analysis and return, were produced in Court. The evidence was that the powder contained almost 10 grams (9.91) of pure Heroine, which, to my mind, is a substantial quantity of the illegal drug.

Considering the above, I answer the second question also in the affirmative and hold that corroboration is not mandatory to establish a charge based on a police detection if the evidence, after probing closely, is acceptable to the judge.
The third question that this court is called upon to answer is whether in cases of this nature, whether the prosecution has a duty towards the accused to provid him with an opportunity to contradict (inter-se) the prosecution witnesses.

The learned ASG took serious objection to the following passage of the impugned judgement of the Court of Appeal. Their Lordships stated that:

> ***"More than corroboration I am concerned about the fact that the defence should be provided with the opportunity to contradict the witnesses. To obtain Contradictions interse is the only way out for an innocent accused.*** *To mark contradictions per se, where trained and experienced government officials such as police Officers give evidence, is seemingly impossible and is a task next to impossibility in view of the fact that an official conducting a raid is more often than not is resourceful in strategy and inevitably an experienced officer with a lot of ingenuity and cunning."*

The learned ASG argued that, casting such a burden on the prosecution is unheard of in our law. I agree with this contention in that, there is neither a legal requirement nor a rule of law to "provide with an opportunity" to contradict witnesses. In the face of an allegation, it is up to the person against whom the

charge is leveled, to formulate his or her own defence. The system of administration of justice gives such person the freedom to testify, to call witnesses to testify on his behalf or even has the freedom to make an application to the court, in the interest of justice, to summon a prosecution witness that had not been called, as a witness of court, in terms of Section 439 of the Code of Criminal Procedure, so that the accused gets an opportunity to cross examine such witness.

I am of the view that the court of Appeal erred when it held that the ***"defence should be provided with the opportunity to contradict the witnesses."***
As such I answer the 3rd question of law also in the affirmative.
For the reasons setout above I hold that;

(a) An accused can be convicted on a single witness in a prosecution based on a police detection, if the judge forms the view that the evidence of such witness can, with caution, be relied upon, after probing the testimony.

(b) Corroboration is not *sine qua non* for a conviction in a police detection case, if the judge, after probing, is of the opinion that the witness is credible and the evidence can be acted upon without hesitation.

(c) There is no burden on the prosecution to provide an accused with the opportunity to contradict the prosecution witnesses.

The Court of Appeal in my view had clearly erred on the three matters referred to above and the setting aside of the conviction of the accused had resulted due to the misdirections on the law. As such I set aside the judgement of the Court of Appeal and restore the judgement of the High Court.

I find, however, that when this matter was argued before the Court of Appeal certain other issues had been urged on behalf of the Accused in challenging the conviction. The Court of Appeal, however, **had not considered** those matters in view of the findings arrived at; on the issues that were dealt in the present appeal before us.

Their Lordships observed thus:

"With regard to the objection taken by the Counsel for the appellant on the question of inward and outward journey of the productions between courts and the department of Government Analyst, this court is of the view that it would not be necessary to deal with that question, in view of the findings arrived at by this court […]"

In view of the fact that the questions of law on which relief had been granted to the accused had now been reversed, it would be a travesty of justice if the accused is deprived of his statutory right to urge other matters on which he canvassed his conviction and sentence, before the Court of Appeal.

As such this court directs the Court of Appeal to re-hear this matter on grounds urged and not considered by the Court of Appeal.

Appeal partially allowed.

Judge of the Supreme Court

Justice Eva Wanasundera PC.
I agree

Judge of the Supreme Court

Justice Sisira J de Abrew.
I agree

Judge of the Supreme Court

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

Kusum Shanthi Iddagoda,
Divisional Secretary,
Divisional Secretariat,
Dodangoda.

Plaintiff

-Vs-

1. Land Reform Commission,
   No. C 82, Gregory's Avenue,
   Colombo 07.

2. Agalawatte Plantations Ltd,
   No.10, Gnanartha Pradeepa
   Mawatha, Colombo 08.

Defendants

AND BETWEEN

SC Appeal No. 158/2011
SC/HC/CA/LA No. 91/2011
WP/HCCA/ Kalutara No: 25/2010
D.C. Kalutara Case No. 82/2006

1. Land Reform Commission,
   No. C 82, Gregory's Avenue,
   Colombo 07.

1st Defendant-Petitioner

Vs

1. Kusum Shanthi Iddagoda,
   Divisional Secretary,
   Divisional Secretariat,
   Dodangoda.

Plaintiff-Respondent

2. Agalawatte Plantations Ltd,
No.10, Gnanartha Pradeepa
Mawatha, Colombo 08.

2nd Defendant-Respondent

AND NOW BETWEEN

1. Land Reform Commission,
No. C 82, Gregory's Avenue,
Colombo 07.

1stDefendant-Petitioner-Petitioner

Vs

Kusum Shanthi Iddagoda,
Divisional Secretary,
Divisional Secretariat,
Dodangoda.

Plaintiff-Respondent-Respondent

Agalawatte Plantations Ltd,
No.10, Gnanartha Pradeepa
Mawatha, Colombo 08.

2nd Defendant-Respondent-Respondent

Before: Sisira J de Abrew, J
Vijith K. Malalgoda, PC J. and
Murdu N.B.Fernando, PC J.

Counsel: S.F.A. Cooray for the 1st Defendant- Petitioner-Petitioner
Avindra Rodrigo with M.R. Samarasinghe for the 2nd Defendant-Respondent-Respondent instructed by F.J. and G. De Saram
Ms. Yuresha de Silva SSC for Plaintiff-Respondent-Respondent

Argued on: 28/06/2018

Decided on: 31/10/2019

Murdu N.B. Fernando, PC. J.

This appeal arises from an Order made by the Civil Appellate High Court of Kalutara dated 08.02.2011 affirming the Order made by the District Court of Kalutara dated 26.05.2010 dismissing a Preliminary Objection raised with regard to the maintainability of a reference made to the District Court by the Plaintiff-Respondent-Respondent, the Divisional Secretary, Dodangoda, being the Acquiring Officer ("Divisional Secretary") under Section 33 of the Land Acquisition Act as amended. ("Land Acquisition Act")

In the instant appeal the Divisional Secretary deposited a sum of Rs. 720,475.00 in the District Court of Kalutara being the compensation payable in respect of a land acquired by the State from Dorzet Estate Bombuwela, under the provisions of the Land Acquisition Act, together with compensation payable for nine blocks of land acquired from the same estate.

The Order in the instant appeal would bind the connected cases bearing SC Appeal No.s 159/11 to 162/11 wherein the same issue is canvassed.

This Court granted Leave to Appeal to the 1st Defendant-Petitioner-Petitioner, the Land Reform Commission ("LRC") on 05-10-2011 on five Questions of Law, referred to in paragraph 17(b),(c),(d),(h) and (k) of the Petition of Appeal dated 21.03.2011 and stayed further proceedings in the District Court case.

The said Questions of Law (reproduced *in verbatim*) are as follows: -

(i) Has the plaintiff in fact made a decision under Section 10(1)(a) of the Act deciding as to who was entitled to such right, title and interest of the land that has been acquired?

(ii) It was not the case of the plaintiff and/or the 1st and 2nd Defendants that there had been compliance with the provisions of Section 10(2) of the Act and that within 14 days of service of notice under Section 10(1)(a) of the Act, that a party to a dispute made an application to the acquiring officer requesting the dispute or the claim to be referred to Court for decision?

(iii) Accordingly, did the District Court and Civil Appellate Court err when it did not consider that the plaintiff had no power and authority in law to refer any dispute or claim to the Court under Section 10(3) for decision by Court?

(iv) Is the conversion of this action from one instituted under Section 33 to one instituted under Section 10(1)(a) had been done without any notice to the 1st Defendant and without a lawfully valid order?

(v) Was the plaintiff *functus* when he decided to refer this case to the District Court?

Thus, the appeal before us, revolves around Sections 10 and 33 of the Land Acquisition Act pertaining to determination of claims for compensation in respect of land acquired by the State.

The factual matrix of this Appeal is as follows: -

The land in question was acquired by the State for the construction of the Southern Expressway. By Gazette notification dated 05.05.2003, Section 7 notice was published under the Land Acquisition Act calling for claims pertaing to the acquired land. On 08.07.2003 an inquiry under Section 9 was held by the Divisional Secretary. The decision under Section 10(1)(a) of the Act was made and communicated to the claimants, the appellant LRC and Agalawatte Plantations Ltd, the 2nd Defendant-Respondent-Respondent ("Agalawatte Plantations"). In the said Section 10(1)(a) Order, LRC was declared the claimant for the land and Agalawatte Plantations, for the cultivation and improvements.

On 23.02.2004, Section 17 Award was made. It indicated the total compensation payable. The Award did not apportion the compensation between the two claimants. Neither party challenged the said Award nor the compensation awarded in a Court of Law nor applied and/or obtained the compensation declared by the Divisional Secretary.

On 26.07.2006, Notice under Section 33 was published in the News papers notifying that the quantum of compensation payable for the lands mentioned therein have been deposited under each case number with the District Court of Kalutara to enable the rightful owners to draw the said money from Court. The land in issue in the instant appeal and the lands referred to in the connected appeals were referred to in the said notice.

Consequent to the issuance of the said notice, Agalawatte Plantations lodged a claim for the total compensation on the basis, that it was the lawful leasee of Janatha Estate Development Board ("JEDB") having entered into a long term lease with JEDB, on whom the land was vested under the Land Reform Law No 01 of 1972, subsequent to the vesting in the LRC. The District Court notified the Appellant LRC about the claim. Thereafter, the LRC too lodged a claim for the total compensation on the basis that LRC was the owner of the said land

as determined by the Divisional Secretary by virtue of the Order made under Section 10(1)(a). Thus, there were two conflicting claims before the District Court and the matter was set down for Inquiry.

At the inquiry LRC raised a preliminary objection that the District Court has no jurisdiction to determine the matter as the Divisional Secretary has already made a finding with regard to the two claims and payment of compensation. The Preliminary Objection was overruled by the District Court. LRC appealed against the said Order to the Civil Appellate High Court of Kalutara ("High Court") and the High Court upheld the Order of the learned District Judge. Appellant LRC is now before this Court against the said Order of the High Court. The relief claimed by LRC from this Court is twofold, to revise the District Court Order and up hold the preliminary objection raised before the District Court and to dismiss the reference made to the District Court by the Divisional Secretary.

Having considered the factual matrix of this appeal, let me now move onto the legal matrix pertaining to the instant appeal.

Land Acquisition Act lays down provisions for the acquisition of lands and servitudes for public purpose and to provide for matters connected with or incidental to such provisions.

Section 7 of the Act provides for the Acquiring Officer to cause a notice describing the land and direct persons interested in the land to submit its interests in the land and particulars of the claims for compensation. Part II of the Act is in respect of claims and Award of compensation and Section 9 provides for the Acquiring Officer to inquire into the claims for compensation.

Section 10(1) makes provision for the Acquiring Officer either to make a decision under sub clause (a) or, to refer the claim or dispute for determination to the District Court under sub clause (b). In the instant appeal the Divisional Secretary being the Acquiring Officer made a determination under Section 10(1)(a) of the Act. Thus, a reference to District Court under Section 10(1)(b) does not arise.

Section 10(2) makes provision for a party dissatisfied with the Section 10(1)(a) Order to request the Acquiring Officer to refer the matter to the District Court.

The said Section reads as follows: -

> "A claimant whose claim is wholly or partly disallowed, or a party to a dispute which is determined, by the decision of an acquiring officer

under subsection (1) may, within fourteen days of the service on him of notice of the decision, make application to that acquiring officer for the reference of the claim or dispute, as the case may be, for determination as hereinafter provided; and that acquiring officer shall make a reference accordingly."

Neither the LRC nor Agalawatta Plantations made a request to the Divisional Secretary under the provisions of the said Section 10(2) for a reference to the District Court. Thus, in view of the provisions of Section 10(5) the decision of the Divisional Secretary was final.

Section 17 of the Act provides for the Acquiring Officer to make an Award determining the persons entitled to compensation, the total compensation payable and the apportionment among the persons who are entitled to compensation according to the Award.

In the instant appeal the Section 17 Award dated 23.02.2004, was made by the Divisional Secretary determining the persons entitled to compensation and the total compensation. However, no Order was made pertaining to the apportionment of compensation. No party challenged the said Award in a Court of law or went before the Land Acquisition Board of Appeal moving for an enhancement of the compensation as provided for in Section 22 of the Act.

Let me now refer to the provisions of Section 18 of the Act which provides for an Acquiring Officer to correct omissions and/or re-open an Inquiry prior to determining an Award.

The said Section reads as follow: -

(1) " Where in the course of any proceedings for the acquisition of any land or servitude under this Act it is found that there has, at any stage of such proceedings, been an inadvertent failure or omission on the part of the Acquiring Officer to comply with any provision of Part I or Part II of this Act relating to such proceedings, the Acquiring Officer may supply such failure or omission at any time prior to the making of his award under Section 17; and thereupon any such proceedings as may have been taken under that Part after the stage aforesaid shall be deemed to be null and void and fresh proceedings shall be taken under the Act as from the said stage.

(2) Where an Acquiring Officer considers it necessary so to do for the purpose of supplying any failure or omission on his part in the course of any proceedings for the acquisition of any land or servitude under this Act to inquire into any matter which should have been inquired into by him at the inquiry held under section 9, he may reopen that inquiry at any time prior to the making of his award under section 17."

In the instant appeal before us, neither the appellant LRC nor Agalawatte Plantations resorted to the extra-ordinary procedure contemplated under this Section. LRC and Agalawatte Plantations did not make representations to the Divisional Secretary to correct inadvertent failures or omissions if any, on the part of the Acquiring Officer or to declare the determination of the claim process null and void. Parties did not request to bring fresh proceedings if and where omissions had occurred or to inquire into any matter afresh which should have been inquired into or re-open the inquiry at any time prior to the making of the Award under Section 17.

Thus, there is no provision in the Act, for the Divisional Secretary to correct any omissions or errors in the Award or to begin fresh proceedings or re-open the inquiry after Award under Section 17 of the Act had been made, in view of the provisions of Section 18 of the Act.

Part IV of the Land Acquisition Act provides for the payment of compensation. Section 29 specifically provides for tendering of the compensation to each person entitled to compensation according to the Award made under Section 17, if the said party consents to receive it.

Section 33 makes provision to deposit the compensation in the District Court to be drawn by persons entitled there to, if a party declines to receive it and in few other given circumstances. The Section also provides for notice of the payment to a District Court to be published in the Gazette and in at least three daily newspapers in English, Sinhala and Tamil circulating in Sri Lanka.

Section 33 reads as follows: -

"Where any person to whom any compensation for the acquisition of a land or servitude under this Act is payable declines to receive it when it is tendered to him, or is dead or cannot be found after diligent search, or where no person entitled to any compensation for the acquisition of a land or servitude under this Act is known, that

> compensation shall be paid into the District Court or the Primary Court having jurisdiction over the place where that land or the servient tenement of that servitude is situated, according as the amount of that compensation exceeds or does not exceed one thousand five hundred rupees, to be drawn by the person entitled thereto.
>
> Notice of the payment of any sum as provided in this section shall be published in the Gazette and in at least one Sinhala daily newspaper, one Tamil daily newspaper, and one English daily newspaper circulating in Sri Lanka."

In the instant appeal the Divisional Secretary resorted to this provision and deposited the total compensation in Court to be drawn by the persons entitled thereto. The appellant LRC and Agalawatte Plantations lodged their claims with the District Court and an inquiry was fixed by the District Court to ascertain the persons entitled thereto.

At the inquiry the appellant LRC raised a preliminary objection, that the District Court does not have jurisdiction to hear and determine this issue which was overruled.

The submission of the Appellant before this Court is that the District Court lacked jurisdiction to inquire into this matter and that the 10(1)(a) Order made in 2003 by the Divisional Secretary should be implemented. The question of law raised before this Court is also on the assumption that the Divisional Secretary, had converted the Section 33 application in contravention of the provisions of the Land Acquisition Act to a Section 10(1)(a) application and also that the Divisional Secretary was *functus* when he decided to refer the case to the District Court.

I see no merit in the above submissions. Undisputedly an Order under Section 10(1)(a) was made. This order was not challenged. An Award under Section 17 was published in accordance with the provisions of the Land Acquisition Act. By virtue of the provisions of Section 18, subsequent to the Award under Section 17 no steps can be taken by the Acquiring Officer. No party consented to receive the compensation. In the said circumstances, the Acquiring Officer took the next step as provided for in the Land Acquisition Act and deposited the total quantum of compensation in the District Court which the Acquiring Officer is empowered to and permitted to do so. Notice was given to the public that the compensation awarded was deposited in Court and persons entitled thereto, if they so desire, to go before the District Court and satisfy the District Court that it is a party entitled to the compensation and obtain the compensation from the District Court.

Thus, it is observed that the Divisional Secretary has followed the provisions laid down in the Act. Therefore, the contention of the Appellant, that the Section 33 application was converted to a Section 10(1)(a) application or that the Divisional Secretary is *functus* to refer this matter to the District Court is not tenable and legally flawed.

We also observe in the Section 17 Award, the apportionment of the compensation is not given. No party challenged the Award in a Court of Law. There are two parties claiming the entire compensation awarded. This matter too requires a resolution.

The provisions of the Act prohibits the Divisional Secretary to re-visit or re-open the inquiry or correct omissions or errors, if any, in the Award or to apportion the compensation between the Appellant and Agalawatte Plantations after the Award was made.

Before the District Court both parties claimed the compensation exclusively to themselves. Thus, there is an issue that the District Court has to resolve prior to permitting the rightful owners to withdraw the moneys deposited in Court. The Court should be satisfied that the party claiming the sum is entitled there to. The Court cannot be shut-out from conducting a statutory function.

In any event the District Court which has the underlying jurisdiction for matters pertaining to the Land Acquisition Act should be permitted to resolve this matter pertaining to the ownership of the land in issue.

One of the main intentions of the Land Acquisition Act, is to provide for the payment of compensation to the parties who are affected by the acquisition of land under the Land Acquisition Act. This purpose would be nugatory if the District Court is shut-out from conducting an inquiry when a reference is made to the District Court under Section 33 of the Act. The unpaid compensation was legally and validly brought before the District Court by the Divisional Secretary for a determination by Court and the Court cannot be prevented from making such determination.

Furthermore, a fundamental legal maxim in interpretation of the law is to avoid absurdity.

Maxwell on Interpretation of Statutes (12th edition) at page 228 states as follows: -

> "where the main object and intention of a statute are clear, it must not be reduced to a nullity …. the cannons of construction are not so rigid as to prevent a realistic solution."

Thus, the District Court should be permitted to hold an inquiry and determine the matter before Court, pertaining to the payment of compensation claimed by Appellant LRC and Agalawatte Plantations without any inhibitions and restrictions. Parties should be permitted to justify their claims before a judicial body in order to arrive at a realistic solution.

Therefore, we hold that the District Court rightly overruled the preliminary objection raised before the District Court and determined that the District Court has jurisdiction to go into the issue and ascertain the rightful owners in order for the said persons to draw the quantum of compensation deposited with the District Court.

In the afore said circumstances, the Questions of Law raised before this Court are answered as follows: -

(i) A Section 10(1)(a) determination was made by the Divisional Secretary, based upon the claims preferred by the Appellant and Agalawatte Plantations.

(ii) Compliance with Section 10(2) did not arise since reference was not requested by the parties and a determination under Section 10(1)(a) had already been made which disposes the need to resort to Section 10(1)(b) of the Act.

(iii) The District Court and the High Court did not err since there was no reason for the Divisional Secretary to have recourse to Section 10(3) in view of the facts referred to in the above answer.

(iv) The reference made under Section 33 of the Act was not converted to a reference under Section 10(1)(b). Therefore, noticing parties or obtaining further Orders did not arise.

(v) Section 33 of the Act makes provision for a Divisional Secretary to refer a matter to the District Court. Therefore, the Divisional Secretary was not *functus* when the matter was referred to the District Court.

We affirm the Order of the Civil Appellate High Court of Kalutara dated 08.02.2011 and the Order of the District Court of Kalutara dated 26.05.2010.

We direct the District Court to hear and determine the reference pertaining to the land in issue, made under Section 33 of the Land Acquisition Act expeditiously and without any further delay.

This Order would bind the connected cases bearing SC Appeal No.s 159/2011 to 162/2011.

The Appeal is dismissed with costs fixed at Rs. 25,000/=.

Judge of the Supreme Court

Sisira J de Abrew, 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 to the Supreme Court from an order of the Provincial High Court under and in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950, as amended.

LT CASE NO. 18/KT/3111/04.

WP/HCCA/KAL No. LT/17/2008.

SC APPEAL NO. 170/2010.

Lanka Banku Sevaka Sangamaya,
(On behalf of T Jagath Chandrakumara)
No. 20, Temple Road, Maradana,
Colombo 10.

APPLICANT

V.

People's Bank, Head Office,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

RESPONDENT

AND BETWEEN,

Lanka Banku Sevaka Sangamaya,
(On behalf of T Jagath Chandrakumara)
No. 20, Temple Road, Maradana,
Colombo 10.

APPLICANT -APPELLANT

V.

People's Bank, Head Office,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

RESPONDENT -RESPONDENT

AND NOW BETWEEN,

People's Bank, Head Office,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

RESPONDENT –RESPONDENT –APPELLANT

V.

Lanka Banku Sevaka Sangamaya,
(On behalf of T Jagath Chandrakumara)
No. 20, Temple Road, Maradana,
Colombo 10.

APPLICANT –APPELLANT –RESPONDENT

BEFORE : **SISIRA J DE ABREW, J.**
PRASANNA S. JAYAWARDENA, PC, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Mrs. Manoli Jinadasa with Ms. Shehara Karunaratne for the Respondent –Respondent –Appellant.

Ms. Sulari Gamage with Ms. Eranga Jayasundara for the Applicant – Appellant –Respondent.

ARGUED ON : 13th June 2019.

WRITTEN SUBMISSIONS : Respondent –Respondent –Appellant on 17th January 2011.
Applicant –Appellant –Respondent on 11th May 2011.

DECIDED ON : 9th July 2019.

S. THURAIRAJA, PC, J.

I find it pertinent to set out the material facts of the case prior to addressing the issues before us.

The workman, T. Jagath Chandrakumara i.e. the Applicant-Appellant-Respondent (hereinafter referred to as the 'Respondent') was an employee of the People's Bank i.e. the Respondent-Respondent-Appellant (hereinafter referred to as the 'Appellant') from 17.06.1991 and is a member of the Trade Union, Lanka Banku Sevaka Sangamaya. It is revealed from the evidence that during the course of his employment at the Appellant's establishment, the Respondent had misconducted himself on several occasions, some of which include- disobeying the orders of his superiors, misbehaving in the presence of customers and abusing his superiors using foul and obscene language. For these reasons, the Bank, on following the usual procedure, including the Respondent being found guilty of misconduct at a domestic inquiry, had terminated the services of the employee by letter dated 10.11.2003, with effect from 08.10.2001. Being aggrieved by the said termination, the workman had preferred an application to the President of the Labour Tribunal of Kalutara (hereinafter referred to as the 'Labour Tribunal'). The learned President of the Labour Tribunal, on conducting a proper and full hearing, held that the termination of the workman was just and equitable.

In appeal, the learned Judge of the Provincial High Court (hereinafter referred to as the 'High Court') had held that the Respondent was "mentally retarded" and that owing to his mental retardation, he could not be held responsible for the alleged misconduct. Accordingly, the Judge of the HC set aside the order of the President of the Labour Tribunal of Kalutara and allowed the appeal, ordering payment of compensation equivalent to the salary of five years (i.e. sixty months), totaling to Rs. 1,096,035.00.

Being aggrieved with the said order, the Appellant had preferred this appeal before us in terms of Section 31DD of the Industrial Disputes Act, No. 43 of 1950, as amended and leave to proceed was granted on 06.12.2010, on the issues set out in paragraph '9' of the petition dated 26.02.2010. Both parties have filed their written submissions and have advanced their oral arguments.

Considering the facts of the case, I find that the conduct of the Respondent was found to constitute grave misconduct, by the President of the Labour Tribunal while the learned High Court Judge stated that, the fact that the Applicant had behaved in an "adamant and furious manner" is evident. However, the learned Judge of the High Court had found that the mental status of the employee is a mitigating circumstance for his conduct and therefore, held that he could not be held responsible for his acts.

The theory advanced by the learned High Court Judge is applicable when determining the criminal responsibility of a person in a criminal case. However, I am of the view that in cases involving an employer-employee relationship, such standards set out in criminal law cannot be applied since, such a relationship is founded on the principles of trust and discipline. As a result, any breach of these principles will affect, not only the relationship between the employer and the employee but also the quality of the services provided by the employer along with the reputation of his establishment. In the case of ***Bank of Ceylon vs. Manivasagasivam***, (1995) 2 SLR 79, it was observed that:

> *"Utmost confidence is expected from any officer employed in the bank. There is a duty, both to the bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the bank"*

In the instant case before us, the Respondent, at one incident shouted to the customers, who were 50-60 in number about the manager saying, 'see how an officer works'. This conduct of the workman which *inter alia* resulted in his termination, would, without an

iota of doubt, affect the integrity and reputation of any establishment, particularly that of a Bank.

The Counsel for the Respondent, in his written submissions before this Court, has relied on "***Uva Regional Transport Board v. PDP Almeida****, Case No. 509/86 decided on 14.06.1993*" which states that the facts of each case have to be decided on its own merits. However, in the instant case, the Respondent had, not only refused to obey the legitimate instructions of his superiors at several instances but had also insulted and humiliated a superior officer in the presence of customers and it is a general rule that refusal to obey reasonable orders justifies the dismissal from service, as observed in the case of ***Kosgolle Wanigasinghe v. Hector Kobbekaduwa Agrarian Research Institute***, S.C. Appeal No. 73/2014, decided on 02.09.2015.

In the case of ***People's Bank v. Lanka Banku Sevaka Sangamaya***, SC Appeal No. 209/12, decided on 16.11.2015, it was observed that, when considering an allegation of unfair dismissal, the concerns of a Labour Tribunal should be:

> *"(a) Were the alleged grounds of misconduct sufficiently established by evidence? What was the quality and nature of the misconduct?*
>
> *(b) Are there proved reasons or legitimate inferences from the evidence available as regards how and why the business of the employer was, or might be reasonably expected to be adversely affected directly or indirectly by the act in question?"*

I am of the view that the above concerns, though not stated in those precise terms, have been sufficiently incorporated in the decision of the President of the Labour Tribunal and the principles of natural justice have also been adhered to.

The learned High Court Judge observed in page six of the order dated 03.02.2010:

"The fact that the Applicant behaved in adamant and furious manner remains unchallenged. So it does not make room for the Respondent to reinstate him in service but it does not mean that the Applicant should be dismissed from service on a mistake or on a misconduct which does not amount to a grave misconduct."

I am of the view that this finding of the learned High Court Judge is erroneous since the misconduct, which the Respondent engaged in, during the course of his employment is of such a nature that would directly affect and jeopardise the business of the employer. Therefore, under these circumstances, the effect of the Respondent's termination becomes justifiable, particularly in the light of the consequences faced by the employer, arising out of the misconduct of the Respondent. Moreover, the learned High Court Judge had also observed in page seven of the order dated 03.02.2010:

"Such an unfortunate employee should not be sacked unless and until he is granted some sort of relief which would assist him to run the rest of his life."

I am again, of the view that this observation of the learned High Court Judge is erroneous. The case law cited below reflects that in cases where the employee's termination is justified on grounds of misconduct, compensation is not usually awarded. In the case of ***Electricity Equipment and Construction Company v. Cooray***, 1962 63 NLR 164, it was observed:

"Where the termination of an employee's services is both legal and justifiable, a Labour Tribunal has power to award, not any benefit or compensation which it may consider equitable, but only a gratuity or other benefit legally due to the employee."

In the case of ***Premadasa Rodrigo v. Ceylon Petroleum Corporation***, (1991) 2 SLR 382, it was held:

"Although in certain circumstances, compensation may be payable where reinstatement is not feasible, if the employee's conduct had induced the termination, he cannot in justice and equity have a just claim for compensation."

On carefully analyzing the material that was produced before the President of the Labour Tribunal of Kalutara and the material submitted before the learned High Court Judge, I am of the view that the findings of the President of the Labour Tribunal is correct. Moreover, higher standards which are applicable in criminal cases cannot be applied to cases before the Labour Tribunal. Accordingly, I find that, the findings of the learned High Court Judge are incorrect and set aside the order of the High Court Judge dated 03.02.2010.

Therefore, I affirm the findings of the President of the Labour Tribunal of Kalutara in order dated 14.11.2008, in case no. 18/KT/3111/04.

Appeal allowed.

JUDGE OF THE SUPREME COURT

SISIRA J DE ABREW, 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 in terms of section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against an order pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

S C Appeal No. 171/2015

SC/HC/LA Application No. 45/14

High Court case No. HC (Civil) 737/2010 MR

Sri Lanka Savings Bank Ltd,
No. 265,
Ward Place,
Colombo 07.

PLAINTIFF - APPELLANT

1. Global Tea Lanka (Pvt) Ltd,
   No. 56/1/2A,

Gemunu Mawatha,
Hunupitiya,
Wattala.

2. Narayana Mudiyanselage Manjula Narayana,
No. 18/B,
Alfred Place,
Colombo 03.

3. Narayana Mudiyanselage Indra Padmakanthi,
No. 18/B,
Alfred Place,
Colombo 03.

DEFENDANT - RESPONDENTS

Before: SISIRA J. DE ABREW J

VIJITH K. MALALGODA PC J

P. PADMAN SURASENA J

Counsel: M U M Ali Sabry PC with Shehani Alwis for the Plaintiff - Appellant.

S A Parathalingam PC with Riad Ameen for the Defendant - Respondent

Argued on: 2019 - 02 – 21

Decided on: 2019 – 06 - 12

P Padman Surasena J

The Plaintiff - Appellant (hereinafter sometimes referred to as the Plaintiff) filed in the Provincial High Court of Western Province holden in Colombo, a plaint seeking to recover a sum of money mentioned in the said plaint form the Defendant - Respondents (hereinafter sometimes referred to as the Defendants).

The Defendants filed their answer on 01-11-2011. Thereafter, the case was fixed for 18-01-2012 for the Plaintiff to file its replication. However, the Court on that date granted the Plaintiff further one week for the filing of its replication with notice to the Defendants and fixed the case for trial for 08-05-2012. The Appellant complying with the said order had filed the replication together with a motion on 03-02-2012. In the said motion, an application was made to court to have the already fixed trial date changed due to a personal difficulty of the counsel for the Appellant.

The case was called in open court on 24-02-2012 to enable the learned counsel for the Appellant to support the said motion. Thereafter, the Court

with the concurrence of the parties ordered the case to stand out of the list of trials scheduled for 08-05-2012 and re fixed the trial of the case for 08-06-2012.

The appellant filed its list of witnesses on 22-05-2012 and also filed two additional lists of witnesses on 28-05-2012 and 04-07-2012.

When the case was taken up for trial on 08-06-2012, the Court had ordered the parties to file written issues within four weeks and postponed the trial for 20-09-2012.

Subsequently, when the case was taken up on 20-09-2012 parties had moved for a postponement to explore the possibility of a settlement. The Court had then granted the requested postponement. However, as the parties had not been able to arrive at a settlement the court had thereafter fixed the case for trial for 29-07-2013.

When this case was taken up for trial on 29-07-2013, the Defendants had raised an objection to the production of the documents annexed to the affidavit dated 25-11-2012. The Plaintiff was seeking to file the said affidavit along with documents as his evidence in chief. The objection raised by the Defendants was on the premise that the Plaintiff has failed to comply with

the provisions in section 121 of the Civil Procedure Code. It was the position of the Defendants that the Plaintiff had failed to file the list of witnesses fifteen days prior to the first date of trial.

Learned High Court Judge having considered the matter had delivered his order dated 11-07-2014 upholding the said objection raised by the Defendants. It is the said order that the Plaintiff seeks to canvass before this Court in this appeal.

This Court by its order dated 09-10-2015 has granted leave to appeal in respect of the following questions of law;

I. Is the order dated 11-07-2014 pronounced by the learned Provincial High Court Judge (produced marked "**P-11**") contrary to the legal provisions contained in section 121 of the Civil Procedure Code?

II. Has the learned Provincial High Court Judge failed to consider the fact that the Court had taken the case off the list of trials scheduled for 08.05.2012 and re-fixed the trial for 08.06.2012?

III. Has the learned Provincial High Court Judge misdirected himself in law when he considered the date 08.05.2012 as the first date fixed for trial despite the learned High Court Judge had taken the case out of the list

of trials scheduled for that date and re-fixed the trial date to be 08.06.2012?

Since the objection raised by the Defendant is based on an alleged non-compliance by the Plaintiff with the provisions in section 121 of the Civil Procedure Code, it would be prudent for this Court to reproduce below the said section in preparation of evaluation of the arguments advanced by parties.

Section 121

1) *The parties may, after the summons has been delivered for service on the Defendant, obtain, on application to the Court or to such officer as the court appoints in that behalf, before the day fixed for the hearing, summonses to persons whose attendance is required either to give evidence or to produce documents.*
2) *Every party to an action shall, not less than fifteen days before the date fixed for the trial of an action, file or cause to be filed in court after notice to the opposite party –*
    a) *a list of witnesses to be called by such party at the trial, and*

b) a list of the documents relied upon by such party and to be produced at the trial.

The Defendant's position is that the date of trial first fixed in this case is 08-05-2012. However, the Plaintiff argues that the date of trial first fixed in this instance must be taken as 08-06-2012. It is therefore the position of the Plaintiff that it has duly filed its list of witnesses fifteen days before that date (i.e. 08-06-2012). It is on that basis that the Plaintiff argues that he has complied with section 121 of the Civil Procedure Code.

At the outset, it must be noted that the above section does not refer to any "date of trial first fixed" or "first date of trial" but only refer to "the date fixed for the trial of an action". Thus, the task of this Court in this case would be to decide whether 'the date fixed for the trial of this action' in the light of the aforesaid circumstances is 08-05-2012 or 08-06-2012 for the purpose of calculating fifteen days referred to in section 121(2) of the Civil Procedure Code.

Section 121(1) is a provision made available to enable the parties to obtain summonses to persons whose attendance is required either to give evidence

or to produce documents at the hearing. If a list of witnesses or a list of documents were not filed in Court then no party would be able to invoke the provision in section 121(1). Hence, it is necessary to specify a time limit for filing any list of witnesses or any list of documents in Court. That is what section 121(2) of the Civil Procedure Code has done.

Thus, the sole purpose of this section is to provide for a framework upon which the Court will be able to commence the trial on the previously fixed date without any hindrance. Therefore, if the Court is in a position to proceed with the trial without any hindrance when it takes up the case for the trial on 'the date fixed for the trial of the action' with the list of witnesses or a list of documents being filed in Court fifteen days before the said 'date fixed for the trial of the action' then the purpose of section 121(2) is achieved.

It would be useful to consider the provisions in section 80 of the Civil Procedure Code at this stage to see under what circumstances a Court could fix the date of trial. The said section, which is reproduced below, requires the completion of the preliminary steps before a case could be fixed for trial.

Section 80

"On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, the court shall appoint a date for the trial of the action, and shall give notice thereof, in writing by registered post to all parties who have furnished a registered address and tendered the cost of service of such notice, as provided by sub section (2) of section 55."

Thus, it can be seen that no specified trial date could exist before the Court appoints a date for the trial of the action in terms of section 80. Therefore, it is clear that a party will have to necessarily take steps to comply with section 121(2) after the Court completes appointing a date for the trial of the action as per section 80.

Compliance of section 121(2) has been made mandatory for obvious reasons. That is because (as has been already mentioned before) no party would be able to proceed with the trial in the absence of any witnesses or documents as the case may be, filed in advance. Thus, what must be complied with, in the eyes of the law, is the fact of filing after notice to the opposite party not less than fifteen days before the date fixed for the trial of an action, the list of witnesses and the list of the documents relied upon by

parties. Then the trial of the action could smoothly take off the ground on the previously appointed trial date.

Moreover, it is important to observe that the date fixed for the Plaintiff to file its replication was 18-01-2012. Thereafter, the Court having granted the Plaintiff further one week for the filing of its replication with notice to the Defendants, had proceeded at the same time to appoint the date 08-05-2012 for the trial of the action. Thus, it is obvious that neither party was in a position to invoke the provisions of section 121(1) until the filing of the replication by the Plaintiff.

The Plaintiff as per the above order indeed filed its replication together with a motion on 03-02-2012. It was in the said motion, that the Plaintiff had moved court to have the already fixed trial date (08-05-2012) changed due to a personal difficulty of the counsel for the Appellant. Thus, it is clear that neither party could have reasonably thought that the already appointed trial date (08-05-2012) would continue to be the date appointed for the trial of the action.

It is also relevant to note as to what happened after the above-mentioned motion was filed in Court on 03-02-2012. The Court had thereafter taken

steps to have the case called in open court on 24-02-2012 to enable the learned counsel for the Appellant to support the said motion. When the said motion was supported the Court with the concurrence of the parties changed the date appointed for the trial of the action to be 08-06-2012. Thus, the date 08-05-2012 could not have been any longer the date appointed for the trial of this action. This is particularly so after 24-02-2012 since the Court on that date altered the date appointed for the trial of the action to be 08-06-2012. It is a fact that the trial of this case as at 24-02-2012 was not scheduled in the list of trials for 08-05-2012. This is a necessary consequence of the order made by Court on 24-02-2012. Therefore, the date appointed for the trial of the action shall for all purposes as at 24-02-2012 must stand to be 08-06-2012.

On the other hand, the Plaintiff cannot be expected to take 08-05-2012 as the date appointed for the trial of the action after the Court had struck this case off the list of trials scheduled for 08-05-2012. Treating that date (08-05-2012) still as the date appointed for the trial of the action after the Court had struck this case off the trial roll scheduled for 08-05-2012 would to say the least is absurd.

As mentioned before, the appellant had filed its list of witnesses on 22-05-2012 and also filed two additional lists of witnesses on 28-05-2012 and 04-07-2012. Thus, the Appellant had clearly filed them not less than fifteen days before the date appointed for the trial of the action i.e. 08-06-2012. Therefore, there is absolutely no basis to hold that the Appellant had violated the time limits specified in section 121(2) of the Civil Procedure Code.

In these circumstances and for the foregoing reasons, this Court holds that the learned Provincial High Court Judge has erred when he had decided to uphold the objection raised by the Defendants. Therefore, this Court answers in the affirmative all three questions of law in respect of which this Court had granted leave to appeal.

This Court directs;

I. that the order dated 11.07.2014 pronounced in the case bearing No. HC (Civil) 737/2010 MR (marked and produced as "**P-11**") by the learned High Court Judge of the Provincial High Court of the Western Province (holden in Colombo) exercising its civil jurisdiction, be set aside,

II. the Provincial High Court of the Western Province (holden in Colombo) exercising its civil jurisdiction to reject the objection raised by the Defendants,

III. the Provincial High Court of the Western Province (holden in Colombo) exercising its civil jurisdiction to proceed with the trial of the action according to law.

This Court makes no order for costs.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW 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 with Special Leave to Appeal obtained from this Court.

ELAYATHAMBY NADESAMOORTHY
Udayar Road, Karaitivu.

PETITIONER

CA Writ Application No. 875/2010
SC SPL LA Application No. 30/2013
SC Appeal No. 174/2013

VS.

1. **T. ASOKA PEIRIS**
   Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla.
2. **JAYALATH DISSANAYAKE**
   Former Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare,
   C/O Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla.
3. **S.M.W. FERNANDO**
   Surveyor General,
   Surveyor General's Office,
   Survey Department of Sri Lanka,
   PO Box 506, No. 150, Kirula Road,
   Narahenpita, Colombo 05.
4. **H.D.L. GUNAWARDENE**
   Secretary, Public Service Commission, No. 356B, Carlwil Place, Galle Road, Colombo 3.

RESPONDENTS

AND NOW BETWEEN

ELAYATHAMBY NADESAMOORTHY
Udayar Road, Karaitivu.

PETITIONER-PETITIONER/ APPELLANT

1. **T. ASOKA PEIRIS**
   Former Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya,80/5, Rajamalwatte Avenue, Battaramulla.

1A.DR. I.H.K. MAHANAMA
Ministry of Lands,
Govijana Mandiraya,
80/5, Rajamalwatte Avenue,
Battaramulla.

2. **JAYALATH DISSANAYAKE**
   Former Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare,
   C/O Secretary, Ministry of Land, Land Development, Janawasa and Ranaviru Welfare, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla.
3. **S.M.W. FERNANDO**
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   Surveyor General's Office,
   Survey Department of Sri Lanka,
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   Narahenpita, Colombo 05.

3A. P.M.P. UDAYAKANTHA
Surveyor General,
Surveyor General's Office,
Survey Depa rtment of Sri Lanka,
PO Box 506, No. 150, Kirula Road,
Narahenpita, Colombo 05.

4. **H.D.L. GUNAWARDENE**
   Former Secretary, Public Service Commission,

No. 177, Nawala Road, Narahenpita, Colombo 5.

4A. GAMINI SENEVIRATNE
Secretary, Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 5.

RESPONDENTS- RESPONDENTS

5. **K. THAVALINGAM**
Former Surveyor General,
Surveyor General's Office,
Survey Department of Sri Lanka,
PO Box 506, No. 150, Kirula Road,
Narahenpita, Colombo 05.
6. **T.M.L.C. SENEVIRATNE**
Former Secretary, Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 5.
7. **DHARMASENA DISSANAYAKE**
Chairman.
8. **A. SALAM A. WAHID**
Member.
9. **D. SHIRANTHA WIJAYATILAKA**
Member.
10. **DR. PRATHAP RAMANUJAN**
Member.
11. **V. JEGARAJASINGHAM**
Member.
12. **SANTI NIHAL SENEVIRATNE**
Member.
13. **S. RANNUGE**
Member.
14. **D. L. MENDIS**
Member.
15. **SARATH JAYATHILAKA**
Member.

All of the Public Service
Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 5.

BEFORE:	Buwaneka Aluwihare, PC, J. Prasanna Jayawardena, PC, J. L.T.B. Dehideniya, J.
COUNSEL:	Faisz Mustapha, PC with Arindra Jayasinghe for the Petitioner-Petitioner/Appellant. Ms. Anusha Fernando, DSG for the Respondents-Respondents.
ARGUED ON:	15th October 2018.
WRITTEN SUBMISSIONS FILED:	By the Petitioner on 21st January 2014 and 12th November 2018. By the Respondents on 01st July 2014 and 31st October 2018.
DECIDED ON:	15th February 2019.

Prasanna Jayawardena, PC, J

The Petitioner-Petitioner/Appellant ["the petitioner"] is a serving officer in the Sri Lanka Surveyors' Service. As a matter of interest, the Sri Lanka Survey Department was established in 1800 and is said to be the first Government Department in Ceylon, as Sri Lanka then was.

The petitioner joined the Sri Lanka Surveyors' Service on 20th October 1989. At that time, the recruitment and promotion of officers in the Service was governed by the Service Minute issued in 1982 and last amended on 07th February 1991. It is marked "P2" in this appeal. "P2" placed the officers of the Service in seven Grades and Classes within which recruitments were made and promotions were effected.

Several years later, a new Service Minute was issued on 20th January 2006 and was published in the Extraordinary Gazette dated 27th February 2006. It is marked "P6" in this appeal. "P6" provided for the *absorption* of the petitioner and all other serving

officers in the Sri Lanka Surveyors' Service into four newly created Grades and Classes. The new scheme set out in "P6" was deemed to have come into effect from 01st August 2005 onwards.

Accordingly, from the time this new Service Minute marked "P6" was issued, recruitments to the Sri Lanka Surveyors' Service were to be made and promotions within the four newly created Grades and Classes were to be effected, under and in terms of "P6".

Prior to the new Service Minute, the petitioner had been placed in Class III Grade II of the scheme which prevailed under and in terms of the previous Service Minute marked "P2". As set out hereinafter, when the new Service Minute marked "P6" came into force, the petitioner *continued* to serve in Class III Grade II of the previous Service Minute marked "P2 until 02nd November 2006. On that day, the petitioner was *absorbed*, with effect from 02nd November 2006, into the new Class II Grade II of "P6" on a supernumerary basis.

On 23rd November 2009, the petitioner complained that he was entitled to have been absorbed with effect from 01st August 2005 [and *not* with effect from 02nd November 2006] into Class II Grade II under the new Service Minute marked "P6". He complained that he was unhappy about the seniority and salary point he was placed at under "P6". He stated that, therefore, he wished to exercise an option for early retirement which was possible under "P6" in cases in which the Public Service Commission was satisfied that the implementation of "P6" had adversely affected the conditions of service of an officer in the Sri Lanka Surveyors' Service to such an extent that he should be permitted to retire and receive a pension under section 7 of the Minute on Pensions. The petitioner's request was refused by the Secretary to the Ministry of Land and Land Development, who was the officer having authority in this regard [the Public Service Commission had not been constituted at that time].

The petitioner made an application to the Court of Appeal seeking writs of *certiorari* quashing that refusal and writs of *mandamus* directing the Secretary of the Ministry to permit the petitioner to exercise the option of taking early retirement.

The Court of Appeal dismissed the petitioner's application. The petitioner made an application to this Court seeking special leave to appeal. He subsequently filed an amended petition. The respondents to this amended petition are the Secretary and former Secretary of the aforesaid Ministry, the Surveyor General and the Secretary to the Public Service Commission. Subsequently, successors to the aforesaid respondents and the members of the Public Service Commission were also added as respondents.

The petitioner was granted special leave to appeal on the following question of law:

> *"Did the Court of Appeal err in failing to consider that the petitioner was adversely affected by the implementation of P6 ?"*

The 4A and 7th to 15th respondents [the Secretary to the Public Service Commission and the Chairman and Members of the Public Service Commission] have filed a statement of objections. The petitioner filed a counter affidavit.

The Service Minutes of the Sri Lanka Surveyors' Service

As mentioned earlier, the recruitment and promotion of officers in the Sri Lanka Surveyors' Service was previously governed by the Service Minute marked "P2". This Service Minute placed the officers of the Service in seven Grades and Classes within which recruitment and promotion was effected - *ie:* (i) Class I Grade I; (ii) Class I Grade II; (iii) Class II Grade I; (iv) Class II Grade II; (v) Class III Grade I; (vi) Class III Grade II and (vii) Class III Grade III.

Thus, under "P2", the entry level grade to the Sri Lanka Surveyors' Service was Class III Grade III. The qualifications required of new recruits to Class III Grade III were passing the G.C.E. [Ordinary Level] Examination/G.C.E. [Advanced Level] Examination. There was also provision for recruitment of graduates from recognized Universities directly to higher Classes and Grades in the Service.

Under the Service Minute marked "P2", officers in the aforesaid entry level Class III Grade III were entitled to be promoted to the next level of Class III Grade II upon completion of five years' service in Class III Grade III and passing the Diploma of Survey Technician (Advanced Level) Examination. Thereafter, "P2" provided that promotion to the higher level of Class III Grade I would be upon passing the Departmental Junior Professional Examination or upon completing nine years of satisfactory service after reaching the salary point of Rs. 25,800/- in Class III Grade II or upon reaching the salary point of Rs. 36,000/- in Class III Grade II with satisfactory service.

The criteria for promotion to higher positions in the Sri Lanka Surveyors' Service under "P2" - *ie:* Class II Grade II and above - are not directly relevant to this application and need not be considered.

The new Service Minute marked “P6” came into force with effect from 01st August 2005. It simplified the structure of seven Classes and Grades which existed under “P2” and provided for only four Classes and Grades within the Sri Lanka Surveyors’ Service - *ie:* (i) Selection Class; (ii) Class I; (iii) Class II Grade I; and (iv) Class II Grade II.

Thus, the entry level grade to the Sri Lanka Surveyors’ Service under and in terms of the new Service Minute marked “P6” was Class II Grade II. Entrants to Class II Grade II were to be recruited by the Public Service Commission from the ranks of “Apprentice Surveyors” of the Sri Lanka Survey Department who held either a degree in Surveying Science and had served as “Apprentice Surveyors” for four years or a degree in Physical Science and had served as “Apprentice Surveyors” for six years. It should be mentioned here that “Apprentice Surveyors” functioned in the Sri Lanka Survey Department but outside the Sri Lanka Surveyors’ Service. They were selected for appointment as “Apprentice Surveyors” upon the results of an Open Competitive Examination. The minimum educational qualification required to sit for this examination was a Degree in either Surveying Science or Physical Science.

Thus, the new Service Minute marked “P6” specified that, from its implementation onwards, all recruits to the entry level Class II Grade II of the Sri Lanka Surveyors’ Service had to hold a degree in Surveying Science or Physical Science.

Several officers of the Sri Lanka Surveyors’ Service who were in service at the time “P6” was issued in 2006 did, in fact, hold degrees in Surveying Science or Physical Science. However, there were also several serving officers who did not hold such a degree.

In these circumstances, the new Service Minute marked “P6” had to make suitable provision for the *absorption* of all serving officers of the Sri Lanka Surveyors’ Service to the appropriate Classes and Grade formed under the new structure introduced by “P6”.

Thus, with regard to officers who were in **Class III Grade I, Class III Grade II and Class III Grade III** under and in terms of the previous Service Minute marked “P2”, the new Service Minute marked “P6” provided for their *absorption* into the newly created **Class II Grade II** under “P6” in the following manner:

(a) As stated in clause 7.1 (*i*) of “P6”, serving officers in any of the aforesaid three Grades of Class III [under the previous Service Minute marked “P2”] who held a degree in Surveying Science, would be absorbed into the permanent cadre of the newly created Class II Grade II [under the new Service Minute marked “P6”] if they had completed a service period of three years;

(b) As stated in clause 7.1 (*ii*) of "P6", serving officers in any of the aforesaid three Grades of Class III [under "P2"] who held a degree in Physical Science and an Advanced Diploma in Surveying Science, would be absorbed into the permanent cadre of Class II Grade II [under "P6"] if they had completed a service period of five years;

(c) As stated in clause 7.1 (*iii*) of "P6", serving officers in any of the aforesaid three Grades of Class III [under "P2"] who did *not* hold a degree in Surveying Science or Physical Science but had passed the Junior Professional Examination, would be absorbed into Class II Grade II [under "P6"] *"on supernumerary basis"* upon completing a service period of fifteen years;

(d) As stated in clause 7.1 (*iv*) of "P6", serving officers in any of the aforesaid three Grades of Class III [under "P6"] who did *not* hold a degree in Surveying Science or Physical Science and also had *not* passed the Junior Professional Examination would be absorbed into Class II Grade II under "P6" *"as personal to them on supernumerary basis"* upon completing a service period of twenty years;

(e) Finally, clause 7.1(*v*) of "P6" stated *"The Surveyors who do not qualify to be promoted to Class II/II under any of the above schemes, will remain in their Present Class/Grade until such time that they qualify for absorption."*. Thus, clause 7.1(*v*) specified that officers in the aforesaid three Grades within Class III under and in terms of the previous Service Minute marked "P2" will *remain* in the same Class/Grade under "P2" until such time as they satisfy the criteria specified in any one or more of clauses 7.1 (*i*), 7.1 (*ii*), 7.1 (*iii*) or 7.1 (*iv*) of "P6" and, thereby, qualify for absorption into the newly created Class II Grade II under "P6", as set out in (a), (b), (c) and (d) above.

With regard to officers serving in **Class II Grade II**, **Class II Grade I**, **Class I Grade II** and **Class I Grade I** of the Sri Lanka Surveyors' Service under and in terms of the previous Service Minute marked "P2", the new Service Minute marked "P6" provided for their *absorption* into the newly created **Class II Grade I**, **Class I** and **Selection Class** under "P6" in the manner specified in "P6".

With regard to the subsequent *promotion* of officers who had been absorbed/recruited into the newly created **Class II Grade II** established by "P6", clause 8.1 of "P6" stated that officers who had completed 10 years of satisfactory service in Class II Grade II and *"who were conferred with permanent status of service"* would become entitled to be

promoted to **Class II Grade I** if they satisfied specified requirements, *inter alia,* with regard to passing Efficiency Bar Examinations and earning the due salary increments.

"P6" also contained provisions governing the *promotion* of officers from Class II Grade I to Class I and from Class I to the Selection Class. Those provisions are not relevant to the present application.

It should also be mentioned that clause 11 of "P6", *inter alia*, specified that *"The seniority of officers who were absorbed to various Classes under the new minute will be decided upon the seniority they enjoyed at the previous Class and post. In the event of any departure from above procedures in deciding the seniority the relevant provisions stipulated by Establishment Code will apply."*.

Thereafter, clause 12 of "P6" states *"If the Public Service Commission is fully convinced that the implementation of provisions in new minutes has adversely affected the conditions of service of any officer to the extent that grant of option for retirement under section 7 of Pension Minutes, is justified, in such event such officer, at his own request can be allowed to exercise his option for retirement during the period of five years effect from 01.08.2005, the date on which the provisions of new minute come in to force."*. It is relevant to mention here that section 7 of the Minute on Pensions sets out the manner of computing the pension or gratuity payable to a public servant *"In the case of abolition of office ….."*.

The petitioner's case

The petitioner states he was recruited on 20th October 1989, to the Sri Lanka Surveyors' Service at the entry level grade of Class III Grade III under and in terms of the previous Service Minute marked "P2". The petitioner was promoted to Class III Grade II under "P2" with effect from 20th October 1994. On 01st October 2002, the petitioner was placed in the 511th position on the seniority list marked "P21". Under and in terms of "P2", the petitioner's next promotion was to be to Class III Grade I upon obtaining the qualifications mentioned earlier.

The new Service Minute marked "P6" was deemed to have come into effect on 01st August 2005.

By the letter marked "P7", the petitioner was advised that he had been absorbed into the newly created Class II Grade II under the new Service Minute marked "P6" with effect from 02nd November 2006 *"on supernumerary basis"* under and in terms of the

aforesaid clause 7.1(*iii*) of "P6" – *ie:* upon passing the Junior Professional Examination *and* upon completing a service period of fifteen years by 02nd November 2006.

The petitioner states that, up to the end of December 2008, the Sri Lanka Survey Department and the Public Service Commission maintained two separate seniority lists. One list was of officers who had been absorbed into the permanent cadre of the newly created Class II Grade II under "P6" as at 01st August 2005 because they qualified under clause 7.1 (*i*) and 7.1 (*ii*) of "P6". The other list was of officers who did not qualify for absorption into the permanent cadre but had qualified for absorption into Class II Grade II on a *"supernumerary basis"* under clause 7.1 (*iii*) and 7.1 (*iv*) of "P6".

The petitioner says that *"he became aware later"* that there was a move to prepare a single seniority list. He says the new single seniority list was to place those officers who had been absorbed into the permanent cadre of the new Class II Grade II at the time of the issue of "P6" *above* the officers who were later absorbed into the new Class II Grade II on a supernumerary basis. A draft of the proposed single seniority list of Surveyors in Class II Grade II as at 01st January 2009 was marked "P23".

The petitioner claims that, the formulation of a new single seniority list on the aforesaid basis as set out in "P23" resulted in about 250 officers who had been junior to him prior to the issue of the Service Minute marked "P6", being placed above him on the new seniority list.

The petitioner also claims that the conversion of the salaries of officers in the Sri Lanka Surveyors' Service in line with the new structure established by "P6" led to the petitioner being placed at a salary point which was about Rs.7,000/- less than the salary point at which most of his colleagues were placed.

The petitioner pleads that, for the aforesaid reasons, he wrote the letters dated 23rd November 2009 and 22nd February 2010 marked "P9" and "P11" requesting that he be allowed to exercise the option of early retirement which was provided by clause 12 of "P6". A perusal of "P9" and, in particular, "P11" shows that the petitioner sought to exercise the option for early retirement on the basis that the implementation of "P6" resulted in him being placed at a lower position on the seniority list and at a lower salary point than his colleagues and, thereby, caused him grave prejudice.

It is common ground that, prior to writing "P9", the petitioner obtained a degree in Surveying Science on 25th September 2009. Thus, from that day onwards, he qualified to be absorbed into the permanent cadre of Class II Grade II under and in terms of "P6".

As set out in the letters dated 08th February 2010 and 29th April 2010 marked "P10" and "P13", the petitioner's request was refused by the Secretary to the Ministry of Land and Land Development for the reason that the petitioner had not suffered prejudice as a result of the provisions of the new Service Minute marked "P6" or its implementation. Instead, as stated in these letters, the petitioner was placed at a lower position on the seniority list due to him having taken No-Pay Leave for a period of two years and, therefore, becoming entitled to be absorbed into Class II Grade II only on 02nd November 2006. In this regard, the petitioner admits that he had proceeded abroad on No-Pay Leave from 29th August 2000 to 04th September 2002.

However, the petitioner contends that officers of the Sri Lanka Surveyors' Service had been previously advised, by the Departmental Circulars dated 28th February 1998 and 04th June 2001 marked "P24" and "P25", that availing oneself of No-Pay Leave *"would not generally affect seniority."*. But a perusal of "P24" shows it states that a period of No-Pay Leave abroad has to be deducted when determining an officer's seniority for purposes of promotion - [*"මින් ඉදිරියට දෙපාර්තමේන්තුවේ සියළුම සේවාවන්ට අයත් නිලධාරීන්ගේ උසස්වීම් ලබාදීම සඳහා ජ්‍යෙෂ්ඨත්වය තීරණය කිරීමේ දී, ඔවුන්ගේ දිවයිනෙන් බැහැර වැටුප් රහිත නිවාඩු කාල සීමාවන් ද පසුගිය දළ සේවා කාලයෙන් අඩුකර, ඒ අනුව ජ්‍යෙෂ්ඨත්වය තීරණය කළයුතු බව, ආයතන අධ්‍යක්ෂය අදහස් කරන බව දන්වා ඇත. ඒ අනුව උසස්වීම්වල දී මින් ඉදිරියට මෙසේ කටයුතු කිරීමට සිදුවන බව දන්වා සිටිමි."*]. Further, "P25" states that, while a period of No-Pay Leave will not ordinarily be taken into account with regard to seniority in the Service, in instances where a mandatory minimum period of service is required to be eligible for a promotion, a period of No-Pay Leave has to be deducted from the period of service when determining eligibility for that promotion - [*"සාමාන්‍ය තත්වය යටතේ වැටුප් රහිත නිවාඩු කාලය නිලධාරීන්ගේ ජ්‍යෙෂ්ඨත්වය කෙරෙහි බලපෑමක් ඇති නොකරයි. නමුත් අනිවාර්ය සේවා කාලයක් අවශ්‍ය යැයි නියම කර ඇති උසස්වීම් සඳහා සේවා කාලය ගණන් ගැනීමේ දී වැටුප් රහිත නිවාඩු කාලය අඩුකොට සේවා කාලය ගණන් ගත යුතුය."*].

The petitioner pleads that the refusal to permit him to proceed on early retirement was *ultra vires*, illegal and arbitrary. He also contends that this refusal was in breach of his legitimate expectations. The petitioner says that, in these circumstances, the Court of Appeal erred when it dismissed the petitioner's application.

The respondents' case

In their statement of objections, the 4A, and 7th to 15th respondents [the Secretary to the Public Service Commission and the Chairman and Members of the Public Service Commission] state that the position in Class II Grade II created by the new Service Minute marked "P6" was a *higher* position than positions in the three Grades of Class III under the previous Service Minute marked "P2".

In this connection, they explain that positions in Class II Grade II under "P6" were those of "Staff Grade Officers" [Executives] at the salary scale SL-1-2006 while positions in all three Grades of Class III under "P2" were those in the lower position of "Management Assistants Supervisory Technical/Non-Technical" at the lower salary scale MN-2006. Further, they state that, while the educational qualification required to enter Class III Grade III under "P2" was passing the GCE Ordinary Level/Advanced Level Examination, the educational qualification required of new recruits to Class II Grade II created by "P6" was a degree in Surveying Science or Physical Science. The respondents also point out that officers serving in Class III Grade III and Class III Grade II under "P2" [such as the petitioner] who were directly absorbed into in the new Class II Grade II created by "P6", thereby, "skipped" having to first reach and serve in Class III Grade I under and in terms of "P2" before being entitled to seek promotion to Class II Grade II under "P2".

Accordingly, the respondents contend that when officers in the three Grades of Class III under "P2" were *"absorbed"* into the new Class II Grade II created by "P6", they were, in reality, *promoted* to a higher position.

Next, it is common ground that, since the petitioner was in Class III Grade II [under "P2"] on 01st August 2005 when "P6" came into effect and since he did not hold a degree in Surveying Science or Physical Science, the petitioner was entitled to be absorbed on a supernumerary basis into the new Class II Grade II created by "P6" only upon passing the Junior Professional Examination *and* upon completing a service period of fifteen years - *vide:* clause 7.1 (*iii*) of "P6".

The respondents submit that, although the petitioner had passed the Junior Professional Examination by 01st August 2005, he had *not* completed a service period of fifteen years by that day because the petitioner had, after joining the Sri Lanka Surveyors' Service on 20th October 1989, been on No-Pay Leave for a period of two years prior to 01st August 2005. The respondents state that, in terms of the applicable rules and procedures, this period of two years No-Pay Leave has to be *deducted* when computing the date on which the petitioner completed a period of fifteen years' service for the purpose of absorption into Class II Grade II under "P6". They say that when this period of two years' No-Pay Leave is deducted, the petitioner completed a period of fifteen years' service only on 02nd November 2006 and that he was duly absorbed into Class II Grade II under "P6" with effect from that day, as set out in "P7".

In this regard, the respondents refer to clause 16:10 of the Establishments Code which stipulates that a period of No-Pay Leave has to be deducted when computing a

minimum period of service required for a promotion. The respondents also refer to a letter dated 29th June 2007 issued by the Director General - Establishments and marked "7R3(a)" which states *"නව මිනින්දෝරු සේවා ව්‍යවස්ථාවේ 7 ඡේදය යටතේ සිදු කරනු ලබන අන්තර්ග්‍රහණය කිරීමේ කාර්යයන් සඳහා නියම කර ඇති සේවා කාල අනිවාර්යයෙන්ම සක්‍රිය සේවා කාල විය යුතු අතර ඊට වැටුප් රහිත නිවාඩු කාල ඇතුළත් කළ නොහැකි බව කාරුණිකව දන්වමි."*. Similar views have been expressed in the letter dated 05th October 2015 marked "7R4(b)" written by the Director General - Establishments.

The respondents point out that the petitioner *remained* in his earlier Class III Grade II [under "P2"], as specifically required by clause 7.1(*v*) of "P6", *until* 02nd November 2006 on which date the petitioner completed a service period of fifteen years and, thereby, qualified to be absorbed into the new Class II Grade II under "P6". The respondents contend that, thereby, the petitioner accepted this position *"without demur"*.

With regard to the seniority lists, the respondents state that maintaining two separate lists - *ie:* one of officers who had been absorbed into the permanent cadre and one of officers who had been absorbed on a supernumerary basis - gave rise to difficulties. Therefore, the Cabinet of Ministers approved the formulation of a single seniority list, as set out in the documents marked "1R1(a)" and "1R1(b)".

In this single seniority list, officers serving in all three Grades of Class III [under "P2"] who qualified to be absorbed, on 01st August 2005, into the new Class II Grade II created by "P6" [either into the permanent cadre as specified in clauses 7.1 (*i*) and 7.1 (*ii*) *or* on a supernumerary basis as specified in clause 7.1 (*iii*) and clause 7.1 (*iv*)] were placed in the order of their seniority which prevailed prior to the issuance of "P6". Thereafter, officers serving in all three Grades of Class III under "P2" [such as the petitioner] who *subsequently* qualified to be absorbed into the new Class II Grade II created by "P6" [either into the permanent cadre *or* on a supernumerary basis] were placed on that single seniority list according to the day on which they were absorbed into Class II Grade II upon obtaining the required qualifications specified in "P6".

Thus, the respondents' position is that the petitioner's place on the new single seniority list was *not* due to any prejudice caused to him by the provisions of the new Service Minute marked "P6" or its implementation but was due to the deduction of the period of two years' No-Pay Leave as required by clause 16:10 of Chapter XII of the Establishments Code when computing the period of fifteen years' service needed for absorption into Class II Grade II under clause 7.1 (*iii*) of "P6".

Next, the respondents state that the petitioner's salary point was lower than that of his colleagues *not* due to the provisions of or implementation of "P6" but because the petitioner failed to pass the First Efficiency Bar Examination within the stipulated time

period which resulted in the cancellation of several increments. In this connection, the respondents have marked as “7R7” the notice sent to the petitioner advising him of the cancellation of these increments.

The respondents plead that, for the aforesaid reasons, the 2nd respondent had duly refused the petitioner’s application for early retirement for the reason that the petitioner had not suffered prejudice due to the provisions of new Service Minute marked “P6” or its implementation as contemplated by clause 12 of “P6”.

The respondents also state that, while serving in Class II Grade II of “P6” on a supernumerary basis from 02nd November 2006 onwards, the petitioner obtained a degree in Surveying Science and became entitled to enter the permanent cadre of Class II Grade II on 25th September 2009, under and in terms of “P6”. They point out that, it is only thereafter that the petitioner sought early retirement by his letter dated 23rd November 2009 marked “P9”. The respondents plead that, in these circumstances, the delay on the petitioner’s part and the petitioner’s conduct disentitled him from maintaining this application.

Decision

Firstly, it has to be kept in mind that, at the time the Service Minute marked “P6” was issued and implemented, the petitioner made **no** complaint about the new schemes set out in “P6” for the *absorption* of serving officers of the Sri Lanka Surveyors’ Service into the four new Classes and Grades created by “P6” and for the *promotion* of officers within those new Classes and Grades. Instead, the petitioner continued, without any expression of dissatisfaction or dissent, to serve in the Sri Lanka Surveyors’ Service subject to the terms and conditions with regard to the *absorption* and *promotion* which are set out in “P6”.

Accordingly, it can be reasonably inferred that the petitioner accepted the validity of the schemes for *absorption* and *promotion* introduced by the new Service Minute marked “P6” and continued to serve in the Sri Lanka Surveyor’ Service subject to “P6”.

Next, it is common ground that the petitioner did not hold a degree in Surveying Science or Physical Science which would have entitled him to be absorbed into the permanent cadre of the new Class II Grade II in terms of clauses 7.1(*i*) or 7.1 (*ii*) of “P6”. Thus, it is undisputed that the earliest the petitioner would have qualified for absorption into Class II Grade II [on a supernumerary basis] was upon passing the Junior Professional

Examination *and* completing a service period of fifteen years in terms of clause 7.1 (*iii*) of "P6".

It is also common ground that the petitioner had passed the Junior Professional Examination as at 01st August 2005 when "P6" came into effect. Therefore, and as evident from the positions of the parties set out above, the crux of the appeal before us is determining *when* the petitioner completed a service period of fifteen years and, thereupon, qualified for absorption into Class II Grade II [on a supernumerary basis] in terms of clause 7.1 (*iii*) of "P6".

On the one hand, as set out above, the petitioner's contention is that he joined the Sri Lanka Surveyors' Service on 20th October 1989 and, therefore, he completed a period of fifteen years' service on 20th October 2004. On that basis, he submits that he had completed a period of fifteen years' service when the new Service Minute marked "P6" came into force on 01st August 2005 and that, accordingly, he was entitled to be absorbed into Class II Grade II under "P6" [on a supernumerary basis] on 01st August 2005, in terms of clause 7.1 (*iii*). He submits that his absorption into Class II Grade II only with effect from 02nd November 2006 resulted in him losing seniority in the single seniority list prepared in 2010 and being placed at a lower salary point.

On the other hand, as set out above, the respondents submit that the petitioner first became entitled to be absorbed into Class II Grade II [on a supernumerary basis] only on 02nd November 2006 because the period of No-Pay Leave he had taken had to be deducted when computing the date on which the petitioner completed a service period of fifteen years. It is evident that, if the aforesaid period of No-Pay Leave is to be deducted, the petitioner would have completed a period of fifteen years only on or about 02nd November 2006 - *ie:* the day on which the petitioner was, in fact, absorbed into the new Class II Grade II [on a supernumerary basis], as stated in "P7".

Therefore, it is necessary to determine whether, in terms of "P6" and the applicable rules, the aforesaid period of No-Pay Leave had to be deducted when fixing the date on which the petitioner completed a service period of fifteen years for the purpose of qualifying for absorption into Class II Grade II under clause 7.1 (*iii*) of "P6".

As stated earlier, the respondents submit that the provisions of clause 16:10 of Chapter XII of the Establishments Code apply and require that the period of No-Pay Leave be deducted.

In this regard, clause 11 of "P6" specifies that the provisions of the Establishments Code will apply when deciding seniority. Further, as stated in clause 12:1 of Chapter II

of the Establishments Code, the general rule is that the provisions of the Establishments Code apply to all public officers, such as the petitioner, with regard to their appointment or promotion to posts in the Public Service.

Next, as mentioned earlier, clause 16:10 of Chapter XII of the Establishments Code stipulates that a period of No-Pay Leave must be deducted when computing a minimum period of service required for a *promotion* within the Public Service.

As set out above, the letters marked "P24" and "P25" show that, from 1998 onwards and long prior to the issue of the new Service Minute marked "P6", the Director General - Establishments and the Survey Department have applied the aforesaid rule in clause 16:10 that, in instances where a minimum period of service is required as a qualification for a *promotion* in the Sri Lanka Surveyors' Service, a prior period of No-Pay Leave must be deducted when computing the period of service.

However, since clause 16:10 and the letters marked "P24" and "P25" all use the word *"promotion"* while the several limbs of clause 7.1 of "P6" all use the word *"absorbed"*, it is necessary to examine the validity of the respondents' aforesaid submission that the *"absorption"* of officers in the three Grades of Class III under "P2" into the new Class II Grade II created by "P6" was, in reality and for intents and purposes, a *"promotion"* to a higher position.

In this regard, the fact that: (i) positions in Class II Grade II under "P6" were those of "Staff Grade Officers" [Executives] as opposed to the lower positions of "Management Assistants Supervisory Technical/Non-Technical" in the three Grades of Class III under "P2"; (ii) the higher salary scale assigned to Class II Grade II under "P6"; (iii) the higher educational qualifications required for entry into Class II Grade II under "P6"; and (iv) the fact that officers in Class III Grade III and Class III Grade II under "P2" [such as the petitioner] "skipped" having to first reach and serve in Class III Grade I under "P2" when they were absorbed into Class II Grade II under "P6"; give substance to the respondents' contention that the *"absorption"* of Officers into the new Class II Grade II created by "P6" was, in reality and for all intents and purposes, a *"promotion"* to a higher position.

In this connection, since clause 7.1 of "P6" uses the word *"absorbed"* and not *"promoted"* when it provides for officers in all three Grades of Class III under "P2" to enter the new Class II Grade II created by "P6", the Secretary to the Ministry has addressed a letter dated 21st May 2007 to the Director General - Establishments inquiring whether a period of No-Pay Leave should be deducted when computing the periods of service required for *absorption* into the new Class II Grade II under the several limbs of clause 7.1 of "P6". As stated in clause 1:3 of Chapter II of the

Establishments Code, the grading and designation of posts within the public service and the general terms and conditions of service are the function of the Director General - Establishments whose approval is to be obtained with regard to procedures relating to recruitment and appointment.

The Director General - Establishments has replied by his letter dated 29th June 2007 marked "7R3(a)" unequivocally stating that a period of No-Pay Leave must be deducted when computing the periods of service required for *absorption* in to the new Class II Grade II under the several limbs of clause 7.1 of "P6" – [*"නව මිනින්දෝරු සේවා ව්‍යවස්ථාවේ 7 ඡේදය යටතේ සිදු කරනු ලබන අන්තර්ග්‍රහණය කිරීමේ කාර්යයන් සඳහා නියම කර ඇති සේවා කාල අනිවාර්යයෙන්ම සක්‍රිය සේවා කාල විය යුතු අතර ඊට වැටුප් රහිත නිවාඩු කාල ඇතුළත් කළ නොහැකි බව කාරුණිකව දන්වමි"*]. The subsequent letter dated 23rd July 2007 marked "7R3(b)" sent by the Secretary to the Ministry of Land and Land Development to the Surveyor General instructs that the aforesaid rule be applied when computing the periods of service required for *absorption* into the new Class II Grade II under the several limbs of clause 7.1 of "P6".

Further, the letter marked "7R4(b)" written by the Director General - Establishments succinctly explains the reasons for the rule stated in clause 16:10 of Chapter XII of the Establishments Code and its application when computing the periods of service required for *absorption* into the new Class II Grade II under the several limbs of clause 7.1 of "P6". He explains that a public officer who takes No-Pay Leave for his own private purposes [such as the petitioner] renders no service to the State during the period of No-Pay Leave and that, therefore, the period of No-Pay Leave cannot be regarded as a period of active service. He goes on to observe that, in these circumstances, if a period of No-Pay Leave is taken into account when absorbing an officer into a new position, other officers who had served continuously without taking No-Pay Leave, would be unfairly prejudiced. [*"ආයතන සංග්‍රහයේ XII පරිච්ඡේදයේ 16 වගන්තියට අනුව වැටුප් වර්ධක උපයාගැනීම් සහිත හෝ වෙනත් කාර්යයක් හේතුවෙන් වැටුප් වර්ධක උපයාගැනීම් රහිතව හෝ රාජ්‍ය නිලධාරියෙකු ලබා ගන්න වැටුප් රහිත නිවාඩු කාලසීමාවකදී ඔහු විසින් සත්‍ය වශයෙන්ම රජයට කිසිදු සේවා සැපයීමක් සිදු කරනු නොලැබේ. ඒ අනුව එම කාලසීමාව නිලධාරියෙකු සක්‍රීයව සේවයේ නොයෙදුනු කාලසීමාවක් ලෙස සැලකිය යුතුය. එබැවින් නිලධාරියෙකු රාජ්‍ය සේවයේ එක් තනතුරක සිට තවත් තනතුරකට අන්තර්ග්‍රහණය කිරීමේදී එම කාලසීමාව සක්‍රීය සේවා කාලයක් සේ සලකා අන්තර්ග්‍රහණය කිරීම සඳහා අදාළ කරගතහොත්, එමඟින් නව තනතුරේ ශ්‍රේණි උසස්වීම් වලට සෘජු බලපෑමක් එල්ල වන අතර එම තනතුරේම වැටුප් රහිත නිවාඩු නොලබා සේවයේ යෙදුනු නිලධාරීන්ට එමඟින් අසාධාරණයක් සිදුවන බව නිරීක්ෂණය කරමි."*].

Thus, the Director General - Establishments has set out rational and equitable reasons why the rule stated in clause 16:10 of Chapter XII of the Establishments Code is to be applied when computing the periods of service required for absorption into the new Class II Grade II under the several limbs of clause 7.1 of "P6".

Further, as observed earlier, the documents before us establish that this rule has been applied, across the board, to all officers of the Sri Lanka Surveyors' Service for many years prior to the petitioner making his application.

It should also be mentioned that a perusal of the other provisions of clause 16 of Chapter XII of the Establishments Code shows that a period of No-Pay Leave is not to be reckoned for *"pension purposes"* [clause 16:8], and that an officer on No-Pay Leave should not be considered for promotion to any vacancies which may arise during his period of No-Pay Leave [clause 16:9]. On the same lines, clause 16:11 states that where a scheme of recruitment stipulates that a certain salary point should be reached for eligibility for consideration for a promotion, any increments granted during No-Pay Leave are not to be taken into account in reckoning the salary point for the purposes of promotion. Thus, it appears that, for the reasons stated in "7R4(b)", the scheme of the Establishments Code is to exclude a period of No-Pay Leave when computing the eligibility of a public officer to receive benefits and advancements which are based on his period of service to the State.

It has to be also kept in mind that the petitioner had passed the Junior Professional Examination by 01st August 2005 and was entitled to be absorbed into Class II Grade II under "P6" immediately upon completing a period of fifteen years' service under and in terms of clause 7.1 (*iii*) of "P6". However, the petitioner was *not* absorbed into the new Class II Grade II created by "P6" with effect from 01st August 2005 since he had not completed a period of fifteen years' service by that date. Therefore, he *continued* to serve in Class III Grade II under the previous Service Minute marked "P2", as required by clause 7.1 (*v*) of "P6" in the case of all officers who were not qualified for absorption into new Class II Grade II as at 01st August 2005. The petitioner made *no* protest and did *not* claim that he was entitled to be absorbed into the new Class II Grade II with effect from 01st August 2005. Instead, the petitioner *continued* to serve in in Class III Grade II under "P2" until he was absorbed into the new Class II Grade II only with effect from 02nd November 2006.

The petitioner's aforesaid conduct gives rise to the inference that he accepted and acknowledged that he had *not* completed a service period of fifteen years as at 01st August 2005 and that he completed a service period of fifteen years only on or about 02nd November 2006, when he was absorbed into Class II Grade II.

In the circumstances set out above, I am of the view that the rule stated in clause 16:10 of Chapter XII of the Establishments Code applies and that the petitioner completed a service period of fifteen years for the purpose of qualifying for absorption into Class II Grade II in terms of clause 7.1 (*iii*) of "P6" only on 02nd November 2006, as stated in "P7" and as submitted by the respondents.

It follows that the petitioner's position on the revised single seniority list was correctly assigned on the basis that he was absorbed into Class II Grade II [on a supernumerary basis] only on 02nd November 2006.

In these circumstances, it is clear that the petitioner has not been prejudiced by the provisions of "P6" or its implementation. Instead, his position on the single seniority list is a result of the rule stipulated in clause 16:10 of Chapter XII of the Establishments Code that a period of No-Pay Leave must be deducted when computing the minimum service period required for absorption into Class II Grade II under "P6". Thus, there is no merit in petitioner's first complaint made in his letter marked "P9" seeking early retirement.

With regard to the petitioner's second complaint, that he has been placed on a lower salary point, the respondents have explained that this was not due to the provisions of the new Service Minute marked "P6" or its implementation but, instead, due to the cancellation of several increments as a result of the petitioner failing to pass the first Efficiency Bar exam within the stipulated time, as set out in "7R7". Thus, there is also no merit in the petitioner's second complaint made in his letter marked "P9".

Further, as mentioned earlier, the petitioner has obtained a Degree in Surveying Science and, thereby, qualified to be absorbed into the permanent cadre of Class II Grade II with effect from 25th September 2009. He was then eligible for promotion to Class II Grade I upon completing ten years' satisfactory service in Class II Grade II and subject to the other terms and conditions of clause 8.1 of "P6". This occurred prior to the petitioner writing his letter marked "P9" seeking to proceed on early retirement. Thus, the petitioner, who was in his early forties at the time of writing "P9", had a clear career path allowing for promotion within the Sri Lanka Surveyors' Service. This is another reason which led to the second respondent refusing the petitioner's request for early retirement.

It also has to be kept in mind that clause 12 of the new Service Minute marked "P6" allowed an officer to exercise the option of early retirement only where the Public Service Commission was satisfied that that provisions of "P6" or its implementation prejudiced that officer to such an extent that he should be allowed to proceed on early retirement under section 7 of the Minute on Pensions rather than be compelled to serve under those adverse conditions. It is also relevant to take into account the fact that section 7 of the Minute on Pensions deals with the pension payable to a public officer whose office has been *"abolished"*. This leads to the inference that clause 12 of "P6" could be properly invoked only in instances where the provisions of "P6" or its implementation have prejudiced the conditions of service of an officer to such an extent

that he cannot be reasonably expected to continue to serve under those adverse conditions.

As set out above, the petitioner certainly did not find himself in such a predicament.

Thus, the Court of Appeal correctly held that the petitioner was not prejudiced by the provisions of the new Service Minute marked “P6” or its implementation and that the 2nd respondent did not act illegally or arbitrarily when he refused the petitioner’s application for early retirement.

Accordingly, the aforesaid question of law is answered in the negative and the appeal is dismissed. 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

SC Appeal No: 178/2018

SC/HC/LA/39/2018
LT Case No: 24/42/2012

In the matter of an Application for Leave to Appeal in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950 (as amended) read with Sections 3 and 10 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990 from the judgement of the High Court of Gampaha dated 23rd February 2018.

P. Chinthaka Lakdewa De Silva
01/162, Mulatiyana,
Kapugoda.

APPLICANT

-VS-

Linea Aqua (Pvt) Limited
Thanahenpitiya Estate,
Giridara, Kapugoda.

RESPONDENT

AND BETWEEN

Linea Aqua (Pvt) Limited

Thanahenpitiya Estate,

Giridara, Kapugoda.

RESPONDENT-APPELLANT

-VS-

P. Chinthaka Lakdewa De Silva

01/162, Mulatiyana,

Kapugoda

APPLICANT-RESPONDENT

AND NOW BETWEEN

Linea Aqua (Pvt) Limited

Thanahenpitiya Estate,

Giridara, Kapugoda..

RESPONDENT-APPELLANT-PETITIONER

-VS-

P. Chinthaka Lakdewa De Silva

01/162, Mulatiyana,

Kapugoda

APPLICANT-RESPONDENT-RESPONDENT

BEFORE : PRIYANTHA JAYAWARDENA, PC, J.

L.T.B. DEHIDENIYA, J.

S. THURAIRAJA, PC, J.

COUNSEL : J.C Thambiah with Dilan de Silva instructed by Sanoja Sarathchandra for the Respondent – Appellant – Appellant

Applicant – Respondent – Respondent is absent and unrepresented.

ARGUED ON : 5th July 2019.

WRITTEN SUBMISSIONS : Respondent- Appellant-Petitioner on 3rd of May 2019

DECIDED ON : 13th November 2019.

S. THURAIRAJA, PC, J.

The employee Applicant – Respondent – Respondent (hereinafter referred to as the Employee) is absent and unrepresented. We peruse the journal entry and find that there were notices issued on several occasions, including to his instructing attorney. All the notices were returned without being served on the Employee. When the case was taken up in open court, his name was called but he was absent and unrepresented.

The Counsel for the Respondent – Appellant – Petitioner (hereinafter referred to as the Employer) commenced his submissions and submitted to the court that he had obtained leave under paragraph 19 grounds (g) and (h) but, he will be confining himself to only one question of law stipulated in Paragraph 19 (g) of the Petition. The said question of law is reproduced for easy reference

> (g) Has the Learned High Court Judge arrived at his conclusions by presuming the Petitioner to be guilty of failing to follow the statutory provisions under the Industrial Disputes Act pertaining to the deposit of the Applicant's twelve month salary, without considering the evidence?
>
> *(Sic eret scriptum)*

I find it pertinent to establish the facts of the case prior to addressing the issues before us. The Employee was employed as an inline Quality Controller at Linea Aqua (Pvt) Limited who was the Employer. It is alleged that the employee had submitted certain bogus claims and obtained funds from the insurance scheme with Union assurance, where the employees are paid up to Rs 15, 000/- annually for the purchase of spectacles. The workers are reimbursed the money spent, by the aforementioned insurance company. The employer stated that the employee had fraudulently obtained a sum of Rs 15, 000/- by presenting a false prescription and receipt. A domestic inquiry was held and he was found guilty and his services were terminated.

Being aggrieved with the aforesaid decision the Employee, filed an application at the Labour Tribunal of Gampaha. After an inquiry, the President of the Labour Tribunal ordered reinstatement of the Employee without back wages and the reinstatement should have taken effect from the 5th of September 2016.

The Employer submits that he had appealed against the said order to the Provincial High Court of Gampaha on the 2nd of September 2016. The matter was then taken up by the High Court. Learned High Court Judge on the 23rd of February 2018 decided that the Employer had not complied with Section 31 of the Industrial Disputes Act by not depositing the money equivalent to one year's salary of the Employee. Accordingly he accepted the preliminary objection and dismissed the appeal.

In **Wimalasiri Perera and Others V. Lakmali Enterprises Diesel and Petrol Motor Engineers and Others [(2003) SLR Vol 1 page 62],** the Labour Tribunal had awarded compensation to the Applicants-Respondents-Appellants. The Employers-Appellants-Respondents appealed to the High Court but failed to deposit security in terms of section 31 D (4). In the said appeal to the Supreme Court, an objection was taken up on behalf of the Applicants that the appeal could not be proceeded with since security had not been deposited. The Employers did not deposit security even then, nor did they tender any evidence as to the reason for that default. As per Fernando, J,

"The deposit of security was mandatory; and the High Court erred in holding that the unexplained failure to deposit security did not justify the rejection of the appeal."

The Counsel for the Employer submits to the court that the aforementioned order cannot be accepted. The Counsel further submits that he had complied with the provision of the Industrial Disputes Act and therefore the High court judge erred in law by not considering the evidence in the appeal.

I perused the brief before us. P10 which is a letter obtained for money deposited at the Labour Tribunal of Gampaha, submitted by the Counsel is a motion dated 6th September 2016 which carries neither endorsement nor rubberstamp of the High Court. Further I could not find any corresponding entries in the journal entry. When inquired, Counsel couldn't submit any material to show that this motion and the attached document were before the High Court of Gampaha, at the relevant time.

The Counsel for the employer draws our attention to a document marked P11, which is a letter stating that the Employer – Appellant had deposited money equivalent to two years salary which was signed by the Labour Tribunal and the President of the Labour Tribunal. This motion was filed on the 16th of March 2018. When perusing, I find that there is a date stamp of the High Court of Gampaha dated 16th March 2018.

If P10 was filed on the 6th of September 2016, I don't see any reason for the Counsel for the Employer to file the same document through another motion, after the delivery of the judgement at the High Court. I do not see that there is any evidence to show that the said P10 was before the judge of the High Court at the time when he delivered the judgement. Therefore, it is not possible to act on P10 and P11. The Appeal was filed on the 2nd of September 2016. This shows that at the time of filing the appeal, the Employer had not complied with the provisions of the Industrial Disputes Act.

Considering the question of Law, I find that the learned High Court judge had considered the provisions of the Industrial Dispute Act and delivered the judgement. Consequently I am not inclined to disturb the said findings.

Accordingly I dismiss the appeal, with cost and I fix the cost at Rs. 10, 000/-.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA 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 from the judgment of the High Court of the Eastern Province, Holden Trincomalee under and in terms of Section 31DD of the Industrial Disputes Act as amended.

SC/APPEAL 194/2016.

SC/HCLA/5/2016
HCT/APP/52/2015
LT Trincomalee No. LT/TC/121/12.

K. Mahendran,
Ward No.05, Gandhi Nagar,
Kumburupiti, Trincomalee.

APPLICANT

-VS-

Deutche Welle Radio and TV International, Colombo Office,
No.92/1 D,
D.S. Senanayake Mawatha,
Colombo 08.

RESPONDENT

AND THEN BETWEEN,

Deutche Welle Radio and TV International, Colombo Office,
No.92/1 D,

D.S. Senanayake Mawatha,

Colombo 08.

RESPONDENT-APPELLANT

-VS-

K. Mahendran,

Ward No.05, Gandhi Nagar,

Kumburupiti, Trincomalee.

APPLICANT-RESPONDENT

AND NOW BETWEEN

K. Mahendran,

Ward No.05, Gandhi Nagar,

Kumburupiti, Trincomalee.

APPLICANT-RESPONDENT-APPELLANT

-VS-

Deutche Welle Radio and TV International, Colombo Office,

No.92/1 D,

D.S. Senanayake Mawatha,

Colombo 08.

RESPONDENT-APPELLANT-RESPONDENT

BEFORE : **SISIRA J. de ABREW, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Niranjan Arulpragasam for the Applicant-Respondent-Appellant.
Thilak Wijesinghe with Ms. G. M. Goonesinghe for the Respondent-Appellant-Respondent

ARGUED ON : 19th July 2019.

WRITTEN SUBMISSIONS : Applicant-Respondent-Appellant on 1st February 2019.
Respondent- Appellant- Respondent on 24th October 2011.

DECIDED ON : 7th August 2019.

S. THURAIRAJA, PC, J.

This is an Appeal filed by K. Mahendran i.e. the Applicant-Respondent-Appellant (hereinafter referred to as the 'Employee-Appellant') against the Respondent-Appellant-Respondent i.e. Deutsche Welle Radio and TV (hereinafter referred to as the 'Employer-Respondent').

The Employee-Appellant was employed as a Transmitter Mechanic in 1985 by the Employer-Respondent. Upon reaching fifty five years of age, the Employee-Appellant retired from service on 2nd November 2011. The Employee-Appellant was re-employed on the basis of two consecutive fixed term employment contracts, each for six months, with the period of the first contract being from 01.11.2010 to 30.04.2011 and the second contract being from 01.05.2011 to 31.10.2011. During the period of the second contract, the Employee-Appellant was informed by the Employer-Respondent that, he is to be suspended from 31st August 2011 till the 31st of October

2011 due to his conduct inside the workplace. He was further informed that his salary will be paid and that his services will not be required after October 2011.

On 23.04.2012, the Employee-Appellant filed an Application bearing No. LT/TC/121/12 in the Labour Tribunal of Trincomalee on the grounds of unjust and wrongful termination of his service. Further, he pleaded that he be re-instated in service and be paid with his gratuity and additional bonus.

The learned President of Labour Tribunal, after hearing the parties ruled in favor of the Employee-Appellant by order dated 18.12.2013. The President of the Labour Tribunal came to a conclusion that his termination was unfair and that, he be paid compensation equivalent to forty four months' salary, which was totaled to Rs. 1,452, 000/-

Being aggrieved with the said order, the Employer-Respondent filed an Appeal to the Provincial High Court of the Eastern Province by Petition of Appeal dated 22.01.2014. The learned Judge of the High Court, after giving reasons, by order dated 10.12.2015 allowed the Appeal and set aside the order of the President of the Labour Tribunal.

Being unsatisfied with the said order, the Employee-Appellant preferred the present Appeal to this Court. When the matter was supported for notice on 24.10.2016, leave was granted on the following questions marked (a) and (e) in paragraph 8 of the Petition dated 21.01.2016-

> *"a) Did the Learned Judge of the High Court of the Eastern Province err in law in coming to the finding that the Petitioner's application to the Labour Tribunal was out of time?*
>
> *e) Was the judgment of the High Court of the Eastern Province 'just and equitable'?"*

It will be appropriate to consider certain factual matters before we proceed to answer the questions in this Appeal. The Employee-Appellant was employed on 16.05.1985

and had retired on 02.11.2010 as per the retirement policy of the Company. Thereafter, he had claimed his Employee Provident Fund (EPF), Employee Trust Fund (ETF) and Gratuity on 10.01.2002. All those claims have been duly paid.

After the retirement, he had filed an application for the post of Transmitter Mechanic (marked as 'R2' on Page 202) and the Employer-Respondent employed the Employee-Appellant on a contract basis and the salary was decided as Rs. 837 per day and can be increased up to Rs. 921 from 10.12.2010. (marked as 'R3' on Page 203).

On perusing the file, we find that the first employment is evidently distinct from the second and third employments. Further, it is observed that the employment relationship which began in 1985 between the employer and the employee, had come to an end on 02.11.2010 when the employee reached the age of fifty five years. On retirement, all the benefits were settled. Therefore, the contracts that resulted in the second and third employment with the same parties is not a continuation of the initial employment but, is rather, a new relationship on a contract basis. When the second term of contract was in force, it appears that the employee was involved in an act of misconduct with another employee, which had gone up to the Police Station and the matter was pending before the authorities at the relevant time.

The period of 2nd Contract was from 1/5/2011 to 31/10/2011. The Employer-Respondent had suspended and terminated the second contract with effect from 31.10.2011. For the purpose of completeness, the Employer-Respondent and Sri Lanka Broadcasting Corporation had a contract. Since the time period of the said contract was complete, the Employer-Respondent decided to close down the workplace. After having obtaining approval from the Commissioner of Labour, the Employer-Respondent provided compensation to its employees. The people who were on service on the relevant date i.e. on 31.12.2011 were paid compensation on the basis of amounts approved by the Commissioner of Labour.

The Counsel for the Employee-Appellant submits that there has been a discrimination since the co-employees were paid compensation while the Employee-Appellant was not paid any such compensation. He submits the following authorities to support his claim that the order of the President of the Labour Tribunal is acceptable- ***United Engineering Worker Union v. K. W. Devanayagam, 69 N.L.R. 289*** and ***Y. G. De Silva v. Associated Newspapers of Ceylon Ltd., 1978-79/2/SLR/12***. Further, he submits that the Employee-Appellant was unfairly treated.

The Counsel for the Employer-Respondent submits to the Court that the Employee-Appellant was not in service on the due date and that therefore, he is not entitled to any compensation. Further, he submits that the Employee-Appellant was inconsistent in his Application to Courts. Elaborating on the same, he states that the Employee-Appellant submitted an Application to the President of the Labour Tribunal and when it was taken up for hearing, he had changed the texture and nature of the Application. He also submits that the Application was time barred.

On carefully perusing all the documents and proceedings available in our brief, I find that, the Employee-Appellant, in his original Application dated 23.04.2012 had sought re-employment, gratuity and additional bonus but when the matter was taken up for inquiry, he submitted that others were paid compensation and other benefits and that therefore, he should be paid compensation as well.

I find that, the termination of the employment services of the other employees was with effect from 31.12.2011 as per contract while the Employee-Appellant's services were terminated with effect from 31.10.2011. Therefore, it is clear that he was not employed on the date of closure of the Company i.e. on 31.12.2011. Hence, he is not entitled to be paid compensation. Moreover, I observe that, the Employee Provident Fund, the Employee Trust Fund and Gratuity claimed by the Employee-Appellant has been duly paid.

In the case of ***Caledonian Estates Ltd. v. Hillman, S.C. 250/72—L.T. 1/27665***, it was observed that-

"The question that the Tribunal has to address itself is … whether the employee has, in the circumstances of the termination, a claim, in justice and equity, to compensation or other benefit for the loss of career resulting from the termination. If the employee's conduct had induced the termination, he cannot, in justice and equity, have a just claim to compensation for loss of career, as he has only to blame himself for the predicament in which he finds himself."

Moreover, in the case of ***Ceylon Transport Board v. Wijeratne, (77 N.L.R. 481)*** **at page 489**, it was observed that-

'It has been repeatedly held that no compensation can be ordered where the dismissal is justified."

In the case of ***Superintendent, Dalma Group v. Ceylon Estate Staff's Union, 73 N.L.R. 574***, it was held-

"Compensation is payable only when a wrong has been done"

In the present case, it is evident that the employee's misconduct had induced the suspension of the second contract and therefore, he is not entitled to obtain compensation in this regard.

Considering the order of the learned President of the Labour Tribunal, I am of the view that, the President of the Labour Tribunal had failed in assessing the approval by the Commissioner of Labour and the mode of termination of employment of the then employees of the Company. At the time of filing the Application dated 23.04.2012 before the President of the Labour Tribunal, the Employee-Appellant was fully aware of the closure of the Company. Even in that background, the Employee-Appellant had sought re-employment and other benefits but not compensation.

Further, with regard to the date of termination and the date of filing the Application, the learned High Court Judge had found that the Employee-Appellant was time

barred. On having carefully perused the record, I find that, the learned High Court Judge is justified in his decision.

Considering the questions in paragraph 8 of the Petition dated 21.01.2016, for which leave was granted, I answer the question marked (a) in the negative and consequently, I answer the question marked (e) in the affirmative.

For the reasons already enumerated by me, I am of the view that, there is no merit in the Appeal. Accordingly, I dismiss the Appeal and award no cost.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

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

Sampath Bank PLC
No. 110, Sir James Peiris Mawatha,
Colombo 02 and at No 19,
Dalada Veediya, Kandy.

Plaintiff

-Vs-

Kaluarachchi Sasitha Palitha
Owner of 'Sunrise Biscuit
Manufactures' at Industrial Zone,
Pallekale.

Defendant

SC Appeal No. 196/2011
SC/HC/CA/LA 453/2011
CP/HCCA/Kandy/157/2009
DC/Kandy/362/2004/MR

Kaluarachchi Sasitha Palitha
Owner of 'Sunrise Biscuit
Manufactures' at Industrial Zone,
Pallekale.

Defendant-Appellant

-Vs-

Sampath Bank PLC
No. 110, Sir James Peiris Mawatha,
Colombo 02 and at No 19,
Dalada Veediya, Kandy.

Plaintiff-Respondent

And Now

Sampath Bank PLC
No. 110, Sir James Peiris Mawatha,
Colombo 02 and at No 19,
Dalada Veediya, Kandy.

Plaintiff-Respondent-Appellant

-Vs-

Kaluarachchi Sasitha Palitha
Owner of 'Sunrise Biscuit
Manufactures' at Industrial Zone,
Pallekale.

Defendant-Appellant-Respondent

Before: Buwaneka Aluwihare PC. J.
L.T.B. Dehideniya. J. and
Murdu N.B.Fernando, PC. J.

Counsel: Chandaka Jayasundera PC with Vishmi Fernando instructed by P. Wickremasekara for the Plaintiff-Respondent-Appellant.
Rohan Sahabandu PC with Ms. Hasitha Amarasinghe for the Defendant-Appellant-Respondent.

Argued on: 03.05.2018

Decided on: 09.09.2019

Murdu N.B. Fernando, PC. J.

The Plaintiff-Respondent-Appellant (the plaintiff-appellant) came before this Court being aggrieved by the judgement of the Civil Appellate High Court of Kandy dated 04-10-2011 setting aside the judgement of the District Court of Kandy dated 14-09-2009 wherein the relief claimed by the plaintiff was granted.

This Court on 08-12-2011 granted Special Leave to Appeal on the following questions of law.

01. Where a bank has granted an overdraft facility when does the prescriptive period commence?

    (a) from demand or
    (b) from the date of the grant of the last overdraft facility

02. Does a conditional acknowledgment of the debt come within the purview of Section 12 of the Prescription Ordinance?

The plaintiff-appellant instituted action on 26-02-2004 in the District Court of Kandy against the Defendant-Appellant-Respondent (defendant-respondent) seeking inter-alia a sum of Rs. 1,426,433.93 together with interest on an overdraft facility granted by the plaintiff bank to the defendant.

In the answer, the defendant, while acknowledging obtaining overdraft facilities took up the position that the claim was prescribed. After trial, District Court entered judgement in favour of the plaintiff bank on the basis that the claim was not prescribed as the defendant has acknowledged the debt and therefore is estopped from denying the same. Being aggrieved by this judgement the defendant went before the Provincial Civil Appellate High Court in Kandy (the High Court).

In the High Court, judgement was entered in favour of the defendant upon the ground that in the absence of a contract with the condition that the overdraft is payable on demand, the trial judge was in error in holding that the prescription begins from the date of the letter of demand and secondly the letter which the trial judge considered as an acknowledgement of the debt cannot be treated as an unqualified acknowledgment of the debt.

Being aggrieved by the said judgement the plaintiff-appellant came before this Court and obtained Special Leave to Appeal on the two questions of law referred to above.

At the hearing before this Court and in the written submissions filed, the contention of the plaintiff-appellant was that prescription on an overdraft facility begins from the date of demand for payment whereas the defendant-respondent took up the position that it was from the date a particular overdraft is granted by the bank.

To buttress the argument, the plaintiff-appellant relied on Paget's Law of Banking and the Court of Appeal judgment of Wigneswaran J in **Gunawardena and others Vs Indian Overseas Bank (2001) 2 SLR 113** wherein a reference is made to Reeday's Law relating to Banking and the defendant-respondent relied on the Supreme Court judgement of **Hatton National Bank Ltd Vs Helenluc Garments Ltd. and others (1999) 2 SLR 365** in which Wijetunga J relied on Weeramantry on Law of Contracts and Chitty on Contracts.

The learned President's Counsel for the plaintiff-appellant submitted that the two judgements referred to above, namely, Court of Appeal judgment of **Gunawardena and others Vs Indian Overseas Bank (2001) 2 SLR 113** and the Supreme Court judgement of **Hatton National Bank Ltd Vs Helenluc Garments Ltd. and others (1999) 2 SLR 365** conflict with each other and if the Supreme Court decision of *Helenluc* is followed, it would undermine the entire regime of overdraft facilities been granted by banks to secure the financial needs of its customers. Thus, the learned President's Counsel argued that in keeping with banking practices, the modern banking authorities have adopted the position that prescription on an overdraft facility should begin to run from the date of demand for payment. The learned President's Counsel for the defendant-respondent strenuously argued that the Supreme Court judgment in which it was held that time starts to run not on demand but when each advance is made by the bank should be followed since it has a binding effect. The learned President's Counsel further submitted that the Court of Appeal judgement delivered a few months later (also in the year 1999) did not refer to the Supreme Court judgement of *Helenluc* and as such the Court of Appeal judgement is *per-incuriam* and should not be followed.

Before considering the above submissions, viz-a-viz the two questions of law raised before this Court, I wish to refer to the facts of the appeal before us in detail.

The defendant who was the sole proprietor of a business at the Industrial Zone of Pallekelle, Kandy maintained a current account with the Kandy branch of the plaintiff bank, from around the year 1997 and enjoyed banking facilities including medium term loan facilities and over drawing facilities. Admittedly there was no formal documentation entered between the parties or special arrangements made with regard to the overdraft facilities obtained by the defendant (commonly known as a TOD- temporary overdraft) and the last overdrawn facility obtained by the defendant was on 23-01-2001 by presenting a cheque for a sum of Rs. 30,000/=. Plaint was filed to recover the balance sum outstanding on the total overdraft facilities on 26-02-2004, 3 years and one month after the last over drawn date and the plaintiff bank in its plaint pleaded that the matter is not prescribed. The defendant accepted over drawing his account and for reasons stated in the answer claimed damages by way of a cross-claim.

At the trial, admissions were recorded and issues raised and a bank official gave evidence on behalf of the plaintiff and documents were marked including P5, defendant's letter of acknowledgment of the debt dated 25-12-2002. The bank official was cross-examined for four days and re-examined. After the closure of the plaintiff's case, the defendant raised two additional issues based on prescription and the plaintiff re-called the sole witness for the bank, the bank official who was further examined and cross-examined pertaining to the additional issues raised by the defendant. The defendant then gave evidence and parties were requested to file written submissions.

Thereafter judgement was entered in favour of the plaintiff bank. The learned judge made reference to the Supreme Court decision of *Helenluc* and held in the absence of a formal document pertaining to granting of overdraft facility, action to recover the sum due should be filed within three years from the date of providing the overdraft facility and in the instant case, since the defendant has categorically acknowledged the debt by P5, the cause of action is not prescribed and therefore rejected the defence of prescription taken up by the defendant and entered judgement for the plaintiff bank.

The defendant appealed against the said judgement to the High Court on the ground that the letter P5 is not an unconditional letter of acceptance of the debt; the judgment is not in accordance with the Prescription Ordinance and the interest claimed by the plaintiff bank is excessive.

In the High Court, the appeal was determined on written submissions and the High Court entered judgement in favour of the defendant upon the basis that the trial judge was in error when he held that prescription begins from the date of demand. The learned Judges further stated that the High Court follows the exception recognized by the Supreme Court in *Helenluc decision*. The 1st question of law this Court has to answer is based on this premise.

The next point considered by the High Court was whether the letter P5 is an acknowledgement of debt. The High Court relied on the case of **Hoare and Co. Vs Rajaratnam 34 NLR 219** and held by the said letter P5 the defendant not only acknowledged the debt but in addition requested the plaintiff bank to reschedule the overdue sum as a loan and therefore P5 cannot be treated as an unqualified acknowledgement of debt. The learned Judges of the High Court went onto state that prescription should be reckoned from the date of granting of the last overdrawn facility and held that the action filed by the plaintiff bank is prescribed and set aside the judgement of the District Court. The 2nd question of law raised before this Court is on this premise.

In the High Court judgment, a passing reference was made to the fact that letter P5 was not available in the brief and the learned President's Counsel for the defendant-respondent in his submissions before this Court constantly requested us not to consider P5. He further submitted that this Court should ignore banking practices as no expert evidence was led and enter judgement in favour of the defendant-respondent solely upon the *Helenluc decision*.

Upon perusal of the brief before us, we observe that not only P5 but none of the marked documents at the trial (excepting P8) are available in the brief. The written submission filed by the parties before the trial court are also not available in the brief. Nevertheless, both the plaintiff and the defendant in their list of witnesses and documents filed before the trial court

refer to the said letter marked P5 and during the trial the witness for the plaintiff and the defendant referred to this document and portions of the said letter P5 were reproduced *verbertim* in evidence and the trial judge based his judgment on P5. In the High Court too, written submissions were filed and judgment was entered revolving around P5.

Thus, in view of the facts and circumstances of this case, this Court will consider P5 and the evidence led at the trial pertaining to P5 in order to ascertain whether in fact P5 was an acknowledgment of debt or not. It is undisputed that the defendant wrote P5 addressed to the Manager, Sampath Bank, Kandy on 25-12-2002. It is undisputed that the defendant sent this letter in response to the letter of demand dated 12-12-2002 and by P5 the defendant acknowledged the debt, indicated his willingness to pay back the overdraft, regretted not been able to re-pay the bank in view of financial constraints faced by him and requested that the sum owed be rescheduled as a 10 year long term loan and that he be granted relief to repay it in instalments since he is not in a position to pay the lump sum at once by the given date. The learned trial judge before whom the defendant's evidence was led and cross-examined and who witnessed the defendant's demeanor came to a finding that P5 was an acknowledgment of the debt.

It is observed that the trial judge, placing reliance on the acknowledgement of the debt by P5 dated 25-12-2002 came to the finding that the plaint was not prescribed and went onto hold that if not for the acknowledgment of the debt and request for relief for payment of the debt by concessionary terms, the plaint would have been prescribed. Hence, it is clearly seen that the trial judge based his reasoning upon the ground that the overdraft facility obtained by the defendant would have been prescribed, if not for the acknowledgment of the debt by P5.

The High Court, it is observed reversed the judgment of the trial Court on two grounds. Firstly, the High Court went on the basis that the trial judge has held that the prescriptive period begins from the date of the letter of demand. This is a clear misconception and I am of the view that the High Court was in error in coming to such a finding. In fact, the trial Judge neither referred to the letter of demand nor to its date nor to the Court of Appeal decision of **Gunawardene and others Vs Indian Overseas Bank** in his judgement. The trial judge only refered to the ***Helenluc Decision*** which is a judgment of the Supreme Court and followed same and clearly stated that action should be filed within three years from the date of granting of the overdraft facility. Nevertheless, in view of the acknowledgment of the debt by the defendant by P5 the trial judge held, that the plaint was not prescribed. It appears that the High Court has not considered the District Court judgment from the said perspective of extension of the prescriptive period in view of the acknowledgment of the debt.

Secondly, it is observed, that the High Court, did not treat P5 as an acknowledgment of the debt. The High Court considered P5 as a conditional acknowledgment since the defendant requested the plaintiff bank to re-schedule the facility as a loan repayable over a period of 10 years in installments. The learned High Court judge relied on the 34 NLR case of **Hoare and Co. Vs Rajaratnam** and came to the conclusion that P5 cannot be considered as an acknowledgement of debt and on such premise held that the prescriptive period should be reckoned from the date of granting of the last over draft facility on 23-01-2001 and therefore the plaint filed on 26-02-2004 was clearly prescribed by one month. In my view, the above analysis of the High Court is also erroneous since the evidence led at the trial, unequivocally suggests that P5 (though not available in the brief) is an acknowledgment of the debt and an acknowledgment of the debt clearly interrupts and extends the prescriptive period.

Having referred to the facts of this case, let me now move onto the questions of law raised before this Court which I intend to answer based upon the facts and circumstances pertaining to this case and not on a vaccum or on a hypothetical basis. I wish to consider the 2nd question of law first.

"Does a conditional acknowledgment of a debt come within the purview of section 12 of the Prescription Ordinance?"

Section 12 of the Prescription Ordinance, reads as follows: -

> "In any forms of action referred to in sections 5,6,7,8,10 and 11 of this Ordinance, **no acknowledgment or promise** by words only **shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments** contained in the said sections, or any of them, or to deprive any party of the benefit thereof, **unless such acknowledgment shall be made or contained by or in some writing** to be signed by the party chargeable….." (emphasis is mine)

Thus, the law as stated in Section 12 of the Prescription Ordinance is very clear. If an acknowledgment is made or contained in writing signed by the party chargeable, it shall be deemed evidence of a new or continuing contract which would take the case out of the prescriptive period whether it falls under Sections 5,6,7,8,10 or 11 of the Prescription Ordinance.

In the appeal before us the cause of action weaves around granting of an over draft facility, temporary in nature for which no formal documents were executed between the plaintiff bank and the defendant and thus falls within Section 7 of the Prescription Ordinance which governs unwritten contracts or agreements.

Section 7 of the Prescription Ordinance, reads as follows: -

> "No action shall be maintainable for the recovery of any movable property, rent or mesne profit, or for money lent without written security, or …. for any money paid or expended by the plaintiff on account of the defendant, or for money due upon an account stated, or upon any unwritten promise, contract, bargain or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen."

This section clearly indicates, in the event of an unwritten agreement, action has to be filed within three years from the date the cause of action arises or in other words a three year restriction is placed on recovery of money lent without written security or money expended by the plaintiff on account of the defendant.

From the foregoing and a plain reading of Sections 7 and 12 of the Prescription Ordinance it is clearly seen, that in the case of granting of temporary over drafts by banks when no documentation is available, action has to be filed within three years from the date the cause of action arises in order, to overcome prescription. Nevertheless, the said provisions speaks of an exemption, being an acknowledgment of debt by the defendant in writing, which would take the case out of the three year window and extend the prescription period. This is the position taken by the trial judge in his judgment, though a specific reference was not made to the provisions of the Prescription Ordinance in holding that the plaint was not prescribed.

It is observed that the learned Judges of the High Court, relied on the case of **Hoare and Co. Vs Rajaratnam** (supra) to hold otherwise. Hence a detailed consideration of the facts of the said case is material. The above case decided in 1932 is in respect of goods sold and delivered and work and labour supplied where the prescriptive period is one year. The plaintiff company relied on a letter sent by the defendant Rajaratnam where it was stated,

> *"In reply to your letter of....., on account of the fall of rubber prices, you will have to wait another couple of months for settlement. In the meantime, please send your contractor to put right the leaking roof…….*",

to take the case out of the one year window. Based on this letter, the company took up the position that in view the acknowledgment of debt by the defendant and the two month extension sought, the prescriptive period should begin two months after the date of the said

letter. The trial judge gave judgement in favour of the plaintiff company upon the basis that the defendant has not denied the letter to be an acknowledgment of indebtedness and there was an unconditional promise to pay on the expiration of two months from the date of the letter. However, in appeal the said decision was over-ruled by the Supreme Court as the court held, that though the letter was an acknowledgment of debt, since the subsequent correspondence implied that the request of Rajaratnam for a couple of months to make the payment was refused by the plaintiff company, that the company cannot thereafter rely upon the said letter as an extension of time and held that the letter was not an unconditional promise to pay at the expiration of two months to take the case out of prescription and therefore the plaint was prescribed.

The facts of the appeal before us, in my view cannot be compared with the above case. The statement in the said letter to 'wait a couple of months for settlement and in the meantime put right the leaking roof,' I consider to be vastly different to P5, where there was a specific acknowledgment of the debt, willingness to pay back the over drawn sum and regret for not paying same earlier. In any event the relationship of a bank and a customer is different to goods sold and delivered and work and labour supply contract.

The defendant was a customer of the bank operating a current account for a number of years and enjoying banking facilities, presenting cheques and obtaining temporary over draft facilities based upon existing interest rates and was in receipt of monthly banking reconciliation statements which were never disputed. The evidence led at the trial indicated that subsequent to the cheque for Rs 30,000/= honoured by the bank in January 2001, many cheques presented by the defendant were not honoured by the plaintiff bank as there were no funds in the account and the monthly bank statements clearly indicated the total sum due to the bank together with the interest on the overdraft facility already obtained and the expenses incurred for cheque returns. The evidence also indicated that on verbal intimation of the outstanding debt, cheques of the defendant and others, drawn in favour of the defendant were deposited in the defendants account which too were dishonored. Thereafter, by letter dated 12-12-2002 when the plaintiff bank informed the defendant the total sum due, the response of the defendant by P5 while acknowledging the debt was his willingness to re-pay, regret for delay in making payments and request for re-scheduling of the sum.

Thus, in my view no parallel can be drawn between the case of **Hoare and Co. Vs Rajaratnam** and the appeal before us. Similarly, the letter referred to in the said case and P5 in the instant appeal are not comparable. Clearly, P5 was a letter which acknowledged a debt and came within the purview of Section 12 of the Prescription Ordinance.

In the said circumstances, the High Court was in error in holding that P5 was not an acknowledgment of the debt. It is observed that the High Court did not consider nor refer to Section 12 of Prescription Ordinance in its judgement when it analysed P5 and thus, glossed over the question of extention of the prescriptive period when an acknowledgment of the debt is forseen.

Let me go back to Section 12 of the Prescription Ordinance once again. The section very clearly indicates that acknowledgment should not be by words but be in writing. It does not state that the acknowledgment should be unqualified or unconditional. It only speaks of acknowledgment of a debt.

This section has been considered by this court on many an occasion, most of the cases pertains to goods sold and received and work and labour supplied contracts. In **Perera Vs Wickremaratne 43 NLR 141** Soertsz J. upheld the position taken up by the trial judge that though the debt was statute barred, in view of the acknowledgment of debt, the plaintiff has a right to recover the debt by virtue of section 12 of the Prescription Ordinance and observed as follows: -

> " '*I wish to settle'* is not merely an acknowledgment of the debt from which a promise to pay can be inferred but it is an acknowledgment with an express declaration of a desire to pay. It has frequently been laid down that when there is an acknowledgment of a debt, without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred. Much more, then, must, such a promise be inferred when the acknowledgment is coupled with an expression of desire to pay."

GPS de Silva J (as he then was) in the Court of Appeal judgement of **Rampala and others Vs Moosajees Ltd and another 1983(2) SLR Page 441** relied on and quoted the above referred observation of Soertsz J. The said case also was in respect of goods sold and delivered contract. In the said case, a letter written by the Managing Agents (Whittals Estates) on behalf of its agent (the estate owner) stating "immediately we hear from them, we will let you know what arrangements have been made with regard to the repayment of the outstanding account" was constituted as an acknowledgment of a debt from which a promise to pay the debt could reasonably be inferred. The Court went on to hold that the letter of acknowledgment (by the agent) was sufficient to take the case out of prescription and therefore the plaint was not prescribed.

The above observations of the learned judges, clearly lay down the legal regime that our courts should consider. The Courts should look at the whole of the evidence led and especially examine the sequence of correspondence entered into, by and between the parties, in ascertaining whether an inference could be drawn with regard to the promise to pay. Thus, the provisions of Section 12 of the Prescription Ordinance should be construed in the stated background to come to a finding with regard to the extension of time, in the event a matter is statute barred. The above stated judicial dicta also points to the fact that an acknowledgment of debt need not be unqualified and unconditional. It could be qualified and conditional. Furthermore, in many an instance, the courts have considered the contents of the correspondence, and the letters of acknowledgment and have come to the conclusion that a letter of acknowledgment comes within Section 6 of the Prescription Ordinance. i.e. written agreements where the period of prescription is six years as opposed to Section 7, unwritten agreements where the period of prescription is three years. I do not wish to go so far or delve into such areas in this appeal.

In the case before us, the learned judges of the High Court held that P5 cannot be construed as an acknowledgement of debt. In my view, the said finding of the High Court is erroneous. P5 written by the defendant himself is clear and precise. It indicates an acknowledgment of the debt and willingness to make the payment. Thus, P5 clearly falls within the provisions of Section 12 of the Prescription Ordinance.

In the said circumstances, I answer the 2nd question of law raised before this Court in the affirmative. I also hold that P5 is an acknowledgment of the debt by the defendant which would extend the prescriptive period beyond the three year window as envisaged in Section 12 of the Prescription Ordinance. Thus this Court holds, the plaint filed, based upon a cause of action pertaining to temporary over draft facility, is not prescribed and upholds the judgement of the District Court. Further, this Court holds that the plaint filed in the District Court is not violative of a positive rule of law as laid down in the Civil Procedure Code.

Moreover in **People's Bank Vs Lokuge International Garments Ltd 2010 B.L.R. page 261**, a matter pertaining to an export bill of exchange between a banker and a customer J.A.N. de Silva CJ held, when liability is admitted at some point before the prescription ends, it operates as a renewal of the running of prescription.

In the Court of Appeal judgement of **Saparamadu and another Vs People's Bank 2002 (2) SLR page 15**, a matter concerning trust receipts, Shiranee Thilakawardane J. held even where the period of prescription has expired, a part payment or an acceptance of the sum which was due would take the case out of the prescriptive period.

Similarly, in **Gunawardene and others Vs Indian Overseas Bank** (supra) Wigneswaran J. held that the question of prescription does not arise if there had been an acknowledgment of the debt due.

If I may put it simply, in this appeal, the defendant last over drew his account on 23-01-2001 and by P5 dated 25-12-2002 acknowledged the debt and thereby extended the prescriptive period. The plaint was filed on 26-02-2004 within the three year period envisaged in Section 7 of the Prescription Ordinance. Therefore, I hold that the plaint cannot be construed as prescribed and thus the judgment of the High Court is erroneous and should be set aside on this ground and this ground alone.

Let me now, move onto the 1st question of law raised before this Court.

> *"Where a bank has granted an overdraft facility, when does the prescriptive period commence, from demand or from the date of grant of the last overdraft facility?"*

This was the more contentious matter argued before us and as stated at the beginning of the judgment where the parties submitted that there were conflicting judgements of the Appellate Courts, namely, **Helenluc decision** of the Supreme Court and **Gunawardene and others Vs Indian Overseas Bank** a decision of the Court of Appeal.

I wish to approach this question of law based upon the facts and circumstances of this case. I do not intend to enter into an arena of academic discourse having in mind, the request of parties for a divisional bench to hear and determine this appeal was not granted.

Thus, if I may summarize the findings pertaining to this appeal, in respect of this question of law the trial judge categorically followed the *Helenluc decision* of the Supreme Court and held, that in the absence of a formal documentation pertaining to granting of the overdraft facility, action to recover the sum should be filed within three years from the date of providing the overdraft facility.

The High Court also followed the *Helenluc decision* though it reversed the trial court finding on the erroneous basis that the trial judge considered the letter of demand to be the commencement of the prescriptive period.

Therefore, it is apparent that both the District Court and the High Court have relied on the *Helenluc decision* of the Supreme Court but came to completely opposite findings on prescription, based upon P5 the acknowledgment of the debt.

This Court has already considered the position in respect of acknowledgment of the debt by P5 and discussed the said issue in detail and answered the 2nd question of law raised before this Court in the affirmative. This Court also determined that the judgment of the High Court is erroneous when it held that the plaint filed in the District Court of Kandy is prescribed and set aside the said judgment on the said ground alone. In the said circumstances, the necessity to answer the 1st question of law, raised before this Court in my view does not arise.

Notwithstanding above, let me look at the said question in the perspective of the facts and circumstances of the instant appeal. Admittedly, the defendant obtained overdraft facilities from the plaintiff bank for which an interest is charged. The total sum overdrawn, sum cleared and the interest component is reflected in the monthly bank statements issued. Admittedly, the defendant last over drew his account on 23-01-2001. Thereafter the cheques presented were not honored and the defendant was informed of the status of the account verbally and by letter on 12-12-2002. The said letter and the debt was acknowledged by the defendant on 25-12-2002.

Thus, when there is an acknowledgment of the debt as far as prescription is concerned, the date of the grant of the last overdraft facility and the date of demand becomes insignificant. What is material is the date of acknowledgement of the debt. Therefore, this question of law raised before us, as formulated, in my view cannot be answered by this Court with a simple 'yes' or a 'no', without any reference to the facts of the instant appeal.

The learned President's Counsels for the Appellant and the Respondent vigorously propounded their respective cases before us based upon the demand theory and the last overdrawn theory supported by the two cases which the said Counsel intimated as conflicting judgements. Hence, I would now proceed to consider the said two cases.

Firstly, the *Helenluc decision* of the Supreme Court. In June 1996, Hatton National Bank in the capacity of an assignee filed plaint against Helenluc Garments Ltd and five of its directors for recovery of monies advanced on an overdraft facility granted to Helenluc Garments Ltd by Dubai Bank initially in or around 1982. Dubai Bank first assigned its interests to Union Bank of the Middle East and the Union Bank (then known as the Emirates Bank) assigned its rights to Hatton National Bank. Plaint was filed in the Commercial High Court, 14 years after the issuance of the overdraft, where there was no formal documentation executed and only based upon a letter of demand issued six days prior to filling of the plaint in May 1996. The plaint also stated that the overdraft facility granted to Helenluc Garments Ltd was secured by a hypothecary bond executed in 1982 and a director's guaranty also issued in 1982 by the original assignor Dubai Bank. The case was heard ex-parte against Helenluc and its directors and was dismissed firstly, upon the basis that no evidence was led to establish the

date of the grant of the overdraft, and secondly, even assuming it was granted on or around the same time the hypothecary bond was issued i.e. in 1982, the prescriptive period on the hypothecary bond (10 years) had lapsed, and the plaint was prescribed against Helenluc Garments Ltd. and its directors. Hatton National Bank appealed against the said judgment to the Supreme Court. This Court dismissed the bank's appeal against the company and allowed the appeal only against the directors of the company, upon the basis, that the cause of action formulated against the directors was based on the guaranty bond, there was an express term in the guaranty bond not to plead prescription and therefore prescription would not operate against the directors and remitted the case back to the High Court to proceed against the directors.

With regard to the company the Supreme Court decision was twofold. In respect of the hypothecary bond, since a period of 10 years had lapsed and in view of the provisions of Section 5 of the Prescription Ordinance this Court held that the cause of action was prescribed. However, with regard to the overdraft, Wijetunga J stated as follows: -

> "In the absence of any material to show that the parties to this action has contracted otherwise, I am of the view that a demand was not a condition precedent to an action based on the principal transaction. No evidence has been led as to when this overdraft was granted. The learned trial judge was right in thinking that it was granted at or about the time the hypothecary bond was signed and that the claim was prescribed."

Thus, the letter of demand dispatched one week prior to filing of action was disregarded by the Court. There was no instrument before the Court to establish the demand to be a pre-condition and the Court, in my view, quite rightly held that the overdraft granted 14 years ago was clearly prescribed. This case I consider to be unique and distinguishable since there was also no evidence before Court pertaining to the granting of the facility or the date of the last overdraft given by Dubai Bank 14 years ago upon which Hatton National Bank went to Court. It appears that the account was dormant for approximately 14 years until a demand was made one week prior to filing of plaint.

In the above stated judgement, Wijetunga J at pages 367 and 368 referred to the views of two eminent authors as follows: -

> "overdrafts are loans by the banker to the customer and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made. A bank cannot therefore recover against a customer on an overdraft which has lain dormant for the prescriptive period which, in Ceylon in the absence of a written contract would be three years."
>
> Weeramantry – Law of Contracts

> "An overdraft is a loan by the banker to the customer. At common law, in the case of an overdraft repayable on demand, a demand was in general not a condition precedent to bringing an action and time ran against the banker in respect of each advance from the time when it was made."
>
> - Chitty - Law of Contracts

Based upon the foregoing statements the contention of the learned President's Counsel for the Respondent before us was that no demand is necessary to sue on an overdraft and time starts running on the date or point of issuance of the final overdraft.

In my view, the statements referred to above by the said two authors who are authorities on the Law of Contract, is based on the basic tenants or the 1st principles of offer and acceptance. The customer makes an offer verbally or in writing or by presenting a cheque and the bank accepts the offer and grants the sum requested. Thus, the clock starts ticking from the time the particular transaction comes into effect.

However, there are other factors that could affect a banking transaction or for that matter any transaction. There could be acknowledgment, part payment, re-scheduling, novation, cancellation which would change the character, the relationship between the parties. As we are aware, an overdraft is a loan granted by a banker to a customer on specific conditions. It could be a 'repayable on demand overdraft', planned or unplanned over draft, authorized or unauthorized overdraft, a permanent overdraft or a temporary overdraft, over draft issued in writing and given for a specific duration or without a limitation, it could be verbal, oral, unwritten or given at the discretion of the bank, it could be for a specific performance of for an unspecified reason, a demand could be a condition precedent or not. Thus, each overdraft will be governed by its terms and conditions and a general statement in my view cannot be given to "overdrafts" per se. Similarly, when answering the questions of law raised before this Court, a hypothetical answer cannot be given without considering the facts and circumstances of each appeal.

In the *Helenluc decision* referred to above, Wijetunga J. at page 370 refers to the two eminent authors once again and their statements as follows: -

> "Weeramantry ….. states under the heading, 'Agreements not to plead limitation' that it is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable…

> Chitty dealing with the English Law on agreement not to plead the statute also states….. that an express or implied agreement not to plead the statute whether made before or after the limitation period has expired, is valid if …. and will be given effect to by the Court."

From the above statements, it could be seen that an agreement not to plead a statute /limitation/ prescription or otherwise can be made expressly or impliedly. Thus, the above statements too, imply that the facts and circumstances should be considered in deciding when prescription begins to run in respect of each overdraft. Each case, each situation, should be analysed independly and a determination made as to when the prescription begins to run. It is a subjective test.

In the instant appeal, the trial judge considered the evidence led and held, in the absence of a formal documentation pertaining to granting of the overdraft facility, prescription runs from the date of providing the facility. However in view of the acknowledgment of the debt discussed earlier, the trial judge came to the conclusion that the plaint was not prescribed.

Let me now move onto the Court of Appeal judgement of **Gunawardane Vs Indian Overseas Bank**. (supra)

This case revolves around issuance of trust receipts and overdraft facilities to a partnership business named AMK Agency. The plaint was filed in the District Court by the bank against the five partners. Summons were not served on one partner and the case went ex-parte against another partner who filed answer but was not represented at the trial. The three partners who were represented did not lead any evidence but only pleaded prescription. After trial, judgement was entered for the bank against the partners. The three partners who were aggrieved went before the Court of Appeal and the Court of Appeal upheld the trial court findings.

In its judgement, the Court of Appeal, referred to the contention of the appellant that the plaint was prescribed under Section 7 of the Prescription Ordinance based on the last date of payment theory propounded on the statement of Weeramantry in Law of Contracts and held that the question of prescription does not arise as there was acknowledgment of the debt due. In the said judgment, Wigneswaran J. referred to the significance of several acknowledgements that the money would be paid, recorded in evidence and held the question of prescription would arise only if there was no acknowledgment or undertaking by the defendant to pay the outstanding dues to the plaintiff. In the penultimate paragraph of the judgement, Wigneswaran J. stated that the entire case of the defence savors of a desire on the part of the defendants to brush aside their obligations and responsibilities and delay payment lawfully due to the bank as long as possible.

In discussing the question of prescription at pages 119-120 of the judgement, Wigneswaran J. stated as follows: -

> *"overdraft facility is afforded by a bank by permitting a customer to overdraw his current account up to certain limits. The current account being operative and in force the facility too will continue to be operative until cancelled and or unless the money due to the bank is demanded by it. If the customer does not take steps to pay-off the overdrawn amount, interest will accrue on such overdrawn amount and shall continue to be a debt due to the bank until there is a repayment of the debt or cancellation of the debt. The overdraft facility itself will come to an end, as stated above, on the cancellation of the facility or when the bank demands repayment. This would be generally so unless there are special arrangements to the contrary. It was held in* ***William and Glyn's Bank Ltd. Vs Barnes (1981 Com. LR 20)*** *that in the absence of special arrangements overdraft dues are repayable on demand and limitation (prescription) will begin to run from the promised date of repayment of a fixed term loan or from the date of demand in any other case. (vide also T.G.Reeday - The Law relating to Banking)"*

However, as stated earlier the finding of the Court of Appeal was based upon the acknowledgment of the debt and not on the question of the commencement of prescription been on demand or on grant of last overdrawn facility.

In this case, it is also a noteworthy fact, that the defendant partnership admitted the existence of a contract based upon granting of overdraft facilities. As evidence led by the bank established, the defendant partnership abided by the terms of the said contract. The plaintiff bank was, as stated in the judgement prevented from producing or furnishing written documents pertaining to the grant of the overdraft facility, in view of circumstances beyond its control, namely the riots of 1983.

Thus, in my view the said two judgements are distinct in nature, and in facts and circumstances and can be distinguished. The two judgements do not conflict with each other. *Helenluc decision* of the Supreme Court follows the grant of last over drawn theory and the Court of Appeal decision is based on acknowledgment of the debt.

Nevertheless, the reference in the above quoted statement of Wigneswaran J. *in the absence of special arrangements overdraft dues are repayable on demand and limitation will begin to run from the promised date of repayment of a fixed term loan or from the date of demand in any other case* appears to be the bone of contention between the parties in the instant appeal heard before this Court.

As I see, in respect of "overdrafts", parties are at variance only with regard to a very narrow issue. If the overdraft is granted based on documentation (an offer and acceptance; a request and a written agreement) there is no issue, parties will be governed by same. If the agreement lays down a provision that a demand is a pre-condition or the overdraft is repayable on demand there is no issue, no controversy. That is why, as commented earlier, it is not possible to answer the question of law as formulated raised before this Court, there being no clarity or being unsure whether the word overdraft therein refers to a written undertaking or not. Generally, an overdraft is given, whether it be permanent or temporary for a particular period of time and/or with a particular credit limit or ceiling and advances could be drawn once or many times at the convenience of the customer and interest accrues on a daily basis on the outstanding sum. There is no hard and fast rule that a particular advance should be paid at a particular time. The overdraft is an ongoing facility and could be cleared by making payments (on the total outstanding including the interest) at the discretion of the customer, subject to it being within the agreed time and ceiling. In such a situation the question of law raised before this Court cannot be answered without referring to the said factors.

Thus, where there is no formal documentation, no verbal understanding of an overdraft been given, then in such a situation, when will prescription begin to run appears to be the narrow issue, that this Court will have to ponder, though the question of law raised before this Court covers the entire gamut of the law pertaining to overdrafts.

In my view the ratio of the two judgments relied on by the parties before us, and discussed in detail earlier can be distinguished and do not conflict with each other as adverted to before this Court. The Sri Lankan Courts have constantly held, that in the absence of formal documentation prescription begins to run from the last drawn date, subject however, to an acknowledgment of the debt which would extend the time period.

In another Court of Appeal judgement delivered in January1999 (prior to the two judgements referred to above) **Indian Overseas Bank Vs Ramdas and others 2000 (3) SLR 322** Edussuriya J. followed the last overdrawn date theory with regard to an overdraft given on an oral agreement. In the said judgement reference was made to certain English authorities as well as the Paget's Law of Banking (9th Edition), where the author questioned the applicability of the last drawn theory (enunciated in **Parrs Banking Company Ltd Vs Yates (1898) 2 QB 460**) and whether it is any longer good law, in respect of continuing guarantees. The above referred Court of Appeal judgement also refered to the Privy Council decision of **Wright Vs New Zealand Farmer's Co-operative Association of Canterbury Limited [1939] 2 AER 701,** where it was held, that so long as there is a continuing guarantee, the number of years which have expired since any individual debt was incurred is immaterial.

From the foregoing it is seen that though Sri Lankan Courts have followed the last overdrawn date theory, the applicability of same based on a 1898 case, has been queried by our Courts in present day context. Therefore, I wish to refer to the said query in somewhat detail.

In Paget's Law of Banking (15th Edition) John Odgers QC at page 141, discusses it as follows: -

"Over drafts on current account

An overdraft is money lent: 'a payment by a bank under an arrangement by which the customer may overdraw is a lending by the bank to the customer of the money'.

An overdraft limit will often be expressly agreed: this is called a 'planned' or 'authorised' overdraft.

If, however, a customer gives a payment instruction (including by a cheque that is presented for payment) that would take the customer beyond the agreed overdraft limit (if any), then that is treated as an implied request for a further overdraft. The bank is not obliged to honour the request and permit further borrowing, although it may have an obligation not to act irrationally. If the request is within the mandate, and the bank chooses to honour it, then that is an acceptance of the request and an agreement to provide a further overdraft. Such a further overdraft is often called an 'unplanned' or 'unauthorised' overdraft, and will often attract higher interest and charges.

An overdraft is repayable on demand and standard forms of charge over security invariably provide accordingly. Nevertheless, the right to repayment on demand should be exercised so as not unduly to prejudice the borrower's interests, in the shape, for example, of outstanding cheques drawn in the belief that the overdraft is available. The position was summarised by Ralph Gibson J in ***Williams and Glyn's Bank Ltd v Barnes*** *(1981 Com. LR 20)*

> 'There is an obligation upon the bank to honour cheques drawn within the agreed limit of an overdraft facility and presented before any demand for payment or notice to terminate a facility has been given. That obligation, however, does not by itself require any period of notice beyond the simple demand. The bank may, by the contract, be required to honour cheques drawn within the agreed facility before the demand for repayment or notice to terminate but still be free to require payment by the customer of any sums previously lent, which will be increased by any further cheques which the bank must honour.'

The drawing of a cheque or the issue of any other form of payment instruction may be taken as a request for an overdraft.

In the same book Paget's Law of Banking at page 129, the author discusses, **"Overdrafts"** under the heading **"Limitation of Actions"** as follows: -

> *"The limitation period in respect of a claim for repayment of an overdraft appears to commence from the date on which demand for repayment is made and not from the date on which the overdraft was granted. The contrary view was taken by the Court of Appeal in Parr's Banking Co Ltd v Yates, where a claim against a guarantor was held to be time-barred in respect of advances made more than six years before the issue of the writ. However, in modern banking practice, overdrafts are treated as repayable on demand, and it is thought that Parr's case does not represent the law today. In any event an unsecured overdraft which creates a debt the repayment of which is not conditional on demand appears to fall within s 6 of the Limitation Act 1980, and the cause of action would accrue on the date on which written demand was made."*

Thus it is seen from the above passages *firstly*, when a bank lends money to a customer on an arrangement expressly or otherwise, generally known as an overdraft, until the said arrangement is terminated, the bank is obliged to honour the arrangement. It could be terminated by notice or by a demand for payment and cause of action to sue arises at that point of time. *Secondly*, unsecured overdrafts where repayment is not conditional on demand also falls within the provisions of the UK Limitation Act and the cause of action arises on demand.

UK Limitation Act of 1980 specifically Sections 5 and 6, reversed the position at common law in respect of demand been made with regard to qualifying loans. The said Limitation Act at **Section 5** refers to action founded on **simple contract** and **Section 6** refers to special time limits for actions in respect of certain loans, more fully known as **qualifying loans** (which does not provide for a fix or determinable date for repayment of debt and does not make the debt repayable conditional on demand). Thus the author of Paget's Law of Banking states, that the limitation period in respect of a claim for repayment of an overdraft commences from the date on which demand for repayment is made and not from the date on which the overdraft was granted.

Further at page 549, the author goes on to state that modern bank guarantee forms obviate the need to consider such issues by providing for the guarantor to discharge his liability to the bank on service of written demand on him and such a demand will be essential to complete the bank's cause of action and time for the purposes of the Limitation Act of 1980, will run from the service of demand.

As we are aware, banking law and practice in this 21st century has evolved into a different arena in comparison to the **Parrs Banking Co. Ltd case** (supra) decided in the 19th Century. In UK, the law has kept abreast with the said trends and the common law pertaining to prescription has undergone many changes with the enactment of the Limitation Act of 1980, superseding the 1963 and the 1908 Limitation Acts.

However, in Sri Lanka the position is different. Limitation or prescription for written and unwritten agreements comes within the purview of the Prescription Ordinance of 1871. The said Ordinance does not provide for continuing guarantees or quantifying loans or loans which does not provide for repayment of a debt on or before a fixed or determinable date or repayable conditional on demand.

The concept of overdraft does not fit into the traditional wording provided for in Sections 6 and 7 of the Prescription Ordinance pertaining to written and unwritten agreements. It cannot be compartmentalized. Overdraft is a continuing agreement, written or unwritten, expressly or impliedly entered into by the parties. Overdraft is not a once and for all drawing or payment. It is issued for a length of time subject to a fixed ceiling. In the circumstances, I see merit in the modern approach pertaining to banking law and practice that demand ought to be the criterion.

However, the function of this Court is to interpret the Law. Reform of the Law is left to the Legislature. Nevertheless, I am of the view that this is an area which should be considered and looked into by relevant authorities and reforms made where necessary.

The modern approach to banking law and practice is not new to our Courts. In **Seylan Bank Limited Vs Intertrade Garments (Pvt) Ltd. SC CHC 32/98** (**2004 BALR 41),** Shirani Bandaranayake J., (as she then was) considered and analyed this position with referance to many decided cases and writings of eminent authors.

At this juncture, I wish to refer to Atkin L.J.'s observations in **Joachimson Vs Swiss Banking Corporation (1921) 3 KB 110 at Page 129,**

> *"the question appears to be in every case, did the parties in fact intend the make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention, the nature of the demand may be material"*

A demand made within a reasonable period of time and a demand to incorporate all sums due, should be a sine qua non, to filing an action, to commence a cause of action as referred to in the Prescription Ordinance. When entering into banking transactions, banks

should be more vigilant and cautious and grant facilities only on documentation, where minds meet and intentions are put on paper. If banks are lackadaisical in its action, if proper guidelines are not adhered to in granting banking facilities, the banks will have to face the consequences. As stated at the commencement of the judgement, I do not wish to delve into this aspect in detail or go into depth since it will not assist me to find an answer to the 1st question of law raised before this Court.

In **Bank of Ceylon Vs Aswedduma Tea Manufactures (Pvt) Ltd. SC (LA) Appeal 175/2015** dated **27-10-2017** a recent judgement of this Court pertaining to granting of temporary overdraft facilities, Anil Gooneratne J.'s observations are illuminating and thought provoking. The Court observed that the High Court erred, in holding that a legally binding agreement did not arise when overdraft facilities were granted and also erred in not considering the basic tenants of the Law of Contracts. Gooneratne J. went onto examine the grant of overdrafts from two aspects.

Firstly, the offer and acceptance, the basic rule of Law of Contracts. There was a written request and a bank memorandum that approved the request and posed the question, ***What more do you need?***

Secondly, drawing and offering of a cheque and honouring the cheque by the bank. On this issue Court relied on two English authorities, namely **Peter Royston Voller Vs Lloyds Bank Plc** No B 3/99/1177 dated 19-10-2000, an opinion of Wall J. of the Court of Appeal and **Barclays Bank Ltd. Vs W J Simms Son and Cooke (Southern) Ltd and another [1979] 3 AER 522** an opinion of Robert Goff J. and came to the conclusion, that where there is a meeting of mind an existence of a written contract is not required. Although in this case reference was not made to the demand theory or the last drawn theory, it espoused the cause of meeting of minds being the significant ingredient of an overdraft and went on to hold that after overdrawing your own current account and benefiting from same, a party is estopped from denying liability.

Thus, my considered view is that each case should be looked upon its merits. Its facts and circumstances. Sweeping statements will not do. Each instance should be analysed and considered and a determination made.

With regard to the instant appeal, I will borrow Gooneratne J.'s phrase and rephrase it to suit the appeal before us. ***What more do you need when you have acknowledged a debt?***

In concluding, I wish to refer to the Questions of Law raised before this Court, once again.

01. Where a bank has granted an overdraft facility, when does the prescriptive period commence, from demand or from the date of grant of the last overdraft facility?
02. Does a conditional acknowledgment of the debt come within the purview of Section 12 of the Prescription Ordinance?

In view of the facts and circumstances of this case and the superseding acknowledgment of the debt by the Defendant-Respondent, the 1st Question of Law raised before this Court will not arise for answer by this Court.

For the reasons enumerated in this judgement, I answer the 2nd Question of Law raised before this Court in the affirmative.

In the facts and circumstances pertaining to the instant appeal, I re-iterate that P5 is an acknowledgement of the debt by the Defendant-Respondent and when there is an acknowledgment of the debt, prescription commences to run from the date of acknowledgment of the debt. Therefore, the finding of the District Court that the plaint was not prescribed is correct and is in accordance with the law.

For the reasons adumbrated in this Judgement, I hold that the judgment of the Civil Appellate High Court of Kandy dated 04-10-2011 is erroneous and should be set aside.

Further I determine, that in view of the acknowledgment of the debt by the Defendant-Respondent, the plaint filed in the District Court was not prescribed and therefore, the Plaintiff-Appellant is entitled to the Judgement granted by the District Court.

The Judgment of the District Court of Kandy dated 14-09-2009 is affirmed.

Appeal is allowed.

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 for Leave to Appeal.

SC.Appeal No.203/16

SC.HC.CALA NO.430/2015

WP/HCCA/COL/173/2010(F)

D.C.Colombo 21391/L

Deniyadura Stephen De Silva

No.307, Muthuwella Mawatha, Modera,

Colombo 15.

Plaintiff-Respondent-Petitioner

Vs.

Reginet Anthony

No.97/9A, St James Street,

Colombo 15.

Defendant-Appellant-Respondent

BEFORE : **SISIRA J. DE ABREW, J.**

VIJITH K. MALALGODA, PC, J. &

P. PADMAN SURASENA, J.

COUNSEL : Athula Perera with Vindya Divulwewa for the Plaintiff-Respondent-Appellant.

Mrs. K. Sivapathasundaram with Daya Guruge for the Defendant-Appellant-Respondent.

ARGUED &

DECIDED ON : 27.02.2019.

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases. This is an appeal against the judgment of the learned Judges of the Civil Appellate High Court dated 12.11.2015 wherein, they set aside the judgment of the learned District Judge dated 07.10.2010. Learned District Judge by the said judgment held the case in favour of the Plaintiff. Learned High Court Judges however, by the said judgment set aside the judgment of the District Judge. When we read the judgment it appears that the learned Judges of the Civil Appellate High Court have set aside the judgment of the District Judge on the basis that the corpus had not been properly identified. Mr. Athula Perera who appears for the Plaintiff-Respondent-Appellant too submits that the learned Judges of the Civil Appellate High Court have set aside the judgment on the basis that the corpus had not been properly identified.

Mrs. Sivapathasundaram who appears for the Defendant-Appellant-Respondent too admits this position. Therefore, the most important question that must be decided is whether the learned Judges of the Civil Appellate High

Court were correct when they set aside the judgment of the learned District Judge. The Defendant-Appellant-Respondent (hereinafter referred to as the Defendant-Respondent) at the trial has raised issues of prescription relating to the disputed land. The disputed land is shown as Lot 3 in Plan No.10164 dated 22.04.2008. This Plan was prepared on a commission issued by the learned District Judge. The most important question that should be considered is whether the Defendant-Respondent is entitled to raise the point that the corpus had not been identified when the Defendant-Respondent has claimed prescriptive title to the corpus. In my view, when the Defendant-Respondent claims the disputed land (the corpus) on the basis of prescription, he is not entitled to raise the question of non- identification of the disputed land (the corpus) because when he raises the plea of prescription, he has impliedly admitted the identification of corpus. Therefore, the question that the corpus had not been properly identified cannot be raised in this appeal. Unfortunately, learned Judges of the Civil Appellate High Court have set aside the judgment of the learned District Judge on the basis that the corpus had not been properly identified. As I pointed out earlier the Defendant-Respondent has impliedly admitted that he has identified the corpus. When we consider all the above matters we are unable to permit the judgment of the Civil Appellate High Court to stand. Further, we note that the Defendant has not disputed the identification of corpus in the District Court. This Court by its order dated 27.10.2016 has granted leave to appeal on questions of law set out in paragraph 22(a)(b)(c)(d) and (e) of the Petition of Appeal dated 18.12.2015 which are set out below,

(a) In the circumstances of the case, has the defendant disputed the identification of the corpus, in that whether lot 3 in plan 10164 dated 06.06.2008 is the portion of land encroached by the defendant from the land described in the 1st schedule to the amended plaint?

(b) Are lots 1, 2, 3 in plan 10164 dated 06.06.2008 form the subject matter of this case?

(c) Is the plan 10164 dated 06.06.2008 a valid plan, in that has the Commissioner of Surveyor had prepared the said plan according to available information?

(d) In the circumstances pleaded is the judgment of the High Court according to law and according to the evidence adduced in the case?

(e) In the circumstances pleaded is judgment of the District Court according to law and according to evidence adduced in the case?

For the above reasons, we answer the question No.1 as follows.

The Defendant has not disputed the identification of the corpus. When we answer the question No.1, we hold that the question No.2 & 3 do not arise for consideration.

We answer question No.4 as follows,

The judgment of the High Court is not according to the law.

We answer question No.5 in the affirmative.

For the above reasons, we set aside the judgment of the learned Judges of the Civil Appellate High Court dated 12.11.2015 and affirm the judgment of the learned District Judge.

Appeal allowed.

Sgd. **JUDGE OF THE SUPREME COURT**

VIJITH K. MALALGODA, PC, J.
I agree.

Sgd. **JUDGE OF THE SUPREME COURT**

P.PADMAN SURASENA, J.

I agree.

Sgd. **JUDGE OF THE SUPREME COURT**

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

In the matter of an appeal with leave of the Supreme Court in terms of section 5 (c) 1 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

DFFCC Bank PLC
No. 73/5, Galle Road,
Colombo 03.

Plaintiff

SC Appeal 211/2017

SC/HCCA/LA 390/2017
WP/ HCCA/COL/07/2017(RA)
DC/ Colombo Case No. 00137/2014/DDR

Vs,

1. **Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan**

2. **Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan**

Both of
No.01, Charles Circus, Colombo 03

Presently of
No. 30/1/3, Glen Arber Place, Colombo 03

Defendants

And then between

1. **Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan**

2. **Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan**

Both of
No.01, Charles Circus, Colombo 03

Presently of
No. 30/1/3, Glen Arber Place, Colombo 03

Defendant-Petitioners

Vs,

DFFCC Bank PLC
No. 73/5, Galle Road,
Colombo 03.

Plaintiff-Respondent

And between

1. **Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan**

2. **Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan**

Both of
No.01, Charles Circus, Colombo 03

Presently of
No. 30/1/3, Glen Arber Place, Colombo 03

Defendant-Petitioner-Petitioners

Vs,

DFFCC Bank PLC
No. 73/5, Galle Road,
Colombo 03.

Plaintiff-Respondent-Respondent

And now between

1. Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan

2. Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan

Both of
No.01, Charles Circus, Colombo 03

Presently of
No. 30/1/3, Glen Arber Place, Colombo 03

Defendant-Petitioner-Petitioner-Petitioners

Vs,

DFFCC Bank PLC
No. 73/5, Galle Road,
Colombo 03.

Plaintiff-Respondent-Respondent-Respondent

Before: **Hon. Nalin Perera C J**
Hon. Vijith K. Malalgoda PC J
Hon. M.N.B. Fernando PC J

Counsel: S.A. Parathalingam, PC with Sagara Kariyawasam instructed Ms. Kethake Siriwardena for the 1st Defendant-Petitioner-Petitioner-Petitioner

Mangala Niyarepola with Ms. Kushini Gunaratna instructed by Ms. Kethake Siriwardena for the 2nd Defendant-Petitioner-Petitioner-Petitioner

Nigel Hatch, PC with Dilumi de. Alwis instructed by Julius and Creasy for the Plaintiff-Respondent-Respondent-Respondent

Supported on: 11.01.2019
Decided on: 18.02.2019

Vijith K. Malalgoda PC J

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) instituted action before the District Court under the Debt Recovery (Special Provisions) Act No 2 of 1990 against the Defendant-Petitioner-Petitioner-Petitioners (hereinafter referred to as Petitioners) seeking Recovery of sums amounting to Rs. 87,538,661.34 and Rs. 7,666,923.97.

The District Court on 5th August 2014 issued an order Nisi in the 1st instance and thereafter heard the Petitioners and made order granting the Petitioners conditional leave to appear and defend subject to the said Petitioners depositing a sum of Rs. 60 Million.

Due to the failure by the said Petitioners to secure the guarantee, the Respondent Bank has secured a decree absolute in its favour to recover sums of money referred to above against the Petitioners as judgment debtors.

The Petitioners have sought Special Leave to Appeal against the said decision of the District Court to the High Court of the Western Province and to the Supreme Court but were not successful in obtaining special leave from both courts.

As revealed before us, the Respondent Bank had then moved the District Court under section 219 of the Civil Procedure Code and obtained an order to issue notices initially on the registered Attorney of the Petitioners namely Ms. Anju Ukwatte, and thereafter both on the Petitioners as well as on the registered Attorney in case No 137/14 DDR.

In the absence of either the Attorney-at-Law or the Respondent appearing before the said District Court, the Court had proceeded to be effected the Controller of Immigration and Emigration, the civil warrant already issued on the Petitioners.

On 9th June 2017 the 1st Petitioner while on his way to a foreign country was detained by the officers of the Department of Immigration and Emigration at the Katunayake Air Port. The 1st Petitioner, who was subsequently produced before the Air Port Police by the officers of the Department of Immigration and Emigration, was thereafter produced before the Magistrate's Court of Negombo under case No. AR 3640/17 and released on bail subjected to the bail conditions being fulfilled after impounding the passport of the 1st Petitioner.

Upon being released on bail, the 1st Petitioner filed a petition supported by an affidavit before the District Court in case No. 137/14 DDR seeking that,

a) To recall the warrant issued on him
b) To release the passport already impounded by the learned Magistrate Nigombo in case No. AR 3640/17

However by order dated 14.06.2017 the learned Additional District Judge had only made order recalling the warrant upon a surety bond of Rupees five million being deposited in addition to the two sureties before the Magistrate's Court of Negombo but put off the order with regard to the release of the passport.

By order dated 04.07.2017 the learned Additional District Judge refused the said application for the release of the passport and made order to continue with the travel ban already imposed on the 1st Petitioner.

As further observed by me, the learned Additional District Judge was mindful of the circumstances under which an order was made under section 219 (2) of the Civil Procedure Code when refusing the application by the 1st Petitioner to lift the travel ban on him and to release the passport.

Being aggrieved by the said order and several orders made prior to that date by the Additional District Judge, the Petitioners have filed a revision application before High Court of the Civil Appeal of the Western Province holden in Colombo to set aside the said orders and also seeking interim relief upon the travel restriction imposed on them in case No 137/14 DDR.

When the said application was supported before the High Court of Civil Appeal, the said court after considering the material placed before court, decided to issue notice on Respondent as prayed for by the Petitioners in paragraph (a) of the prayer to the petition but refused granting interim relief as prayed in paragraphs (g) and (i) to the prayer which includes,

i) Suspension of the travel restriction

ii) Stay of further proceedings in case No 137/14 DDR

The Petitioners being dissatisfied by the refusal of granting interim relief including the suspension of the travel restriction, had appealed against the said order of the High Court of Civil Appeal dated 04.08.2017 to the Supreme Court praying inter alia.

b) Grant the Petitioners leave to appeal from the portion of the order of the High Court dated 4th August 2017 marked as A8 refusing an interim order suspending the operation of the travel restrictions imposed on the 1st and 2nd Petitioners as prayed in prayer (g) of the petition of the Petitioner to the High Court

c) Set aside the portion of the order of the High Court dated 4th August 2017 marked as A8 refusing an interim order suspending the operation of the travel restriction imposed on

the 1st and 2nd Petitioners as prayed for in prayer (g) of the petition of the Petitioner to the High Court

j) Grant an interim order suspending the portions of the order of the Additional District Judge dated 14th June 2017 marked A5 (b) and 4th July 2017 marked A6 in relation to the refusal of the Additional District Judge to recall the travel ban imposed on the Petitioners

k) Grant an interim order suspending the operation of the travel restriction imposed on the 1st and the 2nd Petitioners

When the said application was supported before the Supreme Court on 31.10.2017, this court granted leave to appeal on questions of law raised in paragraph 26 (e) and (h) which reads as follows;

e) The learned High Court Judges have failed to consider the scope and ambit of section 219 of the Civil Procedure Code

h) The learned High Court Judges have failed to consider the fact that the learned District Judge had erred in law by imposing bail conditions such as impounding of the passport of the Petitioners

However this court refused granting any interim relief as prayed by the Petitioners.

As observed by me, what is pending before this court now is the argument of the main matter, on the questions of law the leave was granted by this court on 31.10.2017. When considering the sequence of events referred to above, it is clear that the Petitioners have gone before the High Court of Civil Appeal on two main issues, i.e. firstly on the ambit of section 219 of the Civil Procedure Code and secondly on imposing travel restrictions by impounding the passport of the 1st Petitioner. The learned Judges of the High Court of Civil Appeal refused to grant interim relief by

lifting the travel restrictions and releasing the passport of the 1st Petitioner but decided to hear the revision application. Being dissatisfied with the said refusal of the interim relief, the Petitioners have come before this court. This court too had refused to grant any interim relief but decided to consider whether the learned Judges of the High Court of Civil Appeal had erred in law by failing to consider the question of imposing travel restrictions such as impounding of the passport by the District Judge and the ambit of section 219 when compared to the order already made by the District Judge.

In the said circumstances imposing a travel restriction such as impounding the passport of the 1st Petitioner is a matter to be decided by this court when the main appeal is argued by this court.

The 1st Petitioner, whilst the main appeal is pending, has now come before this court and moved that the inquiry against the 1st Petitioner under section 219 of the Civil Procedure Court is concluded as against him and therefore, to make order that the passport of the Applicant-Petitioner be released and the travel ban imposed on the Appellant-Petitioner be waived.

As for as the case before this court is concerned, the two Petitioners namely, Shaeedul Hijry Mohamed Risan alias Shaheedul Hijry Mohamed Rishan and Wedaralagedara Mohamed Mubarak Siththi Sermila alias Sithy Sharmila Rishan have complained of a travel ban imposed on them by the District Court pending a 219 inquiry against them, and what is to be decided by this court is the legality of the said order imposed by the District Court and that is what to be decided at the conclusion of the main appeal filed by the two Petitioners before this court. When the legality of the travel ban imposed by the District Judge is to be decided by this court, it is premature for this court to make any order directing the learned District Judge to lift the travel ban and release the passport to the 1st Petitioner.

In the said circumstances, I refuse to make any order as prayed by the 1st Petitioner in the aforesaid petition dated 21st November 2018.

Judge of the Supreme Court

Nalin Perera C J

I agree,

Chief justice

M.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 Article 154P (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 Holden in Negombo dated 29th June 2015.

SC/APPEAL/ 212/2016
SC/ APPEAL/ 213/2016

S/C Spl LA Case 207/2015

HC Case No. HCALT 736/ 2012

L/T Case No. 21/ 464/ 2000/ N/

Christopher W.J. Silva,
18, Skelton Road, Colombo 05.

Applicant

~Vs~

Sri Lankan Airlines Limited,
Level 19~22 East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

Respondent

AND BETWEEN

Christopher W. J. Silva,
18, Skelton Road, Colombo 05.

Applicant-Appellant

-Vs-

Sri Lankan Airlines Limited,
Level 19-22 East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

Respondent-Respondent

AND NOW BETWEEN

Christopher W. J. Silva,
18, Skelton Road, Colombo 05.

Applicant-Appellant-Petitioner

-Vs-

Sri Lankan Airlines Limited,
Level 19-22 East Tower,
World Trade Centre,

Echelon Square,
Colombo 01.

Respondent-Respondent-Respondent

Before: Buwaneka Aluwihare PC. J
H.N.J Perera J
Vijith K. Malalgoda PC. J

Counsel: Mohamed Adamaly with Janaka Abeysundera for the Appellant

Manoli Jinadasa with D.Gunsthilaka for the Respondent-Appellant-Respondent instructed by Pieris & Pieris.

Argued on: 27/06/2017, 12/07/2017, 31/07/2017, 21/11/2017, 22/05/2018, 08/06/2018, and 12/07/2018.

Decided on: 22/03/2019

Aluwihare PC. J.,

The parties to SC Appeal 212/2016 and SC Appeal 213/2016 have come before this Court impugning the High Court Orders in HCALT 761/2012 delivered on 29. 06. 2015 and in HCALT 736/2012 delivered on 02. 09. 2015 overturning the decision given in LT 21/464/2000 N by the Labour Tribunal on 12. 11. 2012.

At the outset, it must be noted that the parties in SC/APL/213/2016 and SC/APL/212/2016 agreed to abide by one common judgment given in respect of both cases.

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

1. Did the learned High Court Judge err in law in failing to appreciate that the application to the Labour Tribunal and the substantive case of the Petitioner was on the premise of the termination of his services as a Flight Control Executive and that the incidents relating to the termination of the Petitioner's Cadet training were only a preamble incident to the termination of the Petitioner's employment?

2. Did the learned High Court Judge err in law in failing to consider the findings of fact in the order of the learned President of the Labour Tribunal, especially as regards the harassment meted out to the Petitioner, the termination of the Petitioner's Flight Cadet Training, the termination of his employment and the blatant fabrication of evidence and documents by the Respondent?

3. Has the learned High Court Judge erred in law in failing to appreciate the established judicial authority that the Court of Original Jurisdiction, viz., the Labour Tribunal, is the best judge of the facts?

4. Did the learned High Court Judge err in law in completely failing to consider the evidence relating to the unlawful and unjust termination of the Petitioner's employment by the Respondent?

5. Has the learned High Court Judge erred in law in failing to enhance the compensation awarded by the Labour Tribunal?

On 27. 06. 2017, the Respondent was permitted to raise an additional question of law as follows;

> "Is the order of the Provincial High Court that the Respondent-Respondent-Appellant's allegation that the Respondent-Respondent-Respondent has intentionally terminated his services is not acceptable is correct and proper in law as per the facts & law of this case?"

The Applicant-Respondent-Petitioner in both cases (hereinafter the "Petitioner") joined Air Lanka (hereinafter the "Respondent"/"Respondent company") in 1985 and held the post of Flight Control Executive where he was responsible for the overall management of the flight program.

It has been the Petitioner's long-standing ambition to become a Pilot. In pursuit of this ambition, the Petitioner in 1998, applied for the post of 'Cadet Pilots' in the Respondent Airline and went through the preliminary selection process. He also subjected himself to a medical examination where he was disqualified on account of a certain medical condition in his eyes. Thereafter, at his own cost he travelled to the United Kingdom and obtained a CAA-UK class 1 medical certificate which was the standard required to become a cadet pilot. (Vide documents marked "A9"

and "A9a") Even after fulfilling the necessary qualifications, the Respondents refused him to proceed to the Cadet Pilot training and at that stage the Petitioner filed a fundamental rights application SC FR 172/99 against the Respondent company. The parties reached a settlement in the matter outside Court and the Petitioner was given a written assurance marked "A11" by the Respondent that he would be allowed to take part in the Cadet Pilot training up to the 'Simulator Check' which is the final step of the course. Where one succeeds at the said Simulator Check or, in aviation parlance knows as the 'Sim Check', one could become a pilot.

After the settlement was reached, in March 1999 the Petitioner left for Singapore to take part in the said Cadet Pilot course. He was only able to join the program midway but showed diligence in covering the missing sessions and took part in the remaining sessions. Details of these sessions, which have been meticulously laid before the Labour Tribunal and form a part of the brief, are unnecessary for the present purpose. Suffice to say that these sessions were conducted by flight instructors. The first 7 sessions were overseen by Chief Pilot M. O. Gooneratne under whose guidance, the Petitioner fared well. Thereafter, Captain Aleem was scheduled to take over the remaining sessions.

The Petitioner successfully completed the first sessions and was thereafter put under the guidance of Captain Aleem to receive training in the second session. According to the Petitioner, Captain Aleem made it very difficult for him to follow the instructions and continue his training.

In November 1999, Captain Aleem instructed the Petitioner to return to Sri Lanka. His training was stopped half way and he could not face the 'Sim Check" as he could never complete his training. He claims that he was never made aware till the constructive termination in March 2000 that he 'failed' the training as a Cadet Pilot. It is also important to note that he stopped receiving the salary post July 1999 (vide "A17") without any reasons being made known to him.

When the Petitioner returned to Sri Lanka in November 1999, he was informed by the Manager Flight Operations that the Company has been restructured and that the post he was serving, "Flight Control Executive", has now been retitled as "Duty Manager". During the same conversation he was asked to apply for the re-designated post. Accordingly, he preferred an application and was called for the interview on 24th January 2000 (video "A15 (B)"). On the said day, when the Petitioner went for the interview, he was informed that the interview was postponed and was asked to come again on 27th January 2000. Upon receiving this news, he immediately informed the management in writing (vide "A16") that he has an 'urgent situation' which prevents him from attending the interview and to consider giving him an alternative date for the interview. This was never responded to by the management. Subsequently upon making inquiries he came to learn that the interviews were in fact held on the 24th January 2000 and pursuant to that interview, Mr. Senaka Athukorala – the subordinate of the Petitioner who was overseeing the work during the Petitioner's leave had been appointed to the said 'Duty Manager' post. (Vide "A49")

Thereafter, he was asked by the Manager Flight Operations to report to work on 06th March 2000 to the post of "Fuel & Performance Executive." (Vide page 93, 94) He complied with this request, but it is his stance that upon learning that the new post belonged to a lower grade and was significantly different to what he was handling previously, he protested against it. It is the Petitioner's position that he never accepted this post and that although he reported to work from 06th March 2000 to 14th March 2000 he didn't have a desk or a chair. He had passed a week in that liminal state as a guest in the work stations of others. In her evidence, Manager Human Resources admits that she had no personal knowledge about whether the Petitioner had been assigned a proper work station. (vide p. 691 and the Labor Tribunal order pages 1609, 1610).

On 14th March 2000 the Petitioner received his letter of appointment (Vide "A20") where it was brought to his attention for the first time that he has failed the cadet pilot test. The letter of appointment also informed that he was placed in "Grade 8B" and was to be put on 'probation' in the said position. The salary was lower than what he earlier drew. Accordingly, on the very following day, he sent a letter informing the management that he considers his employment to have been constructively terminated by them. Thereafter he received a phone call from his superior where he was told that his career in aviation was finished. Several days later, the Respondent sent in a letter ("A 24") asking him to report to work on 06th April 2000, failing which he would be deemed to have vacated his post.

It is over the termination of the employment, that the parties took the matter before the Labor tribunal.

On behalf of the Respondent it is stated that after the aforesaid out of Court settlement in SCFR 172/1999, the Petitioner entered into a separate agreement marked "R 9" which *inter alia* stipulated that the Company could terminate the Cadet Pilot course where the trainee fails to make satisfactory progress in the course of study. They further contended that Captain Aleem's assessment in the second session of the Cadet Pilot Training shows that the Petitioner has shown only incremental progress and on his recommendation the training had to be stopped.

They further submitted that by the time the Petitioner returned to Sri Lanka, his post had ceased to exist and already been re-designated. The advertisement calling for fresh applications for the fresh post is marked as "A 15 (a)" and bears a date 05th November 1999, prior to the Petitioner's arrival in Sri Lanka. The Respondent further stated that, on account of this factor, the management could not have reinstated him in his previous position but that they promptly informed him to apply for the newly designated position. His application was accepted and was called for the interview. It was his failure to be present at the interview that placed him at a disadvantage. Nevertheless, the Respondents asserted, that recognizing his

15 years of service, they offered him an alternative employment in the company and that when he reported to work he accepted the same. But that on his own initiative, he refused to come to work from 06th April onwards which left no choice for the company but to consider as he has vacated his post.

The Respondent has produced a document marked 'R-12' in the Labor Tribunal in an attempt to prove that the Petitioner's post as 'Flight Control Executive' has been terminated retrospectively and that he would be paid only an allowance as a trainee. The genuineness of this document has been vigorously disputed by the Petitioner. The learned President of the Labor Tribunal has agreed that 'R-12' is ingenuine. (Vide pages 1605-1607)

At the end of the trial, the Labor tribunal decided that it was constructive termination and ordered a sum of Rs. 2,195,588. 60/= as compensation. The Respondent-Appellant in HCALT 761/2016 (in the present case the Respondent Company) appealed to the High Court impugning that the Labor Tribunal erred when the Tribunal decided it as constructive termination while Applicant-Appellant in HCALT/ 736/ 2016 (in the present case the Petitioner) appealed to the High Court on the ground of inadequate compensation.

The learned High Court Judge, in appeal overturned the decision and made a finding that there was vacation of post and reduced the compensation to Rs.250, 000/=. It is important to note that there were no oral submissions before the learned High Court Judge and that the matter was decided on written submissions. In his judgment, the learned High Court judge places emphasis on the medical condition of the Petitioner and holds that that Respondent was correct in terminating the Cadet Pilot training. He further observes that the Petitioner was offered an alternative employment and that it was the Petitioner who determined his contract of employment. It is pursuant to this decision that the parties have come before this Court.

Of the questions of law raised, except the question on the quantum of compensation, the rest involve as to whether the learned High Court Judge was correct in the factual determination.

Firstly, I make haste to observe that the learned High Court Judge erred when he concluded that the Petitioner's performance at the Cadet Pilot's training provided a justifiable basis to recall him to Sri Lanka and offer him a different employment.

With due deference, it seems that the learned High Court Judge has concerned himself with an important, yet unconnected matter to the question of termination. There can be no doubt that parties' positions in relation to the medical suitability of the candidate and the events that transpired during the training are highly contentious. A good portion of the Petitioner's cross examination and Captain Aleem's evidence deal with the events that took place in relation to the training. (Vide pages 71-88, pages 316-318, pages 1091-1180 and "R15"- "R22") Although these incidents provide a definite background to what happened thereafter, the issue of termination in fact arises with regard to the restructuring and the interview process and not pursuant to the Cadet Training. As the learned President of the Labor Tribunal has most prudently observed "*ඒ අනුව සලකා බලන විට පමණක් අලීම් නැමති අධීක්ෂණ නිලධාරියා ඉල්ලුම්කරු සම්බන්ධයෙන් සාධාරණ සහ යුක්ති සහගත ලෙසකින් කටයුතු කර නොමැති බව පෙනී ගිය ද , මා විසින් ඉහතින් සඳහන් කර ඇති තත්වය අනුව ඉල්ලුම්කරුගේ යෝග්‍යතාවයන් පිලිබඳ නිර්දේශ ලබා දීමේ හැකියාව ඇත්තේ ඉහත විශේෂඥයින්ට පමණක් බැවින් ඒ සම්බන්ධයෙන් විනිශ්චය සහාව මැදිහත් වීම සාධාරණ නොවන බව පෙනී යන කරුණකි.*" (vide page 1603). It indeed is a sphere that neither the Tribunal nor the High Court could make a pronouncement on.

What matters is the point at which the restructuring took place. And as correctly identified by the learned President of the Labor Tribunal, up to the point of the interview, the post of 'Flight Control Executive' had existed within the company. Manager-Human Resources, Anne Seneviratne has on several occasions admitted

that the actual restructuring took place somewhere in May 2000. (Vide, pages 815, 822-823) No doubt, by then the managerial plans to remove the said post have already crystalized. There can be no variance in that regard. For, even at the point the Petitioner came to Sri Lanka, the advertisement calling for application was in circulation. Nevertheless, it is also true that till such time the interview was held and a new officer was chosen, a different officer, other than the Petitioner, was overseeing the work assigned to that post. (Vide evidence in pages 834-844) In fact, evidence has been led to show that it is customary to reinstate an employee in their designation once they have returned from their training. As per document marked "A 31", Mr. U. L. R. Seneviratne who had returned to Sri Lanka after the training has resumed his work in the previous position. The Respondent has not sufficiently explained as to why they singled out the Petitioner and asked his subordinate to continue to oversee the work, which was legitimately the job of the Petitioner.

It is pertinent to briefly refer to the grading system at this point. The Petitioner's post as "Flight Control Executive" belonged to "E III" cadre prior to the restructure. With the restructuring, class "E III" was regraded to "8A" provisionally in April 2000 and equated to Grade 9 in June 2000. (Vide pages 385, 386 and "A 49" and "A 47"). The Manager - Human Resources in her evidence has stated that the new post 'Duty Manager' was a notch higher than the earlier 'Flight Control Executive' since it was a conjugation of two designations with increased responsibilities. She has further stated that owing to this, the new post was elevated to 'Grade 9' and that the Petitioner in any event could not have qualified for the same as his equivalent grading under the new system was "8B." (vide her evidence at page 607-611, 622, 920, 927). However, the documentary proof clearly indicates that Grade 8A and later Grade 9 were Grade E III's counterparts in the new scheme. It is also true that the Petitioner's subordinate who was in a lower grade than he was, subsequently became eligible for this position (vide evidence in pages 834-844). In contrast, the Petitioner who belonged to "Grade 8A" or "Grade 9" was given

"Fuel Monitoring Executive" a post which belonged to "Grade 8B". This mismatch in treatment and the demotion to "Grade 8B" seems surreptitious and unsupported by any rationale.

The Petitioner complains that requiring him to serve a probationary period of 6 months in the new designation was humiliating and malicious. I am not fully inclined to agree with this view as the Respondent company has categorically stated that it is customary to place officers in probation when they assume work in a new post. Several others who were given different appointments have been asked to comply with the same requirement. (Vide "R 28", "R 27").

At the same time however, the company purports to take up the position that he was offered that employment both because he could not go through the interview and because he has 'failed' the cadet pilot test. I think it is beyond any controversy that this last finding is an absolute mendacity. The evidence clearly speaks that the Petitioner could not complete the training. As I mentioned earlier, irrespective of the strained relationship between the instructor and the Petitioner, it is palpably wrong to state that he failed the test. He could only be deemed to have failed only if he went through the simulator test, which he did not.

Therefore, the purported failure cannot justify offering a lower position. However, if the company offered that position as a way of ensuring the continuance of a 15-years-long employee's career, that would be a different matter altogether. However, the history of discrimination and victimization seems to speak against this inference.

The company's failure in providing him a work station, arbitrarily stopping his wages midway into the training, failure to respond to his request asking for an alternative day for the interview, and placing him in a lower grade without sufficient explanation cumulatively does lend credence to the Petitioner's version that he has been mistreated by the company. As an employee who had served the company for 15 years, and who remained in his service till March 2000, the

company ought to have considered his grievances. I fully agree with the Petitioner that when he disclosed that there was an 'urgent situation' which prevents him from attending the interview, at the very least considering his long-standing service, his request ought to have been considered. The Respondent later seemed to agree that attending to his ailing mother is a reasonable excuse for foregoing the interview. However, their position that the Petitioner ought to have disclosed the same in the letter is unwarranted. If they had prompted to inquire, I believe the Petitioner would not have withheld the information.

From the record and the evidence placed before the Labor Tribunal, it appears to me that the management, despite admitting having 'stringent procedures' (vide pages 655-658), have mostly conducted their work based on verbal trust and assurances. The whole affair is an unpleasant result of giving and relying on verbal assurances. While it is undisputed that the informal structures help foster trust and confidence among work colleagues, for the sake of propriety they must also diligence in following due process. If there had been plans to restructure the posts, there was a duty on the Respondent to relay that message to its existing employees to keep them abreast of the developments. If a trainee has poorly performed at a training for which the company has paid, they ought to warn him of his performance. If the company decides not to grant an exception to the interview date, they ought to inform their stance to the applicant. It is precisely the failure to uphold their end of the bargain at each of these steps that paved the way for the present cause of action.

Yet, I stop short at believing the Petitioner's claim that he was 'literally kicked out of the company because he wanted to become a pilot'. While the Company may have looked unfavorably at the unyielding nature of the Petitioner, I do not believe that the management concocted a devious plan to sack the Petitioner because he was too ambitious. But it cannot escape the obvious conclusion the management has been persistently negligent and extremely careless in their treatment towards

the Petitioner to the point where they made it impossible for the Petitioner to continue his services.

Irwin Jayasuriya points out in ***The Concept of Misconduct in the Termination of Employment*** at page 91 that constructive termination takes place, *inter alia*, when the employer refuses to pay the legitimately due salary to the employee or where the salary is reduced or withheld without any reason being given, when the employer unilaterally varies the terms of the contract and when the employer unilaterally demotes the employee in grade or service. The Petitioner has drawn our attention to case law that finds demoting and reporting to a junior officer as amounting to constructive termination. **(Pfizer Limited v Rasanayagam (1991) 1 SLR 290)**.

These developments in law are on par with the developments in English Jurisprudence. At the same time, it must be noted that the doctrine of constructive termination is beset with a certain degree of uncertainty and Courts must take great care not to lightly find that every conduct amounts to a constructive termination. Jurisprudence in this regard has evolved from breaches of direct obligations in the contract of employment to encompass breaches of implied terms as grounds for constructive termination. These are violations which reach the very root of the contract and render further co-operation impossible.

While acknowledging these developments, there can be no harm in reiterating the observations made by the UK Court of Appeal in **Western Excavatina (ECC) Ltd v Sharp (1978) 1 All E.R. 713** that constructive termination must be a breach of contract and not a breach of reasonable conduct. In my opinion, whether a particular conduct amounts to a breach of a direct or implied contractual obligation must be assessed within each factual matrix. A finding in one case that a long-serving employee ought to be given consideration should not be taken as giving rise to a '*right to have their way*' in every situation. If Courts were to blindly follow precedence without heeding to the factual situations unique to each case, it

would loosely assimilate every conduct which may not involve a breach as constructive termination. (See pages 213-217 in ***The Contract of Employment*** by S. R. de Silva)

Bearing that caveat in mind, I am of the opinion that, in the present case the facts warrant a finding of constructive termination. The Petitioner has not at any point acted in a malicious way to disrepute or financially affect the Respondent company. He is not the typical malleable employee that most Companies prefer to have and he has been resolute in his determination to become a pilot. But that is clearly not a ground for a penalty. The learned President of the Labor Tribunal has observed that acts of victimization and discrimination that the Petitioner had to experience warrant a finding of constructive termination of the employment. (Vide page 1613)

In these circumstances, I do not believe that the decision of the learned President of the Labor Tribunal should have been interfered with. Although, my opinion in certain respects diverge from the opinion of the learned President, I do not believe that the decision has caused any miscarriage of justice or is erroneous. The decision is compatible with the evidence led before the Tribunal, and bereft of any glaring failures or unsupported conclusions. Where this is the case, the law is clear that the appellate platforms must not substitute the decisions of the primary court.

In **Caledonian (Ceylon) Tea & Rubber Estate v Hillman (79 NLR 421)** it was held that in order to set aside a determination of facts by the Tribunal "*the appellant must satisfy this Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse having regard to the evidence on record.*"

In **Pfizer Limited v Rasanayagam (1991) 1 SLR 290**, the Court endorsed the observation in the Caledonian Case as follows; "*Where an appeal under section 31(d)2 of the Industrial Disputes Act lies only on a question of law that parties are*

bound by the Tribunal's findings of fact, unless it could be said that the said findings are perverse and not supported by any evidence."

In **D.L.K. Peiris v Celltel Lanka Limited (2012) 1 SLR 170**, the Court has affirmed this line of thought; "*At the very outset it must be noted that whilst this Court undoubtedly has jurisdiction to evaluate the evidence put before the learned President of the Labour Tribunal aforesaid, this Court is equally conscious of the unequivocal recognition of the trial court as the most able, to determine questions of original facts and, therefore, of the need to accord its finding due deference*."

In the instant case too, there is evidence on record to support the findings of the learned President. In those circumstances, I do not think the learned High Court judge had any grounds to alter the findings of the Labor Tribunal. I further reiterate that the learned High Court Judge has erred by trying to forge a link between the termination of the training and the termination of the employment.

Accordingly, I answer the 1st, 2nd 3rd, & 4th questions in the affirmative, and answer in the negative the question of law raised by the Respondent.

That leaves only the question with regard to compensation. On 02. 11. 2016 the learned Counsel for the Petitioner had intimated to the court that "*He is willing to accept the amount awarded by the Labour Tribunal President. The Amount is Two Million One Hundred Ninety-Five Thousand, Five Hundred & Eighty-Eight rupees with interest accrued as a settlement without prejudice to his rights*". As such, I do not consider it necessary to examine the said question of law.

Accordingly, I allow the appeal and set aside the orders given by the High Court in HCALT 761/2012 delivered on 29. 06. 2015 and in HCALT 736/2012 delivered on 02. 09. 2015.

Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J PERERA

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 Special Leave to appeal against Judgment dated 30.05.2012 delivered by the Court of Appeal of the Democratic Socialist Republic of Sri Lanka Case bearing number C.A. 541/1998(F) D.C. Kuliyapitiya Case No. P/10428.

IN THE DISTRICT COURT.

R.M. Siriwardena of Ihalagama,
Alahenegama.

Plaintiff.

S.C. Appeal No. 221/2012
SC (Special) LA No. 121/2012
C.A. Appeal No. 541/98(F)
D.C. Kuliyapitiya Case No. 10428/P

Vs.

Rathnayake Mudiyanselage Jayathilaka
of Thalahenegama,
Alahenegama.

Defendant.

AND BETWEEN IN THE COURT OF APPEAL.

Rathnayake Mudiyanselage Jayathilaka
of Thalahenegama,
Alahenegama.

Defendant – Appellant.

Vs

R.M. Siriwardena of Ihalagama,
Alahenegame.

Plaintiff- Respondent.

AND NOW BETWEEN IN THE SUPREME COURT.

Rathnayake Mudiyanselage Jayathilaka
of Thalahenegama,
Alahenegama.

Defendant – Appellant – Petitioner.

Vs.

R.M. Siriwardena of Ihalagama,
Alahenegama.

Plaintiff – Respondent – Respondent.

Before : Prasanna Jayawardena, PC, J.
P. Padman Surasena, J. &
E.A.G.R. Amarasekara, J.

Counsel : Ms. Sudarshani Cooray for the Defendant – Appellant- Appellant.
Jacob Joseph for the Plaintiff – Respondent – Respondent.

Argued On : 18.02.2019

Decided On : 19. 12. 2019

E. A. G. R. Amarasekara J.

The Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the Plaintiff) by plaint dated 13.07.1992 instituted proceedings against the Defendant – Appellant – Petitioner (hereinafter sometimes referred to as the Defendant) in the District Court of Kuliyapitiya seeking to partition the land called "Bogahamulla Pahala Hena" more fully described in the schedule to the plaint. The position of the Plaintiff was that the Plaintiff and the Defendant were entitled ½ share each as per the pedigree set out in the plaint. Among other things the Plaintiff averred in his plaint that;

i. The original owner of the aforesaid land was one Jayamanna Arachchige Reginahamy.

ii. The said Jayamanna Arachchige Reginahamy had transferred ½ share to the Defendant, R.M. Jayathileke on a deed which cannot be traced since the documents in the Land Registry, Kurunegala had been destroyed.

iii. The other half share was also gifted to the Defendant, R. M. Jayathileke by the said original owner by Deed No. 6120 dated 21/12/1979 which was later revoked by Deed No. 9115 dated 10/10/1990.

iv. Thereafter, by Deed No. 9116 aforesaid original owner sold the said ½ share to Rathnyake Mudiyanselage Mendis Singho.

v. The said Rathnyake Mudiyanselage Mendis Singho transferred the said half share by Deed No. 844 on 10/10/1992 attested by P. Paranawithana, Notary public to the Plaintiff, R.M. Siriwardena.

vi. Accordingly, the land in suit should be partitioned giving ½ share each to the Plaintiff and to the Defendant.

The Defendant in his statement of claim dated 13/09/1994 had stated that,

i. The said original owner Jayamanna Arachchige Reginahamy was subject to the Kandyan Law.

ii. The said original owner transferred half share to him by deed of transfer No. 4847 dated 14/10/1968 attested by A. I. de S. Jayathileke, Notary Public.

iii. The said original owner by executing Deed of Revocation No. 57 dated 29/07/1991, revoked the gift of half share given in the form of a transfer deed by deed No. 9116 to Mendis Singho referred to in the plaint and gifted the said half share to the Defendant by Deed No. 58 dated 29/07/1991.

iv. Accordingly, the Defendant is entitled to the whole land in suit and the Plaintiff did not have any right to the land sought to be partitioned.

v. The Defendant is entitled to the land depicted in plan No. 93/6 dated 03.02.1993 made by licensed surveyor H.A.M.C. Bandara also by possession for a long period of time. (The said plan No.93/6 appears to be the preliminary plan made for the purposes of this case)

Thereby, the Defendant prayed for dismissal of the plaint and for a declaration that the Defendant is the owner of the land depicted in the aforesaid plan No. 93/6.

At the commencement of the trial, the parties admitted paragraphs 1,2,3,4 and 5 of the Plaint. Thus, the followings are among the admissions made by the parties.

I. Jurisdiction of the court.

II. The original owner of the land was the aforesaid Jayamanna Arachchige Reginahamy

III. The said Jayamanna Arachchige Reginahamy had transferred ½ share of the land sought to be partitioned to the Defendant.

IV. The said original owner gifted the other half share to the Defendant, R. M, Jayathileke by Deed No. 6120 and later on revoked the said gift by deed No. 9115 dated 10.10.1990.

V. Thereafter, by Deed No. 9116 the said original owner transferred (**සින්නක්කර විකුනා ඇත**) the said ½ share to Rathnyake Mudiyanselage Mendis Singho by deed No. 9116 dated 10.10.1990.

As per the issues raised before the learned District Judge the main points of contest between the parties were focused on the following matters;

- Whether the aforesaid deed No. 9116 was a deed of transfer for valuable consideration or a deed of gift executed in the form of a transfer,
- Whether it could be revoked by the original owner by the deed no. 57 dated 29.07.1991,
- Whether the original owner gained title back to a ½ share due to the said revocation by deed No.57 to gift it to the Defendant by deed No.58 dated 29.07.1991 and accordingly whether the Defendant is entitled to the whole land sought to be partitioned,
- Whether the Defendant is entitled to the land in suit by long period of possession, or
- Whether the said deed Nos. 57 and 58 are of any force or avail in law since deed No.9116 is a deed of transfer for valuable consideration,
- Whether the Plaintiff gets title from the aforesaid Rathnayake Mudiyanselage Mendis Singho through deed No.844 dated 10.01 1992.

Thus, at the trial in the District Court, the main contention revolved around whether Deed No. 9116, which was written in the form of a transfer, is a deed of gift or not, since if it is a deed of gift, it is subject to the subsequent revocation by deed No.57 executed by Reginahamy as a person subject to the Kandyan Law. The judgement was delivered on 08.09.1998 holding with the Plaintiff and ordering to partition the land sought to be partitioned. Thus, the learned District Judge held in favour of the Plaintiff rejecting the stance of the Defendant that the deed no. 9116 is a deed of gift which could be cancelled under the Kandyan Law by a subsequent deed.

Being aggrieved by the said judgement the Defendant lodged an Appeal to the Court of Appeal on the following grounds;

- Although the deed No. 9116 marked as P3 at the trial is titled as a Deed of Transfer (සින්නක්කර ඔප්පුවක්), truly, it is a Deed of Gift due to the fact that the consideration of Rs.25000/= had been renounced as a donation owing to the compassion towards the vendee as per the attestation of the said deed which was confirmed by the Notary Public while giving evidence.
- Said Deed had been revoked by the Deed No. 57 marked 1V2 and the property contained therein belongs to the Defendant through Deed No. 58 marked 1V3.
- Thus, the Defendant – Appellant is entitled to the whole land.

After hearing both parties, the Court of Appeal dismissed the Appeal of the Defendant and affirmed the judgment of the Learned District Judge of Kuliyapitiya by its Judgment dated 30.05.2012. The learned Court of Appeal Judge in his judgment while dismissing the appeal has commented as follows;

"*In fact, on the face of deed P3 it is nothing but a transfer deed. To state otherwise would certainly offend section 92 of the Evidence Ordinance. Notwithstanding the evidence of the Notary as held in Fernando v Cooray* ***(59 NLR 169)*** *parol evidence, even if admitted without objection will continue to offend section 92 of the Evidence Ordinance. No evidence to vary the consideration referred to in deed P3 would be admitted. The basic rule being that parol evidence cannot be adduced to contradict vary, add to or subtract from its terms. Rule is founded on obvious inconvenience and injustice. Lord Coke calls the uncertain testimony of slippery memory (The Conveyancer and Property Lawyer. E.R.S.R. Coomarasmamy pg.417) Oral evidence is not allowed where the effect of a document incidentally comes up for determination. Velan Alan Vs. Ponny 41 NLR 106. The mere statement of Notary is not sufficient to establish the truth of the payment of such consideration (****E.A. Diyas Singho v E.A. Hearath****) 64 NLR 492. I have also to stress that paragraph 5 of plaint was admitted by the Defendant-Appellant*." (Highlighted references in bold letters are inserted by me.).

When leave to appeal application was supported before this court, leave has been granted on the following questions of law as stated in paragraph 15(a) to 15(d) of the petition dated 09.07.2012, which are reproduced here verbatim;

a) "*Did the learned Court of Appeal and District Court erred in coming to finding that Deed No. 9116 (P 3) is a deed of transfer?*

b) *the court of Appeal and District Court err by failing to pay sufficient attention to the Section 2 of the Kandyan Law Declaration and Amendment Ordinance where a "Gift" has been also defined as a 'voluntary transfer'.*
c) *the Court of Appeal has erred by failing to pay sufficient attention to written submissions made to the Court of Appeal on behalf of the Defendant Appellant; the court of Appeal has not paid attention to the law laid down in Mudiyanse v Banda 16 NLR 53; Sujitha Kumarihamy v Dingiri Amma 72 NLR 409; Sumanasiri v Thilakarathne Banda 74 NLR 155; P.B.Rathnayake v M.B.S.J. Bandara 1990 1 SLR 156.*
d) *did the Learned Court of Appeal err in coming to the conclusion that since the title of the Deed No.9116 states as 'Transfer' the said Deed is a Deed of gift*. "(**Sic**)

(It must be noted that the Court of Appeal has not come to the conclusion that the Deed No.9116 is a deed of gift as suggested by above (d) but has affirmed the lower Court judgment considering the said deed as a deed of transfer.)

As per the journal entry dated 14.12.2012, both counsel have agreed that the appeal could be argued on the briefs that are available. Hence Parties have communicated to court that what is available in the brief is sufficient for the arguments they relied on.

Though there is no admission recorded at the commencement or during the trial that Reginahamy was subject to Kandyan law, it appears that it was common ground between the parties that she was subject to Kandyan law. For example, the Defendant had taken up the position that she revoked the deed No. 9116 by a subsequent deed as a person subject to Kandyan law. On the other hand, the Plaintiff also had referred to revocations by said Reginahamy of previous deeds of gift by subsequent deeds. Furthermore, no issue had been raised to challenge the position taken up by the Defendant stating that she was subject to Kandyan Law or to challenge deeds of revocation found in pedigrees of both side on the ground that she was not a person subject to Kandyan Law. Hence, from trial to the Appeal to this court, parties by their conduct have indicated that it is not in dispute that Reginahamy was subject to Kandyan Law.

As said before the dispute between the parties revolves around as to how one shall interpret deed No. 9116 to find the intention of the executant or grantor of the same, namely whether the intention was to execute a deed of gift or deed of transfer for a consideration at the time of its execution. In construing a deed, *the expressed intention of the parties must be discovered* - Vide **Jinaratana Thero Vs. Somananda Thero (1946) 32 C.L.W. 11.** In the said case then learned judges of this court had cited as follows;

"The *question is not what the parties intended to do by entering into the deed, but what is the meaning of the words used in the deed : a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions*."- Vide Lord Wensleydale's remarks in **Monneypenny Vs Moneypenny 1861 9 H.L.C. 114 at p.146**.

"It *is quite true I am not to conjecture or guess what might have been the intention of the parties but I am to consider the whole instrument. If there is a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give that construction*." – Vide Lord Denman C. J's Remarks in **Clayton Vs Glengall (1841, 1 Dr. and W 1**).

E.R.S.R. Coomaraswamy with regard to the interpretation of deeds and Intention Rule also has referred to the above citations and while further referring to **Gravenor Vs. Dunswart Iron Works (1929) A.D. 299 at 303, Mallen Vs. May 14.L.J.Ex. 48, Evidence Ordinance Section 98, Holland Vs Commissioner of Crown Land,(1877) Buch.105** has stated as follows;

"It is not the function of the judge to decide whether the words used by the parties do not possess some hidden meaning different from their true meaning. The surest method of arriving at the true meaning of the parties is to assume that they intended their words to have their ordinary grammatical meaning. But if this would lead to an absurdity or to something, which from the instrument as a whole it is clearly apparent the parties could not have intended, then the Court is justified in departing from the literal meaning of the words so as to give effect to the true intention of the parties. There are some exceptions to this rule: -

a) *If the deed contains words or phrases which have acquired a technical meaning, the Court will give to them their technical sense.*
b) *When words have acquired a special meaning by trade usage or the custom of a particular locality, the apparent meaning will not be the true meaning, and in such a case evidence of the trade usage or custom can be led.*
c) *Where it is clear from the contract taken as a whole, that the parties did not intend to use the words in their popular and ordinary meaning, the Court will give effect to their intention."* – Vide **THE CONVEYANCER AND PROPERTY LAWYER, Vol 1 Part 1, First Edition** Pages 423 and 424.

In **Reid Vs Coggans 1944 A.C. 91 at page 98** Lord Russell held that "*we must not start with any assumption or surmise of probability of intention on the part of the executant. His intention must be gathered from words of the document".*

Such intention may and usually does appear from the very form and commencement of the document. (E.R.S.R Coomaraswamy in his aforementioned book citing Burrows 46-47).

In **The North Eastern Railway Company Vs Lord Hastings (1900) A.C. 260**, H.L at pages 267 & 268, Lord Davey stated "*The principle on which an instrument of this description should be construed is not doubtful. It is (to quote the words of Lord Watson in an unreported case **Chamber Colliery Co. Limited V Twyerrould, H.L. July 20 1893**) that the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible, or (as was said by Lord Selborne) you may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to bear that interpretation: **Caledonian Ry.Co v North British Ry.Co. 6App. Cas 114*****).**

The afore quoted legal texts, decisions and authorities indicate that when interpreting a deed, a court has to;

- Find the expressed intention of the parties,
- Find such intention through the meaning of the words used in the deed while considering the whole document to ascertain the true meaning of its several clauses. Sometimes the very form of the document may help in ascertaining the intention.
- Interpret each clause in a manner to bring each and every clause or provisions in the deed into harmony with each other.
- Assume that words have been used to give their ordinary grammatical and literal meaning unless it leads to absurdity or it is clearly apparent that such interpretation departs from the true intention of the parties involved, where the court is allowed to deviate from the ordinary literal meaning to give effect to the true intention.
- Give technical meaning or special meaning in trade or customary usage or otherwise when the words are used to give such technical or special meaning.

It is worthwhile to see how the courts have interpreted when there was a conflict or ambiguity between two clauses of a deed. E.R.S.R Coomaraswamy refers to local and foreign cases in relation to inconsistencies between the recital and operative clause- Vide page 425 of the aforementioned Book.

'*If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred'-* ***Per Lord Esher in Ex parte Dawes 17 Q. B. D. 275 at 276****. Thus, where there is a conflict between the operative part of a deed of conveyance and the recitals, the terms of the operative part prevail-* ***Kumarihamy Vs. Maitripala 44 N.L.R. 153****. The recitals cannot control the operative part when the latter is clear. -* ***Bailey Vs. Lloyd, (1829) 5 Russ. 330 at 334.; l. R. C. Vs. Raphael. (1935) A.C. 96****. But they may be used to clear up doubts which arise on the words of the operative part. -* ***Orr vs. Mitchell, (1893) A.C. 238 at 254; Crouch Vs. Crouch, (1912) 81 L.J.K.B. 275.'***

The above quoted passage indicates that, if the operative part is clear it gets the priority over the other parts of the deed but other clauses can be used to clear up doubts that arise in relation to the words in the operative part.

In the backdrop of above rules and examples, now I would proceed to see whether the impugned deed No. 9116 had been properly construed by the learned District Judge as well as by the Court of Appeal.

At the commencement of the deed No.9116, just after its number it is titled as "**විකුනුම්කරය - රුපි: 25000.00**" (Deed of Transfer – Rs.25000.00). Just prior to the number of the deed, along with the date it is written **ඉඩම් 1 යි** (One Land). Thus, the titling at the beginning of the deed indicates it is a deed of transfer of a land for a monetary consideration. In other words, it's a deed written in relation to a sale of land. Further, the following terminology in Sinhala has been used in the operative part of the deed to indicate that it was a sale of land subject to the vendor's life interest for a consideration of Rs.25000.00 paid to the seller, payment of which has been admitted by the seller.

"…….. **රත්නායක මුදියන්සෙලාගේ මෙන්ඩිස් සිංඤේ මහතා විසින් මට ගෙවන ලද (ඒ බව මා විසින් මෙයින් පිලිගත්) ශ්‍රී ලංකාවේ භාවිතා වන මුදලින් රුපියල් විසිපන්දහසක් (රු.25000.00) කරණකොට ගෙන ඉහත කී විකුණුම්කාරී වන මට, මාගම්මන ලුවී ආරියසිංහ ප්‍රසිද්ධ නොතාරිස් මහතා සහතික කල අංක 9115 සහ වර්ෂ 1990 ක්වූ ඔක්තෝබර් මස 10 වෙනි දින දරණ තෑගි අවලංගු කිරීමේ ඔප්පුව පිට අයිති වූ මෙහි පහත උප ලේඛනයෙහි විස්තර කරනු ලබන දේපල සහ ඊට අයිති සියලුදේත් එකී ජයමාන්න ආරච්චිගේ රෙජිනාහාමි වන මගේ ජීවිත බුක්තියට යටත්ව හෙවත් මා ජීවත්ව සිටිනාතුරු එකී දේපල වල ආදායම් ප්‍රයෝජන මා විසින් ලබා ගෙන බුක්ති විඳීමේ බලයට යටත්ව ඉහත කී රත්නායක මුදියන්සෙලාගේ මෙන්ඩිස් සිංඤේ මහතාට මෙයින් සින්නක්කරයේ විකුනා අයිතිකර, හිමිකර පවරා බාර දුනිමි.**

The intention of the vendor indicated by the form of the deed, commencement of the deed as well as the most important operative part of the deed is nothing other than a sale of the land described in the schedule to the deed for a valuable consideration of Rs.25000.00. Moreover, the vendor has admitted that the consideration was paid to her. Once the money is paid the obligation on the part of the buyer is fulfilled. The seller has to respect his obligations as there are no other conditions imposed on the buyer. On the other hand, the agreement between the two parties is contained mainly in the operative part and other clauses may be helpful in interpreting when there is obscurity in the operative part. As shown above there is no ambiguity in the operative part. The dispute with regard to the intention of the vendor is based on what the Notary public has mentioned in his attestation. The attestation does not contain the terms or conditions of the agreement between the parties. It is not among what is read to the parties before they sign the deed in agreement. The attestation is solely done by the Notary, most probably not in the presence of the parties. It generally contains facts in relation to the identity of the parties; the correction of typographical or clerical errors done by him; whether the deed was read over and explained to the parties before they signed it in the presence of each other, the witnesses and the Notary public; whether the consideration was passed before him or not. In the case at hand, the Notary has mentioned in his attestation that the consideration mentioned in the deed was renounced as a donation due to the compassion towards the vendee. (….නවද ඉහත ඔප්පුවේ සඳහන් මුදල වන රුපියල් විසිපන්දහස ගැනුම් කාරයාට ඇති දයාව නිසා පරිත්‍යාගයක් වශයෙන් අත්හල බවද .).The meaning of the Sinhala word ’පරිත්‍යාගය. generally connotes ‘a donation’ or ‘a sacrifice’ like in ‘මුදල් පරිත්‍යාගය. or ‘ජීවිත පරිත්‍යාගය.. However, the Appellant’s contention is that the consideration was not passed and the deed No.9116 is a deed of gift which can be revoked by the donor. As said before the aforesaid phrase in the attestation cannot be a term read over to the parties and explained before they signed the deed. The operative part, the form of deed and the words contained in the body of the agreement for which parties signed after being read over by the Notary have no uncertainty that warrants any interpretation. As per the operative part of the deed, the vendor has admitted payment of money as consideration for the sale of land. Thus, the transaction of sale was culminated with such payment and acceptance. After that, if the money is renounced it has to be considered as a gift of money but not the land already sold.

Thus, when the impugned deed is considered as a whole and each clause is interpreted in harmony with other clauses while giving natural grammatical and literal meaning to the words used one cannot come to any other understanding than that the said deed is a

deed of transfer for consideration of Rs.25000.00 which money was accepted and thereafter renounced as a gift due to the compassion towards the Vendee. Accordingly, as far as the parts of the impugned deed that contains the facts in relation to the meeting of the minds of the parties involved are concerned, it is clear that the deed was executed in view of the sale of the land described in its schedule. Even the attestation part which is an act of the Notary Public refers to a renunciation of the consideration money paid as a donation, but it does not reveal which party instructed or stated that to the said Notary Public or whether the vendee accepted the returned consideration. Furthermore, the admission no. 5 made at the commencement of the trial is in fact an admission of the sale of land by the impugned deed. For the foregoing reasons, it is my considered view that on the face of it, the impugned deed is a deed executed in view of a transfer of a land on payment of a consideration i.e. sale of a land for money.

This court is also mindful of the following decisions, which favours the stance taken up by the Defendant and some of which have been referred to in the Court of Appeal Judgment.

Fernando V Cooray 59 NLR 169 where it was held that '*in the absence of any allegation of fraud or trust, it is not open to a party, who conveys immovable property for valuable consideration by a deed which is ex facie a contract of sale but subject to the reservation that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage. Such parol evidence, even if admitted without objection, would offend the provisions of section 92 of the Evidence Ordinance and cannot be acted upon'.* (This indicates that parties cannot lead oral evidence to prove that conditions or terms of contract which are there in writing on the document are meant for a different kind of contract than what is ex facie understood by the terms and conditions of the contract when there is no allegation of Trust or Fraud. In the case at hand there is no allegation of Fraud or existence of a Trust.)

D. Thomas V D.R. Fernando 57 NLR 521 - "The *consideration is an essential term in a contract of sale. Section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction*."

In **Nona Kumara v Abdul Carder 47 NLR 457**, where transferor did not receive the consideration mentioned in the deed, it was held that '*the deed which, on the face of it, was a transfer for consideration could not be held to be a donation merely because the transferor did not receive the consideration. The Plaintiff's remedy was an action to recover consideration and not to claim a cancellation of the conveyance*'.

In **Velan Alvan v Ponny 41 NLR 106** the claim to lead oral evidence for the purpose of showing that the deed was given for a consideration different from that stated in the deed was not permitted.

In **E.A Diyes Singho v E.A. Hearth 64 NLR 492** it was held that '*the court is unable to agree that proof of the existence of a statement in the deed or instrument by the Notary that the consideration was paid is sufficient to establish the truth of the payment of such consideration'.* (In the case at hand the Defendant also relies on a statement made by the Notary in his attestation. Neither the attestation nor the oral evidence of the Notary available in the brief reveal on whose instruction or under what circumstance he included that statement nor whether the Vendee accepted the said renounced money. As per the evidence available in the brief, the vendee, Mendis Singho had given evidence but no question was put to him suggesting that the consideration was returned to him.).

Yet, the Appellant argues that the learned judges of the lower courts erred by failing to give sufficient attention to the section 2 of the Kandyan Law Declaration and Amendment Ordinance where a 'Gift' has been also defined as a 'voluntary transfer'. The relevant portion of the said section 2 reads as follows;

"'*Gift' means a* ***voluntary transfer****, assignment, grant, conveyance, settlement or other disposition inter vivos of immovable property,* ***made otherwise than for consideration in money or money's worth*****".** (emphasis in bold letters by me).

It is pertinent to note that the said Section 2 does not equalize every voluntary transfer to a gift. As per the said section, only voluntary transfers made otherwise than for consideration in money or money's worth are considered as gifts. As elaborated above the transaction elucidated in the impugned deed is a transfer for money or money's worth, even though the money paid was thereafter renounced as a donation. Hence, the said argument cannot hold water for the benefit of the Appellant.

Further the Appellant has questioned the correctness of the lower courts' judgments stating that those courts failed to consider the decisions in **Mudiyanse v Banda 16 NLR 53; Sujitha Kumarihamy v Dingiri Amma 72 NLR 409; Sumanasiri v Thilakarathne Banda 74 NLR 155; and P.B.Rathnayake v M.B.S.J. Bandara 1990 1 SLR 156.**

In **Mudiyanse V Banda** it was held that '*under Kandyan law a deed which purports to constitute a donation and which is presumably intended by the donor to operate as a donation, and is accepted by the donee as such whatever the motive for deed may is as general rule, revocable.'*

The above does not apply to the case at hand as the impugned deed is not a deed of gift as elaborated above and the intention of the vendor as at the time of executing the deed was to sell the land for the consideration mentioned therein though she appears to have renounced the consideration as a donation after admitting the payment of consideration.

In **Sujitha Kumarihamy V Dingiri Amma** the issue to be decided was quite deferent from the issue at hand in the present case. There the issue was whether certain properties which were the subject matter of a deed fall within the ambit of 'Paraveni Property' or 'Acquired Property' which had to be interpreted in relation to the mode of acquisition of ownership but here it is a simple question of interpreting the deed itself and the nature of the transaction contained therein. Thus, this can be distinguished from the said case.

In **Sumanasiri V Thilakarathne Banda**, the issue revolved around whether the impugned deed in that case was a revocable deed of gift or not. There the deed, on the face of it, was a gift. The Respondent in that case tried to argue that the said deed was not a gift within the meaning of section 2(a) of the Kandyan Law Declaration and Amendment Act owing to the condition which required the donee to perform and render to the donor all needful assistance during the period of her natural life and after her death to bury her remains decently according to the customs of the Buddhist religion. The counsel for the Respondent in that case appears to have argued that as the donee had to perform certain services and, if a money value could be placed on such service it was not a gift. But the court held otherwise. The court found that the consideration was natural love and affection towards the donee and the deed described the transaction as a gift. Furthermore, the court said that inclusion of a clause containing the words that a gift is subject to the donee rendering all necessary succor and assistance to the donor or words to that effect was not uncommon in deeds of gifts in the Kandyan Province. Thus, there the attempt to interpret a deed of gift as a 'transfer on a consideration' in view of a clause contained in the main part of the deed was refused. If the same wisdom is applied here to the case at hand, owing to the reasons mentioned before, the argument that the deed is a deed of gift owing to the aforesaid statement of the Notary which is not even a condition or term in the main part of the deed must fail. On the other hand, the consideration in the instant case is money paid as per the operative part of the deed.

Though the decision in **P.B. Rathnayake v M.B.S.J. Bandara** was made in relation to deeds of gifts made under Kandyan Law, there is no similarity in the issue discussed there with the present case. There the issue was whether the majority decision of Privy Council in **Dullewa v Dullewa 71 N L R 289**, which held that a Kandyan deed of gift is

revocable unless renunciation of the right of revocation is expressed in the particular manner stated in section 5(1) of the Kandyan Law Declaration and Amendment Ordinance No.59 of 1939, was correct or not. Issue at hand in the present case is whether a deed which is on the face of it is a deed of transfer for valuable consideration could be interpreted as a deed of gift due to a statement made by the Notary Public in his attestation. Thus, the ratio decidendi of that case has no relevance to this case. However, it appears that the Appellant relies on the following comment made by Thambiah J as he then was:

"*The General Rule under Kandyan Law was that all deeds of gift, even transfers by sale were revocable by the grantor in his life time, subject to the right of the grantee to be compensated by the grantor for improvements*."

However, the Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939 has no provision for the revocation of deeds of transfers made for consideration paid in money or money's worth. In this regard following passages from "**A Treatise on The Laws and Customs of the Sinhalese, by Frederic Austin Hayley** at page 305 **and Kandyan law and Buddhist Ecclesiastical Law by T.B. Dissanayake and A. B. Colin de Soysa** at 104 are relevant.

"*A proclamation of July 14.1821,which, it may be noted, recognized the existence of the right to re-purchase "in some of the said [Kandyan} Provinces ,"declared that all sales of land should be final and conclusive, and neither seller nor his heirs should have any right to re-purchase, unless an express stipulation to that effect were contained in the deed, in which case the right must be exercised within three years, and during the life of the grantor, and the purchase money be repaid together with compensation for improvements "*.(from aforesaid page 305)

"***Right to repurchase**. In former times the vendor had in some cases a right to repurchase the land which he had even absolutely sold in paraveny. A proprietor who had definitely sold his land, may resume possession at any time during his life time, after paying the amount which he received and the value of any improvements.*

But this right was annulled by proclamation dated 14th July 1821 which enacted that all sales of land made in writing according to the provisions of proclamation dated eighth day of October 1820 in the Kandyan provinces shall be final and conclusive and that neither the seller nor his or her heirs shall have any peculiar right to repurchase the same, unless an express stipulation reserving such privilege shall be inserted in the deed of sale. This was done with the object of giving purchaser an immediate and permanent interest in the property and inducing him to improve it." (form aforesaid page 104, which

refers to Perera's Armour on Kandyan Law pages 109 and 90 and Constitution of the Kandyan Kingdom by Doyly page 60).

In the impugned deed in this case, there is no reservation made by the vendor that enables her to repurchase or revoke it.

For the foregoing reasons this court does not see any reason to hold with the Appellant to say that the impugned deed No. 9116 is a deed of gift or deed of transfer which is revocable under the Kandyan Law and the issues of law has to be answered in favour of the Plaintiff Respondent.

For the reasons elaborated above, this court finds no reason to interfere with the findings of the learned District Judge as well as of the Learned Judge of the Court of Appeal.

Hence the Appeal is dismissed with costs.

……..

E.A.G.R. AMARASEKARA, J

Judge of the Supreme Court.

I agree.

……

Prasanna Jayawardena, P C, J

Judge of the Supreme Court.

I agree.

……..

P. Padman Surasena, J

Judge of the Supreme Court.

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

In the matter of an application for leave to appeal 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.

SC. Appeal No. 232/2017

SC. HC. CA. LA. No. 428/2012

H.C.C.A. Case No.
CP/HCCA/KAN/141/2009 (FA)

District Court of Hatton
Case No. L/409

1. M. L. M. Ameen
2. Mahmud Riad Ameen

Both of

No. 01, Col.
T. G. Jayawardana Mawatha,
Colombo 03.
Plaintiff-Respondent-Petitioners

Vs.

Ammavasi Ramu alias Ramaiah
South Wanarajah Estate,
Dikoya.
Defendant-Appellant-Respondent

BEFORE : Sisira J. de Abrew, Acting CJ.

Murdu N. B. Fernando, PC, J.

E. A. G. R. Amarasekara, J.

COUNSEL : Faisz Musthapha, PC, with Thushani Machado instructed by G.S. Thavarasa for the Plaintiff-Respondent-Appellants.

Uchitha S. Bandara instructed by S. Yogarajah for the Defendant-Appellant-Respondent.

ARGUED & DECIDED ON : 22.01.2019

Sisira J. de Abrew, Acting CJ.

Heard both Counsel in support of their respective cases.

This is an appeal against the Judgment of the Civil Appellate High Court dated 04.09.2012 wherein the learned Judges of the Civil Appellate High Court dismissed the Plaintiffs' action and also dismissed the cross claim of the Defendant.

Being aggrieved by the said judgment, the Plaintiff-Respondent-Appellants (hereinafter referred to as Plaintiff-Appellants) have appealed to this Court.

Learned District Judge by his judgment dated 19.07.2009 held the case in favour of the Plaintiff-Appellants and ordered them to pay Rs.100,000/-(Rupees One Hundred Thousand) as compensation for the improvements done to the relevant house by the Defendant.

This Court by its order dated 24.11.2017 granted leave to appeal on questions of law set out in paragraph 9 (a), (b) and (f) of the petition of appeal dated 12.10.2012 which are stated below:-

1. Did the Provincial High Court err and/or misdirect itself in law by failing to appreciate that the Petitioners' cause of action was for ejection of the Respondent on the basis of termination of leave and licence?

2. Did the Provincial High Court err and/or misdirect itself in law by concluding that a declaration of title essential to maintain the Petitioners' action?

3. Did the Provincial High Court err and/or misdirect itself in law by failing to appreciate that the sketch marked "P2" annexed to the Plaint was sufficient compliance with Sections 40 and 41 of the Civil Procedure Code?

Learned District Judge by his judgment decided that the Defendant-Appellant-Respondent (hereinafter referred to as the

Defendant-Respondent) was a licensee of the Plaintiff. Learned Judges of the Civil Appellate High Court too in their judgment concluded that the Defendant-Respondent was a licensee of the Plaintiff.

We note that the Defendant-Respondent has failed to appeal to this Court against the said judgment. Therefore, he has admitted the fact that he was a licensee of the Plaintiff.

The learned Judges of the Civil Appellate High Court had dismissed the Plaintiff's action on the basis that the Plaintiff has failed to set out an averment asking for declaration of title. But, we note that the issue No. 01 raised by the Plaintiff to the effect that whether the Plaintiff was the owner of the land described (Wanarajah Estate) in the Plaint. There was no objection raised to this issue. Therefore the trial in the District Court has proceeded on the issue whether the Plaintiff was the owner of the land. The learned District Judge was duty bound to answer the said issue. The learned District Judge has answered the above issue in the affirmative.

Therefore when the learned Civil Appellate High Court Judges decided to dismiss the Plaintiff's action on the basis that the Plaintiff had not asked for a declaration of title, the said conclusion, in our view, is wrong.

Now the question that must be decided is whether the Defendant-Respondent who is a licensee is entitled to claim the plea of prescription.

In finding an answer to the above question, I am guided by **Section 116 of the Evidence Ordinance** which reads as follows:-

"*No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and*

no person who came upon any immovable property by the licence of the 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."

I am further guided by the judicial decisions of this Court on this question.

In the case of **De Soysa v. Fonseka, 58 NLR, page 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 v. Jayasinghe Udenis de Silva, 52 NLR page 289 Privy Council** held as follows:-

"*If a person goes 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 **Reginald Fernando vs. Pabilinahamy and others 2005 1SLR page 31**, this Court observes 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 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".

I would also like to consider the judicial decision in **Ruberu and Another v Wijesooriya 1998 1SLR page 58 wherein Justice Gunawardane** held as follows:-

"Whether it is a licensee or lessee, the question of title is foreign to a suit 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 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-respondent is perforce an admission of the fact that the title resides in the plaintiff."

When we examine the evidence of the Defendant-Respondent, we can come to the conclusion that the Defendant-Respondent in his evidence has admitted that the Plaintiff is the owner of the land. The Plaintiff-Appellants, by letter marked P5 dated 30.04.2004, has terminated the leave and licence granted to the Defendant-Respondent. Applying the principles laid down in the above judicial

decisions, I hold that when a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property.

For the above reasons we hold that the Defendant-Respondent is not entitled to claim prescriptive title in this case. We have earlier held that the learned Judges of the Civil Appellate High Court were wrong when they rejected the Plaintiff's case.

For the above reasons we answer the 2nd question of law as follows:-

"Since the Plaintiff-Appellants have raised an issue whether the Plaintiff-Appellants are the owner of the land in dispute, Provincial High Court has erred on this matter. Therefore the 2nd question of law is answered in the affirmative. The 1st question of law is also answered in the affirmative. The 3rd question of law does not arise for consideration."

For the above reasons, we set aside the judgment of the Civil Appellate High Court and affirm the judgment of the learned District Judge.

The learned President's Counsel appearing for the Plaintiff-Appellants submits that the Plaintiff-Appellants are prepared to

pay Rs.100,000/= (Rupees One Hundred Thousand) ordered by the learned District Judge to the Defendant- Respondent.

Appeal allowed.

ACTING CHIEF JUSTICE

Murdu N. B. Fernando, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara, 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 in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006 against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5 of the said Act.

S C Appeal No. 234/2014

SC/HCCA/LA No. 505/2013

High Court Case No: NWP/HCCA/KUR/20/2013 (Rev)

District Court of Chillaw Case No: No. 1105/M

L Ajith Thilakarathne De Silva,
Senevirathne Road,
Madampe.

DEFENDANT - PETITIONER - APPELLANT

Warnakulasuri Josep Victor Daberera,
Anita Magrat House,
Mepals Road,
Uhitiyawa,
Wennapuwa.

PLAINTIFF - RESPONDENT - RESPONDENT

Before: BUWANEKA ALUWIHARE PC J

VIJITH K. MALALGODA PC J

P. PADMAN SURASENA J

Counsel: Pulasthi Rupasinghe with Ms. Nilma Abeysuriya for the Defendant - Petitioner - Appellant.

Chandana Wijesuriya with Chinthaka Hettiarachchi for the Plaintiff - Respondent – Respondent

Argued on: 2019 - 02 - 22

Decided on 2019 - 04 - 04

P Padman Surasena J

The Plaintiff - Respondent - Respondent (hereinafter sometimes referred to as the Plaintiff) filed in the District Court of Chilaw, a plaint in terms of provisions in chapter LIII of the Civil Procedure Code. This is to recover a sum of money amounting to Rs. 4,000,000/= form the Defendant – Petitioner - Respondent (hereinafter sometimes referred to as the Defendant). The said amount is the amount mentioned in the cheque dated 1998-10-21 bearing No. 205090 handed over to the Plaintiff by the Defendant as a settlement of a debt obtained by the Defendant from the Plaintiff.

The Defendant had thereafter sought leave of Court in terms of the provisions contained in the said chapter of the civil Procedure Code, to appear and defend the action without any condition. However, the learned Additional District Judge by his order dated 16th August 2006 had only granted the Defendant leave of Court to appear and defend the action subject to the condition of depositing in Court, the full amount (Rs. 4,000,000/=) claimed by the Plaintiff. The said order dated 16th August 2006 has been produced marked (**P 4**) in this Court.

Admittedly, the Defendant has never challenged the above order. Thus, the said order dated 16th August 2006 pronounced by the learned Additional District Judge remains valid to date.

Perusal of the journal entries[1] of the District Court case record clearly shows that the learned District Judge has granted on the application of the Defendant, several further opportunities for the Defendant to deposit the said amount of money and file answer in order that he could defend the action. However, the Defendant without making use of the said opportunities (granted to him by the learned Additional District Judge) had thereafter chosen to default appearing in Court. It was in these circumstances that the learned Additional District Judge on 2007-03-28, had proceeded to enter a decree in favour of the Plaintiff as per the prayers of the plaint.

The Appellant had thereafter, up until the year 2013, for the reasons only known to him had maintained a stoic silence. It was on 27 - 08 - 2013,[2] that the appellant had filed the revision application bearing No. NWP/ HCCA/ KUR/ 20/ 2013 (Rev), in the Provincial High Court of North Western Province holden at Kurunegala to challenge the order dated 16th August 2006 pronounced by the learned Additional District Judge. Upon the said revision application being supported, the Provincial High Court by its order dated 22nd October 2013 has refused to issue notices on the Respondent. The Provincial High Court has based the said refusal on the following grounds.

i. The Petitioner has not placed any exceptional circumstance, which warrants the Provincial High Court to invoke its revisionary jurisdiction.
ii. There is no merit in the said application.

[1] Journal entries dated 2006-10-04, 2006-11-08 and 2007-01-10.
[2] According to the order dated 22-10-2013 of the Provincial High Court.

iii. There is an undue delay in filing the said revision application.

This Court by its order dated 03-12-2014 has granted special leave to appeal on the following questions of law.

i. "Their Lordships in the Civil Appellate High Court of North Western Province erred in law by coming to a wrong conclusion that they are barred by its predecessor's decision as exceptional circumstances have not been established."
ii. "Have their Lordships in the Civil Appellate North Western Province erred in law by not judicially evaluating the facts pertaining to this case."
iii. "Has the learned Additional District Judge of Chillaw erred in law by making judgment dated 16th August 2006 as it was not supported by evidence?"

Before this Court lays its hands on the above questions of law, it would be prudent to briefly consider some of the provisions in chapter LIII of the Civil Procedure Code under which the learned Additional District Judge had made the order dated 16th August 2006. Section 704 of the Civil Procedure Code states as follows;

Section 704

(1) In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the action unless he obtains leave from the Court as hereinafter mentioned so to appear and defend; and in default of his obtaining such leave or of appearance and defence in pursuance thereof, the Plaintiff shall be entitled to a decree for any sum not exceeding

the sum mentioned in the summons, together with interest to the date of the payment, and such costs as the Court may allow at the time of making the decree.

(2) The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into Court the sum, mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *prima facie* sustainable, or feels reasonable doubt as to its good faith.

This Court has perused the affidavit filed (in the District Court) by the Plaintiff, the copies of the documents the Plaintiff had referred to in his affidavit, the affidavit filed by the Defendant seeking leave of Court to appear and defend the action without any condition and the order dated 16th August 2006 made by the learned Additional District Judge only granting the Defendant leave of Court to appear and defend the action subject to the condition of depositing the full amount (Rs. 4,000,000/=) claimed by the Plaintiff in Court. It is the view of this Court that the learned Additional District Judge is correct when he made the order dated 16th August 2006 as the material the Plaintiff has produced before Court and the contents of the affidavit filed by the Defendant enable the Court to form a view;

a) that the defence advanced by the Defendant is not *prima facie* sustainable, and
b) that there is a reasonable doubt as to its good faith.

It would suffice for this Court to stop at that since this is only an appeal against an order of refusal by the Provincial High Court to issue notices

in a revision application when it was supported before Court and not an appeal against a final judgment.

In these circumstances, this Court answers the question of law No. (iii) in the negative.

This Court has also perused the order dated 22nd October 2013 made by the Provincial High Court refusing to issue notices on the Respondent. The basis upon which the Provincial High Court has refused to issue notices on the Respondent has already been stated in this judgment. The Provincial High Court has given detailed reasons for refusing to entertain the revision application. The Defendant has not adduced before this Court any valid basis for this Court to interfere with the said Provincial High Court order. Thus, it is the view of this Court that this is a frivolous appeal lodged by the Defendant for collateral purposes. Thus, in the above circumstances this Court answers the question of law No. (ii) also in the negative.

This Court observes that the question No. I formulated by the Defendant is not sufficiently clear. On the other hand this Court is of the view that the nature of question No (i), despite whatever its real meaning, would not be directly relevant for the disposal of this appeal and that answering the questions of law No I and II would be more than sufficient to dispose this appeal. Therefore, this Court would not proceed to answer the question of law No. (i).

In these circumstances, this Court affirms both the order dated 22nd October 2013 pronounced by the Provincial High Court of North Western Province holden at Kurunegala and order dated 16th August 2006

pronounced by the learned Additional District Judge of Chillaw. This Court proceeds to dismiss this appeal with costs fixed at Rs. 50,000/= payable by the Defendant to the Plaintiff.

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 appeal of an Appeal in terms of Section 5(1) of the Provinces (Special Provisions) Act No.10 of 1996 read with Articles 127 and 128 of the Constitution.

Dynamic Steel (Private) Ltd.,
484, Annanagar West Exten,
Chennai, 600-101,
India.

Plaintiff

SC/CHC/Appeal7/2012
Commercial High Court Case No.
H.C. (Civil) 36/2004/01

Vs

1. Kara Steel Mills (Private) Limited,
   633, Srimavo Bandaranayake Mawatha,
   Colombo 14.

2. Faiz-ur Rahaman,
   Kara Steel Mills (Private) Limited,
   633, Srimavo Bandaranayake Mawatha,
   Colombo 14.

Defendants

NOW

1. Kara Steel Mills (Private) Limited,
   633, Srimavo Bandaranayake Mawatha,
   Colombo 14.

2. Faiz-ur Rahaman,
   Kara Steel Mills (Private) Limited,
   633, Srimavo Bandaranayake Mawatha,
   Colombo 14.

Defendant-Appellants

Vs

Dynamic Steel (Private) Ltd.,
484, Annanagar West Exten,
Chennai, 600-101,
India.

Plaintiff-Respondent

Before : Sisira J de Abrew J
V.K.Malalgoda PC J
Murdu Fernando PC J

Counsel : Maithri Wickramasinghe PC with Rakitha Jayathunga for the Defendant-Appellants
Canishka Witharana for the Plaintiff-Respondent

Argued on : 9.1.2019

Written Submission
Tendered on : 10.2.2012 by the Defendant-Appellants
21.3.2016 by the Plaintiff-Respondent

Decided on : 6.3.2019

Sisira J de Abrew J

The Plaintiff-Respondent in this case instituted action against the Defendant-Appellants to recover a sum of US Dollars 160,139.64

The learned High Court Judge of the Commercial High Court, by his judgment dated 24.11.2011, held in favour of the Plaintiff-Respondent and concluded that a sum of Rs.4,195,353.33 is payable by the 1st Defendant-Appellant to the Plaintiff-Respondent. Being aggrieved by the said judgment the Defendant-Appellants have appealed to this court.

The 1st Defendant-Appellant has, from time to time, purchased certain materials and machinery used in the steel industry from the Plaintiff-Respondent. According to the admissions recorded at the trial, the Defendant-Appellants have paid US Dollars (USD) 1750 on two occasions in connection with invoice No.131 and 138 in settlement of the sum due on purchase of goods from the Plaintiff-Respondent. However the Plaintiff-Respondent in its plaint takes up the position that the Defendant-Appellants have paid USD 4511.33 and USD 1750 on 27.6.2003 and 21.3.2001 respectively in order to settle the balance due from the Defendant-Appellants. Learned President's Counsel for the Defendant-Appellants submitted that the claim of the Plaintiff-Respondent had been prescribed within one year from the date of sale of goods in terms of Section 8 of the Prescription Ordinance. He contended that the Plaintiff-Respondent had sold goods to the 1st Defendant-Appellant and that therefore the claim of the Plaintiff-Respondent would be prescribed within one year from the date of sale of goods in terms of Section 8 of the Prescription Ordinance. He relied on the concept of 'goods sold and delivered.' Learned President's Counsel for the Defendant-Appellants further submitted that the Plaintiff-Respondent had instituted this action on individual invoices and that therefore the action of the Plaintiff-Respondent would be prescribed within one year from the date of the transaction in terms of Section 8 of the Prescription Ordinance. But the position of the Plaintiff-Respondent was that the action had been instituted on the basis of accounts stated and not on the basis of individual invoices. The learned High Court Judge has however considered Section 7 of the Prescription Ordinance and decided to accept the position taken up by the Plaintiff-Respondent. The learned High Court Judge further held that the action of the Plaintiff-Respondent was not prescribed. In these circumstances, I would like to

consider Sections 7 and 8 of the Prescription Ordinance. Section 7 of the Prescription Ordinance reads as follows.

> *"No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be-commenced within three years from the time after the cause of action shall have arisen."*

Section 8 of the Prescription Ordinance reads as follows.

> *"No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due."*

The most important question that must be decided in this case whether action of the Plaintiff-Respondent is prescribed or not. If the action of the Plaintiff-Respondent has been instituted on the basis of 'account stated', then the action is not prescribed. I now advert to this question. In order to consider this question paragraphs 15 and 16 of the Plaint should be examined. Paragraph 15 of the Plaint reads as follows.

> *"The Plaintiff states that in the Annual Accounts prepared by the Plaintiff for the Fiscal Year ended from 31st March 2000 a balance of a sum of US Dollars 54,608.65 was found to be entered in the corresponding value in Indian Rupees as the amount due to the Plaintiff from the 1st Defendant Company. (A true copy of the Annual Accounts stated for the Fiscal Year*

1999-2000 is annexed hereto marked as P7 and pleaded as part and parcel of the Plaint).

Paragraph 16 of the Plaint reads as follows.

"The Plaintiff also found the said value of US Dollars 54,608.65 equivalent in Sri Lankan Rupees is entered under the heading 'Current Liabilities' as Rupees 6,968,375 in the Balance Sheet that forming part of the Annual Accounts of the 1st Defendant for the year ended from 31st March 2000. (A true copy of the Annual Accounts of the Defendant Company for the year ended from 31st March 2000 is annexed to the Plaint marked P8 and pleaded as part and parcel of the Plaint."

Further at the trial, Kodikar Madar Sahib Ajmal Ahamed, Charted Accountant who is the Statutory Auditor of the 1st Defendant-Appellant giving evidence produced the Financial Accounts of the 1st Defendant-Appellant marked P23 for the year ended on 31.3.2003. According to the said report under the heading of 'Current Liabilities and Creditors' an amount of Rs.4,195,353/33 has been entered and under the heading of 'Creditors', 'Dynamic Steel (Pvt) Ltd, 404, Annanager, Madras 600101,India'has been typed and against the said name Rs.4,195,353/33 has been typed. 'Dynamic Steel (Pvt) Ltd, 404, Annanager, Madras 600101, India' is the Plaintiff-Respondent in this case. The above particulars clearly indicate that the action of the Plaintiff-Respondent has been instituted on the basis of Account Stated and not on the basis of individual invoices. Further in the statement of Financial Accounts of the 1stDefendant Company (the 1st Defendant-Appellant) for the year ended 31.3.2003 marked P23, the 1st Defendant-Appellant has admitted that his creditor was the Plaintiff-Respondent and that the current liability to the creditor was Rs.4,195,353.33. This is an admission by the 1st Defendant-Appellant that the amount payable to the Plaintiff-Respondent as at 31.3.2003 was

Rs.4,195,353.33. The case was filed in the Commercial High Court on 27.2.2004. Thus the action of the Plaintiff-Respondent has not been prescribed in terms of Section 7 of the Prescription Ordinance. Even in the statement of Financial Accounts of the 1st Defendant Company (the 1st Defendant-Appellant) for the year ended 31.3.2000 marked P20, the 1st Defendant-Appellant has admitted that one of his creditors was the Plaintiff-Respondent and that the current liability to the creditor was Rs.6,017,410.62. Similar entries are found in the statement of Financial Accounts of the 1st Defendant Company (the 1st Defendant-Appellant) for the year ended on 31.3.2001(P21) and 31.3.2002(P22). Thus it appears that in his own statements of Financial Accounts, the 1st Defendant-Appellant has admitted his liability to the Plaintiff-Respondent. When I consider the above matters, I am of the opinion that the applicable provision relating to prescription is section 7 of the Prescription Ordinance and not section 8 of the Prescription Ordinance. This view is supported by the judgment of Justice Garvin in the case of Silva Vs Silva 36 NLR 307 wherein His Lordship observed the following facts.

> *"There was an account in respect of goods sold and delivered between plaintiff and defendant, consisting of debit entries in respect of goods sold to the defendant and credit entries in respect of payments by him. On a certain date the accounts were looked into and a balance found to be due, which the defendant acknowledged by signing a document.*
>
> His Lordship held as follows: *"An action to recover the balance was prescribed in three years."*

For the above reasons, the contention of learned President's Counsel for the Defendant-Appellants that the action of the Plaintiff-Respondent has been prescribed in terms of Section 8 of the Prescription Ordinance cannot be accepted and is hereby rejected.

Considering all the above matters, I hold that the action of the Plaintiff-Respondent

has not been prescribed and that the learned High Court Judge was correct when he held in favour of the Plaintiff-Respondent.

For the above reasons, I dismiss the appeal of the Defendant-Appellants with costs.

Appeal dismissed.

Judge of the Supreme Court.

V.K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

SC. Appeal No. 39/2016

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

In the matter of an application for Special Leave to Appeal in terms of Article 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 Provinces (Special Provisions) Act No. 19 of 1990.

SC. Appeal No. 39/2016

Badulla High Court Appeal No. 16/2014.

L.T. Case No. LT5/ 19711/2007

Uwa Development Bank,
No.26, Bank Road,
Badulla.

Respondent-Appellant-Petitioner.

-Vs-

Ceylon Bank Employees Union,
on behalf of W.K.Vusudigam,
No. 20, Temple Road,
Maradana.

Applicant-Respondent-Respondent

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

Murdu N.B. Fernando, PC, J &

S. Thurairaja, PC, J

Counsel: Uditha Egalahewa PC with Hemantha Gardhihewa for the Respondent-Appellant-Appellant.

Nalin Amarajeewa instructed by Indula Hewage for the Applicant-Respondent-Respondent.

Argued &
Decided on: 02.07.2019

Sisira J. de Abrew, J

Heard both counsel in support of their respective cases. This is an appeal filed against the judgment of the learned High Court Judge dated 24.04.2015 wherein he affirmed the judgment of the learned President of the Labour Tribunal. The learned President of the Labour Tribunal in his Judgment dated 27.03.2014 decided that the termination of services of the Applicant-Respondent-Respondent (hereinafter referred to as the Applicant-Respondent) is unjustified and ordered reinstatement and ½ back wages amounting to Rs. 990,600/-. Being aggrieved by the said judgment of the High Court, the Employer-Appellant-Appellant (hereinafter referred to as the Employer-Appellant) has appealed to this Court. This Court by its order dated 09.02.2016 granted leave to appeal on the questions of law set out in paragraph 13 (a),(b) and (e) of the affidavit dated 03.06.2015 which are set out below.

1) Was the said order of the Honourable Judge of the High Court of the UWA Province against the weight of the evidence led at the inquiry before the Labour Tribunal ?

2) Did the Honourable Judge of the High Court fail to consider the findings of fact by

the Labour Tribunal that the workman had not served with the Petitioner Bank by keeping 100% trustworthiness and honesty as required to carry out by a Bank officer ?

3) Did the Honourable Judge of the High Court err in law with regard to burden of proof of the Employer ?

Learned President's counsel for the Employer-Appellant at the conclusion of submissions by both parties submitted to Court that he would confine himself to question of law set out in paragraph 13(b) of the affidavit dated 03.06.2015. He further submitted that he would not support the other two questions of law. He relied on the following questions of law.

" Did the Honourable Judge of the High Court fail to consider the findings of fact by the Labour Tribunal that the workman had not served with the Petitioner Bank by keeping 100% trustworthiness and honesty as required to carry out by a Bank officer "?

The Applicant- Respondent in this case was the Manager attached to Thanamalwila Branch of Uva Development Bank. His services were terminated by the Bank. There were several charges levelled against him at the domestic inquiry and he was exonerated from charges 1 and 6 but was convicted on charges Nos. 2 to 5 and 7 to 9 . The learned President of the Labour Tribunal in his judgment has decided that the Applicant-Respondent who was the Manager of the said Bank had not acted with 100% honesty in dealing with affairs of the bank.

The above conclusion reached by the learned President of the Labour Tribunal is correct when we consider the evidence led at the trial.

Thus the most important question that must be decided is whether the Applicant- Respondent can be reinstated in the bank especially when the learned President of the Labour Tribunal decided that he had not acted with 100% honesty. When finding an answer to this question, I am guided by the judgment of this Court in the case of ***National Savings Bank Vs Ceylon Bank Employees Union 1982 (2) SLR page 629 at page 632.*** His Lordship Justice Soza in the said judgment held as follows;

> " whether the misconduct relates to the discharge of his duties in the Bank or not, if it reflects on the Bankman's honesty, it renders him unfit to serve in a Bank and justifies dismissal."

I'm also guided by the judgment of His Lordship Justice G.P.S. De Silva, CJ in the case of ***Bank of Ceylon Vs Manivasagasivam 1995(2) SLR page 79.*** His Lordship Justice G.P.S de Silva, CJ, in the said judgment held as follows;

> " Utmost confidence is expected of any officer employed in a Bank. There is a duty both to the Bank to preserve its fair name an integrity and to the customer, whose money lies in deposit with the Bank ".

At page 83 His Lordship further held as follows;

> " It seems to be that by reason of the part played by the Applicant in two transactions which, to say the least, were questionable, he has clearly forfeited the confidence reposed in him as an employee of the Bank. In the circumstances, the Bank should not and cannot continue to employ him."

In the present case, the learned President has decided that the Applicant-Respondent has not acted with 100% honesty when he was dealing with his duties relating to the bank affairs.

When the learned President of the Labour Tribunal came to such conclusion, he cannot make an order to reinstate the bank employee in the same bank with back wages. This view is supported by the above 02 judicial decisions. The learned High Court Judge affirmed the judgment of the learned President of the Labour Tribunal without

giving due consideration to above judicial decisions.

Considering all the above matters, we hold that the decision of the learned President of the Labour Tribunal is wrong. The learned High Court Judge has also affirmed the said Judgment of the learned President of the Labour Tribunal. In these circumstances, we hold that both the learned President of the Labour Tribunal and the learned High Court Judge were wrong when they came to the above conclusion.

We therefore set aside both judgments of the learned President of the Labour Tribunal and the learned High Court Judge.

In these circumstances we hold that the termination of the Applicant-Respondent is justified. In the circumstances we answer the above questions of law in the affirmative.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, PC, J

I agree.

JUDGE OF THE SUPREME COURT

S. Thurairaja, PC, J

I agree.

JUDGE OF THE SUPREME COURT

kpm/-

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

In the matter of an Application for Leave to Appeal under and in terms of Section 5C (1) of the High Court of the Provinves (Special Provisions) Act No. 19 of 1990 as ameneded by Act No. 54 of 2006

SC Appeal No: 126/2016
SC/HCCA/LA/No.60/2016
WP/HCCA/COL/253/2008 (F) A
D.C Colombo Case No. 20519/L

B. Premarajah Jayawardena,
No.1, Alwis Avenue,
Mount Lavinia.

PLAINTIFF

-VS-

1. B. Upali Dayananda Janapriya Jayawardena,
   87/3, Bandaranayake Mawatha,
   Katubedda,
   Moratuwa.

2. Alvarapillai Vengadasam,
   104, 4th Cross Street, Colombo 11,
   and No. 125, Bankshall Street,
   Colombo 11

RESPONDENTS

AND BETWEEN

Alvarapillai Vengadasam,

104, 4th Cross Street, Colombo 11, and No. 125, Bankshall Street, Colombo 11

2nd DEFENDANT-APPELLANT

-VS-

B. Premarajah Jayawardena
No.1, Alwis Avenue,
Mount Lavinia.

PLAINTIFF-RESPONDENT

B. Upali Dayananda Janapriya Jayawardena,
87/3, Bandaranayake Mawatha,
Katubedda,
Moratuwa.

1st DEFENDANT- RESPONDENT

AND BETWEEN

B. Premarajah Jayawardena,
No.1, Alwis Avenue,
Mount Lavinia.

PLAINTIFF-RESPONDENT-PETITIONER

-VS-

B. Upali Dayananda Janapriya Jayawardena,
87/3, Bandaranayake Mawatha,
Katubedda,

Moratuwa.

(Now Deceased)

1st DEFENDENT-RESPONDENT-RESPONDENT

1a Kananke Acharige Wimalawathie,

1b Hiranya Keshini,

1c Harendra Geethal Jayawardena,

1d Buddika Dananjaya Jayawardena,

All of 87/3, Bandaranayake Mawatha,

Katubedda,

Moratuwa.

DEFENDANTS– RESPONDENTS-RESPONDENTS

Alvarapillai Vengadasam,

104. 4th Cross Street, Colombo 11 and No.125, Bankshall Street

Colombo 11.

2nd DEFENDANT-APPELLANT-RESPONDENT

BEFORE : **PRASANNA JAYAWARDENA, PC, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Harsha Soza, PC with Shantha Perera, PC and Ms Sudarshani Ukwatte for Plaintiff- Respondent- Petitioner instructed by S. Mahanama

Gamini Jayasinghe with P.P. de Silva for substituted 1st Defendant-Appellant- Respondent

ARGUED ON : 26th August 2019

WRITTEN SUBMISSIONS : Plaintiff – Respondent – Appellant on 11th September 2019
Substituted 1st Defendant – Respondent – Respondent on 23rd September 2019

DECIDED ON : 17th December 2019.

S. THURAIRAJA, PC, J.

B. Premarajah Jayawardena the Plaintiff – Respondent – Appellant – Petitioner (hereinafter referred to as the Plaintiff - Appellant) instituted action in the District Court of Colombo against B. Upali Dayananda Janapriya Jayawardena (1st Defendant – Respondent – Respondent hereinafter referred to as the 1st Defendant - Respondent) and Alvarapillai Vengadasam (2nd Defendant – Appellant – Respondent – Respondent hereinafter referred to as the 2nd Defendant - Respondent) stating that he was entitled to the property described in the first schedule to the plaint, that his brother, the 1st Defendant - Respondent, was the owner of the property bearing No. 104, 4th Cross Street which was adjacent to No. 113, 5th Cross Street owned by the Plaintiff – Appellant, in January 2004 the 1st Defendant - Respondent had illegally and forcefully annexed 1.95 perches from the plaintiff's property and given it over to the 2nd Defendant – Respondent.

Plaintiff Appellant filed this action seeking inter alia, a declaration of title to the property bearing assessment N.s 111, 113 and 114 5th Cross Street as described in the first schedule of the plaint, ejectment of the 2nd Defendant-Respondent from

the portion of the property described in the second schedule of the plaint and certain injunctive reliefs to prevent the 1st and 2nd Defendant - Respondents from selling, mortgaging, renting and/or otherwise alienating the property described in the second schedule of the plaint and in extent 1.95 perches, and further to prevent the first and second defendants from effecting any constructions on the said property.

In the District Court the Plaintiff – Appellant had pleaded that he was entitled to the property described in the first schedule to the plaint, that his brother, the 1st Defendant - Respondent, was the owner of the property bearing No. 104, 4th Cross Street which was adjacent to No. 113, 5th Cross Street owned by the Plaintiff – Appellant, in January 2004 the 1st Defendant - Respondent had illegally and forcefully annexed 1.95 perches from the plaintiff's property and given it over to the 2nd Defendant – Respondent.

The 1st Defendant - Respondent by his answer pleaded that the said portion of land claimed by the Plaintiff - Appellant was in fact an undivided portion of his property No. 104, 4th Cross Street, owned by him and the 2nd Defendant - Respondent was his tenant in possession of the said premises. The 1st Defendant - Respondent prayed for the dismissal of the action.

The cause of action in this suit was based on an alleged 'forcible annexation' of a part of the Plaintiff's land by the 1st Defendant – Respondent.

The allotment of land described in the first schedule belonged to the Plaintiff – Appellant and 1st Defendant – Respondent's mother, Mulin Felicia Dulcie Wijewardena who by Deed No. 240 of 07/08/1942 gifted the portion of land bearing assessment No. 104 to the 1st Defendant - Respondent and gifted the allotment of land bearing assessment No. 111,113 and 115 to the Plaintiff – Appellant.

The Plaintiff - Appellant asserts that he lives abroad and came to Sri Lanka around twice or thrice a year. Owing to that he asked his younger brother (1st

Defendant – Respondent) to whom he had given his power of attorney to look after the property. However from 1985 the Plaintiff - Appellant had taken full control of the property.

When the Plaintiff - Appellant had visited his property in January 2004 he had observed that the extent of his land was around 2 perches less than 8.75 perches Thereupon he hired surveyor M.M.S Fernando to survey the land and find out its extent. The surveyor had then prepared Plan no. 927 dated 30th September 2004 and a report dated 1st October 2004. According to this Plan, lot 4 which is 1.95 perches and is described in the second schedule to the plaint in extent represents the encroached portion. He states that the present extent of the Plaintiff's property is 6.80 perches, when it should be 8.75 perches. The common boundary between the two properties is an old wall, it is the Plaintiff – Appellant's position that the old wall had been burned down during the communal riots in 1983 and the 1st Defendant – Respondent had reconstructed the wall and in doing so had encroached upon 1.95 perches of the Plaintiff – Appellant's property.

Thereafter the Plaintiff - Appellant had lodged a complaint at the Mediation Board to resolve the issue with the 1st Defendant - Respondent. Counsel for the Plaintiff – Appellant submits that the 1st Defendant - Respondent had made a promise to return the encroached portion of land back to the Plaintiff - Appellant. However the 1st Defendant - Respondent had failed to honour his promise and as a result the Plaintiff - Appellant instituted action at the District Court.

After trial was concluded the additional District Judge of Colombo by his judgement dated 26.09.2008 granted the Plaintiff - Appellant all the reliefs prayed for in the plaint.

Being aggrieved with aforementioned judgement the 1st and 2nd Defendant – Respondents appealed to the High Court of Civil Appeals of the Western province Holden at Colombo by two separate petitions of appeal. The High Court by

judgement dated 06.01.2016 allowed the appeals of the Defendant - Respondents and gives the following reasons.

> *"If there is no evidence whatsoever that the common old wall separating the two properties has been changed, and if it is quite clear (by plans P3 and P6) that there is a discrepancy between the extent and boundaries of the two properties conveyed, then the question is which one shall be given preference or to shall prevail?"*
>
> *"The description of boundaries in the Title Deed of both parties, namely P1, is precise and has subsisted to the present date and admitted by both parties as correct until January 2004 when the plaintiff wanted to do some constructions in his property (page 150 of the Brief) he felt that he does not have the full extent mentioned in the Deed.* ***When there is a variation between description and extent given in a Deed, in law, description must prevail."***
>
> *(Emphasis added)*

Being aggrieved with the judgement of the High Court, the Plaintiff - Appellant appealed to the Supreme Court and leave to appeal granted on the questions of law stated below;

i. *Did the High Court of Civil Appeals, Colombo err in law in substituting its findings in place of the factual findings of the District Court which are not held to be perverse?*

ii. *Did the High Court of Civil Appeals err in law in disregarding the views of the surveyors who are both experienced and experts without any valid reasons?*

iii. *Did the High Court of Civil Appeals err in law in failing to consider that the totality of the evidence in this case shows beyond doubt that the first Defendant has encroached upon the plaintiff's property?*

iv. *Did the High Court of Civil Appeals fatally err in failing to consider that a new wall was constructed after the communal riots of 1983, and that the said encroachment took place with the construction of the new wall?*

The decisive factor in regards to this issue is the old wall which separates the Plaintiff – Appellant and 1st Defendant – Respondent's properties. According to the Defendant – Respondent's the wall is around 70 years old and the height of the wall is about 12 ½ feet. The Plaintiff - Appellant however disputes the age of the said old wall stating that the wall had been burnt down during the communal riots of 1983. The Plaintiff – Appellant's position is that the 1st Defendant - Respondent had reconstructed the wall, and in doing so he encroached an extent of 1.95 perches of the Plaintiff – Appellant's property.

The western boundary of the Plaintiff Appellant's Property and the eastern boundary of the 1st Defendant – Respondent's property is a common boundary. This common boundary is the old wall. The Boundaries of the Plaintiff- Appellant's property have been described in Deed No. 240 dated 7/8/1942 as;

"උතුරට පස්වන හරස් වීදියේ වරිපනම් නො . 117 දරන ගොඩනැගිල්ල ද

නැගෙනහිරට පස්වන හරස් වීදියද

දකුණට පස්වන හරස් වීදියේ වරිපනම් නොම්මර 105 දරන ගොඩනැගිල්ල ද

බස්නාහිරට හතරවන හරස් වීදියේ වරිපනම් අංක ***104*** *දරන මෙම ගොඩනැගිල්ලේ ඉතිරි කොටසට අතර බිත්තිය ද"*

English Translation of the above paragraph as follows;

"Bounded on the North by premises bearing assessment No. 117, Fifth Cross Street

On the East by 5th Cross Street

On the South by Premises bearing assessment No. 105, Fifth Cross Street

On the West by the wall separating the balance portion of the building bearing Assessment No. 104"

And the boundaries of the 1st Defendant's property have been described in Deed No. 240 dated 7/8/1942 as;

"උතුරට හතරවන හරස් වීදියේ වරිපනම් නො . 108 දරන ගොඩනැගිල්ල ද

*නැගෙනහිරට පස්වන හරස් වීදියේ වරිපනම් නොම්මර **111, 113** සහ **115** ක් දරන මෙම ගොඩනැගිල්ලේ ඉතිරි කොටසට අතර බිත්තියද,*

දකුනට හතරවන හරස් වීදියේ වරිපනම් නොම්මර 100 දරන ගොඩනැගිල්ලද

බස්නාහිරට හතරවන හරස් වීදියද'

English Translation of the above paragraph as follows;

"Bounded on the North by premises bearing assessment No. 108, Fourth Cross Street

On the East by the wall between this and the balance portion of the building bearing Assessment Nos 111, 113 and 115

On the South by Premises bearing assessment No. 100, Fifth Cross Street

On the West by 4th Cross Street"

Nonetheless there was no evidence led at the trial to prove that the boundary wall has been shifted in January 2004 leading to an encroachment of the Plaintiff – Appellant's property. The High Court Judge in his Judgement stated that

*"Let alone in January 2004 there is **no iota of evidence to say that the 1st defendant encroached upon any portion of the plaintiff's land** at any time after the execution of the deed in 1942"*

(Emphasis added)

Thus there is no evidence to support the Plaintiff - Appellant's claim that the old wall had been replaced by a new wall which had been constructed to encroach upon his property.

In the first schedule to the Deed No. 240 the extent of the Plaintiff - Appellant's property is given as 8.75 perches. The complaint of the Plaintiff - Appellant is that he is occupying a lesser extent of land and that therefore there is an encroachment. The pivotal legal issue that then arises is where there is a discrepancy between the description of the property by reference to definite physical boundaries and the description by extent, which of these ought to prevail?

In **W.B. Appuhamy v W.M.A Gallella and others (78 NLR 404)** Sharvananda J held as follows;

> *"Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. It is permissible to resort to extrinsic evidence in order to resolve the ambiguity relating to the subject matter referred to in the conveyance. In such circumstances it is proper to have regard to the subsequent conduct of each of the parties, especially when such conduct amounts to an admission against the party's proprietary interest."*

In **Woodroffe & Amir Ali on Law of Evidence**, 14th Edition, Page 2062 it stated as follows;

> *"In case of a discrepancy between dimensions and boundaries, the rule is now well established that the area specified within the boundaries will pass whether it be less or more than the quantity specified"*

Monir in **Principles and Digest of the Law of Evidence**, 3rd Edition, page 759 stated as follows;

> *"In a conflict between the description of the boundaries and that of the quantity of the land conveyed, the description of the boundaries, if precise and accurate, dominates the description of the quantity, in every case the question of intention of the parties must be taken into consideration"*

I have observed as per the submitted facts and evidence In this case that there is no extrinsic evidence to justify taking a different view.

Answering the 1st question of law, did the High Court of Civil Appeals, Colombo err in law in substituting its findings in place of the factual findings of the District Court which are not held to be perverse? I find that the learned Judge of the District Court had come to his conclusion by relying on statements made at the Mediation Board. However the problem that arises is that the Mediation certificate had not been produced at trial. Further the Provisions of Section 16 (2) of the Mediation Board Act No. 72 of 1988 reads;

> *"No statement made by any person before a Mediation Board shall be admissible in evidence in any civil or criminal proceedings"*.

For this reason I answer the first question of law negatively.

Answering the 2nd question, did the High Court of Civil Appeals err in law in disregarding the views of the surveyors who are both experienced and experts without any valid reasons? However as there is no proof of encroachment and for the reasons given in this judgement I answer this question negatively

Answering the 3rd question of law, did the High Court of Civil Appeals err in law in failing to consider that the totality of the evidence in this case shows beyond doubt that the first Defendant has encroached upon the plaintiff's property? The

Plaintiff – Appellant's main argument on the encroachment is that the wall which is the common boundary between the two lands had been rebuilt by the 1st Defendant – Respondent after the Communal riots of 1983. However there isn't any evidence to prove this claim. Hence I answer this question negatively.

Answering the 4th Question of law, did the High Court of Civil Appeals fatally err in failing to consider that a new wall was constructed after the communal riots of 1983, and that the said encroachment took place with the construction of the new wall? For the reasons given above I answer the 4th question negatively.

In these circumstances, the general principle that, where there is a variation between description and extent in a deed, description will prevail. Consequently I find that the Learned Judge of the High Court of Civil Appeal had considered all the information and made his decision. Thus I am not inclined to disturb his findings. Accordingly I dismiss the appeal and award no 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

SC (CHC) 05/2009

Case No. HC (Civil) 128/2000(01)

Seylan Bank PLC,
Registration No.PQ9
Ceylinco Seylan Towers,
90, Galle Road, Colombo 3.

Plaintiff

Vs.

Premier Marketing Ltd,
456, Galle Road, Colombo 3

Defendant

AND NOW

In the matter of an appeal in terms of Section 5(1) of the High Court of the Provinces (Special provisions) Act No.10 of 1997 read with Articles 127 and 128 of the Constitution.

Premier Marketing Ltd,
456, Galle Road, Colombo 3

Defendant –Appellant

Vs.

Seylan Bank PLC,
Registration No.PQ9,
Ceylinco Seylan Towers,
90, Galle Road, Colombo 3.

Plaintiff-Responden

Before: H.N.J Perera CJ,

Vijith K. Malalgoda, PC, J.

L.T.B. Dehideniya J.

Counsel: Maithree Wickremasinghe PC with Rakitha Jayathunga instructed by Paul Rathnayake Associates for the Defendant –Appellant.

Avindra Rodrigo with Shamlie Jayathunga and Rasika Aluwihare for the Plaintiff – Respondent.

Argued on; 11/09/2018

Decided on: 22/03/2019

L.T.B. Dehideniya J,

The Plaintiff-Respondent (hereinafter sometime called and referred to as the Plaintiff) filed an action in the District Court which has subsequently been transferred to the Commercial High Court of the Western Province, seeking to recover the monies due to it from the Defendant-Appellant (hereinafter sometime called and referred to as the Defendant), under the facilities that have been granted by it to the Defendant. The Commercial High Court, after trial delivered the judgement dated 17-10-2008 in favour of the Plaintiff.

The Defendant –Appellant have by its Petition dated 11-12-2008 appealed to this Court praying for the following reliefs:

a) To set aside the said judgement of the Commercial High Court of the Western province.
b) To award costs to the Defendant- Appellants.
c) To award such other and further relief as this court shall seem to meet to the Defendant –Appellant.

In this case, the Plaintiff Bank granted overdraft/loan facilities to the Defendant at the latter's request and the Defendant agreed to repay the facilities with the interest on demand. The parties have entered into an agreement dated 4th April 1996. The Plaintiff's version is that the Defendant obtained several facilities

throughout for a period of time. The Plaintiff has made a demand for the sum of Rs. 4, 571,173.62 being the amount payable by the Defendant and the relevant interest by letter dated 20th October 1997. The Defendant denied the liability to pay the said amount of money by the letter dated 26th November 1997. Subsequent to the letter of denial, the Plaintiff reduced the liability of the Defendant to Rs.4, 274,921.39 and pleaded that it was entitled to judgement for the recovery of the said sum from the Defendant with an interest at 30% per annum from 24th September 1997. The Defendant filed an answer on 26th March 1999 and denied the claim of the Plaintiff and pleaded, denying liability to pay the sum demanded. The Defendant sought a dismissal of the Plaintiff's action. The District Court made an order transferring the action to the High Court established under the Act No.10 of 1996. The High Court, after trial, has decided the case in favour of the Plaintiff.

The Defendant argues in this case that, the upper limit of the facility which could have granted by the bank as per the agreement was Rs. 1,250,000.00 and there is no authority on the part of the Plaintiff to grant greater amount than the specific upper limit to the Defendant.

At the trial the Plaintiff Bank called the Assistant General Manager Mr.T.H.D.C.E De Silva who was the Manager of the Cinnamon Garden branch when the parties entered into the agreement, as a witness. He submitted an affidavit giving evidence in examination-in-chief. Thereafter, he has been cross-examined and re-examined. The witness stated that the Plaintiff and the Defendant entered into the agreement marked P3 to provide facilities to the Defendant. The upper limit of the agreement was 1.25 million, but according to this witness the bank can increase that upper limit.

In questioning this witness, it was put to the witness that the agreed rate of interest is 25% and any increase of the interest has to be advised to the customer. When he was questioned whether he has any document to show that such an increase is advised, he answered in negative, but he volunteered to say that the bank in certain circumstances includes the enhancement of the rate of interest in the bank statements. He further stated that if the rate of interest has been increased, the bank advice the customer. The Defence Counsel neither questioned the witness on this statement nor he denied the statement that the bank advise the customer. Therefore, this piece of evidence that the bank advises the customers on the enhancement of the interest rate is unchallenged.

An unchallenged piece of evidence is a 'matter before court'. In the case of Silva v. Chandradasa de Silva 70 NLR 169 it was held:

> *When the Respondent's counsel in the instant case called upon the Election Judge to decide the matter of the Petitioner's status upon a consideration of the evidence on record at the close of the case for the Petitioner, he did so without himself calling any evidence in disproof of the status. In other words, the evidence on record remained uncontradicted. But, nowhere in the judgement did the learned Election judge refer to this circumstance as a 'matter before the court' and it is evident that he took no account of this circumstance in reaching his conclusion. The failure to take account of this circumstance was a non- direction amounting to misdirection in law which vitiates the conclusion of fact which the Judge, ultimately*

reached. That is a sufficient ground on which to set aside the order dismissing the petition.

The evidence that has been led in the instant case that the interest had been increased and the Defendant was advised accordingly can be accepted though there is no documentary proof, because the oral evidence was not denied or challenged.

What the Plaintiff argues in this case is that the Defendant did not call any evidence and the evidence which was given by the Plaintiff was not contradicted, and in such an instance not giving evidence becomes a 'matter before court'.

The Defendant stated that, 25% is the interest which has been provided in the agreement, and any other rate of interest can be charged only if it is notified and the Plaintiff Bank has made no notification to that effect. Further, the Defendant continues in his contention that, setting out a different interest rates in the bank statement is not a method in accordance with the contract and the Bank Statements produced by the Plaintiff Bank does not depict the interest rates. It is apparent, that what the Defendant attempted to uphold throughout the case, was that he is not liable to pay the claim demanded by the Plaintiff Bank, and especially the rates of interest 28% and 30% are not relevant to the Defendant. The court expects the Defendant to be diligent and attentive to protect the right that he expects to vindicate. It is clear that, the Defendant has not in any manner attempted to oppose the voluntary statement made by the witness. The silence entertained by the Defendant at the instance where he needed to question the stance of the Plaintiff amounts to an acceptance of the fact that, he was duly

advised by the Plaintiff Bank about the increased rates of interest and he is liable to pay the claim of the latter.

This court further pays attention to the argument that was brought before at the hearing. The Plaintiff argues that non payment of the money due to the Bank becomes an unjust enrichment on the part of the Defendant. This was not pleaded in the plaint or raised as an issue at the trial.

The principle of 'unjust enrichment' has roots in both Roman Dutch Law and English Law. As far as the Roman Dutch Law is concerned, it has been stated in **Peiris v. Municipal Council, Galle 65 N.L.R. 555 AT 557,**

> *Under the Roman law, an action would lie where one person had been unjustly enriched to the detriment of another. Hence, different types of condictiones and the actio de in rem verso were available, but no general action based on undue enrichment existed.*

> *In Roman –Dutch Law, the cases where an action would lie to recover undue enrichment received extension. Many Dutch Jurists, considered undue enrichment as a source of obligations and the various condictiones by which such enrichment could be recovered are still part of the modern law, though both in Roman and Roman Dutch Law, these actions are essentially statements on the substantive law, cloaked under terms of various actions.*

The English Law approach to the principle of unjust enrichment is worthy to consider here. In **Banque Financiere de la Cite v. Parc (Battersea) Ltd (1999) AC 221, 227, HL,** Lord Steyn held that a *Plaintiff must show three things to make a claim under the ground of unjust enrichment.*

1) *The Defendant has been enriched.*
2) *The enrichment has been gained at the Plaintiff's expense.*
3) *The circumstances of the enrichment are such that, it would be unjust to let the Defendant keep the benefit.*

This specifically refers to an instance which depicts the receipt of money and service. In **BP Exploration Co. (Libya) v. Hunt (1979) 1WLR 783,** Robert Goff J, held that,

> *Money has the peculiar character of a universal medium of exchange. By, it is receipt, the recipient is inevitable benefited; and (subject to problems arising from such matters as inflation, change of position and the time value of money) the loss suffered by the Plaintiff is generally equal to the Defendant's gain, so that no difficulty arises concerning the amount to be repaid.*

In the present case, it is apparent to court that, the Plaintiff Bank has provided money to the Defendant that constitute an amount of money out of the funds of the Plaintiff. This becomes detrimental to the Plaintiff, if the Defendant evades the payment of money. At a failure to payment, the Defendant incurs a benefit

which is undue and unjust. But, the Plaintiff has not pleaded unjust enrichment in the plaint.

Even though the argument on the unjust enrichment is not considered, the other evidence of the Plaintiff's witness establishes the plaintiff's case.

I see no reason to interfere with the findings of the learned High Court Judge. Appeal dismissed with cost fixed at Rs. 25,000/-

Judge of the Supreme Court

H.N.J Perera CJ

I agree

Chief Justice

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 in terms of section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 reads with Article 154P (3) of the Constitution of the Republic of Sri Lanka

Commercial Bank of Ceylon Limited alias
Seemasahitha Lanka Vanija Bankuwa of No. 21, Bristol Street, Colombo 01 and having branch office and/or place of business at No. 343, Galle Road, Colombo 06.

Plaintiff

SC/CHC /19/2007
HC (Western Province) Civil
Case No. 100/98 (1)

Vs

1. Samarathilaka Wijesingha Ekanayaka
2. Indra Iranganie Wijesingha Ekanayaka
3. Sujeewa Wijesingha Ekanayaka

Carrying on business under the name style and firm of "Sahana Printers" at Dummaladeniya, Wennappuwa.

Defendants

And

Commercial Bank of Ceylon Limited alias
Seemasahitha Lanka Vanija Bankuwa of No. 21, Bristol Street, Colombo 01 and having branch office and/or place of business at No. 343, Galle Road, Colombo 06.

Plaintiff-Appellant

Vs

1. Samarathilaka Wijesingha Ekanayaka
(Now deceased)

1A. Indra Iranganie Wijesingha Ekanayaka

1st Substituted Defendant-Respondent

2. Indra Iranganie Wijesingha Ekanayaka

2nd Defendant-Respondent

3. Sujeewa Wijesingha Ekanayaka

Carrying on business under the name style and firm of "Sahana Printers" at Dummaladeniya, Wennappuwa.

3rd Defendant-Respondent

Before: **Justice Vijith K. Malalgoda PC**

Justice L.T.B. Dehideniya

Justice S. Thurairaja PC

Counsel: **S. A. Parathalingam, PC with Varuna Senadhira for the Plaintiff-Appellant**

Lasitha Kanuwanaarachchi with Bhagya De Silva for the Substituted Defendant-Respondent

Argued on: 22.03.2019

Decided on: 28.11.2019

Vijith K. Malalgoda PC J

The Plaintiff-Appellant (here in after referred to as "the Appellant Bank") has instituted an action before the Commercial High Court of the Western Province against the 1st to 3rd Respondents-Respondents (here in after referred to as the 1st to 3rd Respondents) for the recovery of

a) a sum of Rs. 1,545,986/35 a further sum of Rs. 475,231/96 by way of unpaid interest and a sum of Rs. 9,504/63 by way of Turn Over Tax on such interest and a sum of Rs. 21,385/43 by way of Defence Levy on such interest from 01. 08. 1995 to 12.02.1997 aggregating to sum of Rs 2,052,108/37 and further interest on the said sum of Rs. 1,545,986/35 at 20% per annum from 13.02.1997 until full and final settlement and Turn Over Tax on such interest at 2% and Defence Levy on such interest at 4.5% and
b) a sum of Rs. 1,800,000/- with legal interest from the date of the Plaint and thereafter with further legal interest on the decreed amount till payment in full

granted to the Respondents by the Appellant Bank as a loan facility.

During the trial before the Commercial High Court three admissions and 35 issues were raised by the parties.

The Plaintiff summoned one Keerthi Ediriweera an executive from the Plaintiff bank and closed the case marking P-1 to P-9. On behalf of the Defendants, the 1st Defendant S.W. Ekanayake testified before the High Court and summoned one Senarathne, Inspector of Police as the witness for the defence and closed the case marking V-1 to V-19.

At the conclusion of the said trial, the Commercial High Court of the Western Province by its judgment dated 07th February 2007 dismissed the said action. Being aggrieved by the said judgment, the Appellant Bank has filed the instant appeal before this court.

As revealed before this court, the 1st-3rd Respondents, who were carrying on a business under the name and style of "Sahana Printers", was a regular customer of the Appellant Bank in its branch at No. 343, Galle Road, Colombo. 06 and had maintained a current account bearing No. 6049 which was later changed to No. 6017320 with the said branch of the Appellant Bank.

As admitted by both parties, the Appellant Bank had granted an overdraft facility to the said account and according to the Appellant Bank, by 17th March 1994 the aforementioned current account was overdrawn in a sum of Rs. 3,472,592/50.

The Appellant Bank had taken up the position before the Commercial High Court that the Bank has granted a loan in a sum of Rs. 3,500,000/- that was duly credited to the aforesaid current account of the Respondents in order to settle the said overdrawn facility. It was further submitted that the Appellant Bank had rescheduled the said loan into two parts; such as an interest free loan of Rs. 1,800,000/- and an interest bearing loan of Rs. 1,700,000/-. Both the said loans were utilized to recover the overdrawn balance in the current account of the Respondents. But, as stated by the Appellant Bank, the Respondents have failed and neglected to repay the due amounts.

At this point, it is pertinent to observe that according to the evidence of witness Ediriweera, the overdraft facility that has been granted to the Respondents was based on an oral request made by them. The witness of the Appellant Bank whilst giving evidence before the Commercial High Court stated that the Respondents had been granted overdraft facilities in the absence of any funds in the said account to honour the cheques drawn by them.

The 1st Respondent, in his evidence, has admitted that the Appellant Bank has granted an overdraft facility to the Respondents. This has been accepted by both parties but it was the position taken by the 1st Respondent whilst giving evidence before the trial court that, they have settled such amount. However, the settlement of the overdraft balance is not the question before us. The foremost question is whether the bank has granted another loan to recover the overdrawn balance.

During the trial, it was submitted on behalf of the Appellant Bank that there were some discussions regarding a settlement of the overdrawn balance of Rs. 3,472,592.92/- and then the bank has granted the said loan valued Rs. 3,500,000/- to the Respondents. Even though the Bank has taken up the position that it is the established usual banking procedure when an overdrawn balance in a current account remains outstanding such overdrawn balance could be recovered by granting a loan to such customer, the Appellant Bank had failed to establish the granting of a loan, with documentary proof. It means that there is no request letter of the Respondents, no valid certificate regarding the granting of this loan and no signed documents. Without providing any such signed documents, it is doubtful as to how the Appellant Bank, being a responsible

institution, had granted a loan to their customers. Although, it was stated that the loan facility was granted based on the oral request of the Respondents, the Bank had failed to bring acceptable evidence to prove their case.

In the case of the **Hatton National Bank Limited v Helenluc Garments Ltd and Others (1999) 2 SLR 365**, Wijetunga J has stated that 'Overdrafts are loans by the banker to the customer…….' In such a situation, a question arises as to whether a fresh loan could be granted to settle the given loan.

On the perusal of the Judgment of the High Court, I observe that the learned Judge has correctly identified that there was no evidence to substantiate the said loan. Further, the learned Judge had observed that the procedure followed by the Appellant Bank to recover the overdraft balance was an unusual as well as surprising process.

Moreover, it is important to focus that the bank has granted a high amount of a loan for the Respondent to settle their overdrawn balance. But, there is no guarantee bond, mortgaged bond, valid loan agreement, and the bank has failed to take sureties privileges such as *beneficium ordinis sue excussionis* and *beneficum divisionis*.

The importance of such requisites were discussed in several cases before Appellate Courts. In the case of ***Brunswick Exports Ltd vs. HNB Ltd (1999) 1 SLR 219*** it is stated that " the Mortgage had been executed to secure the repayment of a commercial loan given by a commercial bank to a company for the purpose of its business." Further, in the ***Hemas Marketing (pvt) Ltd Vs. Chandrasiri and Others (1994) 2 SLR 181***, the Court of Appeal observed that "a guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated……" Therefore, as a reputed Commercial Bank, the Appellant Bank should have a greater responsibility more than this when they are granting loan facilities to their customers.

On the other hand, the Counsel for Respondents has submitted that the Respondents have never asked for such a loan valued 3.5 Million or otherwise. Further, the counsel submitted that the Respondents have settled the said overdraft of Rs. 3,472.92/=. Furthermore, the Respondents' position is, during this time, one Lalith Peiris, who was the Manager of the Appellant Bank, had fraudulently prepared documents and misappropriated monies belonging both, to customers of

the Bank as well as the Appellant Bank. The learned High Court Judge has correctly analyzed the above position based on V-19 a document produced by the defence as follows;

"විත්තියෙන් පැමිණිලිකාර බැංකුවට සහ එහි කළමණාකරුවෙකු වශයෙන් සිටි ලලිත් පීරිස්ට විරුද්ධව එල්ල කරන ලද මෙම චෝදනාව ඇත්ත වශයෙන්ම ඉතා බරපතලය. මෙම චෝදනාව ඔප්පු කිරීම සඳහා විත්තිය පැමිණිලිකාර බැංකුවේ නිලධාරියකු වන "ලලිත් පීරිස්" යන කළමණාකරුගේ අනුප්‍රාප්තික නිලධාරියා විසින් වරක් පොලිසියට කරන ලද පැමිණිල්ලක් උපයෝගී කර ගත්තේය. එම පැමිණිල්ලේ සහතික පිටපතක් විත්තියෙන් සාක්ෂි සඳහා කැඳවන ලද අපරාධ පරීක්ෂණ දෙපාර්තුමේන්තුවේ සාක්ෂිකරු වන පොලිස් පරීක්ෂක යාපා මුදියන්සේලාගේ සේනාරත්න මාර්ගයෙන් ඉදිරිපත්කරන ලදී. මෙම තීන්දුවේ සම්පූර්ණාත්වය උදෙසා "වි-19" ලේඛණයෙන් සමහර කොටස් නැවත උපුටා දැක්වීම යෝග්‍ය බව මගේ අදහස බැවින් එකී ලේඛණයේ සමහර කොටස් පහත උපුටා දක්වමි.

"මා කොමර්ෂල් බැංකුවේ ප්‍රධාන කාර්යාලයේ ශාඛානය අංශයේ ප්‍රධාන කළමණාකරු ලෙස සේවය කරනවා. මාගේ රාජකාරී ස්වභාවය වනුයේ කොළඹ ශාඛා මගින් නිකුත්කරන ණය සහ අයිරා අධීක්ෂණය කිරීමයි. එක් එක් අංශය මගින් නිකුත් කරන එවැනි ණය පහසුකම් සම්බන්ධව මාසික වාර්තාවක් ප්‍රධාන කාර්යාලයට එවීම කෙරෙනවා. වැල්ලවත්ත ශාඛාවේ කළමණාකරු ලෙස එච්. ආර්. ආරියතිලක මහතා 1994.03.21 වෙනි දින වැඩ බාරගත් පසුව ගනුදෙනු සම්බන්ධව සොයා බැලීමේදී සැක සහිත ණය පහසුකම් ලබාදී තිබූ බව අප වෙත වාර්තා කළා. එම විස්තර අනුව සහකාර සාමාන්‍ය අධිකාරී පිටදෙණිය මහතාගේ ප්‍රධානත්වයෙන් එම විස්තර පරීක්ෂා කළා. එම පරීක්ෂණයෙන් අනාවරණය කරගෙන තිබුණා එම බැංකු ශාඛාවේ හිටපු කළමණාකරු එල්.එස්. පීරිස් මහතා බැංකු ප්‍රතිපත්ති වලට පටහැනිව විශාල ප්‍රමාණයේ සැක සහිත ණය පහසුකම් තුනක් සපයා දී ඒවා ගෙවීම් පැහැරහැර බැංකුවට අලාභවී තිබීමක් ගැන. මේ ගැන සොයා බලා ගෙන යද්දී කරුණාරච්චි පේ. පී. නැමැති අයට නිකුත්කර තිබූ රු. දසලක්ෂ හතයි දශම 06 ක ණය අයිරා පහසුකම් බැංකුවට ගෙවීමෙන් එම ගනුදෙනුව අවසන් කළ හෙයින් දැනට අලාභයක් නැත. පහත සඳහන් විස්තර අයිරා දෙකක පීරිස් මහතා විසින් වංචනික ලෙස නිකුත් කර

ඇත. (1) කලුතර ගාලු පාර නිව් පරණගම බිල්ඩර්ස් යන ලිපිනයේ ලක්ෂාන් සමාගමට රු. 7700000/- යි. (2) දුම්මලදෙණිය වෙන්නප්පුව සහන ප්‍රින්ටර්ස් ආයතයට රු. 3500000/- යි. එකතුව 11200000/- යි. ඉහත කී ලක්ෂාන් සමාගම හවුල්කරුවන් 05 දෙනෙකුගෙන් යුක්තය. එච්.ඊ. තිසේරා, එන්. වයි. පරණගම, වයි. එම්. එම්. චූලවතී, පීරිස් එම අයයි. එම සමාගමට 26.09.91 සිට 26.08.94 දක්වා කොටස් වශයෙන් එකී ණය අයිරාව ගෙවා තිබුනා. ආරම්භයේ ගිණුම් අංක 6170 යටතේත් පසුව කම්පියුටර් කලාට පසුව අංක 6018386 යටතේත් ගෙවීම් කර තිබුනා. අංක 251250 චෙක් පොතේ චෙක්පත් 15 ක් මගින්ද අංක 8003800 චෙක් පොතෙහි චෙක් පත් 08 ක් මගින්ද, අංක බී 818-383200 චෙක් පොතේ චෙක් පත් දෙකක් මගින්ද ගෙවීම් කර තිබේ. තවද එම ණය අයිරා ගෙවූ බව සඳහන් කර තිබුනේ ණය ලබාගන්නා සමාගම ලක්ෂ 72 ක තැනපතුවක් බැංකුවේ තැන්පත් කළ බවට ව්‍යාජ විස්තරයක් ඉදිරිපත් කිරීමෙනි. එවැනි තැන්පතුවක් නොතිබූ බව අප පරීක්ෂණයේ හෙළි වී තිබුණා. ඉහත කී චෙක් පොත් 03 ට නිකුත් කළ චෙක්පත් 25 ට අමතරව වෙනත් චෙක්පත් රාශියක් නිකුත් කර ඇති බවට පෙනී ගියා..... එම චෙක්පත් වල විස්තර බැංකු ප්‍රකාශයේ ඇතුළත් වේ. තවද මෙම 1994 මාර්තු 17 දින ලක්ෂ 3500000/- ක ණයක් මගින් මෙම අයිරාව බැර කර අයිරාව ගෙවීමක් ලෙස පෙන්වා ඇත. එසේ කර ඇත්තේ බැංකුව නොමඟ යැවීමටයි. එහෙත් එම මුදල දැනට ණය ලෙස සුරැකුම් නොමැතිව මේ දක්වා අලාභයක්ව පවතී.”

ඉහත වී.19 ලේඛණයේ අඩංගු සියළු කරුණු මෙම නඩුවේ පාර්ශවකරුවන් අතර පැණ නැගී ඇති ආරවුලේ විනිශ්චය සඳහා අරටුවටම කිඳා බසින සුළු කරුණු අඩංගු ලේඛණයකි. එකී ලේඛණය අපක්ෂපාතී ලෙස විශ්ලේෂණය කර බලන විට නෛතික වශයෙන් මතු වන්නා වූ ප්‍රධාන ප්‍රතිඵලයක් නම්, පැමිණිලි පක්ෂය සිය වගකිව යුතු නිලධාරියෙකු මාර්ගයෙන් මෙම නඩුවට අදාළ ප්‍රශ්නය ඇති වූ වකවානුවේම දරා ඇති ස්ථාවරය පැහැදිලි වන්නේය. වී.19 මගින් පැමිණිල්ල දරා ඇති ස්ථාවරය අනුව මෙම නඩුවට අදාළ විත්තිකරුවන්ට දානය කරන ලද බව කියන මිලියන 3.5 ක මුදලක් ඇත්ත වශයෙන්ම විත්තිකරුවන් හට ගෙවා නොමැත. එම මුදල වී.19 කිසි ව්‍යාකූලතාවයකින් තොරව පැහැදිළි කරන අයුරු පැමිණිලිකාර බැංකු ශාඛාවේ කලක්

කළමනාකාර සේවයේ නියුක්තව සිටි ලලින් පීරිස් යන අය විසින් සිය පරිහරණයට ලබා ගෙන ඇති බව පැහැදිලිය. එකී සිද්ධිමය කරුණා තව දුරටත් ඔප්පු කිරීමේ අවශ්‍යතාවය විත්තිය මත පැටවීම අවශ්‍ය වන්නේ නැත."

In the case of the ***Sri Lanka Ports Authority and Another vs. Jugolinija –Boal East (1981) 1 SLR 18*****,** *Samrakoon CJ* held that "If no objection is taken, when at the close of a case, documents are read in evidence, they are evidence for all purposes of the law. This is the *cursus curiae* of the original civil courts". Therefore, the 'V-19' can be accepted as evidence to this fraud done by the Appellant Bank official.

I am further mindful of the decision in ***Alwis vs. Piyasena Fernando (1993) 1 SLR 119*** where *G.S.P. de. Silva CJ* had observed that, "the findings of primary facts by a Trial Judge who hears and sees the witnesses are not to be lightly disturbed on appeal."

This court is also of the view that the Appellant Bank by having preferred this appeal cannot seek benefits as there was a fraud done by the bank official Lalith Peiris and in the said circumstances the Appellant Bank has failed to establish the issues before the High Court.

Hence, I affirm the judgment of the High Court of Western Province Civil (holden in Colombo) and dismiss the instant appeal.

Appeal Dismissed with cost.

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree,

Judge of the Supreme Court

Justice S. Thurairaja PC

I agree,

Judge of the Supreme Court

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

SC CHC Appeal No. 17/2010
HC (Civil) 123/05 (1)

The Attorney General,
Attorney General's Department,
Colombo 12.
Plaintiff

~Vs~

Tisara Packaging Industries Ltd,
No. 129, Dutugemunu Street,
Dehiwala.
Defendant

AND NOW BETWEEN

Tisara Packaging Industries Ltd,
No. 129, Dutugemunu Street,
Dehiwala.
Defendant~Appellant

The Attorney General,
Attorney General's Department,
Colombo 12.
Plaintiff~Respondent

Before: Buwaneka Aluwihare PC., J
Priyantha Jayawardena PC., J
Murdu N. B. Fernando PC.

Argued on: 02-08-2018

Written Submissions: Appellant; 31-07-2012 and 12-09-2018
Respondent; 21-09-2018

Decided on: 18.10.2019

Aluwihare PC. J.,

The Plaintiff-Respondent (hereinafter sometimes referred to as "Plaintiff"), instituted the original action in the High Court of the Western Province holden in Colombo on 1st July 2005, claiming damages amounting to Rs. 8, 005, 536.88 with legal interest from the Defendant-Appellant (hereinafter sometimes referred to as "Defendant") for breach of contract.

On 3rd August 1999, the Defendant entered into an Agreement with the Commissioner General of the Department of Educational Publications in the Ministry of Education (hereinafter "Commissioner General") to print the following school text books;

i.සිංහල කියවීම් පොත 1 ශ්‍රේණිය
ii.හින්දු ධර්මය (දෙමළ) 8 ශ්‍රේණිය
iii.World Through English (P.B.) 10
iv.ගණිතය (සිංහල) 9 ශ්‍රේණිය

This Agreement is marked “P1” and the clauses which are relevant for the present case are as follows;

(1) 1 වන උපලේඛනයෙහි දැක්වෙන පෙළපොත් දක්වා ඇති කාල සීමාව තුළ මුද්‍රණකරු විසින් මුද්‍රණය කොට සැපයිය යුතුය. මෙකී කාල සීමාව වෙනස් කිරීමේ බලය අධ්‍යාපන ප්‍රකාශන කොමසාරිස්තුමා සතුය.

(7) සැපයීමට ගිවිසගත් පිටපත් සංඛ්‍යාව වෙනසක් නැතිව එම සංඛ්‍යාව මුද්‍රණකරු විසින් අධ්‍යාපන ප්‍රකාශන කොමසාරිස් වෙත සැපයිය යුතුය. […]

(8) නියමිත දින හෝ ඊට පෙර හෝ මුද්‍රණකරු විසින් ගිවිසගත් ප්‍රමාණයට අනුකූලව තමාගේ වියදමින් එකී පෙළපොත් මුළු ප්‍රමාණය ම, අධ්‍යාපන ප්‍රකාශන කොමසාරිස්ගේ පොත් ගබඩාවට ගෙනැවිත් භාර දිය යුතුය.

(14) මිලෙහි උච්ඡාවචනයක් නිසා හෝ වෙනත් හේතුවක් නිසා හෝ අමතර ගෙවීමකට කවර ඉල්ලීමක් හෝ මුද්‍රණකරු විසින් නොකරනු ලැබේ.

(15) මෙහි 1 වන උපලේඛනයෙහි සඳහන් කාලසීමාව තුළ පෙළ පොත් සම්පාදනය කොට භාරදීමට මුද්‍රණකරු අසමත් වුවහොත් එසේ ප්‍රමාදවන එක් දිනකට පහත විස්තර පරිදි මුදලක් දඩ මුදලක් වශයෙන් නොව අවසාසික නාශ වන්දි වශයෙන් මුද්‍රණකරු විසින් ශ්‍රී ලංකා ජනරජයට ගෙවිය යුතුය. […]

(21) මෙම ගිවිසුමෙහි කොන්දේසි සහ විස්තරයන්ට අදාළව අධ්‍යාපන ප්‍රකාශන කොමසාරිස් සෑහීමකට පත්වන අයුරු මුද්‍රණකරු විසින් ගිවිසගත් ලෙස සියලුම පොත් සැපයීමට අපොහොසත් වූ විටකදී එවැනි අපොහොසත්වීම හේතුකොට ගෙන උද්ගතවන අතිරික්ත පිරිවැයෙහි හෝ සිදු වූ අලාභයෙහි හෝ සම්පූර්ණ මුදලම මුද්‍රණකරුගෙන් අය කරගැනීමට ශ්‍රී ලංකා ජනරජයේ ආණ්ඩුවට බලය ඇත්තේය.

(23) 1 වන උපලේඛනයෙහි සඳහන් කාලසීමා තුළ දී ගිවිසගත් අයුරු පෙළ පොත් සම්පාදනය කොට සැපයීමට මුද්‍රණකරු අපොහොසත් වුවහොත් පහත සඳහන් කොන්දේසි වල දැක්වෙන අයුරු ශ්‍රී ලංකා ජනරජයට ක්‍රියා කළ හැකි බවට මුද්‍රණකරු තව දුරටත් එකඟ වන්නේය.

(අ). කිසිම වන්දියක් නොමැතිව ගිවිසුම සමාප්ත කිරීම.

(ආ). මෙම පෙළ පොත් මුද්‍රණය කිරීමේ කාර්යය වෙනත් කිසිවෙකුට පවරා එවැනි තත්ත්වයක් උද්ගතවීමෙන් ඇති වෙන ප්‍රතිවිපාකයක් වශයෙන් ශ්‍රී ලංකා ජනරජයේ ආණ්ඩුවට විඳ දරා ගැනීමට සිදුවන පිරිවැයෙහි අතිරික්තය මුද්‍රණකරුගෙන් අය කරගැනීම.

(ඇ). ඇප තැන්පතුව රාජසන්තක කිරීම.

In terms of the Agreement, the Defendant agreed to print 380,000 copies of the book "World Through English" for Rs. 14, 568, 321/= and to deliver the said copies to the Commissioner General of the Department of Educational Publications on or before 30. 11. 1999. The said book consisted of 160 pages and was a given a unit price of Rs. 38.34/=. However, the Commissioner General subsequently reduced the number of pages to 136 and the Defendant-Appellant agreed to print the same number of copies taking Rs. 32.58/= as the new unit price.

It is the contention of the Plaintiff that the Defendant failed to meet the deadline and complete the order. The Defendant had only succeeded in printing 120, 400 copies and even those copies had been delivered past the deadline. As a result of the default, the Commissioner General was compelled to commission three other printing agencies to print the remainder.

Orders had been placed with Wishwalekha Printers, AJ printers and Samayawardhana printers to print respectively, 100, 000 copies (Rs. 71.55/= per copy), 49, 910 copies (Rs. 69.25/= per copy) and 50, 000 copies (Rs. 78.07/= per copy) of the text book. The total cost incurred to print the remaining copies amounted to Rs. 8, 005, 536. 00. The final receipts and invoices pertaining to each order are marked from "P2" – "P7".

Exercising rights stipulated in clauses (15), (21) and (23) of the Agreement, the Commissioner General, on behalf of the State, sought to recover the aforesaid Rs.

8, 005, 536. 00 from the Defendant by way of a letter of demand, as it was the Defendant's default that caused additional expenses. Having failed to secure the recovery by way of a letter of demand, the Attorney General instituted action in the High Court of the Western Province holden in Colombo.

The matter proceeded to trial on 15 issues raised on behalf of the Plaintiff-Respondent. The Defendant-Appellant, however, did not raise any issues.

Case for the Plaintiff was presented through the witness Wasantha Kumara Perera, Commissioner (Finance) of the Educational Publications Department and the documents "P1" to "P10" were marked and produced through this witness. The Defendant, in their written submissions filed before this court had conceded that the Defendant did not challenge the documents marked and produced as "P2" to "P9".

The Manager of the Defendant Company (K. A. A. V. Nishantha) and the Accountant of the Company (L. D. S. Wickrama), testified on behalf of the Defendant and produced the documents "D1" to "D3". The Learned High Court Judge in delivering the judgement, answered all issues raised in favour of the Plaintiff.

The learned counsel for the Defendant submitted that the facts are not in dispute, however, he stated that he only wishes to canvass the conclusions reached by the learned trial Judge. As such, I do not wish to dwell on the facts in detail.

At the trial, the Defendant contended that the Agreement was terminated by mutual consent and not pursuant to a breach. According to their version, a consensus was reached between the Commissioner General and the Defendant to terminate the contract and hand over the Art work, Positive and Press copy to the Commissioner General. However, evidence explaining reasons for such consensus, or the purported consensual termination has not been led before the High Court. Instead, the Defendant had sought to establish their position relying

on "Guidelines on Government Tender Procedure" wherein it is stated that a party will not be entitled to receive final payment until the completion of the contract. They have marked the final invoice sent to the Commissioner General dated 26. 07. 2000 (marked "V1") and have contended that they would not have received the final payment if they, as alleged, were in breach of the contract.

By the same token, they have pointed out that the Commissioner General has not taken any steps to blacklist them as a 'defaulting contractor' in terms of the said Guidelines—which, according to them, reinforce the contention that there was no breach of contract. Additionally, they have also referred to the fact that the Plaintiff had not taken steps to appropriate the security bond given as Guarantee to the Agreement, further adding weight to the fact that no breach had taken place. The gravamen of the submission of the learned counsel for the Defendant was that, the learned trial Judge was in error in not considering the totality of the evidence led in the correct perspective, and if the learned trial Judge had not misdirected himself, he ought to have come to the conclusion that the Defendant was not in breach of the agreement "P1".

Thus, the only issue that this court is called upon to decide is **whether the Defendant in fact had not breached the agreement "P1"**, based on the grounds raised by them: that the belated partial supply and non-supply of the balance copies of the textbook by the Defendant were not treated as a default or as a breach of contract by the Department (Plaintiff), and that such conduct on the part of the Department amounts to a mutual termination of the agreement "P1".

It was pointed out that the Department of Educational Publications being an organ of the state, was required to adhere to the guidelines on Government Tender Procedure. In terms of the said guidelines, it was pointed out, that the Department was required to serve a written notice requiring the Appellant to show cause as to why the Appellant should not be included in the list of "defaulting contractors" and that this requirement is mandatory under the guidelines referred to above. It

was further pointed out that no such notice was served on the Appellant by the Department.

It was also contended that the matter does not end by sending a "show cause" letter, but a series of consequences flow, following a show cause letter. In terms of the Government Tender Guidelines, no further contracts should be granted to such defaulting contractor; no payments should be made without deducting any dues and any Performance Bond given as security could be appropriated etc.

The learned counsel for the Appellant pointed out that as far as the Defendant-Appellant was concerned, none of these procedures were put in motion by the Department against them. It was also pointed out that it is in evidence that the Appellant was neither issued with a show cause letter nor was blacklisted as a contractor.

The learned counsel for the Defendant contended that the Defendant was awarded other contracts, their performance bond was not appropriated for the non-supply of the text books, and no deductions were made from the payments that were made to the Appellant in relation to the other contracts awarded to the Defendant. In this regard, attention of this court was drawn to the admission by the witness who testified on behalf of the Respondent, that the Defendant was not blacklisted as a contractor; three other contracts were awarded to the Defendant subsequent to the Agreement "P1", violating Regulation 159 of the Tender Guidelines; making the final payment of the contract before the supply was completed; non-appropriation of the performance bond; sending the Letter of Demand ("P10") 5 years after the alleged breach etc.

In the course of the submissions, the learned counsel for the Defendant referring to the conduct of the Plaintiff as aforesaid, submitted that the cumulative effect of those factors is a clear indication that non-supply of the required number of books by the Defendant under agreement "P1", was not treated as a default or a breach of contract by the Plaintiff.

The learned Additional Solicitor General on behalf of the Plaintiff argued that the failure on the part of the officials of the Educational Publications Department to take action against the Defendant in terms of the Government Tender Guidelines may amount to dereliction of duty on the part of the officials of the Department, but those factors by themselves would not prove that the Defendant had not breached the terms of the agreement "P1".

In fact the learned trial Judge has considered this issue, namely non-compliance with the Government Tender Guidelines, not blacklisting the Appellant, and entering into fresh contracts with the Appellant even after the Defendant defaulted or breached the agreement ("P1"). The learned trial Judge had quite correctly held that the failure on the part of the government officials to take any steps in performing their official duties referred to above, which could be a result of administrative lapses on the part of the public officials, does not absolve the Defendant from contractual obligations cast on them as per the agreement "P1", entered into by and between the Plaintiff and the Defendant.

With regard to the assertion of the Defendant that the parties mutually terminated the agreement "P1", the learned trial Judge had observed that if that was the case, the Defendant could have specifically asserted so in their response to the Letter of Demand ("D3") or in the answer filed by the Defendant. The Defendant, the learned trial Judge observed, had done neither. The learned trial Judge had concluded that the assertion that the parties had terminated the agreement mutually, is only an afterthought on the part of the Defendant. He had gone on to conclude that no acceptable evidence has been placed before the court to deduce that the Defendant had been released from the obligations arising out of agreement "P1". This, the Court observes, is a finding of fact by the learned trial Judge and I am of the view that the learned trial Judge was entitled to form that opinion and I see no fault on the part of the learned High Court Judge in arriving at such a conclusion.

In light of the above, the contention by the Defendant that they, by their belated partial performance of the contract and non-supply of the balance textbooks, did not breach/are not in default of the contract "P1", but that the contract has come to a mutually agreed termination as implied by the conduct of the Plaintiff, requires further scrutiny.

The Defendant avers that, by the conduct of the Plaintiff enumerated heretofore: i.e. not serving notice to show cause, not blacklisting the Defendant, awarding subsequent contracts and making payments without any deductions in the form of a penalty to the Defendant, and not appropriating the performance bond, the Plaintiff had tacitly released the Defendant from obligations and relinquished further rights arising from the contract "P1", by mutually agreeing to discharge the contract.

Even though a waiver could be implied by conduct, the intention of a creditor, (the Plaintiff in the present contract) to voluntarily renounce his/her obligations, is never presumed or inferred, but has to be established through clear evidence. Basanayake J (as His Lordship then was) has elaborated on this in **Fernando v. Samaraweera** (1951) 52 NLR 278 at page 285,

> "An intention to waive a right or benefit to which a person is entitled is never presumed. The presumption is against waiver … the intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct. The onus of proof of waiver is on the person who asserts it."

This is resonated in **C.G. Weeramantry's, "Law of Contracts"** (1967 edition) at page 716 where it is stated that, "the reason for the time-honoured dictum that 'waiver must be clearly proved' *(nemo facile praesumitur donare)* is that persons are not lightly held to have abandoned their rights."

Therefore, contentions based on administrative lapses, invoices for certain other contracts between the same parties ("V1"), and a document prepared by the Defendant Company subsequent to the commencement of the trial - purportedly a "Reconciliation of Account" ("D1") - demonstrating a sum of money paid to the Defendants for a different contract with certain deductions made- hardly discharge the onus of proof on the Defendant to clearly establish an intention of voluntary relinquishment of rights by the Plaintiff.

As such, I reject the argument on behalf of the Defendant-Appellant that a waiver of obligations is implied through the conduct of the Plaintiff-Respondent, bringing the agreement "P1" to a mutually agreed termination.

Further, the duty cast on the public officials by the Tender Guidelines to adhere to the procedures stipulated under those Guidelines, in my view, are purely administrative, a breach of which may expose the errant public officials to disciplinary action being taken against them. Breach of such procedures, by itself, has no impact on the contractual obligations of the parties, arising out of the agreement between them ("P1"), in the instant case.

However, it is important to note that there is a stark paucity of any evidence, even marginally insinuating, that the Defendant did in fact print the agreed number of copies—as they undertook under clauses (1), (7) and (8)– on or before the deadline. They (Defendant) have attempted to absolve themselves from the liability to pay damages by pointing to lapses in the Plaintiff's conduct without clearly denying the Plaintiff's allegation that they (Defendant) failed to uphold their contractual obligation to print and supply the agreed number of copies by 30. 11. 1999.

In his judgment, the learned High Court Judge has made a similar observation on page 5 of the judgment;

"කෙසේ වෙතත් පැමිණිල්ලේ සාක්ෂි පවසා ඇත්තේ එකඟ වූ පොත් ප්‍රමාණයෙන් පොත් 120, 400 පමණක් නියමිත දින වන 1999. 11. 30 වන දින පසු වී භාර දුන් බවයි. විත්තියේ සාක්ෂි එකඟ වූ පොත් ප්‍රමාණය නිවැරදිව, නියමිත දිනට භාර දුන් බව කියා සිටින්නේ නැත."

The learned High Court Judge has further noted the admissions made by the witnesses for the Defendant;

"විත්තියේ සාක්ෂිකාර විරාජිත් නිශාන්ත නම් අය 2008. 09. 02 වන දින 7 වන පිටුවේ දී මෙම ප්‍රශ්නය පැන නැගුණ පොතේ කොටසක් හැර අනෙක්වා ඔක්කොම මුද්‍රණය කල බව කියා සිටි. මෙම පොතේ කොටසක් හැර මුද්‍රණය කල බව කීම තුළ ම මෙම නඩුවට සම්බන්ධ පොතට අදාළව පැහැර හැරීමක් වූ බව ඉන් පෙනී යයි. [...] නැවත එම පිටුවේදී ම මෙම නඩුවට සම්බන්ධ පොතෙහි කොටසක් නියමිත දිනට මුද්‍රණය කර ගැනීමට නොහැකි බව පිළිගෙන ඇත. එම සාක්ෂිකරු ම එදින 13 වන පිටුවේ දී පිටපත් 380, 000 ක් මුද්‍රණයට දුන් බව පිළිගෙන, ප්‍රමාදයක් වූ බවත්, ඉන් 120, 400 ක් ප්‍රමාද වී භාර දුන් බවත් පිළිගෙන ඇත. [...] විත්තියේ දෙවැනි සාක්ෂිකාර සඳුන් වික්‍රම 2008. 12. 01 වන දින 5 වන පිටුවේ පවසන සාක්ෂි අනුව ද පෙනී යන්නේ 1999. 11. 30 වන විට පැ. 1 ගිවිසුම අනුව එහි සඳහන් සියළු පොත් භාර දී නැති බව ය."

As the brief lays bare, the Defendant has failed to substantiate their position that they were not in breach of the agreement. They have neither produced evidence establishing that they fulfilled their obligations nor have they controverted the evidence led by the Plaintiff to this effect. Their submissions have been largely limited to lapses in the Plaintiff's conduct *viz a viz* the "Guidelines on Government Tender Procedure."

In respect of the submission on the "final invoice", the learned High Court Judge has observed that the final invoice marked as "V1" has been prepared by the Defendant after the case was instituted. More importantly the said invoice relates to the printing of Mathematics Books commissioned under a different agreement and it does not in any manner seek to alleviate the alleged breach of the Agreement put in suit. In relation to the contention on the security bond, the learned High Court Judge has noted that the Defendant has failed to produce any evidence sustaining their claim, nor a copy of the bond itself to assist the Court to appreciate their stance.

Having considered the evidence presented by the Plaintiff, and being satisfied of the same, the learned High Court Judge has entered judgement in the Plaintiff's favour;

> "මේ අනුව එකඟ වී ඇති පොත් ප්‍රමාණයෙන් පොත් 120, 400 ක් පමණක් ප්‍රමාද වී භාර දුන් බවටත්, ඒ අනුව ගිවිසුම ප්‍රකාරව එකඟ වන ලද පොත් ප්‍රමාණය මුද්‍රණය කිරීමට අපොහොසත්ව විත්තිකරු වගකීම පැහැර හැර ඇති බවටත්, පැමිණිල්ල පවසන කාරණා වැඩි බරින් පිළිගත හැකිය."

The Defendant has come before this Court impugning the said Judgement on the ground that the learned High Court Judge has erred in attaching liability to the Defendant to pay damages. However, there is nothing on the face of record to indicate that the learned High Court Judge has erred, misdirected or failed to consider evidence when delivering the judgment.

Accordingly, I agree with the learned High Court Judge's decision that the Defendant, by breaching clauses (1), (7) and (8) of the Agreement ("P1") dated 03. 08 1999, is liable to pay Rs. 8, 005, 536.88 and legal interest to the Government of Sri Lanka as damages for breach of contract, in terms of clauses

(15), (21) and (23) of the said Agreement. As such, I affirm the judgement of the learned High Court Judge dated 17.11.2009 and accordingly dismiss the Appeal.

Appeal dismissed.

Judge of the Supreme Court

Justice Priyantha Jayawardena PC.
I agree

Judge of the Supreme Court

Justice Murdu N.B. 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 appeal in terms of section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against a judgment pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

S C Appeal (CHC) No. 20/2007

HC Colombo (Civil) 137/99

1. Pesumal Bulchand Chandiramani,

2. Jayashree Pesumal Chandiramani,

Both of
No. 18,
Murugan Place,
Colombo 06.

PLAINTIFF - APPELLANTS

-Vs-

1. Chandru Lakshimal Sadhwani,

No 50,
Nelson Place,
Colombo 06.

2. Seylan Bank Ltd,
Ceylinco Seylan Towers,
No. 90,
Galle Road,
Colombo 03.

DEFENDANT - RESPONDENTS

Before: Sisira J. De Abrew J

Vijith K. Malalgoda PC J

P. Padman Surasena J

Counsel:

Faisz Musthapha PC with Keerthi Thilakaratne for the Plaintiff - Appellants

Bimal Rajapakshe with Amrith Rajapakse for the 1st Defendant - Respondent

Romesh de Silva PC with Palitha Kumarasinghe PC and Manjuka Fernandopulle for the 2nd Defendant - Respondent.

Argued on: 2019 - 03 - 05

Decided on: 2019 - 04 - 04

P Padman Surasena J

The Plaintiff - Appellants (hereinafter sometimes referred to as the Plaintiffs) filed the plaint relevant to this case in the High Court of the Western Province against the 1st and 2nd Defendant - Respondents (hereinafter sometimes referred to as the 1st and 2nd Defendants). In the said plaint, the plaintiffs have complained that the 1st and 2nd Defendants acting in collusion, wrongfully and without any authority converted and/or misappropriated and/or deprived the plaintiffs a sum of US $ 161,381.15. The Plaintiffs have further stated that despite several demands, the 2nd Defendant (Seylan Bank Ltd.) has failed and neglected to pay the said sum of money, which it was obliged to pay to the Plaintiffs.

It would be useful at the outset, for the Court to identify, the case presented (as per the plaint) by the Plaintiffs to the High Court.

The following salient features in the case for the Plaintiffs could be highlighted.

1. The Plaintiffs who are husband and wife, along with the 1st Defendant had jointly opened (in the year 1987) an account (a term deposit bearing No. 230-3156-101 at the Bank of Credit and Commerce International (overseas) Ltd, Gloucester Branch, Hong Kong (hereinafter referred to as BCCI).

2. In or around the year 1991 the said BCCI had seized operations worldwide.[1]
3. The Plaintiffs had thereafter claimed a sum of approximately US $ 161,381.15 from the liquidator of the BCCI.
4. The Plaintiffs had provided proof to claim this sum of money from the said BCCI in its liquidation proceedings.[2]
5. Somewhere in November 1998, the Plaintiffs had become aware from independent sources that the said liquidator in Hong Kong has remitted the money so claimed by the plaintiffs to the 2nd Defendant, which is a bank operating in Sri Lanka (Seylan Bank).
6. Thereafter the 2nd Defendant Bank by its letter dated 1999-02-18 had informed the Plaintiffs that the 2nd Defendant had received instructions that proceeds from the deposits placed in BCCI Hong Kong Ltd be utilized towards the reduction of the liabilities of Esquire Garments Industry Ltd with the bank and that the said instructions had been duly carried out.[3]

The Plaintiffs have taken up the position that they did not at any stage give any instructions to the 2nd defendant to utilize the said proceeds towards the reduction of liabilities of Esquire Garments Industry Ltd. [4]

It is the position of the Plaintiffs that the 1st and 2nd Defendants acting in collusion wrongfully and without authority converted and or

[1] Paragraph 7 of the Plaint.
[2] Paragraph 8 of the Plaint.
[3] Paragraph 14 of the Plaint.
[4] Paragraph 15 of the Plaint.

misappropriated and / or deprived the Plaintiffs of the said sum of US $ 161,381.15.[5]

The 2nd Defendant filed its answer stating;

i. that the Colombo branch of the Bank of Credit and Commerce International (Overseas) Ltd, at the request of the Plaintiffs and the 1st Defendant had provided banking facilities to Esquire Garments Industry Ltd, which is a company duly incorporated in Sri Lanka.[6]

ii. that the Plaintiffs and the 1st Defendant had deposited the term deposit receipts pertaining to the account bearing number 230-3156-101 as a security for the repayment of the said banking facilities, with the Colombo branch of the BCCI under lien and assigned all rights over the said term deposit to the said Colombo branch of the BCCI. [7]

iii. that on or about 28th December 1991, as the BCCI had seized operations, the Monetary Board of the Central bank of Sri Lanka under the powers vested in it by virtue of the Emergency (Banking Special Provisions) Regulation No. 02 of 1991 made by His Excellency the President under section 5 of the Public Security Ordinance, had vested all the assets and liabilities of Colombo branch of BCCI with the 2nd Defendant (Seylan Bank) with effect from 1st January 1992.[8]

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[5] Paragraph 16 of the Plaint.
[6] Paragraph 4(a) of the answer filed by the 2nd Defendant.
[7] Paragraph 4(b) of the answer filed by the 2nd Defendant.
[8] Paragraph 5(b) of the answer filed by the 2nd Defendant.

iv. The 2nd Defendant had since then become entitled to the business and assets to the said Colombo branch of BCCI since 1st January 1992.[9]

v. The said Esquire Garment Industry Ltd had defaulted payments pertaining to the banking facilities granted to it by the Colombo branch of the BCCI. [10]

It is the position of the 2nd Defendant that the Plaintiffs and the 1st Defendant, after the collapse of the BCCI, had duly authorized the liquidator of BCCI (in the process of its winding up proceedings conducted in terms of winding up rules of Hong Kong), to pay the dividends due to the Plaintiffs and the 1st Defendant on the said term deposit receipts, to the 2nd Defendant.

The 2nd Defendant further states that the said liquidator in view of the said authority granted to him by the Plaintiffs and the 1st Defendant, had from time to time remitted the relevant dividends to the 2nd Defendant. In essence, it is the position of the 2nd Defendant that it merely recovered the moneys due to it by Esquire Garments Industry Ltd under the above-mentioned lien.

This Court at this stage would like to highlight a special feature in the case presented to the High Court by the Plaintiffs. The plaintiffs for the reasons best known to them had chosen not to refer to the fact of obtaining the said banking facilities from the BCCI or tendering the relevant term deposit receipts of the account bearing No. 230-3156-101 with the Colombo branch of the BCCI as a security for repayment of the relevant

[9] Paragraph 5(c) of the answer filed by the 2nd Defendant.
[10] Paragraph 6 of the answer filed by the 2nd Defendant.

banking facilities. Ironically, the Plaintiffs appear to simulate a mere general situation where the bank (2nd Defendant) despite several demands, has failed and neglected to pay to its account holder (Plaintiffs) the remainder of the funds of their account after the closure of the said account. The Plaintiffs allege that the 2nd Defendant (Seylan Bank Ltd.) wrongfully, without any authority and acting in collusion with the 1st Defendant (the other joint account holder) had converted and or misappropriated the said sum of money, which it was otherwise obliged to pay to the Plaintiffs.

The written authority given by the Plaintiffs and the 1st Defendant to the liquidator to pay the dividends pertaining to the term deposit bearing No. 230-3156-101 has been produced in the trial marked **D 3**. Perusal of the contents of the said document (**D 3**) clearly shows that the Plaintiffs and the 1st Defendant have unequivocally authorized and requested the liquidator to pay to the 2nd Defendant all dividends declared in the relevant liquidation proceedings as payable to them (Plaintiffs and the 1st Defendant).

As has been pointed out by the learned President's Counsel for the 2nd Defendant, remitting this money to the 2nd Defendant is unconditional. Further, the 1st plaintiff who had given evidence on his behalf and his wife's behalf (2nd Plaintiff's behalf) has admitted in his evidence, in no uncertain terms;

i. that the relevant term deposit is a joint account opened together by the plaintiffs and the 1st Defendant.
ii. that the said account was operated jointly by all of them,
iii. that no single account holder could have operated it alone,

iv. that a liquidator was appointed after the BCCI went into liquidation,

v. that it was the liquidator who was in charge of all funds in BCCI,

vi. that in order to deal with the said funds the liquidator wanted him to make a claim,

vii. that all three of the joint account holders namely the plaintiffs and the 1st Defendant signed the form 72 (**D 3**) and gave instructions to the liquidator to remit the money to the 2nd Defendant,

viii. that the 2nd Defendant accordingly had correctly received this money from the liquidator,

ix. that it is that amount of money which is the subject matter of his claim in the instant action,

x. that there is no fault on the part of the liquidator in sending money to the 2nd Respondent,

xi. that the plaintiffs do not have any account with the 2nd Defendant.

Further, as pointed out by the learned President's Counsel for the 2nd Defendant, there is no evidence to prove (other than the letter of demand) that the Plaintiffs had at any time demanded from the 2nd Defendant that the said remitted amount of money be paid to them. The 1st Plaintiff has admitted in his evidence that the first letter he wrote to the 2nd Defendant is the letter produced marked **P 5**.

This Court while observing that the plaintiffs and the 1st Defendant had signed the form 72 (**D 3**) on the 10th December 1993 giving instructions to the liquidator to remit the money to the 2nd Defendant also observes that it was on a date as late as the 31st December 1998 that the Plaintiffs had sent the letter (**P 5**) to the 2nd Defendant. It would be noteworthy that the Plaintiffs either in **P 5** or in the other subsequent communication

(**P 6**) sent by them to the 2nd Respondent, had not made any claim to this sum of money from the 2nd Defendant. The first time the plaintiffs had made a claim, for this money is through the letter of demand dated 27th April 1999 (produced marked **P 9**) sent to the 2nd Defendant by the Attorneys at Law of the Plaintiffs. This appears to be after the 2nd Defendant had informed the Plaintiffs by letter dated 18th February 1999 (produced marked **P 7**) that the said money was utilized by it towards the reduction of the liabilities of Esquire Garments Industry Ltd as per the instructions given by the Plaintiffs. This fact militates against the hypothesis that the Plaintiffs have not given any instructions to the 2nd Defendant to use the relevant remittances received from BCCI towards reducing liabilities of Esquire Garments Industry Ltd.

Learned President's Counsel for the Plaintiffs strenuously argued that the learned High Court Judge should have held that the 2nd Defendant should pay this sum of money to the Plaintiffs. He advanced the above argument based on the answer provided by the High Court to the issue No. 30. The said issue No. 30 and the answer provided to it are as follows.

Issue No. 30;

Is the 2nd Defendant entitled to recover and/ or set off the moneys remitted or paid by the liquidator against the liabilities of the said Esquire Garments Industry Ltd under the lien granted to the 2nd Defendant?

Answer;

not proved.

It would be of some relevance at this stage to note the fact that the High Court has answered the issue No. 13 in the negative. The said issue No. 30 and the answer provided to it are as follows.

Issue No. 13;

Did the 1st and 2nd Defendants wrongfully and unlawfully utilize the said remittances towards the reduction of the liabilities of the Esquire Garments Industry Ltd?

Answer;

No.

It is also relevant at this stage to observe that the parties have recorded the following admissions at the trial.

I. The plaintiffs and the 1st Defendant made the term deposit into the account bearing No. 230-3156-101 at the BCCI as stated in paragraph 4(b) in the amended answer.
II. BCCI seized operations in 1991 as stated in paragraph 5 of the 2nd Defendant's answer.
III. BCCI was subject to liquidation and/ or winding up proceedings, as averred in paragraph 7(a) as amended in the answer of the 2nd Defendant.
IV. The 2nd Defendant recovered the proceeds of dividends for itself and received from the liquidator of the BCCI from time to time in terms of paragraphs 8(a) and (b) of the answer of the 2nd Defendant.

1st Plaintiff in the course of his cross-examination has admitted that none of the Plaintiffs either jointly or severally has had any account with the 2nd

Defendant. He also had admitted that neither of them had any dealings with the Seylan Bank and that the only person, whom they had dealt with, was the liquidator. The Plaintiffs had categorically admitted that they had authorized the liquidator to pay to the 2nd Defendant whatever the monies due to them. The Plaintiffs do not complain against the liquidator alleging that the said liquidator had remitted the said sum of money due to them, to a wrong person namely the 2nd Defendant. In the light of the above facts, this Court is unable to gather any basis as to why the 2nd Defendant should thereafter also have sought instructions from the plaintiffs as to the disbursement of that money. The said sum of money with the said remittance had become part of the 2nd Defendant's funds. This is particularly so in view of the fact that the Plaintiffs and the 1st Defendant have not mentioned anywhere in **D 3** that they authorize the liquidator to remit this money to the 2nd Defendant to be transferred to them or to be used only according to their instructions. Thus, on the balance of probability of the evidence led in this case, this Court is of the view that the learned High Court Judge is correct when he held that the Plaintiffs and the 1st Defendant by the act of signing the form 72 (**D 3**) have authorized the liquidator to pay the dividends to the 2nd Defendant. Thus, this Court is of the opinion that dismissal of the Plaintiffs' action by the learned High Court Judge is justifiable.

This Court holds that the argument advanced by the learned President's Counsel for the Plaintiffs that the learned High Court Judge should have held that the 2nd Defendant should pay this money to the Plaintiffs when he had held that the issue No. 30 has not been proved, has no merit. This

Court concludes that the High Court has correctly decided that the Plaintiffs have failed to prove their case.

In these circumstances, this Court affirms the judgment of the High Court dated 22nd February 2007 and proceeds to dismiss this appeal with costs. Learned Judge of the High Court holden in Colombo is directed to enter the decree accordingly.

JUDGE OF THE SUPREME COURT

Sisira J. De Abrew 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

SC Appeal No. CHC 22/11

case no: HC (Civil) 36/2007/MR

1. Union Bank of Colombo Ltd,
   No. 15A, Alfred Place, Colombo 03.

Plaintiff

~Vs~

1. Emm Chem (Pvt) Ltd
   No. 16, Flower Terrace, Colombo 07.

2. Kodduru Arachchige Don Adrin Lakshman Perera,
   No. 25/4A, Jayapura Mawatha,
   Baddegana, Kotte South, Pitakotte.

3. Mailwaganam Surendran,
   No. 53A, Maradana Road, Hendala,
   Wattala.

Defendants

AND NOW

In the matter of an Appeal to the Supreme Court from the judgment

of the High Court of the Western Province Holden in Colombo (exercising Civil/Commercial Jurisdiction dated 01/06/2011) in terms of the provisions of the High Court of Provinces (Special Provisions) Act No.10 of 1996

1. Kodduru Arachchige Don Adrin Lakshman Perera,
   No. 25/4A, Jayapura Mawatha, Baddegana, Kotte South, Pitakotte.

(2nd Defendant-Appellant)

-Vs-

1. Union Bank of Colombo Ltd,
   No. 15A, Alfred Palce, Colombo 03.

(Plaintiff-Respondent)

2. Emm Chem (Pvt) Ltd
   No. 16, Flower Terrace, Colombo 07.

3. Mailwaganam Surendran,
   No. 53A, Maradana Road, Hendala, Wattala.

(Defendant – Respondents)

Before:	Buwaneka Aluwihare PC. J H.N.J. Perera J Vijith K. Malalgoda PC. J
Counsel:	Hiran De Alwis with Kalpa Virajith for the 2nd Defendant- Appellant instructed by Prasanna Ekanayake Sandamali Munasinghe for the Plaintiff-Respondent instructed by Nirosha Kannangara.
Argued on:	27/06/2017
Decided on:	07/03/2019

Aluwihare PC. J.,

The 2nd Defendant- Appellant (Hereinafter referred to as the 2nd Defendant) in this case was the 2nd Defendant in the case originally filed at the Commercial High Court. The initial case was filed by the Plaintiff-Respondent to recover a sum of Rs. 5, 162,341.53/= and the interest as claimed in the plaint dated 06/02/2007, from the 2nd Defendant and the 3rd Defendant of the original case (hereinafter

referred to as the 3rd Defendant), who were the directors of the 1st Defendant company.

At the request of the 2nd and 3rd Defendants, the Plaintiff-Respondent (Hereinafter the "Plaintiff Bank") extended certain credit facilities (including term loan facilities, bank overdraft, lent and advanced monies etc.) to the 1st Defendant company. The offer letter sent by the Plaintiff Bank in this regard dated 11/ 03/1998 is marked "P5." This Offer letter, *inter alia*, required a personal guarantee from two directors for Rs. 7 million. The 2nd and 3rd Defendants, signed and accepted the contract and executed a Joint and Several Personal Guarantee ("P15") on 16/03/1998.

In the year 2000, the 1st Defendant company began defaulting in its monthly repayments which prompted the Plaintiff Bank to send reminders to settle the overdue amounts. On 25th October 2000, by way of letter marked "P6", another director of the 1st Defendant Company appealed to the Plaintiff Bank "*to consider granting a suitable facility merely for survival of the organization so that we are confident that we could commence settling your dues.*" Considering this request, the Plaintiff Bank sent another offer letter on 19/ 06/ 2001, marked "P7", *restructuring the outstanding amount*. The 2nd Defendant signed and accepted this offer on 16/ 07/ 2001. Underneath his signature was also an assurance, authenticated by his own signature, stating "*We could settle according to our fax dated 27/ 03/ 2001.*"

However, the 1st Defendant company continued to fail in their timely repayments. Subsequently, the Plaintiff Bank sent notices on 24/04/2002 and 08/07/2002 to the 2nd and 3rd Defendants reminding them of the overdue payments and requiring prompt settlement of the same. These letters are marked "P8" and "P9". Again on 27/08/2002, through the letter of demand marked "P14", the Plaintiff Bank demanded the 1st Defendant Company to settle their outstanding amount. Similar letters of demand were sent to the 2nd and 3rd Defendants which are marked as "P14", "P14(a)", "P16", and "P16(a)". These letters were not responded to by the Defendants and no attempts appears to have been made to settle the outstanding sum, which gave rise to the cause of action in the Commercial High Court.

At the trial, the Plaintiff Bank abandoned their claim against the 1st Defendant company and pursued only the claim against the 2nd and 3rd Defendants for the recovery of the said sum on the strength of the guarantee bond executed on 16/03/1998 to pay all monies due and owing from the 1st Defendant company to the Plaintiff Bank.

During the trial, the 2nd Defendant-Appellant resisted the claim on the basis that the Plaintiff Bank's cause of action has prescribed. He contended that, contrary to what the Plaintiff Bank states, in 2001 the 1st Defendant company *did not reschedule the existing loan repayments but obtained a new credit facility*. This credit facility was provided by the Plaintiff-Bank without obtaining a personal guarantee. The 2nd and 3rd Defendants only became sureties for the 1998 loan and

not for the loan obtained in 2001. Their guarantee bond having been executed in 1998, the claim for recovery of money in respect of the same in 2007 was prescribed.

At the end of the trial, the learned High Court judge entered the judgment in the favour of the Plaintiff Bank. The 2nd Defendant-Appellant aggrieved by the said judgment invoked the appellate powers of this Court.

It is the contention of the 2nd Defendant-Appellant that the guarantee bond which he executed along with the 3rd Defendant only extends to the 1998 loan. The arrangement that took place in 2001 between the 1st Defendant Company and the Plaintiff Bank was a new loan and not a continuation of the former. It was further pointed out that for this last loan, (*i.e.*, 2001) the Plaintiff Bank did not obtain any personal guarantee nor was there any guarantee bond. The liability of the 2nd Defendant-Appellant, therefore, if at all would only extend to the 1st loan obtained in 1998. Even in respect of the said loan, the 2nd Defendant-Appellant disputed his liability on two grounds; firstly, that the claim is prescribed and secondly that there was no outstanding amount due from the Company. The 1998 loan, according to the 2nd Defendant-Appellant, had been settled in full and the same is reflected in the Bank ledgers (marked "P12") As such, there was no liability accruing to the 2nd Defendant-Appellant to settle it as a surety. It was further submitted that the Plaintiff-Bank has exploited the 1998 guarantee bond which was executed for a specific loan and has extended its application for future uncertain monies.

The learned counsel for the 2nd Defendant, drew our attention to the case of ***Hatton National Bank v Rumeco Industrial Limited*** (SC Appeal 99A/2009, SC minutes 8th June 2011) and submitted that it has been held that guarantee bonds cannot be enforced for future and antecedent debts. Even if that had been the case, it would not help the Defendant since the 2001 credit facility was not a "new loan" but a continuation of the former.

While there is no doubt about the accuracy of the said position of law, it must be noted that the said position of law will apply to the present case, only if the 2001 credit facility was a 'new loan'. If the 2001 credit facility was not a 'new loan' but a continuation of the former, the position in the ***Rumeco*** case cannot be made applicable to the present case. Concomitantly, if the 2001 credit facility was in fact a continuation, then the 2nd Defendant-Appellant's defence of prescription too will become untenable.

As stated on page 713 of **Paget's Law of Banking (12th Edition)** Courts must consider the factual background known to the parties at or before the date of the contract and ascertain the objective of the transaction when interpreting the Guarantee Bond.

It is common ground that the 1st Defendant-Company obtained credit facilities in the year 1998 from the Plaintiff Bank. It is also common ground that in or around 2000, the 1st Defendant Company defaulted in their payments. The arrangement in 2001 takes place pursuant to the said act of defaulting and pursuant to the letter

of request forwarded by one director of the 1st Defendant company. In the said letter, the director of the 1st Defendant-Company admitted that "*a number of Import Loans/Bills have fallen due and the Company Current Account with you [the Plaintiff Bank] is also overdrawn excessively*". In the same letter, the 1st Defendant-Company appealed to the Plaintiff-Bank to grant a "*suitable facility merely for the survival of the organization so that we [the 1st Defendant-company] are confident that we could commence setting your dues in the following manner.*" Thereafter, the letter spells out three ways in which the 1st Defendant-Company proposes to settle their dues, namely;

> *"(a) to pay a sum of Rs. 55, 000/= monthly out of the already accrued interest component for the first six months beginning in January 2001*
>
> *(b) to pay monthly a sum of Rs. 55, 000/= together with reasonable amount from the capital of course at your discretion-commencing July 2001 till the completion of the outstanding.*
>
> *(c) to continue to deposit whatever the collection of monies to our current account with you, to help reduce the overdrawn balance*".

Thus, it appears that although the said letter refers to 'granting a facility', what the 1st Defendant-company intended to seek was a series of '*concessions*' to settle their dues. The three methods quoted above could only be construed as proposing ways to settle their outstanding amount. They do not disclose any intention to obtain a 'new loan'. Moreover, it is inconceivable that a company—which by their own admission—was "*not in a position to import the requisite materials as the bank has stopped granting any facilities, pending settlement of this outstanding*" and "*has*

come to a grinding half", would venture to obtain further loans from the Plaintiff Bank.

There is no dispute that it was the abovementioned request letter marked "P6" that prompted the Plaintiff Bank to send a new offer letter in June 2001 marked "P7." In the said letter the Plaintiff Bank has clearly indicated that "*We, the Union Bank of Colombo, are pleased to restructure the outstanding pertaining to Emm Chem (Pvt) Ltd on terms and conditions stipulated below*." According to the said letter, the outstanding amount was restructured as "Term Loan 1" and "Term Loan 2". Even at the end of the letter "P7", the Plaintiff Bank has stated "*Please note that this is the second re-schedulement of the outstandings and therefore request you to strictly adhere to the rescheduled payments*".

It is also important to note that under the heading "Security", the Plaintiff-Bank has specifically referred to "*personal guarantee for Rs. 7, 000, 000/= of Mr. Lakshman Perera and Mr. Surenthiran together with net worth investments*". The 2nd Defendant-Appellant argued based on this reference that "P7" was a new and distinct loan which required a new personal guarantee. In contrast, the Plaintiff-Bank claimed that it was not a request for 'fresh guarantee' but a cross-reference to the already existing guarantee bond executed in 1998. I am inclined to believe that it was a cross-reference, as it specifically refers to the 2nd and 3rd Defendants who were the sureties in the 1998 Guarantee Bond. If the Plaintiff-Bank was requesting fresh guarantee, there would not have been any necessity to specifically

refer to the 2nd and 3rd Defendants' names. The Plaintiff-Bank could have easily followed the requirements in the Board Resolution marked "P4" which only requires the signature of "*any two directors of the company.*"

Apart from these contentions, the 2nd Defendant-Appellant also sought to argue that the 2001 facility was a new loan based on the ledger accounts marked "P12." In the said ledger account, there is an entry to the effect 'full recovery of the loan granted'. According to the 2nd Defendant-Appellant, this entry proves that the 1998 loan had been fully repaid and nothing was remaining. If the 1998 loan was 'fully recovered", the 2nd Defendant-Appellant argued that there could be no continuation of the same. Thus, the 2001 loan could only be construed as a 'new loan'.

However, immediately underneath the said entry are two further entries to the effect: "Term Loan 1" and "Term Loan 2". When asked to explain the three entries, Mr. Ned Gomez – Head of Operations of the Plaintiff-Bank, in his evidence stated that the said entry "full recovery of the loan granted" was not made pursuant to any physical money being deposited by the 1st Defendant company. Instead, it has been made for accounting purposes and to cross-reflect that it was the same outstanding amount of the aforesaid loan, that had been rescheduled as "Term Loan 1" and "Term Loan II". He also gave evidence that no cash was released with regard to "Term Loan I" and "Term Loan II". All these clearly indicate that, contrary to what is claimed by the 2nd Defendant, the 2001 arrangement was not

a new loan. What the 2nd Defendant-Appellant attempts to characterize as a 'new loan' is the amount which the 1st Defendant-Company was anyway duty bound to repay.

Throughout trial, the two witnesses on behalf of the Plaintiff-Bank have consistently maintained that no new loan was granted to the 1st Defendant-Company and that the action was instituted to recover the outstanding amount with interests of the same continuing loan.

The 2nd Defendant-Appellant's position is that "Term Loan I" and "Term Loan II" were two new loans granted to the 1st Defendant-Company and one for which the Plaintiff-Bank never obtained fresh security. It would be difficult to believe that, in the circumstances where there had been default and delay in paying the monies that were due, the plaintiff bank would have even considered making the restructured banking facilities available without security of the existing bank guarantee.

All these factors cumulatively indicate that there was only one continuing loan—i.e. the loan obtained in 1998. It was the same loan for which the 2nd Defendant-Appellant along with the 3rd Defendant had signed a guarantee bond.

I now turn to the issue of prescription. The 2nd Defendant-Appellant claims that the Plaintiff-Bank cannot maintain this action as the Guarantee Bond was entered into in 1998 –9 years prior to the institution of the action. However, the material point at which the time begins to run is not the date of the execution of the

guarantee bond, but "*the date on which the payment became due*" [See. ***Hatton National Bank Limited v Sellers Sports (Pvt) Ltd and others (SC Appeal (CHC) No. 6/97(F))*** and ***Parr's Banking Co. Ltd v Yates [1898] 2 QB 460, CA***]

The Plaintiff-Bank instituted the action for recovery of money on 6th February 2007. As per the second offer letter "P7", the rescheduled loan payments were to be made by the 30th November 2001, which is well within the 6 year period under section 7 of the Prescription Ordinance. Moreover, we have before us another letter dated 24th April 2002, marked "P8" where it is stated that the Plaintiff-Bank has further extended the time to April 2002 on the request of the 2nd Defendant-Appellant. It states "*As per Offer Letter dated 19/ 06/ 01, the balloon payment was to be made by November 2001 but on your specific request we changed it to April 2002."* This also indicate that the action has been instituted before the expiration of 6 years. In any event, in terms of "P7", the Plaintiff-Bank has reserved the right to make demand to make the payment if circumstances arise. They sent letters of demand dated 27th August 2002 to all the Defendants in the case. Having failed to secure their payments at each of these points, the Plaintiff-Bank resorted to legal action on 6th February 2007. It is clear that 6 years have not lapsed either from the point at which the payment became due or from the day the letter of demand was not honored. Therefore, the action is not prescribed.

The 2nd Defendant-Appellant also claimed that the Plaintiff Bank caused a material variation of the initial loan agreement with the 1st Defendant-Company by

agreeing to provide further time to settle their outstanding amount by the second offer letter marked "P7." It was his contention that according to accepted legal norms, granting such extension results in discharging the guarantor from the guarantee.

Undoubtedly, equitable principles could intervene to protect a guarantor by discharging him from liability under the guarantee in a number of situations when there is evidence that his rights are prejudiced by the Creditor's conduct. This include, as correctly contended by the 2nd Defendant-Appellant, situations of granting further time which amount to material variations of the initial contract. **(Paget's Law of Banking, 12th Edn, p. 705)**. However, the mere fact of granting further time does not at all times amount to a situation warranting discharge. The material element is to see whether such extension/ variation of the contract was arrived at without the consent or the knowledge of the guarantor. Additionally, there must also be evidence demonstrating that such variations were substantial and caused prejudice to the rights of the guarantor. In ***Bank of India v Trans Continental Commodity Merchants Ltd. [1983] 2 Lloyd's Rep 298, CA*** it was held that an 'irregular' conduct will not *per se* amount to a material variation that discharges the guarantor from his bond.

In the present instant the 2nd Defendant-Appellant claims that providing an extension of time to settle the payments amount to a material variation that discharged the guarantor. However, this change, as reflected in "P7" was arrived

with the full knowledge of the 2nd Defendant-Appellant. The 2nd Defendant-Appellant was a director of the 1st Defendant Company and was one of the two directors who authorized, signed and accepted the terms of the initial loan. He was a director of the said company during the time the Company sent "P6" to the Plaintiff-Bank requesting a re-structure of the outstanding amount. Moreover, he has himself signed and accepted the second offer letter marked "P7" and has assured by way of an extra line that "*they could settle according to the fax dated 27/03/2001*". Furthermore, the Plaintiff-Bank has produced the document "P8" which is a letter addressed to the 2nd Defendant-Appellant on 24th April 2002 reminding him to make arrangements to settle the overdue amount. In the said letter it is clearly stated "*As per Offer Letter dated 19/06/01, the balloon payment was to be made by November 2001 but on your specific request we changed it to April 2002. Further if you do recall the payment schedule was created by consulting you and according to the inflow projected by you*". In these circumstances, I do not think the agreement to extend time for settlement was arrived outside the knowledge of the 2nd Defendant-Appellant. The variation was mutually and openly agreed between the parties.

In this regard, it must be noted that it is the general practice of commercial banks to "***preserve the guarantor's liability in the event of the bank giving time or any indulgence to the principal debtor***" **(Paget's Law of Banking, 12th Edn, page. 722)** This preservation, if intended, would be communicated clearly to the stake holders. In this instant, the Plaintiff-Bank has made very clear reference to the existing

personal guarantee of Mr. Lakshman Perera and Mr. Surenthiran in the second offer letter marked "P7." This indicate that the 2nd Defendant-Appellant's liability was preserved when the loan was restructured in 2001.

Furthermore, I also make it a point to state that the 2nd Defendant-Appellant cannot approbate and reprobate the status of the agreement arrived in 2001. If he contends that the 2001 facility was a 'new loan', he cannot at the same time maintain that there was a material variation of the former loan agreement. By taking the position that the Plaintiff-Bank materially altered the contract by granting an extension of time for repayment, the 2nd Defendant-Appellant has inadvertently conceded that no new loan was obtained in 2001.

Additionally, the 2nd Defendant-Appellant disputed receiving the letter of demand on the basis that the Plaintiff-Bank had sent it to the wrong address. Several authorities were cited before us to illustrate that a cause of action would not accrue to the creditor without first a demand being made. However, I observe that the circumstances in the present case are somewhat different to those in the said authorities. In ***L B Finance v Manchanayake (2000) 2 SLR 142,*** there was no demand at all made by the plaintiff to honour the obligation to pay. In ***Seylan Bank Ltd v Inter Trade Garments (Pvt) Ltd (2005) 1 SLR 80,*** the Supreme Court concurred in Justice Nagalingam's observation in ***Sivasubramaniam v Alagamuthi (1950) 53 NLR 150*** that "*under our common law a demand is essential before it could be said that a cause of action accrues to a creditor to sue the debtor*".

However, in ***Seylan Bank Ltd.*** case, there was no dispute that a written demand was made. The question was to see at which point a cause of action would arise when the contract does not stipulate a deadline for repayment—whether it was at the point the loan was given or when the demand for repayment was made. Accordingly, it was held that where there is no specific time for repayment, the six-year period will not run till a demand is made from the debtor.

In the present case, the Plaintiff-Bank has expressly reserved the right to demand repayment where necessary. This is reflected in both "P5" (the first offer letter sent in 1998) and in "P7" (the second offer letter rescheduling the 1998 outstanding amount). Accordingly, the Plaintiff-Bank *did in fact make a demand*. The letters of demand, which the Plaintiff Bank sent to the 1st Defendant-Company, 2nd Defendant-Appellant and the 3rd Defendant dated 27th August 2002 and are marked "P14" and "P16". The Registered postal receipts are also attached marked "P14(a)" and "P16(a)". I do not observe any ground to challenge the validity of the demand that has been made. A working definition for a valid demand was given in ***Re Colonial Finance, Mortgage, Investment and Guarantee Corp; Ltd*** (1905) 6 SRNSW 6 where it was held that " *there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness. It must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect*". (p.9) All these characteristics are reflected in the letters of demand sent

to the Defendants. The letter clearly intimates the total sum due to be paid, the credit facility from which the payment stems, the liability of the Defendants and the time before which the payment should be made.

The Defendant-Appellant claims that there was no letter of demand since it has been sent to the wrong address. However, the Plaintiff-Bank has stated that they forwarded all correspondence and letters to the Defendant-Appellant's last known residence in Nugegoda. In March 2001, the Defendant-Appellant had signed and accepted "P7" (the offer letter) which was sent to the same address. As such, when the Plaintiff-Bank sent the letter of demand by way of registered post in 2002 to the same address, they had no reason to believe that the Defendant-Appellant may have changed the address within one year. In those circumstances, I am unable to agree with the 2nd Defendant-Appellant's contention that there was no demand giving rise to the present cause of action.

The final point raised on behalf of the 2nd Defendant-Appellant was that the Plaintiff-Bank attempts to stretch the applicability of the 1998 Guarantee Bond to future debts of the company. However, as I have already addressed, there was only one continuing loan since 1998. In 2001, on the request of the 1st Defendant-Company, the Plaintiff-Bank only rescheduled the outstanding amount and granted further time to settle. They did not grant a new loan. In those circumstances, the guarantee bond which the 2nd Defendant-Appellant signed in 1998 continues to be operative.

As a general rule, contracts of guarantee are strictly construed in favor of the surety. As Lord Campbell said in ***Blest v Brown (1862) 4 De GF & J 367 at 376***: "*It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound therefore merely according to the proper meaning and effect of the written engagement that he has entered into.*"

In terms of the guarantee bond marked "P15", the 2nd Defendant-Appellant has agreed to repay the "*loan together with interest thereon at such rates or rates as may be charged by [the Plaintiff-Bank] and all legal and other charges and expenses whether taxable or not occasioned by or incidental to the enforcement of this or any other security for the said Loan or the recovery thereof*".

In the letter of demand marked "P16", the Plaintiff-Bank has demanded the 2nd Defendant-Appellant to pay "*a sum of Rupees Five Million One Hundred and Sixty Two Thousand Three Hundred and Forty One and Cents Fifty Three (Rs. 5, 162, 341. 53) together with the interest thereon, all legal and other charges and expenses up to the date of settlement in full.*" The letter also specifies that the said sum was due as at 20th August 2002 for having failed to settle their credit facility. Accordingly, the Plaintiff-Bank has not used the Guarantee Bond in respect of any 'new' or 'future' debt. The Guarantee Bond remains valid and binding on the

sureties since the original loan obtained by the 1st Defendant-company was never settled.

In the totality of the aforesaid circumstances, I see no reason to interfere with the findings of the learned High Court Judge.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE H.N.J PERERA

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

SC Appeal No. SC/CHC/37/2013
HC (Civil) Case No. 440/2008/MR

CENTRAL FINANCE COMPANY PLC
No. 84, Raja Veediya, Kandy.

PLAINTIFF

VS.

1. **SAPPANI CHANDRASEKERA**
   No. 22-E, Quarry Road, Colombo 12.
2. **SITTAMBARAM PILLEI SHANMUGAM**
   No. 23, Abdul Jabbar Mawatha, Colombo12.

DEFENDANTS

AND

CENTRAL FINANCE COMPANY PLC
No. 84, Raja Veediya, Kandy.

PLAINTIFF-APPELLANT

VS.

1. **SAPPANI CHANDRASEKERA**
   No. 22-E, Quarry Road, Colombo 12.
2. **SITTAMBARAM PILLEI SHANMUGAM**
   No. 23, Abdul Jabbar Mawatha, Colombo12.

DEFENDANTS-RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
L.T.B. Dehideniya, J.
Murdu N.B. Fernando, PC, J.

COUNSEL:	Harsha Amarasekera, PC, with Dhammika Welagedara instructed by M/S Paul Ratnayeke Associates for the Plaintiff-Appellant. S.P. Sriskantha with Nandun De Silva, Prassanna Sriskantha and Shawn Tissera instructed by N.Y. Kunaseelan for the Defendants-Respondents.
ARGUED ON:	01st November 2018.
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Appellant on 06th August 2013 and 30th November 2018. By the Defendant-Respondent on 30th November 2018.
DECIDED ON:	30th May 2019

Prasanna Jayawardena, PC, J,

This appeal is from a judgment of the High Court of the Western Province exercising Civil Jurisdiction [usually referred to as the "Commercial High Court"] dismissing the Plaintiff-Appellant's action. It is evident from the judgment that the sole reason for the High Court dismissing the action was that the affidavit by which the evidence-in chief of the Plaintiff-Appellant's principal witness was presented, was not in the Case Record when the judgment was being prepared and, therefore, the learned High Court Judge holding that there was no evidence to prove the Plaintiff-Appellant's case.

The Plaintiff-Appellant Company ["the plaintiff"] instituted this action seeking to recover a sum of Rs. 3,284,670/11 and interest thereon from the 1st and 2nd Defendants-Respondents ["the defendants"]. The defendants filed their answers. Admissions and issues were framed and the case was fixed for trial on 07th September 2011.

It is well known that, there has been, for many years, a salutary practice in the Commercial High Court for witnesses whose evidence-in-chief is likely to be lengthy if given *viva voce*, to submit their evidence-in-chief by way of an affidavit with annexed documents, subject to the right of the other parties to cross examine that witness *viva voce*. This is done where the parties consent to that procedure. In such cases, the affidavit setting out the evidence-in-chief of the witness with annexed documents has to be filed in the Court Registry before the trial. Copies of the affidavit are furnished to the other parties at the same time. On the trial date, that witness gives brief evidence-in-chief *viva voce* and the affidavit and annexed documents are marked and produced in

evidence. Thus, the recording of the evidence-in-chief of that witness which would otherwise be time consuming, is completed within a short space of time. Thereafter, counsel for the opposing parties cross examine the witness with counsel having the benefit of previously reading the evidence-in-chief contained in the affidavit and examining the annexed documents which have now been produced in evidence. The nature of actions which are usually before the Commercial High Court [as set out in section 2 read with the First Schedule to the High Court of the Provinces (Special Provisions) Act no. 10 of 1996] make the aforesaid procedure suitable for adoption in that Court. It also enables a speedier determination of actions instituted in the Commercial High Court, which is an important consideration in view of the significant role of that Court in the development of our economy. In these circumstances, the aforesaid practice was introduced in the Commercial High Court well over a decade ago, drawing on sections 179 and section 180 of the Civil Procedure Code.

In the present case, Journal Entry no. 19 states the parties agreed on 26th May 2011 that the evidence-in-chief of the plaintiff's principal witness would be presented to the Court by way of an affidavit.

Accordingly, the evidence-in-chief of that witness was set out in an affidavit dated 02nd September 2011 sworn to by the Senior Manager of the plaintiff company. This affidavit was filed in the Court Registry along with a motion dated 02nd September 2011 which states that a copy of the affidavit has been despatched to the defendant's attorney-at-law by registered post. Copies of the motion and affidavit have been filed with the petition of appeal marked "A" and "B". The defendants acknowledge that copies of both documents were received by the defendants prior to the trial.

A perusal of the affidavit dated 02nd September 2011 marked "B" shows that the Senior Manager of the plaintiff company who has sworn to the affidavit has averred, as his evidence-in-chief in the trial, an account of the plaintiff's cause of action against the defendants. That is set out in the averments of the witness in the thirteen paragraphs of the affidavit and the annexed documents marked "පැ 1" to "පැ 7 (අ)".

When the case was taken up for trial on 28th November 2011, the plaintiff's principal witness gave brief evidence-in-chief *viva voce* as set out below:

Q: *Witness on the 02nd of September 2011 tendered to this Court an affidavit swearing about the circumstances pertaining to the cause of action of this case ?"*

A: *Yes.*

Q: *An* [*sic*] *in that affidavit you have marked the documents "P1", "P2", "P3", "P4", "P4A", "P5", "P5A", "P6", "P6A" "P7" and "P7A" today you're tendering the originals of the said documents except for the document marked "P4A","P5A",*

"P6A", and "P7A". The originals of those documents have been tendered in case No. H.C. (Civil) 439/2008 which matter is also between the same parties of [*sic*] *who are parties to this action. I will undertake to tender the certified copies of those documents before the next date."*.

Court

"Until such time this documents [*sic*] *can be marked subject to proof."*.

As evident from the proceedings, the aforesaid witness has given oral evidence stating that he had sworn to an affidavit dated 02nd September 2011 setting out the plaintiff's cause of action and that he has tendered this affidavit to the court. Learned counsel appearing for the defendants did not object to the reception of that affidavit by the court. Immediately thereafter, learned counsel for the defendants commenced his cross examination of this witness.

Section 154 (1) in Chapter XIX of the Civil Procedure Code stipulates *"**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…."* and section 154 (3) requires *"The document or writing being admitted in evidence, **the court, after marking it with a distinguishing mark or letter** by which it should, when necessary, be ever after referred to throughout the trial, shall cause it, or so much of it as the parties may desire, to be read aloud."*. Further, the Explanation to section 154 (3) states that *"If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it".* The Explanation to section 154 (3) also specifies that *"Whether the document is admitted or not **it should be marked as soon as any witness makes a statement with regard to it**; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it."* [emphasis added]. On similar lines, section 114 (1) of the Civil Procedure Code states that *"No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force."*. Thereafter, section 114 (2) stipulates that *"**Every document so proved or admitted shall be endorsed with some number or letter sufficient to identity it**. The Judge shall then make an entry on the record to the effect that such document was proved against or admitted by (as the case may be) the person against whom it is used, and shall in such entry refer to such document by such number or letter in such a way as to identify it with the document so proved or admitted. The document shall then be filed as part of the record."*. [emphasis added].

These are important provisions setting out the manner in which documents should be produced and marked in evidence at a civil trial and should be followed in the original

civil courts. Neglecting to do so usually leads to mistakes, delay, and sometimes - as in this case - substantial prejudice to the parties. Counsel conducting civil trials would be well advised to ensure they carefully abide by the procedure set out in these provisions. It is also perhaps not out of place to mention here that the learned judges before whom civil trials are conducted should be vigilant to ensure that these provisions are complied with.

In the present case, although learned counsel who appeared for the plaintiff on 28th November 2011 has elicited evidence that the witness had *"tendered"* an affidavit dated 02nd September 2011 to Court, she failed to specifically elicit evidence that the witness was producing that affidavit in evidence and, further, she failed to give the affidavit a distinctive marking. As set out above, section 154 (1), section 154 (3), the Explanation to section 154 (3), section 114 (1) and section 114 (2) of the Civil Procedure Code required her to ensure that this was done.

Nevertheless, the proceedings establish that the intention of both counsel for the plaintiff and the plaintiff's principal witness was to produce the affidavit in evidence. More importantly, it appears that the learned High Court Judge who heard the case on 28th November 2011 has proceeded on the basis that the affidavit was in the case record and was produced in evidence. In passing, it should also be mentioned here with regard to the question of whether there was sufficient evidence to prove the affidavit, that the witness has expressly stated in his oral evidence that he had sworn to this affidavit dated 02nd September 2011 and *"tendered"* it to Court. These facts were not disputed when the witness was cross examined. Thus, there was evidence which would prove the affidavit if it had been duly produced.

Thereafter, as seen in the proceedings set out earlier, learned counsel has stated that the witness is *"tendering"* the documents annexed to the affidavit marked "පැ 1" to "පැ 7 (අ)". Some of these documents were originals and some were copies. Counsel has undertaken to furnish the certified copies of those copies. The learned High Court Judge has made Order that the aforesaid documents may be admitted subject to proof.

Here again, it is clear that the intention of counsel and the witness was to produce the aforesaid documents marked "පැ 1" to "පැ 7 (අ)" in evidence, with the same markings that they were given in the affidavit. More importantly, the fact that the learned judge considered the documents were produced in evidence is seen from his Order that some of these documents be admitted 'subject to proof'.

Further, it is clear from the contents of the cross examination which immediately followed the aforesaid evidence-in-chief of the witness, that learned counsel for the defendants proceeded on the basis that the affidavit dated 02nd September 2011 was in the case record and produced along with the documents marked "පැ 1" to "පැ 7 (අ)".

The witness was then re-examined by learned counsel for the plaintiff.

To sum up, the proceedings of 28th November 2011 establish that learned counsel for the plaintiff and learned counsel for the defendant both believed that the affidavit dated 02nd September 2011 setting out the substantive evidence-in-chief of that witness was filed in the case record. The proceedings make it clear that the learned judge before whom this evidence was led, was also under the same impression.

However, it appears that, unbeknownst to the parties and counsel and the learned judge, the affidavit was, in fact, not in the case record.

That was because the motion and affidavit marked “A” and “B” both bear the erroneous case number 440/2009/MR whereas the case number of the present action is 440/2008/MR. Thus, it would appear that, when the plaintiff’s Attorneys-at-Law submitted the motion and affidavit marked “A” and “B” to the Court Registry on 02nd September 2011, these documents would have been [in all probability] filed in the case record of the case bearing number 440/2009/MR and not in the record of the present case. However, as mentioned earlier, the parties and the learned judge were unaware of this error on 28th November 2011 and were unaware that the affidavit was not in the case record [of the present Case no. 440/2008/MR] when evidence was led on that day.

Thereafter, the case was next taken up on 03rd February 2012 before the same judge and the plaintiff led the evidence of another witness and then closed its case. The defendants chose not to give evidence. The parties tendered their written submissions and the case was reserved for judgment by the learned judge who had heard the case on 28th November 2011 and 03rd February 2012.

The fact that the affidavit was not in the case record was not noticed even at that time.

The judge before whom the case was taken up on 28th November 2011 and 03rd February 2012 was appointed a Judge of the Court of Appeal before he delivered the judgment. Another High Court Judge succeeded him in the Commercial High Court. That judge has proceeded to prepare and deliver the judgment, which is the subject matter of this appeal. It appears that the parties were unaware that the succeeding High Court Judge was proceeding to prepare and deliver the judgment.

The learned High Court Judge who delivered the judgment has stated in his judgment that the aforesaid affidavit was, in fact, not in the case record and that the case record does not bear a journal entry which records that the affidavit was filed. As mentioned at the outset, the learned judge then proceeded to dismiss the plaintiff’s action solely on the basis that the affidavit setting out the evidence-in-chief of the plaintiff’s principal witness was not in the case record and, therefore, the plaintiff had failed to prove its case.

When deciding this appeal, there is no gainsaying the fact that there have been errors on the part of the plaintiff's Attorneys-at-Law and learned counsel who appeared for the plaintiff on 28th November 2011.

In the first place, the wrong case number was negligently placed on the motion and affidavit by the plaintiff's Attorneys-at-Law. The result was that these documents were [in all probability] filed in the wrong case record. Thereafter, as observed earlier, learned counsel who appeared for the plaintiff on 28th November 2011 failed to specifically produce the affidavit in evidence and assign it a marking when the witness referred to the affidavit. If learned counsel had sought to do that, the fact that the affidavit was not in the case record would have immediately come to light and these events would not have come to pass.

However, the responsibility for failing to detect that the affidavit was not in the case record on 28th November 2011 cannot be left only at the door of the plaintiff's Attorneys-at-Law and counsel. The Court too must share a part of the responsibility for failing to detect the error.

In this regard, the officers of the Court Registry who accepted the motion and affidavit for filing on 02nd September 2011 have failed to notice that these documents did not relate to Case no. 440/2009/MR. Thereafter, the officer who would have made a related minute in the case record of Case No. 440/2009/MR, has also failed to notice that the documents did not relate to that case. In the event a judge of the Commercial High Court has signed such a minute in the case record of Case No. 440/2009/MR [as happens in the ordinary course of procedure in the Commercial High Court], there has been a failure to notice the error at that stage too.

More importantly, it has to be kept in mind that the provisions in Chapter XIX of the Civil Procedure Code which govern the procedure at a trial in a civil court, make it clear that the judge who is hearing the trial is the master of all that is done before him at the trial. In particular, he has the responsibility of ensuring that the presentation of evidence by the parties is in accordance with the procedure and provisions set out Chapter XIX of the Civil Procedure Code and Chapter XII of the Evidence Ordinance and other relevant provisions of these enactments. In fact, section 167 and section 169 of the Civil Procedure Code specify that the evidence of each witness is received under the trial judge's *"personal direction and superintendence"*. As Basnayake CJ said in MOHAMED FAUZ vs. SALHA UMMA [58 CLW 46 at p.48], *"….. the function of admitting evidence is vested in the Judge (Section 136, Evidence Ordinance)….."*.

In particular, there was a duty placed on the learned judge before whom the aforesaid evidence was led on 28th November 2011 to have directed the plaintiff's counsel to ensure that the affidavit be formally produced in evidence and be given a distinctive

marking - *vide:* section 154 (1), section 154 (3), the Explanation to section 154 (3) and section 114 (2) of the Civil Procedure Code, which were cited earlier.

With regard to the last sentence of section 114 (2) which calls for the documents produced in evidence to be filed as part of the record, there is a practice in many civil courts to read that requirement as permitting documents marked and produced in evidence and initialled by the trial judge in the course of a trial, to be returned to the party who has produced those documents and for the Court to call for all documents produced in evidence to be tendered to be filed in the record at the end of the trial. This is necessitated by limitations in the storage capacity of many Court Registries and other practical difficulties and has hardened into an established practice in several civil courts. In PODIRALAHAMY vs. RAN BANDA [1993 2 SLR 20 at p.21], Senanayake J commented on this practice and said *"There is a duty cast on the Court once the document is admitted and endorsed with a letter to identify it that the Court should have the custody of the documents so marked and identified, though the original Courts for convenience return the documents to Attorneys of the respective parties to tender the documents if necessary after being stamped with an accurate list of the documents.".* Subsequently, in PERERA vs. CALDERA [2007 1 SLR 165 at p.167], Gooneratne J, then in the Court of Appeal, recognised the existence of this practice when he stated *"In the instant case the defendant-appellant's documents D1 to D10 were not only marked but also led in evidence without any objection from the opposing party. Those documents have been admitted; therefore the Court in terms of the provisions of section 114(3) should have kept them in its custody. If was for convenience the Court had allowed the Attorney-at-Law to the defendant-appellant to retain the documents during the trial, there was a duty cast on the learned District Judge to call for the documents.".* It should be mentioned here that, since Gooneratne J noted that the documents had been returned to the defendant's Attorney-at-Law to be retained during the trial, His Lordships's mention of the duty cast on the trial judge to call for the documents, is a reference to calling for the marked documents to be tendered to the Court at the end of the trial. More recently, in PERERA vs. PERERA [SC Appeal No. 41/2008, decided on 03rd August 2018]. Eva Wanasundera J stated [at p.7] *"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."*.

To get back to the facts of the present case, it is well known and, as set out above, was specifically stated by Her Ladyship, Wanasundera J in PERERA vs. PERERA, that the

requirement in terms of section 154 (3) and section 114 (2) is for the judge who is hearing the trial to initial each document as it is produced and marked.

However, the proceedings of 28th November 2011 make it clear that the learned judge before whom the evidence was led, failed to ensure that these steps were taken and had not sought to initial the documents when they were produced and marked during the *viva voce* evidence of the plaintiff's principal witness. If the learned judge had acted in terms of the procedure stipulated in the aforesaid provisions of the Civil Procedure Code and, at the time the witness referred to the affidavit in his oral evidence-in-chief, directed that the affidavit be formally produced and marked in evidence and be handed to the judge to be initialled by him, the learned judge and the parties would have immediately discovered that the affidavit was not in the case record. Remedial steps would have then been taken immediately.

Thus, there was a manifest error on the part of the learned judge before whom evidence was led on 28th November 2011 when he failed to direct that the affidavit be formally produced and marked in evidence. Thus, the Court too must bear responsibility for the failure to detect the fact that the affidavit containing the evidence-in-chief of the plaintiff's principal witness was not in the case record when the trial was concluded and the case was reserved for judgment.

Somewhat similar circumstances arose in PERERA vs. AVISHAMY [12 NLR 26 at p.26-27] where the trial judge had, *inter alia*, omitted to ensure that the proceedings recorded that the documents referred to and relied on by the plaintiff were formally produced in evidence and identified with distinctive markings. Wood Renton J described this [and some other errors committed by the trial judge] as *"…worse than irregular. They are positively unjust to both sides. They directly tend to encourage appeals from the learned Judge's decisions, and make the task of the Appeal Court, in endeavouring to arrive at a sound conclusion, needlessly laborious."*.

To move on to the judgment of the High Court from which this appeal lies, it is evident that, despite the proceedings of 28th November 2011 making it very clear that the learned judge who heard the trial and counsel for both parties all proceeded on the basis that the affidavit dated 02nd September 2011 was in the case record, the learned judge who delivered the judgment has proceeded to dismiss the plaintiff's action without making the slightest effort to find out why this affidavit was not in the case record.

The aforesaid recent decision of PERERA vs. PERERA dealt with comparable circumstances. In that case, the judgment of the learned trial judge makes it clear that, when preparing the judgment, the trial judge found that several documents produced in evidence by the defendants were not in the case record. The trial judge has proceeded to deliver her judgment without taking any steps to obtain those documents and without considering those documents. The defendants appealed. Eva Wanasundera J held that

the failure by a trial judge to call for those documents from the defendants and consider them before preparing the judgment, resulted in a miscarriage of justice. Her Ladyship stated [at p. 8], *"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."* Her Ladyship goes on to state, *"…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."*.

On similar lines, in PERERA vs. CALDERA Gooneratne J held [at p.167] "*There seems to be a serious lapse in this case where a judgment had been pronounced without documents being considered by the Original Court and it would be no excuse for a trial Court Judge to observe in the Judgment that the defendant had not tendered the marked documents to Court. The District Judge should call for those documents.".*

The aforesaid decisions make it clear that, even where there has been a lapse on the part of a party to ensure that documents which have been led in evidence at the trial are before the Court when a case is reserved for judgment, there is an overarching duty placed on the Court to ensure that all such documents are before the judge and are given due consideration when writing the judgment.

It is a matter of regret that, in the present case, the learned judge who delivered the judgment did not think it fit to first have this case called in open Court in the presence of the parties and ascertain why the affidavit dated 02nd September 2011 was not in the case record. It appears the learned judge did not even make inquiries in the Court Registry to find out the reason why that affidavit was not in the case record. To my mind, these were elementary steps which common sense dictated should be taken by the learned judge when he discovered that an affidavit containing evidence [which his predecessor and the parties thought was in the case record], was not in the case record.

Had the learned judge taken either of those steps, he would have immediately ascertained that the reason the affidavit was not in the case record was that the motion and affidavit marked "A" and "B" both bore the erroneous case number 440/2009/MR when the case number of the present action is 440/2008/MR. Thus, if the learned judge had directed that the case first be called in open court in the presence of the parties, a glance at the copies of the motion and affidavit which were with the plaintiff and the

defendants, would have highlighted the erroneous case number and led to locating the affidavit dated 02nd September 2011. Similarly, if the learned judge had made inquiries in the Court Registry, a glance at the register maintained in the Court Registry to record the filing of documents, would have revealed that the affidavit was [in all probability] filed in the case record of Case No. 440/2009/MR and not in the case record of the present case bearing no. 440/2008/MR.

Thus, if the learned judge had taken either or both of these common sense steps and discovered the aforesaid error, he could have immediately taken appropriate steps to remedy the situation by directing that the affidavit be filed in the case record of the present case and giving the parties an opportunity to lead further evidence, if required. The learned judge had ample authority to do so under section 165 of the Civil Procedure Code which states *"The court may also in its discretion recall any witness, whose testimony has been taken, for further examination or cross-examination, whenever in the course of the trial it thinks it necessary for the ends of justice to do so".* Further, section 165 of the Evidence Ordinance vested in the judge the power to order, at any time, the production of the affidavit and question the witnesses *"to discover or to obtain proper proof of relevant facts."*. While considering comparable provisions in India, the Delhi High Court in SURESH KUMAR vs. BALDEV [AIR 1984 439] stated that, a Court has the discretion to recall a witness at any stage before the judgment is pronounced. In MADUBHAI AMTHALAL vs. AMTHALAL NANALAL [AIR 1947 156], the Bombay High Court held that a Court which is considering its judgment may recall a witness to clear up an ambiguity or omission.

Further, ordering the production of the affidavit and recalling the witness would not have caused any irreparable prejudice to the defendants since they too believed and had proceeded on the basis that the affidavit was in the case record. Any monetary loss caused to the defendants by way of additional expenditure incurred by them, could have been compensated by the award of costs against the plaintiff.

To sum up, the learned judge who delivered the judgment erred gravely when he failed to take any steps to ascertain why the affidavit dated 02nd September 2011 was not in the case record and, instead, summarily dismissed the plaintiff's action for want of evidence. That was a hasty and ill-considered action which resulted in a denial of justice and grave prejudice to the plaintiff. Further, it resulted in this appeal with the attendant delay and unnecessary expenses which the parties would have been compelled to bear.

In the circumstances set out above, the time honoured maxim *actus curia neminem gravabit* - an act of the Court shall prejudice no man - applies, and made it incumbent on the High Court to rectify its own errors and ensure that the affidavit dated 02nd September 2011 was placed before the High Court when it determined the plaintiff's case. In this connection, in SIVAPATHALINGAM vs. SIVASUBRAMANIAM [1990 1 SLR

378 at p.388] Goonawardene AJ [as His Lordship then was] quoted with approval the following passage from Lord Cairns' decision in ROGER vs. THE COMPTOIR D' ESCOMPTE DE PARIS [1871 LR 3 PC 465]: *" Now their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression `the act of the Court' is used, it does not mean merely the act of the Primary Court, of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case. It is the duty of the aggregate of these tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court".* Goonewardene AJ cited several decisions which referred to the *"….. rule that the Court will not permit a suitor to suffer by reason of its wrongful act ….. and a Court of Justice is under a duty to repair the injury done to a party by its act"* [*vide:* SIRINIVASA THERO vs. SUDASSI THERO (63 NLR 31 at p.34)] and the *"….. rule that a Court of Justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act.* [*vide:* SALIM vs. SANTHIYA (69 NLR 490 at p. 492)]. His Lordship went on to state [at p. 392], *"The authorities undoubtedly make clear that a court whose act has caused injury to a suitor has an inherent power to make restitution. That power I am of the view is exercisable by a court of original jurisdiction as the cases show and in the case of a superior court such as the Court of Appeal there can be no doubt whatever that that power is exercisable in that way."*.

Since, in the present case, the High Court has failed to correct its own errors and, thereby, caused prejudice to the plaintiff, the maxim *actus curia neminem gravabit* requires this Court to step in and ensure that the plaintiff is not prejudiced by the errors of the High Court.

For these reasons, it is incumbent on this Court to set aside judgment of the Commercial High Court and return this case to that Court for trial *de novo*.

Before concluding, it is relevant to mention that, when the learned judge delivered the judgment, he, presumably, considered that the provisions of Section 48 of the Judicature Act No. 02 of 1978, as amended, entitled him to prepare and deliver the judgment since his predecessor had been appointed a Judge of the Court of Appeal.

Section 48 of the Judicature Act states:

"In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his

predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and re-heard. "

No doubt, section 48 of the Judicature Act gave the learned judge the discretion *"to act on the evidence already recorded by his predecessor"* and proceed to prepare and deliver the judgment.

Thus, in DHARMARATNE vs. DASSENAIKE [2006 3 SLR 130], the trial concluded and the District Judge who heard the trial reserved the case for judgment. However, before delivering judgment, he was promoted to the High Court and travelled abroad on leave. The succeeding District Judge had the case called in the presence of the parties. The defendants made an application for the trial [which was a civil trial] to be heard *de novo* for the reason that the succeeding judge had not heard the witnesses. The plaintiff objected to that application submitting that section 48 of the Judicature Act entitled the succeeding judge to proceed to deliver judgment on the basis of the evidence that was on record. After considering written submissions filed by the parties on the aforesaid question, the succeeding judge held that, although section 48 entitled him to direct that the trial be commenced *de novo,* doing so will cause great prejudice to the plaintiff. He made order that the judgment will be delivered by him on the basis of the evidence that had been recorded before his predecessor. The defendants appealed to the Court of Appeal, which set aside the aforesaid Order and directed that the trial be heard *de novo.* In appeal from that Order of the Court of Appeal [DASSENAIKE vs. DHARMARATNE [2008 2 SLR 184], the Supreme Court set aside the Order of the Court of Appeal and affirmed the Order of the District Court. Silva CJ observed [at p.185] "*It is necessary for a succeeding Judge to continue proceedings since there are changes of Judges holding office in a particular Court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving a discretion to a Judge to continue with the proceedings. Hence the exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case. It is common ground that there are no such issues as to demeanour when evidence was adduced by the 1st defendant."*.

It is evident that section 48 vests a discretion in the succeeding judge in a civil trial to decide which of the three lines of action referred to in that provision of law should be followed when he takes over a case which has been heard by his predecessor. These three lines of action are: if the trial had concluded but his predecessor has not delivered

judgment, to act on the evidence that has been recorded before his predecessor and prepare and deliver judgment; (ii) if the trial is underway, to proceed with the trial by adopting the evidence that was recorded before his predecessor, hear the remaining evidence and give his judgment; or (iii) commence the trial proceedings afresh. Thus, in AG vs. SIRIWARDANE [2009 2 SLR 337 at p. 353] Salam J observed with regard to section 48 of the Judicature Act, *"On a proper analysis of the above section it would be seen the three courses available are*

1. To act on the evidence already recorded and deliver judgment.

2. To act on the evidence partly recorded by the predecessor and partly recorded by the successor and deliver judgment or

3. ***If the successor thinks fit,*** *to re-summon the witnesses and commence the proceedings afresh."*.

However, the discretion vested in the succeeding judge to follow one of the aforesaid three lines of action must be exercised reasonably since whenever the law vests a discretion in a Court, it is implicit that such discretion has to be exercised reasonably. When a succeeding judge is weighing how he should exercise the discretion vested in him by section 48 and which line of action envisaged in section 48 should be chosen by him, his decision will depend on the facts and circumstances of the case before him. These facts and circumstances will include: whether the nature of the issues before the Court make it essential for the succeeding judge to hear the witnesses and assess their demeanour and deportment in order to correctly determine the case or whether the correct decision of the case rests more on documents and it is unnecessary for the succeeding judge to rehear the oral evidence which has been led up to the point he took over the case; and whether one or both of the parties will be substantially prejudiced by hearing the trial *de novo* etc - *vide:* MV. OCEAN ENVOY vs. AL-LINSHRAH BULK CARRIERS LTD [2002 2 SLR 337]. In this regard, it is useful to cite the words of Salam J in AG vs. SIRIWARDANE [at p. 354-355] who observed, *"But the application of section 48 may vary depending on the facts and circumstances of each case. Since it is a discretion vested in court, it should have been exercised diligently for it is said that a person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reasons direct. He must act reasonably (Roberts us. Hapwood[(8)] at 613).".*

In my view, in instances where a succeeding judge is called upon to deliver judgment in a case where the evidence has been concluded before his predecessor, the requirement that the discretion vested by section 48 of the Judicature Act in the succeeding judge must be exercised reasonably, places a duty on the succeeding judge to have the case called in open court and notify the parties that he [the succeeding

judge] is required to deliver judgment since his predecessor is unavailable. At that time, the succeeding judge should give the parties an opportunity to be heard with regard to which course of action outlined in section 48 should be followed. Having considered the submissions made by the parties on that question, the succeeding judge is entitled to make Order as to the manner in which he decides to exercise the discretion vested in him by section 48.

However, in the present case, as the plaintiff has submitted and as borne out by the relevant journal entries in the case record, the succeeding High Court judge has proceeded to prepare and deliver the judgment [based on evidence recorded before his predecessor] without informing the parties that he intended to do so and without giving the parties an opportunity to be heard on that issue. That was a grave error on his part.

For the reasons set out above, the appeal is allowed and the judgment dated 26th April 2013 of the Commercial High Court is set aside. The Commercial High Court is directed proceed to trial *de novo* based on the pleadings that have been filed. I wish to make it clear that this Court does not express any opinion on the merits of the cases of the plaintiff and defendants. The parties will bear their own costs.

Judge of the Supreme Court

L.T.B. 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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution.

T.G.J.L. AMARASINGHE
87th Kilometer Post, Kanthattiya,
Mihinthalaya.

PETITIONER

SC FR Application No. 15/2017

VS.

1. **DR. N.C.D. ARIYARATNE**
   Regional Director of Health Services,
   Office of the Regional Director of
   Health Services, Anuradhapura.

2. **DR. W.M. PALITHA BANDARA**
   Provincial Director of Health
   Services, Provincial Department of
   Health Services - North Central,
   Bandaranayake Mawatha,
   Anuradhapura.

3. **G.D. KEERTHI GAMAGE**
   Secretary, Ministry of Health,
   Provincial Administrative Building
   Complex, 3rd Floor, Harischandra
   Mawatha, Anuradhapura.

4. **A.W.C. ARIYADASA**
   Secretary to the Governor,
   Secretariat of the Governor, North
   Central Province, Anuradhapura.

5. **R.B. ABEYSINGHA**
   Chairman.

6. **H.M.K. HERATH**
   Member,

7. **H.M.H.B. RATHNAYAKA**
   Member,

   5th to 7th Respondents, all of the North Central Provincial Public Service Commission, North Central Province, Anuradhapura.

8. **HON. ATTORNEY GENERAL**
   Attorney General's Department, Colombo 12.

BEFORE:	Sisira J. de Abrew, J. Prasanna Jayawardena, PC, J. Murdu Fernando, PC, J.
COUNSEL:	Senany Dayaratne with Eshanthi Mendis for the Petitioner. Sureka Ahmed, SC for the Respondents.
ARGUED ON:	26th November 2018.
WRITTEN SUBMISSIONS FILED:	By the Petitioner, on 03rd April 2017 and 26th December 2018. By the Respondents on 27th March 2019.
DECIDED ON:	02nd September 2019

Prasanna Jayawardena, PC, J,

The petitioner is a public officer serving in the Public Service of the North Central Province. He is attached to the Provincial Department of Health Services of the Province. The petitioner filed this application complaining that the fundamental rights guaranteed to him by Article 12 (1) of the Constitution have been violated by the respondents. That complaint arises from his interdiction from service without pay

following the discovery of a suspected fraud committed by him in the course of his official duties, coupled with the failure to hold a disciplinary inquiry against him despite the passage of four years and nine months from the date of interdiction. The respondents to this application are the Regional Director of Health Services - Anuradhapura [the 1st respondent], the Provincial Director of Health Services - North Central Province [the 2nd respondent], two other officials of the provincial administration, the Chairman and members of the Public Service Commission of the North Central Province and the Attorney General.

The petitioner was granted leave to proceed on the alleged violation of the fundamental rights guaranteed to him by Article 12 (1) of the Constitution. The 2nd respondent [the Provincial Director of Health Services - North Central Province] has submitted an affidavit and the petitioner has filed a counter affidavit.

The facts

The pleadings and documents before us establish the facts that are set out below.

The petitioner was 54 years of age at the time of filing this application. In 1988, he was recruited to the Public Service as a probationary driver attached to the Department of Health and was attached to the office of the Provincial Director of Health Services of the North Central Province. In 1991, he was confirmed in the post of Driver Class IIB attached to the Provincial Ministry of Health, Transport and Culture of the North Central Province. He was later promoted to the post of a Class I Driver by the Public Service Commission of the North Central Province. From 01st September 2006 onwards and at all times material to this application, the petitioner worked as an ambulance driver at the Horowpatana Peripheral Hospital.

In or about the month of December 2011, the Department of Provincial Internal Audit and Investigation of the North Central Province discovered a suspected fraud committed in relation to diesel said to have been purchased for the use of the ambulance bearing Registration No. LW - 0181 which was driven by the petitioner. After making further investigations, the aforesaid Department sent the petitioner a letter dated 25th February 2012 filed with the petition marked “P11” requesting him to provide further information. In response, the petitioner answered several questions put to him by an Audit Officer on 29th February 2012 and at the same time also provided a written statement to that Department.

Subsequently, the Department of Provincial Internal Audit and Investigation of the North Central Province submitted a detailed report dated 15th March 2015 marked “P57” setting out its findings with regard to the suspected fraud and reaching a *prima faice* conclusion that the petitioner was the culprit. “P57” states that, during the period from 26th January 2007 to 08th December 2011 while the petitioner worked as an ambulance

driver at the Horowpatana Peripheral Hospital, the petitioner committed this fraud by: (i) from time to time during the aforesaid period, filling up 581 "Government Order (Diesel)" Forms and having them signed by medical officers at the Hospital on the basis of the petitioner's assurances that the diesel to be purchased using these Forms was needed for the purposes of the Hospital's ambulance bearing Registration No. LW - 0181, which he drove. These "Government Order (Diesel)" Forms were all addressed to a specified fuel station and provided for the Horowpatana Peripheral Hospital to pay the cash value stated on these Forms to the fuel station; (ii) the petitioner not making the corresponding entries in the "Daily Running Sheets" of the ambulance and, thereafter, misappropriating quantities of diesel obtained from the fuel station or obtaining cash from the fuel station without pumping the corresponding value of diesel into the fuel tank of the ambulance and (iii) the fuel station then submitting the "Government Order (Diesel)" Forms to the Horowpatana Peripheral Hospital and obtaining payment of the full cash amounts stated therein.

"P57" states that, thereby, the petitioner obtained, from the fuel station, cash amounting to an aggregate sum of Rs.1,149,151/80 being the price of 14,817 litres of diesel which were not pumped into the fuel tank of the ambulance; The report marked "P57" also states that the petitioner admitted committing this fraud in the written statement furnished by him to the Department of Provincial Internal Audit and Investigation.

On 03rd April 2012, the petitioner was interdicted from duty pending the holding of a Disciplinary Inquiry, as set out in the letter marked "P13". The interdiction was without pay. By a subsequent letter dated 23rd April 2012 marked "P12", the petitioner claimed that he signed the aforesaid written statement without knowing its contents.

Thereafter, a Charge Sheet dated 20th June 2012 marked "P15(b)" was issued to the petitioner by the Provincial Director of Health Services. It contained separate 61 Charges arising from the aforesaid suspected fraud said to have been committed by the petitioner. There were individual Charges framed in respect of specified months during the period from 26th January 2007 to 08th December 2011 - *ie:* the period when the petitioner is said to have committed this fraud. The Charge Sheet listed the witnesses and documents the prosecution intended to rely on to substantiate the Charges.

Upon receiving the Charge Sheet marked "P15(b)", the petitioner wrote a letter dated 28th June 2012 marked "P16" declaring his innocence and asking for an opportunity to examine the documents listed therein and obtain photocopies of these documents. The petitioner also named the defence officer he wished to appoint and sought the concurrence of the Provincial Director of Health Services.

The Acting Provincial Director of Health Services replied by his letter dated 03rd August 2012 marked “P19” concurring with the appointment of the defence officer but stating that the petitioner could not be allowed to take photocopies of the documents.

The defence officer then wrote a letter dated 13th August 2012 marked “P20” to the Provincial Director of Health Services citing sections 14:2:8, 14:9 and 14:11 read with section 1:2 of Chapter XLVIII of the Establishments Code and reiterating the request that an opportunity be given to examine the documents listed in the Charge Sheet and obtain photocopies of these documents. The Provincial Director of Health Services has stated in his affidavit that a letter dated 08th October 2012 marked “2R3’ had been sent by his predecessor to the petitioner advising that the petitioner or his defence officer could examine the documents and take copies on 15th October 2012. I see no reason to disbelieve this categorical statement affirmed to by the Provincial Director of Health Services that the letter marked “2R3” was sent to the petitioner. However, in his counter affidavit, the petitioner denies having received “2R3” and states *“no such letter was received by me”*. That denial has a ring of truth since it is seen that “2R3” was sent to the petitioner’s home address and, by that time, the petitioner was in remand custody, as narrated later on. But, it should be mentioned that the petitioner’s defence officer had sent the letters dated 05th September 2012, 16th September 2012, 26th October 2013, 06th December 2013 and 13th January 2014 marked “P21” to “P25” asking that an opportunity be given to examine the documents and take copies. The Provincial Director of Health Services has admitted receiving several of these letters. In those circumstances, he should have replied the letters sent by the defence officer and informed him that the letter marked “2R3” had been sent giving an opportunity to examine the documents and take copies. The Provincial Director of Health Services should have also fixed another day on which the defence officer could examine the documents and take copies. In any event, as mentioned later on, the petitioner was given another opportunity to examine the documents and take copies on 28th May 2015.

Subsequently, the Provincial Director of Health Services sent a letter dated 06th February 2014 marked “P26-X2” to the defence officer noting that the Public Service Commission has issued a letter dated 18th August 2011 [produced before us marked “2R9”] prohibiting the defence officer named by the petitioner from participating in any Disciplinary Inquiry falling within the authority of the Public Service Commission and advising that the Governor of the North Central Province had instructed that this prohibition will also operate in respect of disciplinary inquiries falling within the authority of the Public Service Commission of the North Central Province. A copy of a letter dated 06th February January 2014 marked “P26-X2” sent by the Secretary of the Public Service Commission of the North Central Province to the Provincial Director of Health Services was attached. A copy of P26-X2” was sent to the petitioner informing him of

the prohibition placed on the defence officer named by him and requesting the petitioner to appoint another defence officer.

The defence officer replied by his letter dated 25th February 2014 marked “P26-X3” stating that he was unaware of any prohibition imposed by the Public Service Commission. The defence officer cited section 14:2:9 and section 18 of Chapter XLVIII of the Establishments Code and took up the position that he was entitled to participate in the proposed disciplinary inquiry. The Provincial Director of Health Services replied by his letter dated “P26-X8” sent to the petitioner stating that, by operation of Circular No.s 2/99 and 2/99(1) issued by the Public Service Commission of the North Central Province, he was the duly appointed Disciplinary Authority having disciplinary powers over the petitioner and that, in terms of section 15:1 of Chapter II of the Establishments Code of the North Central Province, his concurrence was required if the petitioner wished to appoint a defence officer to participate in the proposed disciplinary inquiry. Eventually, following protracted correspondence exchanged between the petitioner and the respondents, the Secretary to the Governor of the North Central Province wrote a letter dated 03rd December 2014 marked “P26-X13” to the Provincial Director of Health Services permitting the aforesaid defence officer to participate in the proposed disciplinary inquiry to be held against the petitioner. It was made clear that this was being done on an exceptional basis only for the reason that the Provincial Director of Health Services had previously concurred with the appointment of the Defence Officer as set out in the letter dated 03rd August 2012 marked “P19”. “P26-X13” instructed that the disciplinary inquiry against the petitioner be held without delay. “P26-X13” was copied to the aforesaid defence officer.

Thereupon, the defence officer sent a letter dated 16th December 2014 marked “P37” to the Provincial Director of Health Services, renewing his request that an opportunity be given to examine the documents listed therein and obtain photocopies of these documents. The Provincial Director of Health Services did not respond to that request.

Instead, the Provincial Director of Health Services issued an Amended Charge Sheet dated 21st April 2015 marked “P44(b)” to the petitioner. That Amended Charge Sheet consolidated the individual Charges in respect of specified periods by setting out the relevant details in a Schedule and made a total of 4 Charges.

The petitioner replied by his letter dated 05th May 2015 marked “P45(b)” denying the Charges and stating that he was entitled to examine the aforesaid documents and obtain photocopies of these documents before submitting a detailed reply to the amended Charge Sheet. He also asked that he be reinstated without further delay since he has suffered substantial prejudice as a result of the proposed disciplinary inquiry remaining at a standstill since the initial Charge Sheet was issued on 20th June 2012.

The Provincial Director of Health Services replied by his letter dated 19th May 2015 marked “P47” stating that the petitioner and his defence officer could examine the documents and take photocopies on 28th May 2015. At the request of the petitioner, that date was rescheduled for 21st July 2015, as set out in the notice marked “P50”.

The Provincial Director of Health Services also issued a letter dated 15th July 2015 marked “P51(a)” appointing an Inquiring Officer. That letter was copied to the petitioner and his defence officer.

The Inquiring Officer wrote a letter dated 24th August 2015 marked “P58” notifying the Provincial Director of Health Services, the petitioner and his defence officer that the disciplinary inquiry would commence on 01st September 2015. However, the disciplinary inquiry did not commence on that day because the Prosecuting Officer had advised the Inquiring Officer that it was necessary to amend the Charge Sheet once more. The petitioner was not given an indication of when the proposed (second) Amended Charge Sheet would be issued. The disciplinary inquiry was postponed *sine die* until the proposed (second) Amended Charge Sheet was issued to the petitioner and he had an opportunity to furnish a reply - *vide:* the letter dated 15th October 2015 marked “P59” written by the Inquiring Officer to the Provincial Director of Health Services.

In the meantime, the Kebitigollawa Police had, on 04th May 2012, instituted proceedings bearing Case No. B/267/2012 against the petitioner in the Magistrate’s Court of Kebitigollawa with regard to the aforesaid suspected fraud; this was in pursuance of a complaint made against the petitioner. The petitioner was named as the only suspect. On 05th October 2012, the petitioner was arrested on suspicion of having committed offences under the Offences Against Public Property Act No. 12 of 1982. The petitioner was remanded on 06th October 2012. The petitioner remained in remand custody until 20th September 2013, when the High Court of North Central Province enlarged him on bail consequent to a Revision Application filed by the petitioner in the High Court. The documents placed before us reveal that the aforesaid Case No. B/267/2012 has been pending in the Magistrate’s Court of Kebitigollawa up to the end of the year 2016, without charges being filed or the petitioner being discharged. The record states that this is due to a continued delay in obtaining advice from the Attorney General’s Department.

The proposed (second) Amended Charge Sheet was not issued even by 31st December 2016, despite the passage of 16 months from 01st September 2015 when the disciplinary inquiry had first been scheduled to commence. As a result, the disciplinary inquiry against the petitioner had not commenced up to 31st December 2016. Consequently, the petitioner has not received his salary and other remuneration during the period of four years and nine months from the time he was interdicted on 03rd April 2012 up to 31st December 2016.

The petitioner filed this application on 03rd January 2017. He complained that the respondents' alleged failure to carry out a preliminary investigation prior to interdicting the petitioner, the respondents' alleged failure to act in terms of the provisions of the Establishments Code subsequent to interdicting the petitioner and the respondents' alleged failure to commence and complete the disciplinary inquiry despite the passage of four years and nine months from the date the petitioner was interdicted, was unreasonable, arbitrary and capricious and violated the petitioner's fundamental rights guaranteed by Article 12 (1) of the Constitution.

The petitioner prayed, *inter alia*, for an Order reinstating the petitioner in service and a declaration that the respondents were not entitled to withhold the petitioner's usual remuneration from 20th June 2013 onwards - *ie:* after the expiry of one year from the issue of the first Charge Sheet dated 20th June 2012 marked "P15(b)".The petitioner also prayed for a declaration that the aforesaid disciplinary inquiry against him is null and void or, alternatively, for a direction that the disciplinary inquiry be concluded before 13th March 2017 on which date the petitioner claimed he was due to retire, presumably upon reaching the age of 55 years. Further, the petitioner prayed for a direction that, if the disciplinary inquiry is not concluded before 13th March 2017 the petitioner's pension not be subjected to any deductions in terms of section 12 of the Minute on Pensions.

As mentioned earlier, the petitioner was granted leave to proceed under Article 12 (1) of the Constitution. That was on 31st January 2017. About one week later a (second) Amended Charge Sheet dated 08th February 2017 marked "2R8" has been issued to the petitioner. Thereafter, the disciplinary inquiry commenced on 31st July 2017 and there had been 14 days on which the inquiry had been held up to 18th May 2018, as set out in the document marked "P72". The progress of the disciplinary inquiry after 18th May 2018 has not been placed before us.

Before proceeding to consider how this case should be decided, I should mention that the Provincial Director of Health Services [the 2nd respondent] has stated in his affidavit dated 23rd March 2017 that *"….. 55 years is the optional age of retirement of the Petitioner as per the Public Service Commission circular dated 06.09.2012 which is applicable to the Petitioner, however the Petitioner has not informed of his intention to retire from service to date."*. The documents marked "2R1" and "2R1(a)" relate to this statement. "2R1" is the aforesaid Circular issued by the Public Service Commission. It gives notice of an amendment made on 27th June 2012 to section 178 in Chapter XVI of Volume 1 of the "PROCEDURAL RULES ON APPOINTMENT, PROMOTION AND TRANSFER OF PUBLIC OFFICERS AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH AND INCIDENTAL THERETO" which had been issued earlier by the Public Service Commission and was published in Government Gazette No. 1589/30 dated 20th February 2009. As set out in section 177 read with section 178 of Volume 1 of these Procedural Rules, as amended, the compulsory age of retirement of public officers falling under the authority of the

Public Service Commission is 60 years. However, a public officer is entitled to exercise an option of retiring after reaching the age of 55 years while the Appointing Authority is entitled to compulsorily retire a public officer on the grounds of inefficiency or unsatisfactory service after that public officer reaches the age of 57 years, subject to the public officer's right of appeal. The letter dated 25th October 2012 marked "2R1(a)" establishes that these Procedural Rules apply to public officers falling under the authority of the Public Service Commission of the North Central Province. When the petitioner's statement that he was 54 years of age on 03rd January 2017 [which is the date of his affidavit] is read with prayer (i) of the petition which states that the petitioner's date of retirement would be 13th March 2017, it can be concluded that the petitioner reached 55 years of age on 13th March 2017 while this application was pending before this Court. We have not been advised of any termination of his services after this application was filed. Therefore, it can be assumed that, at the time of this judgment, the petitioner is 57 years of age and that he will remain in service until he reaches the age of 60 years unless his services are terminated before he reaches that age.

Determination

As pleaded in paragraph 73 of the petition, the petitioner's claim that his fundamental rights guaranteed by Article 12 (1) of the Constitution have been violated is based on the following three contentions:

(i) The petitioner contends that the Charge Sheet dated 20th June 2012 was issued without first conducting a preliminary investigation and ascertaining that there was a *prima facie* case against the petitioner and pleads that this was unlawful, unreasonable, arbitrary and discriminatory;

(ii) The petitioner contends that the respondents have failed to comply with the provisions of the Establishments Code with regard to procedural steps prior to the commencement of the Disciplinary Inquiry and pleads that this was unlawful, unreasonable, arbitrary and discriminatory;

(iii) The petitioner contends that there has been a delay of over four and a half years to commence the disciplinary inquiry after the petitioner was interdicted on 03rd April 2012 during which period the petitioner has not been paid any part of his monthly salary and other entitlements, and pleads that this is unlawful, unreasonable, arbitrary and discriminatory.

Before considering the above three claims made by the petitioner, I should mention that the petitioner maintains that there has been a continuing violation of his fundamental rights guaranteed by Article 12 (1) of the Constitution and that the respondents have not taken up the position that the present application is time barred.

The petitioner's first contention that the Charge Sheet dated 20th June 2012 marked "P15(b)" was issued without first conducting a preliminary investigation and ascertaining that there was a *prima facie* case against the petitioner, can now be examined.

In this regard, the relevant provisions of the Establishments Code are found in Chapter XLVIII which is titled "Rules of Disciplinary Procedure". All the sections of the Code which are referred to in this judgment are within this Chapter XLVIII of the Establishments Code ["the Code"].

Sections 32 (1) and 32 (2) of the Provincial Councils Act provide that the powers of appointment, transfer, dismissal and disciplinary control of officers of the Provincial Public Service of each Province is vested in the Governor of that Province, and empowers the Governor to delegate his said powers to the Provincial Public Service Commission of that Province. It is not in dispute that the Governor of the North Central Province has delegated these powers to the Public Service Commission of the North Central Province - *vide:* paragraph [81] of the petitioner's written submissions dated 26th December 2018. Thereafter, section 2 of the Code identifies the Disciplinary Authority who exercises the powers of dismissal and disciplinary control over various categories of public officers. The petitioner is a Class I Driver attached to the Horowpatana Peripheral Hospital, which is under the authority of the Provincial Director of Health Services of the North Central Province. Section 2:3 stipulates that the powers of dismissal and disciplinary control of public officers who are not in Staff Grades [with some specified exceptions] have been delegated by the Public Service Commission to the relevant Secretaries to Ministries, Heads of Departments and other Public Officers. It is an undisputed fact that the petitioner is not a public officer of "Staff Grade".

Accordingly, the petitioner's Disciplinary Authority is the aforesaid Provincial Director of Health Services [the 2nd respondent]. In fact, this has been clearly stated in the letter marked "2R16" which records that the Public Service Commission of the North Central Province has, by its Circulars bearing No.s 02/99/and 02/99(1), delegated to the Provincial Director of Health Services, disciplinary powers in respect of several categories of employees. Class I Drivers such as the petitioner, fall within one of those categories.

Next, the issue of a Charge Sheet is usually the first step in disciplinary proceedings against a public officer [unless the public officer has been interdicted prior to that]. The issue of a Charge Sheet sets disciplinary proceedings in motion and has serious consequences to the public officer to whom the Charge Sheet is addressed. In view of this fact, the scheme of the Establishments Code is that when a Disciplinary Authority is considering whether disciplinary action should be taken against a public officer, he should first ensure a `preliminary investigation' is held to ascertain whether there is a *prima facie* case which justifies taking disciplinary action against that public officer.

Thereafter, a Charge Sheet is to be issued only if that preliminary investigation discloses a *prima facie* case against the public officer. Needless to say, this is a safeguard put in place to ensure that disciplinary action against a public officer is commenced only where it is justified.

Thus, section 6 of the Code deals with the *"Procedure for Disciplinary Action by a Head of Department or other Officer Holding Delegated Authority from the Public Service Commission"* and contains the relevant provisions outlining the general procedure to be followed with regard to disciplinary proceedings against categories of public officers such as the petitioner. Sections 6:2 and 6:3 stipulate that:

"6:2 *Where a Head of Department or other Public Officer holding delegated authority in terms of sub-section 6:1 above contemplates disciplinary action against an officer in a category of officers coming within his disciplinary authority, he should hold a preliminary investigation himself or cause to be made a preliminary investigation by another officer or a group of officers appointed by him.*

6:3 *If a prima-facie case disclosed against the officer by the preliminary investigation held in terms of sub-section 6:2 above, the relevant Disciplinary Authority should prepare a charge sheet and duly issue it on the officer ….. "*

Section 13 deals with *"Preliminary Investigations"* and section 13:1 makes it clear that a preliminary investigation is held *"to find facts as are necessary to ascertain the truth of a suspicion or information that an act of misconduct has been committed by an officer or several officers, and to find out and report whether there are, prima facie, sufficient material and evidence to prefer charges and take disciplinary action against the officer or officers under suspicion."*. Section 13:1 also states that the primary task of an officer or group of officers conducting a preliminary investigation is to record the statements of relevant persons, to examine the documents and records, to obtain the original documents or certified copies, to physically verify state-owned assets in charge of the officer or officers who are under investigation, to examine the relevant premises, to take over articles and documents as considered necessary and to make *"their observations and recommendations on matters found out by them regarding the act of misconduct committed."*.

Thus, to sum up, it is clear from the aforesaid provisions that the Provincial Director of Health Services, who is the petitioner's Disciplinary Authority, was required to first hold a preliminary investigation on the lines described above or to cause such a preliminary investigation to be held. It is also common ground that the Provincial Director of Health Service did not hold a preliminary investigation or cause a preliminary investigation to be held by an officer appointed by him before issuing the Charge Sheet dated 20th June

2012 marked “P15(b)”. As learned counsel for the petitioner submits *“a Preliminary Investigation has never been held in respect of the purported acts of misconduct.”*

However, it is apparent that the Provincial Director of Health Services issued the Charge Sheet marked “P15(b)” relying on the provisions of section 29 of the Code which enable a Disciplinary Authority to issue a Charge Sheet based on a comprehensive report from the Auditor General without the Disciplinary Authority having to also go through the process of holding a separate preliminary investigation. Thus, learned State Counsel has submitted, in terms of section 29, *“when the report submitted by the Auditor General is sufficiently comprehensive, a charge sheet can be directly issued and the requirement of holding a preliminary investigation can be dispensed with.”*.

Section 29 is titled *“Offences disclosed in an audit report”* and section 29:1 states that in instances where a report by the Auditor General discloses that a public officer has committed irregularities or acts of misconduct by not adhering to rules and regulations or through negligence or inadvertence, the relevant Disciplinary Authority should invariably take disciplinary action against that public officer.

Thereafter, section 29:2 and section 29:3 state:

“29:2 If the report of the Auditor-General is comprehensive enough as to establish the charges to be preferred against the officer, a charge sheet should be issued based on such report and a formal disciplinary inquiry held and necessary action taken”.

29:3 Where the Disciplinary Authority is of the opinion that preparing a charge sheet or establishing the charges against an accused officer on the report of the Auditor-General is difficult, the relevant Head of Institution or Disciplinary Authority should, without delay, hold a preliminary investigation to further consolidate the acts of misconduct mentioned in the report of the Auditor-General and to facilitate the proper presentation of the charges at a formal disciplinary inquiry. Where a case of misconduct is prima facie disclosed by the preliminary investigation, the relevant Disciplinary Authority should take disciplinary action against the accused officer in accordance with the provisions of this Code.”

Learned counsel for the petitioner has reproduced only sections 29:1, 29:2 and 29:3 in his written submissions and contends that these sections refer to and are limited to reports issued by the Auditor General and not to reports issued by the Internal Auditors. Counsel for the petitioner highlights that the report marked “P57” has been issued by the Director - Internal Audit and Investigations of the Department of Provincial Internal

Audit and Investigation of the North Central Province. He cites Financial Regulations 133 and 134 and points out that the Report marked "P5" has *"emanated from the Internal Auditor,"* and that "P5" is not a Report by the Auditor General or one issued under the Auditor General's authority.

It is evident that "P57" has been issued by the Internal Auditors of the Provincial Administration of the North Central Province - *ie:* by the Department of Provincial Internal Audit and Investigation of the North Central Province - and not by the Auditor General or the Auditor General's Department. Learned counsel submits that, since "P57" has not been issued by the Auditor General or under his authority, the provisions of sections 29:1 to 29:3 of the Code cannot be invoked and, therefore, the Provincial Director of Health Services could not have lawfully relied on the report marked "P57" to issue the Charge Sheet marked "P15(b)". On that basis, counsel has submitted *"It is evident that it* ["P57"] *has not been prepared from a Branch of the Auditor General, or under the supervision of the Auditor General and thus the Respondents relying upon section 29 is wrongful, illegal and unlawful."*.

It is to be regretted that counsel for the petitioner did not proceed to also reproduce in his written submissions and refer to 29:4 of the Code, which reads:

29:4 Even where acts of misconduct are disclosed by Internal Audit Reports, the relevant Disciplinary Authority should take action in terms of sections 29:1, 29:2 and 29:3 above.".

Thus, a glance at section 29:4 establishes that the Provincial Director of Health Services was fully entitled to rely on the report marked "P57" prepared by the Department of Provincial Internal Audit and Investigation of the North Central Province when issuing the Charge Sheet marked "P15(b)". Accordingly, section 29:4 conclusively disposes of the argument made on behalf of the petitioner with regard to the authority held by the Provincial Director of Health Services to issue the Charge Sheet marked "P15(b)" placing reliance on the report marked "P57".

It is necessary to observe here that section 29:4 stands immediately below sections 29:1, 29:2 and 29:3 of the Code. Counsel for the petitioner has reproduced sections 29:1, 29:2 and 29:3 in his written submissions and has made extensive submissions based only on these three sub-sections of the Code. Thus, the omission to cite section 29:4 is a cause for concern. Perhaps it is not out of place to observe that a Court is entitled to expect that learned counsel will refer to and draw the attention of Court to all provisions of the law and the judicial decisions which are relevant to the issues which

are being considered and not selectively only to the provisions of law and judicial decisions which favour the arguments of his client.

Perhaps as a second string to the aforesaid bow, it has been submitted on behalf the petitioner that the report marked “P57” does not meet the aforesaid description of a `preliminary investigation’ set out in section 13:1 of the Code. In this regard, learned counsel for the petitioner has submitted that the officers of the Department of Provincial Internal Audit and Investigation have not obtained the statements of relevant persons or verified the facts by questioning the medical officers who signed the “Government Order (Diesel)” Forms. It has also been submitted that “P57” does not include details of readings from the odometer of the ambulance.

However, a perusal of “P57” shows that a statement from the petitioner was obtained before “P57” was prepared. In fact, the petitioner has admitted making a statement to an officer of the Department of Provincial Internal Audit and Investigation. “P57” records that the officers of the Department of Provincial Internal Audit and Investigation examined the individual “Government Order (Diesel)” Forms. These documents bear the signatures of the medical officers who authorised the purchase of diesel and the identity of these medical officers is *ex facie* evident on the documents. The fact that the petitioner prepared these “Government Order (Diesel)” Forms and that he has signed them, is also *ex facie* evident on the documents. “P57” makes it clear that “Daily Running Sheets” of the ambulance were examined and, in the normal course of business, these documents would have contained readings from the odometer of the ambulance.

To sum up, a reading of “P57” leads me to take the view that it sets out a comprehensive report of the alleged fraud said to have been committed by the petitioner. “P57” contains a considerable amount of detail and refers to a large volume of documents which were examined prior to issuing the report.

In this connection, it has to be also kept in mind that section 13:1 is only a broad description of what would constitute a `preliminary investigation’ as envisaged in the Establishments Code. Section 13:1 is only a guide. It is not a rigid list of mandatory instructions which will vitiate a `preliminary investigation’ simply because one or even a few of the steps referred to in section 13:1 have not been taken. What is important and what is stressed in section 13:1 is that the `preliminary investigation’ should encompass an investigation of the facts relating to a complaint or a suspicion that a public officer has committed an act of misconduct and that this investigation should be sufficient to ascertain and report on whether or not there is sufficient material and evidence to establish a *prima facie* case which justifies issuing a Charge Sheet and proceeding to

disciplinary action against that public officer. There is an objective standard inherent in section 13:1. On reading “P57”, I am satisfied that this standard was met.

In these circumstances, I see no merit in the petitioner’s submission that the report marked “P57” fails to meet the description of a `preliminary investigation’ set out in section 13:1 of the Code.

Learned counsel for the petitioner has also made extensive submissions seeking to analyse the nature of the evidence examined by the Internal Audit Officers who carried out the investigation which led to the issue of the report marked “P57”. Counsel has sought to draw inferences from the total amount of litres of diesel said to have been misappropriated by the petitioner and the *“mileage, traffic conditions, conditions of the ambulance and its efficiency in its consumption of fuel”*, in an attempt to argue that the petitioner could not have been guilty of the alleged fraud.

However, this Court is not in a position to act on these hypotheses when considering the present application. It would be inappropriate for us to place ourselves in the position of the Internal Audit Officers who carried out the investigation. Our function in the present application is to assess whether an objective, unbiased and reasonable preliminary investigation [or its equivalent in terms of section 29 of the Code] was carried out and whether the outcome of that exercise was a finding that a *prima facie* case of misconduct had been established against the petitioner. As held earlier, the answer to that question is in the affirmative.

For the reasons set out earlier, the petitioner’s first contention fails.

It is necessary to now consider the petitioner’s second contention that the respondents have failed to comply with the provisions of the Establishments Code with regard to procedural steps prior to the commencement of the Disciplinary Inquiry.

In this regard, the first step taken in the disciplinary process commenced against the petitioner was when, on 03rd April 2012, the petitioner was interdicted from duty pending a disciplinary inquiry, as set out in the letter marked “P13”.

Section 31 of the Code deals with “*Interdiction and Compulsory Leave”*. Section 31:1 states that the Disciplinary Authority is entitled to forthwith interdict a public officer where it is disclosed, *prima facie,* that he has committed one or more of the fifteen types of misconduct listed in sections 31:1:1 to 31:1:15. As the Disciplinary Authority [*ie:* the Provincial Director of Health Services] stated in “P13”, the report marked “P57” has disclosed, *prima facie*, that the petitioner has misappropriated diesel purchased for the aforesaid ambulance. That is undoubtedly an act of misconduct which falls firmly within

the description set out in section 13:1:8 - *ie: "Misappropriate government resources or cause such misappropriation, or cause destruction or depreciation of government resources willfully or negligently."*. It may also be said that this act of misconduct falls within several other limbs of section 31:1.

It should also be mentioned that the interdiction was imposed on 03rd April 2012, which is after the report dated 15th March 2012 marked "P57" was examined by the Disciplinary Authority. Thereby, the requirements of section 31:4 of the Code which state that *"Normally a public officer should be interdicted on matters disclosed in a preliminary investigation held into the charges against him."* were also met.

In these circumstances, it is clear that the Disciplinary Authority acted lawfully and properly when he interdicted the petitioner.

Next, the Charge Sheet dated 20th June 2012 marked "P15(b)" was issued. Learned counsel for the petitioner has cited section 14:2 of the Code which requires that a Charge Sheet should *"essentially contain"*, *inter alia, "14:2:1 - Under which Chapter, Section or Sections of this Code the Charge Sheet against the officer is issued"* and *"14:2:2 - Under which schedule of this Code the charges fall ……..."*. Counsel submits that the Charge Sheet marked "P15(b)" does not contain these particulars and contends that, therefore, the Charge Sheet marked "P15(b)" is wrongful and illegal.

However, a perusal of the Charge Sheet marked "P15(b)" shows that it does state, in its very first paragraph, that the Charge Sheet has been issued under section 6:3 of Chapter XLVIII of the Code [which was cited earlier]. Further, the first paragraph of "P15(b)" goes on to specify that the Charges made against the petitioner and set out therein, fall within the Offences listed in the Code's *"First Schedule of Offences Committed by Public Officers"* .

Thus, the aforesaid submissions made on behalf of the petitioner are factually wrong and are without any substance.

Learned counsel for the petitioner has also submitted that the Charge Sheet was issued without a *prima facie* case against the petitioner first being established and, in this connection, has cited a previous decision in [SC Appeal No. 111/2010 dated 09th December 2016] in which I held that, under and in terms of the Universities Establishments Code, a Charge Sheet could be properly issued only if a *prima facie* case against the accused officer had been established. No doubt, that principle holds good in the present case too, by operation of section 6:3 of the Establishments Code [which was cited earlier].However, as determined earlier, the report marked "P57" had established a *prima facie* case of misconduct against the petitioner and the Charge Sheet marked "P15(b)" was properly issued only after that *prima facie* case had been

disclosed. Thus, the requirement that a *prima facie* case should be established before a Charge Sheet is issued, was met,

For the reasons set out above, I see no merit in the petitioner's second contention.

That brings me to the petitioner's third and final contention that the delay of over four and a half years to commence the Disciplinary Inquiry after the Charge Sheet was issued on 20th June 2012 and the fact that the petitioner has not been paid any part of his monthly salary during this period, is unlawful, unreasonable, arbitrary and discriminatory and constituted a violation of the fundamental rights guaranteed to him by Article 12 (1) of the Constitution.

In this regard, it is necessary to consider the amendment to section 22:1 of the Code which was effected by the Public Administration Circular No. 06/2004 dated 15th December 2004. This Circular introduced a new sub-section 22:1:1 immediately after the existing sub-section 22:1. Thus, section 21 deals with *"The Role of the Disciplinary Authority"* and sections 22:1 and 22:1:1 now states:

"22:1 *Where it is observed that the proceedings of a formal disciplinary inquiry are being unduly delayed, it will be the responsibility of the Disciplinary Authority to take action, as and when necessary to avoid such delays.*

22:1:1 *The Disciplinary Authority should take necessary steps to conclude the relevant inquiry and to issue the disciplinary order within a period of one year from the date of serving of a charge sheet against an accused officer. Except where the charge is not in terms of Sub-Section 31:11, and except where the proceedings and the issue of disciplinary order are delayed for more than one year due to the lapse of the part of the accused officer, he should if under interdiction be re-instated in service and paid his salary from that date. Regarding the unpaid salary up to that date action should be taken as stated in the disciplinary order received."*.

It should also be mentioned here that sections 31:11:1 and 31:11:2 of the Code state that a public officer who is interdicted in circumstances *"Where legal proceedings have been initiated for ….. an offence of …… fraud"* or *"Where misappropriation of a serious nature of public funds and property is committed or where they are caused to be destroyed or depreciated by acts of commission or omission"*, should not be paid any emoluments during the period of interdiction.

Thus, the provisions of section 31:11:1 and section 31:11:2 of the Code must now be read with the aforesaid provisions of section 22:1 and section 22:1:1 of the Code.

While section 22:1 of the Code makes the Disciplinary Authority responsible for taking necessary action to avoid delays in the conclusion of a disciplinary inquiry, the first limb

of the newly introduced section 22:1:1 specifies that a disciplinary inquiry against a public officer must be concluded within a period of one year from the date of issue of the Charge Sheet. Thereafter, the second limb of the section 22:1:1 requires that a public officer who is under interdiction should be reinstated in service and be paid his salary after a period of one year from the issue of the Charge Sheet if the disciplinary inquiry continues after that time.

However, there are two exceptions to the aforesaid general rule set out in the second limb of section 22:1:1 The first exception is in the case of a public officer facing a disciplinary inquiry in respect of Charges framed in respect of one or both types of misconduct falling within the ambit of section 31:11 of the Code and is under interdiction. Section 22:1: 1 provides that such a public officer need not be reinstated in service and paid his salary even if the disciplinary inquiry continues after the lapse of one year from the issue of the Charge Sheet. The second exception is in the case of a public officer who is under interdiction pending the conclusion of a disciplinary inquiry against him and whose own acts or omissions cause the disciplinary inquiry to spill over the specified period of one year. Section 22:1:1 provides that in such cases, the public officer need not be reinstated in service and paid his salary even if the disciplinary inquiry continues after the lapse of one year from the issue of the Charge Sheet.

Accordingly, in the present case, the first limb of section 22:1:1 of the Code placed a duty on the Disciplinary Authority [*ie:* the Provincial Director of Health Services] to conclude the disciplinary inquiry and issue a disciplinary order within a period of one year from the issue of the Charge Sheet dated 20th June 2012 marked “P15(b)” - *ie*: on or before 20th June 2013.

The facts set out above, make it clear that the disciplinary inquiry had not even commenced by 20th June 2013 and, in fact, had not commenced up to 06th January 2017 when this application was filed in this Court.

In these circumstances, the only possible conclusion is that the Disciplinary Authority [*ie:* Provincial Director of Health Services] has failed and neglected to comply with the requirement specified in the first limb of section 22:1:1 of the Code which states that a disciplinary inquiry against a public officer should be completed within one year of the issue of the Charge Sheet.

Learned State Counsel had submitted that the holding of the disciplinary inquiry was delayed *“due to reasons which were beyond the control of the Respondents”*.

In this connection, learned State Counsel has submitted that the endeavours made by the petitioner’s defence officer to examine the documents and take copies, the initial refusal of permission for the defence officer to participate at the disciplinary inquiry, an

injury to the prosecuting officer and a requirement to amend the Charge Sheet, resulted in unavoidable delays in holding and concluding the disciplinary inquiry, due to no fault of the respondents.

However, these excuses cannot be accepted.

In this regard, firstly, section 14:9 of the Code gives the petitioner and his defence officer a right to examine the documents, and section 14:11 of the Code gives the respondents the discretion to provide copies of the documents on payment of charges, if so requested by the petitioner or his defence officer. As mentioned earlier, the Disciplinary Authority had sent the letter dated 08th October 2013 marked "2R3" to the petitioner advising him that he could examine the documents and take copies on 15th October 2012 but the petitioner states he did not receive "2R3". The truth of the petitioner's claim is supported by the fact that the petitioner was in remand custody when "2R3" was sent to his home address. In these circumstances, as mentioned earlier, the Provincial Director of Health Services should have replied the letters marked "P21" to "P25" sent by the petitioner's defence officer and fixed another day on which the defence officer could examine the documents and take copies. The fact that the Provincial Director of Health Services belatedly gave the petitioner and his defence officer the opportunity to examine the documents and take copies on 28th May 2015, highlights the fact that this opportunity should have been given much earlier when the Provincial Director of Health Services received the letters marked "P21" to "P25".

Thus, the submission made by learned State Counsel that the endeavours of the petitioner's defence officer to exercise his lawful right to examine the documents and take copies justifies the delay in commencing the disciplinary inquiry, has to be rejected.

Secondly, the submission made by the learned State Counsel that the initial refusal of permission for the defence officer to participate at the disciplinary inquiry also has to be rejected for the simple reason that the respondents later recognised that the refusal was unnecessary and permitted the defence officer to participate in the disciplinary inquiry.

Thirdly, an injury to the prosecuting officer cannot be regarded as an insurmountable obstacle to commencing and concluding the disciplinary inquiry. If the appointed prosecuting officer was unavailable, the Disciplinary Authority should have appointed another prosecuting officer and proceeded with the disciplinary inquiry.

Fourthly, a perceived need to amend the Charge Sheet cannot justify a delay in holding the disciplinary inquiry beyond the period of twelve months provided by section 22:1:1 of the Code. There might have been a large number of documents to examine and consider, but that is no excuse for protracted delays in holding the disciplinary inquiry after the Charge Sheet dated 20th June 2012 marked "P15(b)" was issued.

Learned State Counsel goes on to adduce another reason for the delay in holding and concluding the disciplinary inquiry. She states that the petitioner was in remand custody from 06th October 2012 to 20th September 2013 and submits that the disciplinary inquiry could not be held during that time.

In this connection, section 27:11 of the Code stipulates that *"Even when Court proceedings are in progress against a public officer for an offence which falls under this Code, the relevant Disciplinary Authority should hold a disciplinary inquiry against the officer independent of Court proceedings. The suspension or postponement of the disciplinary inquiry should be done only when there is compelling reasons or unavoidable obstacle.".* Further, section 27:12 states that *"The fact that Court proceedings against the officer are still in progress will in no way affect the making of a disciplinary order at the conclusion of the disciplinary inquiry against him in terms of sub-section 27:11 above."*. Thus, on the one hand, the effect of the aforesaid two sub-sections of the Code is that the Disciplinary Authority was required to proceed with the disciplinary inquiry notwithstanding the fact that the petitioner was in remand custody, unless the Disciplinary Authority considered that there were *"compelling reasons"* or an *"unavoidable obstacle"* to proceeding with the disciplinary inquiry.

However, on the other hand, section 27:7 of the Code stipulates that when a public officer is remanded before the commencement of legal proceedings in a Court of Law, he should be granted compulsory leave to cover the period in remand. Thereafter, section 27:9 provides that the public officer should be reinstated upon being released on bail if the Disciplinary Authority determines that reinstating him will not adversely affect the interests of the public service. However, if the Disciplinary Authority determines that reinstatement will adversely affect the interests of the public service, the public officer could be kept on compulsory leave or, where a disciplinary inquiry is to be held against the public officer, he should be interdicted.

In the present case, it is apparent that the Disciplinary Authority [*ie:* the Provincial Director of Health Services] has taken the view that the petitioner will suffer substantial prejudice if the disciplinary inquiry is proceeded with while the petitioner was in remand custody. He has been of the view that this amounted to *"compelling reasons or unavoidable obstacle"* which called for the suspension of the disciplinary inquiry during that period. That view was *ex facie* reasonable since the fact that the petitioner was in remand custody for a period of more than eleven months from 06th October 2012 to 20th September 2013 was likely to have prevented the petitioner from properly defending himself at a disciplinary inquiry, if it was held during this period.

In these circumstances, it would be unreasonable to find fault with the Disciplinary Authority for having suspended proceeding with the disciplinary inquiry during the period

from 06th October 2012 up to 20th September 2013 when the petitioner was in remand custody.

But, it has to be kept in mind that a period of three and a half months had lapsed from 20th June 2012 [when the Charge Sheet marked "P15(b) was issued up] to 06th October 2012 [when the petitioner was taken into remand custody]. That period of three and a half months must be counted when calculating the period of twelve months from the date of issue of the Charge Sheet, which is the period within which the Disciplinary Authority was required to complete the disciplinary inquiry, in terms of the provisions of section 22:1:1 of the Code.

It has to also be kept in mind that the Disciplinary Authority had no reason not to proceed with the disciplinary inquiry from 20th September 2013 onwards since the petitioner had been released on bail on that day and, from then on, was able to defend himself at a disciplinary inquiry.

In these circumstances, since a period of three and a half months had already lapsed from the date of issue of the Charge Sheet up to the date the petitioner was taken into remand custody, the aforesaid provisions of section 22:1:1 of the Code required that the disciplinary inquiry be completed within the balance period available of eight and a half months from 20th September 2013 onwards, when the petitioner was released on bail and faced no impediment to defending himself at a disciplinary inquiry.

Thus, after discounting the period during which the petitioner was in remand custody, the aforesaid provisions of section 22:1:1 of the Code required that the Disciplinary Authority ensure that the disciplinary inquiry be completed within a period of eight and a half months from 20th September 2013 - *ie:* on or before 04th June 2014.

However, as evident from the facts set out earlier, the disciplinary inquiry had not even commenced by that date.

The fact that the petitioner had not submitted a reply to the Charge Sheet dated 20th June 2012 marked "P15(b)" or to the amended Charge Sheet dated 21st April 2015 marked "P44(b)" did not prevent the Disciplinary Authority from insisting that the petitioner furnishes his answer to the Charge Sheet within a specified period of time and, thereafter, to proceed in terms of section 15:4 of the Code if the petitioner still failed to submit his answer to the Charge Sheet. It should be mentioned here that section 15:4 of the Code empowers the Disciplinary Authority to make an appropriate disciplinary order on the presumption that the accused officer is guilty of all the Charges, if that accused officer has failed or wilfully neglected to furnish his answer to a Charge Sheet within the specified period.

For the reasons set out above, I conclude that the Disciplinary Authority was required by the first limb of section 22:1:1 of the Code to have completed the disciplinary inquiry on or before 04th June 2014.

In these circumstances, the second limb of section 22:1:1 of the Code requires that the petitioner should have been reinstated in service and be paid his monthly salary from 04th June 2014 onwards - *ie:* from the expiry of twelve months from the date the Charge Sheet marked "P15(b)" was issued, after discounting the period the petitioner was in remand custody.

But, it is common ground that the petitioner was not reinstated in service and was not paid his monthly salary from 04th June 2014 onwards and that the petitioner remained under interdiction and without pay.

In this connection, learned State Counsel submits that the aforesaid first exception to the second limb of section 22:1:1 applies and justifies keeping the petitioner under interdiction without his monthly salary [and not reinstating him in service and paying his monthly salary], because the petitioner has been charged with acts of misconduct which fall within the ambit of section 31:11 of the Code.

There is no doubt about the fact that the petitioner is charged with grave acts of misconduct which fall firmly within the ambit of section 31:11 of the Code. Therefore, upon a strict and literal application of the aforesaid first exception to the second limb of section 22:1:1, the Disciplinary Authority was *prima facie* entitled to keep the petitioner under interdiction even after 04th June 2014 and to refuse to reinstate him and pay his monthly salary.

It would appear that the aforesaid first exception to the second limb of section 22:1:1 proceeds on the basis that a public officer who is charged with grave acts of misconduct involving dishonesty falling within the ambit of section 31:11 of the Code and is under interdiction due to these Charges, should remain under interdiction and not be reinstated in service and should not be paid his monthly salary until the disciplinary inquiry is concluded and there is a determination as to whether or not he is guilty of the grave acts of misconduct with which he is charged. In other words, that a public officer who is under interdiction and charged with grave acts of misconduct falling within the ambit of section 31:11 of the Code may be reinstated in service and paid his monthly salary only if he is found to be not guilty of the Charges at the disciplinary inquiry.

However, the manner of application of the aforesaid first exception to the second limb of section 22:1:1 must be in harmony with the overriding duty placed on a Disciplinary Officer by section 22:1 to ensure that disciplinary inquiries are not unduly delayed and to take all necessary action to avoid delays in concluding disciplinary inquiries. Further, the first exception to the second limb of section 22:1:1 should be applied in light of the

general rule set out in the second limb of section 22:1:1 that an officer who is under interdiction is entitled to be reinstated in service and be paid his monthly salary if the disciplinary inquiry continues even after the expiry of one year from the date of the Charge Sheet.

Viewed in this light, I am of the view that the first exception to the second limb of section 22:1:1 has to be applied reasonably and in manner which authorises keeping a public officer who is charged with grave acts of misconduct falling within the ambit of section 31:11 of the Code under interdiction and without pay for more than one year after date of issue of the Charge Sheet, only in cases where the Disciplinary Authority has exercised and is exercising reasonable diligence in proceeding with the disciplinary inquiry.

Any other construction of the manner in which the first exception to the second limb of section 22:1:1 is to be applied, will result in an unacceptably harsh provision which will give license to a Disciplinary Authority to act negligently or even *mala fide* and cause unnecessary and protracted delays in holding and concluding a disciplinary inquiry against a public officer who is charged with acts of misconduct falling within the ambit of section 31:11 of the Code and is under interdiction without pay and, thereby, drive that public officer to desperation, penury and defeat. In this connection, it has to be kept in mind that the provisions of Volume II of the Establishments Code which deal with *"GENERAL CONDUCT AND DISCIPLINE"* and *"RULES OF DISCIPLINARY PROCEDURE"* are designed to not only ensure integrity and efficiency in the public service and deal with delinquent public officers but also to do justice to public officers and to protect their interests. These provisions of the Establishments Code are both the sword to be wielded against delinquent public officers, as well as the shield that will defend public officers from any arbitrary or capricious actions of their superior officers. To my mind, the aforesaid manner of applying the first exception to the second limb of section 22:1:1, is in harmony with the design of the provisions in Volume II of the Establishments Code.

Applying the aforesaid approach and keeping in mind the previous determination that the period of twelve months from the issue of the Charge Sheet is deemed to have ended on 04th June 2014, it is necessary to ascertain whether the Disciplinary Authority has exercised reasonable diligence in proceeding with the disciplinary inquiry from that date onwards and is, therefore, entitled to rely on the first exception to the second limb of section 22:1:1 and keep the petitioner under interdiction and without pay even after 04th June 2014.

An examination of the events which transpired after 04th June 2014 shows that the Disciplinary Authority [*ie:* the Provincial Director of Health Services] and some other officers of the Provincial Administration and the petitioner's defence officer have engaged in protracted correspondence duelling over the refusal to permit the defence

officer to participate at the disciplinary inquiry and also the request to examine the documents and take copies. As mentioned earlier, both disputes were eventually resolved with the defence officer being permitted to participate at the disciplinary inquiry and also examine the documents and take copies. However, this process took up a great deal of time and it appears that both sides concentrated on having their way on these issues rather than on the need to expedite the disciplinary inquiry. The petitioner's defence officer has also not helped the situation due to an apparent habit of engaging in lengthy and repetitive letter writing and sometimes citing sections in the Establishments Code which are irrelevant. More importantly, the petitioner did not furnish his answer to the Charge Sheet.

Eventually, the Disciplinary Authority issued an amended Charge Sheet dated 21st April 2015 marked "P44(b)". I have previously held that the perceived need to amend the Charge Sheet cannot be held out by the respondents to justify the delay in holding and concluding the disciplinary inquiry. In any event, a perusal of the amended Charge Sheet marked "P44(b)" shows that the main amendment was the consolidation of the individual Charges set out in the initial Charge Sheet dated 20th June 2012 marked "P15(b)". There were also a few other relatively minor changes. Thus, the somewhat cosmetic nature of the amendments to the Charges reinforces the conclusion that the alleged need to amend the Charge Sheet did not justify the delay in proceeding with the disciplinary inquiry.

In any event, the petitioner replied the aforesaid amended Charge Sheet by his letter dated 05th May 2015 marked "P45(b)" and denied the Charges and stated that he will tender a fuller reply after examining the documents and taking copies of the documents. In his letter marked "P45(b)", the petitioner has highlighted the numerous delays that have taken place and the prejudice caused to him by these delays. He has then requested that he be reinstated in service and be paid his monthly salary pending the holding and conclusion of the disciplinary inquiry.

However, that request was ignored by the respondents and an Inquiring Officer was appointed by letter dated 15th July 2015 marked "P51(a)". Eventually, the Inquiry was scheduled to commence on 01st September 2015, as intimated by "P58". But, as mentioned earlier, the Inquiry did not commence even on that day and had not commenced even up to the time this application was filed on 06th January 2017.

In these circumstances, the Disciplinary Authority cannot claim to have exercised reasonable diligence in proceeding with the disciplinary inquiry from 04th June 2014 onwards and, therefore, the Disciplinary Authority is not entitled to rely on the first exception to the second limb of section 22:1:1 and keep the petitioner under interdiction and without pay.

The question then arises as to the date from which the Disciplinary Authority became disentitled from relying on the first exception to the second limb of section 22:1:1 and not entitled to keep the petitioner under interdiction and without pay.

In seeking to fix on that date, it will be appropriate to exclude the period during which the parties were engaged in the aforesaid protracted correspondence. That is due to the fact that both parties contributed to the delay during this period, as observed earlier.

The next stage was the Disciplinary Authority issuing the amended Charge Sheet dated 21st April 2015 marked "P44(b)" and the petitioner replying by his letter dated 05th May 2015 marked "P45(b)" and highlighting the numerous delays that have taken place and the prejudice caused to him by these delays and requesting that he be reinstated in service and be paid his monthly salary pending the holding and conclusion of the disciplinary inquiry.

In JAYASINGHE vs. THE ATTORNEY GENERAL [1994 2 SLR 74], the petitioner pleaded that his fundamental rights guaranteed by Article 12 (1) of the Constitution had been violated by the respondents' inordinate delaying the disciplinary proceedings against the petitioner after he was interdicted without pay. Fernando J held [at p.85-86] *"The Petitioner's complaint is not that he was directly deprived of those safeguards: but only of the delay in the proceedings. It is trite, but nevertheless true, that justice delayed is justice denied: for the very good reason that delay may result in the denial of the substance of a fair trial, although all the forms are solemnly observed. Delay may result in essential witnesses and documents becoming unavailable, in recollections slowly fading, in legal expenses gradually becoming ever more unbearable, and in sapping the will to fight on for justice. All the safeguards may be there as a matter of form, but the substance of the protection of the law will be lacking. The aim of the protection of the law is to ensure justice, and so when there is inordinate delay, it can equally truly be said: protection delayed is protection denied. All delay is unacceptable, but that is not enough. What amount of delay is to be regarded as inordinate ?"*

The principle enunciated by Fernando J in JAYASINGHE vs. THE ATTORNEY GENERAL applies with full force to the present case before us and the question raised by His Lordship with regard to the point of time when delay becomes *"inordinate"* has to be determined in the present case.

When seeking to determine the point at which the Disciplinary Authority and the respondents lost the right to claim the benefit of the aforesaid first exception to the second limb of section 22:1:1 of the Code, it is my view that by 05th May 2015 at the very latest - *ie:* when the Disciplinary Authority ignored the petitioner's request that he be reinstated in service in view of the very long delay in even commencing the disciplinary inquiry and the very substantial prejudice caused to the petitioner by his being kept on interdiction without pay for many years - the Disciplinary Authority and the respondents had lost the entitlement to rely on the first exception to the second limb of

section 22:1:1 and keep the petitioner under interdiction and without pay. The unreasonable delay on the part of the Disciplinary Authority and the respondents to commence the disciplinary inquiry was painfully clear by then and was inexcusable, and stripped them of any right to claim that the first exception to the second limb of section 22:1:1 entitled the Disciplinary Authority to continue to keep the petitioner under interdiction and without pay. The fact that the Charges against the petitioner were of misconduct involving dishonesty falling within the ambit of section 31:11 of the Code does, where necessary and particularly where the collation and production of comprehensive evidence at the disciplinary inquiry is time consuming, give a Disciplinary Authority a reasonable period time beyond the usual twelve months to conclude disciplinary proceedings. However, in the present case, the delay in even commencing the disciplinary inquiry by 05th May 2015 was manifestly unreasonable and unjustified.

In these circumstances, I hold that, in terms of the provisions of the Establishments Code, the Disciplinary Authority was bound and obliged to reinstate the petitioner and pay his monthly salary from 05th May 2015 onwards until the conclusion of the disciplinary inquiry and the making of the disciplinary order. If the Disciplinary Authority was of the view that reinstating the petitioner to service and permitting him to exercise the functions of his office was not in the interests of the disciplinary inquiry, the Disciplinary Authority was entitled to act on the lines of section 31:16 of the Code which provides for placing the petitioner on compulsory leave or attaching the petitioner to a another suitable post pending the conclusion of the disciplinary inquiry

In conclusion, I hold that the failure of the 1st and 2nd respondents [the Regional Director of Health Services and the Provincial Director of Health Service] to act in terms of the provisions of the Establishments Code and reinstate the petitioner and pay his monthly salary from 05th May 2015 onwards until the conclusion of the disciplinary inquiry and the making of the disciplinary order or, alternatively, to act on the lines of section 31:16 of the Code and place the petitioner on compulsory leave or attach the petitioner to a another suitable post from 05th May 2015 onwards pending conclusion of the disciplinary inquiry and the making of the disciplinary order, violated the petitioner's fundamental rights guaranteed by section 12 (1) of the Constitution.

The 1st and 2nd respondents are directed to reinstate the petitioner and pay his monthly salary from 05th May 2015 onwards until the conclusion of the disciplinary inquiry and

the making of the disciplinary order. If the 1st and 2nd respondents are of the view that reinstating the petitioner to service and permitting him to exercise the functions of his office is not in the interests of the disciplinary inquiry, they are entitled to act on the lines of section 31:16 of the Code.

The 1st and 2nd respondents are directed to ensure that, in the event the disciplinary inquiry against the petitioner is still in progress, it is concluded within a period of three months of this judgment.

The petitioner's prayer for direction to the effect that the petitioner is not to be subjected to any deductions in terms of section 12 of the Minutes on Pensions, is refused. In the event a disciplinary order has been made or is to be made against the petitioner based on the determinations reached at the disciplinary inquiry, the question of whether any such order is to be made in terms of section 12 of the Minutes on Pensions is one that to be decided in terms of the disciplinary order and by the respondents in accordance with the provisions of the relevant law and regulations.

The parties will bear their own costs.

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 under and in terms of Articles 17 and 126 of the Constitution

SC /FR/ Application No 28/2018

1. Deva Wisaru Damdhara Wijesiri
   No. 59/10, Mahayaya,
   Bogahawatte,
   Ambalangoda.

2. Dewarahandi Sabeetha De. Silva
   No. 59/10, Mahayaya,
   Bogahawatte,
   Ambalangoda.

Petitioners

Vs,

1. Hasitha Kesara Wettamuni,
   Principal,
   Dharmashoka College,
   Ambalangoda.
   Chairman,
   Interview and Administrations Board

2. Dhammika Kodikara,
   Secretary,
   Interview and Administrations Board

3. K. Janika Jayamali de. Silva,
   Head of Primary
   Member
   Interview and Administrations Board

4. Sarath Somathilake,
   School Development Society
   Representative
   Member
   Interview and Administrations Board

5. Ashoka Kumara
   Representative Past Pupils Associates
   Member
   Interview and Administrations Board

   Member of the Interview Board in relation to admission of students to Grade 1 of the Dharmashoka College, Ambalangoda for year 2018

6. K. K. K. Kodithuwakku,
   Chairman,
   Appeals and Objections Board

7. R. N. Mallawarachchi
   Secretary
   Appeals and Objections Board

8. S. K. S. D.de. Silva
   Member
   Appeals and Objections Board

9. Monaka Niranjana
   School Development Society
   Representative
   Member
   Appeals and Objections Board

10. Ravindra Assalaarachchi
    Representative Past Pupils Associates
    Member
    Appeals and Objections Board

    Members of the Appeals and Objections Board in relation to admission of students to Grade 01 of Dharmashoka College, Ambalangoda for years 2018

11. Secretary,
    Unit to admit students to Grade 1,
    Ministry of Education,
    "Isurupaya" Pelawatta,
    Battaramulla.

12. Secretary,
    Ministry of Education,
    "Isurupaya" Pelawatta,
    Battaramulla.

13. Director of National Schools,
    Ministry of Education,
    "Isurupaya" Pelawatta,
    Battaramulla.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice S. Thurairaja PC
Justice E.A.G.R. Amarasekera

Counsel: Vishwa De. Livera Tennekoon for the Petitioners Instructed by Ms. Lilani Ganegama

Suren Gnanaraj, SSC for Attorney General

Argued on: 25.07.2019

Judgment on: 07.11.2019

Vijith K. Malalgoda PC J

The two Petitioners before this court, the five years old son and his mother, have alleged violation of their fundamental rights guaranteed under Article 12 (1) of the Constitution by denying the admission of the 1st Petitioner to grade one of Dharmashoka College Ambalangoda.

As revealed before us the 2nd Petitioner being the mother of the 1st Petitioner minor, submitted an application for admission of her son to grade one of Dharmashoka College Ambalangoda under the category, Children of Officers employed with the State, Corporations, Statutory Boards or State Banks, who have been transferred on exigency of service, commonly known as transfer category as laid down in Clause 7.6 of Circular number 22/2017 which governed the school admission to grade one for the year 2018.

Under clause 7.6 of the said circular 4% of the total number of vacancies were allocated to the children come under the said category and how such parents should establish their eligibility to come within the said clause and the allocation of marks to them is explained under the said clause.

The 2nd Petitioner who is a Grama Niladhari by profession was working at 88A Kandegoda Grama Niladhari Division at the time she submitted the application on behalf of her son the 1st Petitioner to gain admission to Dharmashoka College under the said category. Appointed as a Grama Niladhari in the year 2009, (P-2) 2nd Petitioner was attached to Balapitiya AGA's Division of the Galle District and was working as Grama Niladhari at 19B Makumbura Ahungalla until she received a transfer to 88A Kandegoda Grama Niladhari Division with effect form 09.03.2016 by letter dated 08.03.2016 (P-4) on exigency of service. She reported to work on 15.03.2016 to 88A

Kandegoda Grama Niladhari Division and changed her residence to a place closer to the new division with effect from 16.03.2016 (P-7)

Duly filled application along with supporting documents required under Clause 7.6 was submitted to Dharmashoka College by the 2nd Petitioner and the Petitioners were called to attend an interview on 30th August 2017. When the Petitioners attended the said interview on 30th, the Interview Board consist of 1st to the 5th Respondents after going through the documents submitted by the 2nd Petitioner before them, had rejected their application without giving any marks. When rejecting their application the 1st Respondent informed the reason for rejection as "former residence, current residence, former place of work and the present place of work are within the radius of 10 km, and as such the Petitioners cannot be considered under the transfer category."

The above position was written on her mark sheet by the 1st Respondent in Sinhalese language as follows (P-14) "පෙර පදිංචිය, පසු පදිංචිය පෙර සේවා ස්ථානය පසු සේවා ස්ථානය යන ස්ථාන හතරම 10 km අරය ගෙන අඳින වෘත්ත සීමාව තුල පිහිටා ඇත. පදිංචියේ වෙනසක් ගණයට අදාලව නැත."

The Petitioners have appealed against the said decision of the Interview Board under the provisions of the said circular but the Objections and Appeal Board informed the Petitioners that the application submitted by the 2nd Petitioner cannot be considered under the said category.

The main requirements that should be fulfilled under Clause 7.6 is explained under the said clause as follows;

> "Under this category applicants who are permanently residing with the child in the feeder area of school, after being transferred to a Government, Corporation, State Bank or statutory institution situated within the area of the school on exigency of service (not at

> the request of the employee) during a period of 5 years prior to the date of calling for applications are entitled to come under the said clause of the circular."

It is further required that the applicant should come to the new place of residence with the child from the previous place.

The following explanation too had been given to the term "area of the school" under the said clause in the following manner;

> "The area of school means the relevant institute should be located within a circle drawn with a radius of ten kilometers having taken the school as the center"

When it comes to the allocation of marks under this category, the distance between the previous work place to the present work place, plays a significant importance and the applicant is entitled to a maximum of 40 marks under the following guide lines;

More than 150 km	40 marks
From 149 km to 100 km	32 marks
From 99 km to 50 km	24 marks
From 49 km to 25 km	16 marks
Less than 25 km	8 marks

When going through the requirements and the marking guide lines referred to above it appears that the applicant should fulfill the following requirements to comes within Clause 7.6 of the circular,

1. Permanently reside with the child in the feeder area of the school after the transfer

2. The institution to which the applicant is transferred should locates within the area of the school
3. The transfer should be on exigency of service
4. The transfer should be within 05 years prior to the date of calling for application
5. The applicant should come to the new place of residence with the child from the previous place

Whilst referring to the above, the Petitioners submitted that Clause 7.6 of the circular does not refer to the "previous place of residence" and/ or the previous place of work but the requirements under the circular are,

a) Transfer must be to an institution located within the area of school
b) The applicant should permanently resides in the feeder area of the school after being transferred
c) Applicant should come to the new place of residence with the child from the previous place

and since the distance between the previous work place to the present work place is less than 25 km, the applicant is entitled to obtain 8 marks under the transfer category.

However whilst challenging the above position, the 1st Respondent had explained the requirement under Clause 7.6 in paragraph 21 of his affidavit as follows;

21 (1) for an applicant to be eligible to apply for school admission under the category for "Children of Officers in Government/Corporation/Statutory Boards/State Banks receiving transfers on exigencies of service" as set out

in Clause 7.6 of the School Admission Circular marked P-9 to the petition, as applicant must satisfy the following requirements namely;

a) The transfer must be on exigencies of service and not made on the personal request of the applicant
b) The transfer should have been effected 5 years prior to the closing date for application
c) The transfer must be to an institution located within the “area of the school”. The area of the school is defined as an area having a 10 kilometers radius from the school
d) The applicant must have commenced his/her residence within the feeder area of the school only after having assumed duties in the institution to which he/she was transferred. The term “feeder area of the school” is defined in Clause 4.7 of the School Admission Circular to mean the Administrative District in which the school is located.
e) The applicant and the child should have relocated from the place of previous employment to the new place of employment
f) Only the final destination of transfer will be considered for the purpose of this category
g) Change in residence for the purpose of being attached to a particular institution or for the purpose of training and education will not qualify under this category.

Submitting the above requirements as the eligibility criteria for an applicant to succeed under the said category, the 1st Respondent had analyzed the application submitted by the 2nd Petitioner and submitted under sub-paragraphs 2 and 3 as follows;

2. According to the Petitioner's application, the 2nd Petitioner's transfer as Grama Niladhari was from 19B Makumbura situated in the Ahungalla Grama Niladhari Division of the Balapitiya Divisional Secretariat to the 88A Kandegoda Grama Niladhari Division of the Balapitiya Divisional Secretariat. Therefore the 2nd Petitioner's transfer was not a transfer from an institution outside the "area of the school" to an institution within the 'area of the school as contemplated under Clause 7.6 of the School Admission Circular, but was a transfer between two institutions which were within the same' area of the school"
3. Furthermore, according to the Petitioner's application the 2nd Petitioner was previously resident at No 708/A/9 Makumbura, Ahungalla and pursuant to her transfer had relocated her residence to No 59/10 Mahayaya Bogahawatte, Ambalangoda. Therefore the 2nd Petitioner had always been resident in the Galle district within the " feeder are of the school" and had not commenced residing in the "feeder area" pursuant to the transfer as required under Clause 7.6 of the School Admission Circular."

As observed by this court the interpretation given to term "area of the school" was amended in the year 2016 (School Admission for year 2017) to extend the area from 2 km to 10 km and the identical provisions were included in the year 2017 when the new circular was issued with regard to the School Admission for the year 2018.

When extending the area from 2 km radius to 10 km radius, the Education Ministry had explained its decision in Circular 17/2016 (ii) dated 26.09.2016 as follows;

> “ස්ථාන මාරු ගණය යටතේ පාසැල්වල පළමු ශ්‍රේණියට ළමුන් ඇතුළත් කිරීමේදී, පෙර වර්ෂ වල දුර සීමාව සලකා නොබැලීම නිසා, පාසලට ආසන්න සේවා ස්ථානවලට ස්ථාන මාරු ලැබ පැමිණ, ඒ අවට පදිංචිවූ අයදුම්කරුවන්ට පාසලට ඇතුළත්වීමට තිබූ අවස්ථාව අහිමිවී ඇති බව නිරීක්ෂණය විය. එම තත්වය අවම කිරීම අරමුණු කර ගෙන 2016.05.16 දිනැති 17/2016 චක්‍රලේඛයේ අංක 6.5 වගන්තිය යටතේ ස්ථාන මාරුවීම් ලැබූ නිළධාරීන්ගේ දරුවන් තෝරා ගැනීමේදී පාසල පිහිටි ප්‍රදේශය ලෙස, පාසල කේන්ද්‍රය කර කිලෝමීටර් 2ක් අරය ලෙස අඳින වෘත්තයක සීමාව තුල අදාළ ආයතනය පිහිටා තිබිය යුතු බව දක්වා ඇත. එනමුත්, ස්ථාන මාරුවීම් ලබා පැමිණි බොහෝ නිළධාරීන්ගේ වර්තමාන සේවා ස්ථානය හා පාසල අතර දුර, කිලෝ මීටර් 2 සීමාව ඉක්මවා යන නිසා වැඩි පිරිසකට පාසැල් නොලැබීයාම සම්බන්ධයෙන් ලැබී ඇති ඉල්ලීම් සැලකිල්ලට ගන්නා ලදී.
>
> සේවා ස්ථාන නාගරික ප්‍රදේශයෙන් බැහැරට ගෙනයෑමේ රජයේ ප්‍රතිපත්තිය මත කිලෝ මීටර් 2 සීමාව තුළ පාසල් නොමැතිවීම නිසා ස්ථාන මාරුවීම් ලබා පැමිණෙන නිලධාරීන්ට මුහුණ දීමට සිදුවන දුෂ්කරතා හා අපහසුතා සැලකිල්ලට ගෙන 17/2016 චක්‍රලේඛයේ අංක 6.5 වගන්තියෙහි ස්ථාන මාරුවීම් ගණය යටතේ, සලකා බලන දුර ප්‍රමාණය කිලෝ මීටර් 2 වෙනුවට කිලෝමීටර් 10ක් ලෙස අදාළ වගන්තිය සංශෝධනය කරනු ලැබේ. ”

When going through the reasoning given in the above Circular, it is clear that the reason for extending the radius from 2 km to 10 km was to accommodate more children to apply under the said category and not to restrict children applying under the said category.

However, as observed by this court, when rejecting the application submitted by the Petitioner to admit her child the second Petitioner into Dharmashoka College Ambalangoda, the only reason given by the Interview Board was that, “former residence, current residence former place of work

and the current place of work are within the radius of 10 km" which was introduced to the above circular for the 1st time in the year 2016 in order to accommodate more children, as explained in the Circular 17/2016 (II).

It is further observed that, Clause 7.6 which refers to the Children of Officers employed with the State Corporations, Statutory Board, State Banks, who have been transferred on exigency of service had only required such employees to come and live with the child in the area where the school is located, from the previous place, if he or she fulfills the other requirements under the said Circular, but is silent whether the previous place comes within or outside the area where the school is located.

In this regard I have further observed that the Respondent in paragraph 21 (1) (d) of his objections had averred that;

> "The applicant must have commenced his/her residence within the feeder area of the school ***only*** after having assumed duties…." (Emphasis added)
>
> but, Clause 7.6 of the Circular, does not contain the term "only" when referred to the residence after assuming duties.

When going through the provisions of Clause 7.6 it appears to me that the 1st Respondent had introduced the term "only" to impress the position he has taken in paragraph 21 (3) of his objections.

When considering the material already discussed, it is clear that the 2nd Petitioner who has received a transfer order on exigency of service, had reported to work in the New Grama

Niladhari Division on 15.03.2016 which is within the area of Dharmashoka College Ambalangoda and moved to a new residence within the feeder area of the school with effect from 16.03.2016.

The said transfer was effected within the 5 years period stipulated in Clause 7.6 of the School Admission Circular. As observed above, the Circular is silent on the place of previous stay and the previous work place and in the said circumstances we observe that Petitioners were eligible to come under Clause 7.6 of the said Circular.

In the case of ***Mallika Jothirathna and Another Vs. Principle Dharmashoka Vidyalaya and Other SC FR 412/2016*** SC minute dated 31. 10. 2018 this court had observed the instances where this court would interfere in cases of School Admissions as follows;

> "….. Nevertheless, these Circulars aim at achieving the best possible frame work for admission of students to Grade one of all Government Schools each year and, are from time to time, refined and revised by the lessons learnt from the experience of each year. In these circumstances this court would be reluctant to question the provisions as, of such circular 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 one, 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 admission of Grade one 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"

In the case of ***Laksith and Another Vs, Chairman, School Committee Dharmashoka Vidyalaya Ambalangoda and other 2009 (2) Sri LR 267***, court observed, "Education is one of the most important aspects in any civilized society as such authorities concerned are under a public duty to ensure and grant the right to admit a child to a school (if possible of his choice) if the admission requirements are fulfilled.

During the argument before this court it was further revealed that the full quota under Clause 7.6, i.e. 4% of total number of vacancies was not admitted for the year 2018. The Interview Panel had refused to assess the Application submitted by the Petitioner to gain admission to Dharmashoka College Ambalangoda and the said decision was arbitrary and not supported by any provision of the School Admission Circular 22/17.

Referring to arbitrariness in ***E.P. Royappa Vs. State of Tamil Nadu and another (AIR 1974 SC 555)*** *Justice Bhagawati* (as he was then) observed,

> "In fact equality and arbitrariness one sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14…."

For the aforementioned reasons I hold that the fundamental right of the Petitioners guaranteed under Article 12 (1) of the Constitution has been infringed by refusing the admission of the 2nd Petitioner to grade one of Dharmashoka College Ambalangoda by the Respondents. Even though the application submitted under Clause 7.6 of the Circular 22/17 was not assessed by the 1st to 5th Respondents, for the reasons given in this judgment, I am satisfied that the Petitioners have had the necessary requirement to gain admission under Clause 7.6 of the said Circular. In the said

Circumstances I direct the 1st Respondent to make necessary arrangement for the 1st Petitioner to be admitted to appropriate grade forthwith.

Application allowed. No costs.

Judge of the Supreme Court

Justice S. Thurairaja PC

I agree,

Judge of the Supreme Court

Justice E. A. G. R. Amarasekara

I agree,

Judge of the Supreme Court

SC.FR.NO.30/18

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

In the matter of an application under Article 126 and Article 12 and 12(1) of the constitution of the Democratic Socialist Republic of Sri Lanka.

1. S.M.N.S. Thilakarathne,
   10/2, Baduwatta Lane, Dharmashoka Mawatha, Lewella, Kandy.

1a. Sajana Sathmina Gunarathne (minor)
   10/2, Baduwatta Lane, Dharmashoka Mawatha,
   Lewella, Kandy.

Petitioners

Application No. SC/FR/30/18.

1. M.W.D.T.P. Wanasinghe
   The Principal and the Chairman of the Interview Board,
   Dharmaraja College, Kandy.

2. W.M. Wijerathna,
   The Zonal Director of Education,
   Zonal Education Office,
   Kandy.

3. W.M. Jayantha Wickaramanayake,
   Director of National Schools Branch,
   Ministry of Education,
   "Isurupaya" Battaramulla.

4. Sunil Hettiarachchi,
   The Secretary, Ministry of Education,
   "Isurupaya" Battaramulla.

5. Herathmudiyanselage Kanishka Hemindra Hearth,

5a. H.M.C.D. Hearath (minor)
   Both are at:
   29/58, Nuwarawela, Ampitiya Road,
   Kandy.

6. T.B.G. Bulumulla,
6a. T.B.G.U.E. Bulumulla (minor)
   Both are at:
   96/39A, Rajapheela Mawatha, Kandy.

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

Respondents.

Before : Murdu N. B. Fernando, PC, J.
P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.

Counsel : Shiral Lakthilake for Petitioners.
Viraj Dayarathna PC, ASG with Ganga Wakistarachchi, SSC for 1 – 4th and 7th Respondents.
P.L. Gunawardena with T.D. Douglas for 5th & 5A Respondents.

Argued on: 31.01.2019.

Decided on: 28.05.2019.

E.A.G.R. Amarasekara, J.

The Petitioners by their Petition dated 22.01.2018 have complained to this Court that their fundamental rights guaranteed by Article 12 and 12(1) of the constitution were infringed by the Respondents when the 1st Respondent refused to admit the 1st Petitioner's son (1a Petitioner) to Dharmaraja College Kandy by the letter dated 15.12.2017. The reason given for this refusal appears to be that the petitioners had failed to obtain required minimum marks under the applied category. The Petitioners state that the appeal board also later confirmed the said refusal. This court by its order dated 14.05.2018 granted leave to proceed under Article 12(1) of the constitution.

The 1st Petitioner who is the mother of the 1a Petitioner tendered an application to Dharmaraja College Kandy to get 1a Petitioner admitted to Grade 1. The said application was made under the category "Children of residents living in close proximity to the school". The Petitioners' stance is that they had submitted ample documentary evidence to show that the 1st Petitioner was an eligible resident who could get her child, 1a Petitioner admitted to Dharmaraja College Kandy.

Though the Petitioners, in their Petition, have referred to the circular No. 17/2016 as the relevant circular, the Respondents have correctly pointed out that the relevant circular is No. 22/2017. The Petitioners have admitted in their written submissions that they erroneously assumed that the admissions to schools in 2018 were based on circular No. 17/2016 (P 22) but the marking scheme for grade 1 was based on circular No.22/2017 marked as IR2.

As per the said circular marked as IR2, the Petitioners' application for the admission to grade 1 in 2018 is governed by clause 7.2 of the said circular. Under this clause marks are designed to be awarded under four different headings as detailed by its clauses 7.2.1 to 7.2.3., namely;

1. Proving the place of residence by evidencing the registration in the electoral register—Maximum 30 marks (Clauses 7.2.1 to 7.2.1.3).
2. Documents in proof of residency—Maximum 15 marks (Clauses 7.2.2 & 7.2.2.1).
3. Additional documents to confirm the place of residence—Maximum 5 marks (Clause 7.2.2.2).
4. Proximity to the school from the place of residence—Maximum 50 marks (Clause 7.2.3).

Clauses 7.2.1 to 7.2.1.3 – Proving the place of residence by evidencing the registration in the electoral register

Maximum of 30 marks is given under the provisions of clauses 7.2.1 to 7.2.1.3 for the proof of residence within the feeder area when it is proved by the registration in the electoral register. The Petitioners have tendered the applicable registration indicating that both the parents were registered in the electoral register for the relevant area for five years and they have obtained the maximum 30 marks allocated for proof of residence through the registration in the electoral register. Thus, there is no allegation about the marks given under the provisions of clauses 7.2.1 to 7.2.1.3.

Clauses 7.2.2 and 7.2.2.1—Documents in Proof of Residency

The clauses 7.2.2 and 7.2.2.1 provide how marks should be given for the documents or deeds that prove the title or entitlement of the relevant person to the place of residence.

A careful perusal of the said clauses shows that the relevant person referred to in the clause 7.2.2 has to be one of the following persons;

- The applicant - (As per clause 5.1, an application can be tendered by the parents or legal guardian of the child. In other words, the applicant has to be one of the parents or legal guardian).
- The spouse of the applicant.
- The father or mother of the applicant.
- The father or mother of the applicant's spouse.

The clause 7.2.2 allocates marks for the documentary proof of title or entitlement to the place of residence in the following manner;

- If the document in proof of residency shows the title or entitlement of the relevant person to the place of residence for five years or more as at the final date given to tender applications – Full marks (100%).
- If it is less than five years and more than three years—75% of the full marks.
- If it is less than three years and more than one year – 50% of the full marks.
- If it is less than one year and more than six months – 25% of the full marks.
- If it is less than six months and more than 3months – 10% of the full marks.
- If it is less than three months -- 05% of the full marks.

  As per the said clauses 7.2.2 and 7.2.2.1, the maximum one can gain under this heading 'Documents in proof of residency' is 15 marks. However, when one reads clause 7.2.2 with clause 7.2.2.1 (i), (ii) and (iii), it is clear that;

  a. If the ownership or entitlement to the place of residence is in the name of the applicant/spouse, the applicant can gain the maximum of 15 marks subject to the percentages referred to above in relation to the period of ownership.

b. If the ownership or entitlement is in the name of the mother/father of the applicant/spouse, the applicant can gain only 10 marks out of the maximum of 15 marks, which is further subject to the percentages referred to above in relation to the period of ownership.
c. If the applicant's residency is based on a registered leasehold right or as an occupant of a government quarters or as a tenant under the Rent Act, the applicant can gain only 6 marks out of the maximum 15 marks subject to the percentages referred to above in relation to his entitlement to the resident property.

However, the 1st Petitioner alleges that she was given only 11.25 marks out of 15 marks under the clauses 7.2.2 and 7.2.2.2 for the proof of title to the place of residence though she produced her title deeds marked as P5 (wrongly referred to as P4 in the petition) and P6 when she should have been given the maximum of 15 marks. P5 shows ownership in the name of the Petitioner only for 3 years and few months which is less than five years. As per clause 7.2.2, she is entitled only to 75% of the maximum 15 marks for this deed. However, the Petitioner's contention is that since the previous deed in the chain of title marked as P6 is in the name of her father she should have been given the maximum 15 marks. This contention of the Petitioner cannot be accepted since clause 7.2.2 gives marks to the document in proof of residency which is in the name of the relevant person. It contemplates only one relevant person not many. In the instant case, it is the Petitioner not her predecessors in title.

Furthermore, to give marks time is counted from the date the ownership or entitlement was transferred to the name of the relevant person to the final date given to tender applications. Since the time is counted until the final date given for applications, it impliedly indicates that the relevant person aforementioned is the person who holds the

relevant document in his/her name as at the final date given to tender applications. The father of the 1st Petitioner, the predecessor in title, did not hold the ownership in his name at the final date given to tender applications, since he gifted his right to the Petitioner by executing deed marked as P5. Therefore, I cannot accept the stance taken up by the 1st petitioner that she should have been given maximum 15 marks for the documents in proof of residency, which has to be in the name of the relevant person. On the other hand, there is no allegation that for any of the applicants, marks were given for his/her or his/her spouse's title documents as well as for the title documents of the father/mother of the applicant or his spouse causing discrimination.

Clause 7.2.2.2—Additional documents to confirm the place of residence

Maximum of 5 marks, i.e. at the rate of 1 mark for each document up to 5 documents, is given for the additional documents tendered to confirm the place of residence under the above clause. The Petitioner has been given the maximum marks under this heading. Thus, there is no allegation about the marks given under this heading.

Clause 7.2.3 - Proximity to the school from the place of residence

Maximum of 50 marks is given under this heading only if the applicant's place of residence is proved, and if there are no other Government Schools with primary sections located closer to the place of residence than the school applied for. In the event of having other Government schools with primary sections for the admission of the child which are closer to the place of residence than the school applied for, marks are deducted at the rate of 5 marks from the maximum marks for each such closer school.

As per the parenthesis of this clause, to reduce marks, other government primary school/schools which are closer to the place of residence must;

- have the learning medium the child has applied for,

- be a girls' or boys' school or a mixed school appropriate for the child and
- be able to admit 10% or more children of the religion to which the child belongs to.

The 1st Petitioner alleges that she should have been given 40 marks out of maximum 50 marks under this heading but was given only 30 marks. Her position is that marks should not have been deducted for D.S. Senanayake Vidyalaya, since it is not closer to the petitioner's residence when compared with the distance to Dharmaraja College. She further has taken up the position that the respondents have not been able to maintain a consistent policy, since in 2017 1st Respondent informed the Human Rights Commission that the interview board of that time had reached a common decision not to deduct marks for Sirimalwatte Vidyalaya on different reasons even when it was closer to the applicants who had applied for Dharmaraja Vidyalaya. She further states that the said Sirimalwatte Vidyalaya is situated in Kundasale Pradeshiya saba limits while the applicant resides and Dharmaraja college is situated at Kandy Municipal limits.

However, it appears that by the application marked as P1 with the petition, though the petitioners have claimed the maximum 50 marks, the 1st Petitioner herself has identified four schools as schools that are situated in closer proximity to the 1st Petitioner's residence which allows deducting 5 marks each totalling up to 20 marks out of 50 marks as per the marking scheme. Those four schools are Dharmashoka Vidyalaya, D.S. Senanayake Vidyalaya, Sangamitta Vidyalaya and Sirimalawatte Vidyalaya. Thus, on the face of the application, the respondents are entitled to reduce 20 marks out of the 50 marks given under this grouping. Anyhow, the petitioner now argues that the deduction of 10 marks for D.S. Senanayake College and Sirimalwatta Maha Vidyalaya was made in an arbitrary manner. In support of the petitioners' present argument that Dharmaraja

College is situated closer to her residence than D.S. Senanayake College, the 1st Petitioner has marked two letters issued by the Head of Land Division, Kandy Municipal Council marked as P17 and P18. P17 states that the aerial distance between 1st Petitioner's residence and Dharmaraja College is 1.25 Km., and as per the said letter P18, the distance between 1st Petitioner's residence and D.S. Senanayake Vidyalaya is 1.28 Km. The Petitioners complain that irrespective of such evidence five marks were deducted for the closer proximity of D.S Senanayake College. If members of the interview board have to rely on survey reports tendered by each applicant, the allocation of marks would be affected by and subject to the reliability, skills and experience of each surveyor giving others an opportunity to question the propriety of such reports. It is always prudent to use a common map or method to measure the distance between places of residence and the relevant schools. The clause 7.6.1 of the relevant circular provide proper guidance in this regard. As per the said clause, when considering proximity from the place of residence, the aerial distance shall be taken, and the map prepared by the Department of Surveyor General shall be used for this purpose.

Furthermore, the circle with the radius from the main door of the applicant's house to the main office of the school or the primary office if the primary office is on a separate place from the main school shall be drawn and if there are schools where child could be enrolled within the said circle, marks shall be deducted. However, even if any such school is located within the said circle, if it is difficult to access the said school due to natural barriers such as rivers, lagoons, marshlands, forests etc. marks shall not be deducted for such schools. The 1st petitioner does not complain that the relevant authorities did not use the aerial map prepared by the Department of Surveyor General or the calculation of distance is wrong according to such map prepared by the Surveyor General's Department. In her petition, she states that she was not informed how the marks were allocated or deducted indicating that she was not aware of how it was done,

but in contrast she avers that the methods adopted by the interview board to measure the distance between one's residence and the particular school were not based on a scientific and/or rationale method.-vide Paragraphs 30 and 32 of the Petition. However, the 1st Respondent has stated in his affidavit that in measuring the distance he adhered to the criteria stipulated in the relevant circular 22/2017.

The Petitioners do not allege that the schools which are in closer proximity cannot admit 10% or more children of the same religion to which the 1a Petitioner belong. Neither is there any allegation that natural barriers are making access to such schools difficult. The 1st Respondent asserts that the aerial distance was measured as per the criteria stipulated by the aforesaid clause 7.2.3. In fact, the aerial map was submitted to the court during the oral argument without objections, which clearly shows that the straight distance to D.S Senanayake Vidyalaya is less than the distance to Dharmaraja College. All other schools including Sirimalwatta Vidyalaya mentioned in the application marked as P1 are closer to the resident of the 1st Petitioner as per the said aerial map.

As far as Sirimalwatta Vidyalaya is concerned, it may be true that it is situated within the Kundasale Pradeshiya Saba area. As per clause 4.7, the feeder area of a school is the administrative district in which the school is situated, and when the school is situated on a border of an administrative district, nearest divisional secretary's division of the neighbouring administrative district is also considered as the feeder area of the given school. The 1st petitioner has not placed any material to indicate that the residence of the 1st petitioner does not fall within the feeder area of Sirimalwatta Vidyalaya. In the backdrop mentioned above, I do not see that there is any valid reason as per the relevant circular presented before this court to show that reduction of marks is not in accordance with the said circular marked as IR1.

As mentioned before, based on the documents marked P19 and P19a the Petitioners state that in 2017 1st Respondent informed the Human Rights Commission that the interview board had reached a common decision not to deduct five marks for Sirimalawatte Vidyalaya and admitted a student under application No. 182 to the school without deducting marks for Senanayake Vidyalaya and Sirimalwatte Vidyalaya. Petitioner submits that a cardinal principle in equal protection is that it does not mean all persons and things that are subject to classification should be treated alike. It means that persons or things similarly circumstanced must be similarly treated. In that sense, the Petitioners argue that it is difficult to categorise Dharmaraja College in Kandy Municipality and Sirimalwatte Vidyalaya in Kundasale Division as equally circumstanced schools in relation to socio-economic and geographical reasons. Petitioner states this is the reason why in the previous year education authorities have taken a common decision not to deduct five marks for Sirimalwatte Vidyalaya. The present application is not based on alleged discrimination or inequality before the law between Dharmaraja College or Sirimalwatta Vidyalaya but with regard to the rights of the Petitioners. In relation to the matters complained in the petition, the similarly circumstanced persons in comparison to the Petitioners have to be identified among the applicants for the year 2018 but not from the applicants for the previous year 2017.The number of vacancies, number of applicants and the relevant circulars and guidelines would have been different in the previous year. As such, methods used in selecting students in the previous year cannot be considered in deciding whether any discrimination or inequality before the law took place in selecting students for the year 2018.

The 1st Petitioner also states that the 1st respondent in an arbitrary manner made the 5th and 6th respondents to get more marks than the petitioner even when they do not reside

closer to Dharmaraja College compared to 1st Petitioner's residency causing discrimination-vide paragraph 34 and 35 of the Petition. In reply to this allegation, the 1st Respondent has explained that the 5th and 6th Respondents got more marks since there were no schools within the circle drawn in favour of the 5th Respondent and only one school within the circle drawn for the 6th Respondent. 5R1 tendered by the 5th respondent shows that he got 91 marks including the maximum 50 marks for the proximity of his residence to the school. Other than mere statements of the 1st Petitioner no material is placed before this court to show that the marks given to the 5th and 6th Respondents were not in accordance with the relevant circular.

It is clear that the total of 76.25 marks given to the petitioners was in compliance with the relevant circular and it was insufficient since the threshold was 85marks.
The Petitioners have submitted that the 1st Petitioner has based her case on the particular executive action that had been engaged with an unreasonable classification but not on an error on admission scheme itself-vide paragraph 20 of the written submission. Thus, the Petitioners' action is to challenge the decision of the 1st Respondent and/or interview board and/or appeal board alleging that they wrongly construed and applied the relevant circular in giving marks in relation to the admission of 1a petitioner to Dharmaraja College Kandy. What the petitioners allege is that the 1st Respondent failed in adopting proper principles to administer stipulated classification provided by the circular-vide paragraph 16 and 17 of the written submissions filed on behalf of the Petitioners. The Petitioners further have cited **Budhan Choudhry Vs State of Bihar AIR 1995 SC 191, Palihawadana Vs Attorney General 1978 (1) SLR 65, Ram Krishna Dalmia Vs Justice Tendolkar AIR 1958 SC 538, Tuan Ishan Ruban et al Vs T.I.de Silva (acting IGP) case No.SC/FR/599/2003** and bring to the attention of this court that to pass the test of permissible classification following two conditions have to be satisfied.

- The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and
- The differentia must have a reasonable or a rationale relation to the object and effects sought to be achieved.

The counsel for the petitioner argues that a classification to come within the framework of Article 12(1) of the constitution there must, therefore, be some rational nexus between the basis of classification and the objects to be achieved by such classification.

However, as elucidated before in this judgment the Petitioners failed in establishing that the Respondents wrongly applied the relevant circular and its clauses in the selection process and had been engaged with an unreasonable classification. The respondents, on the other hand, have explained that they have correctly followed the classifications and the marking scheme contained in the relevant circular. The Petitioners' case, as mentioned before, is not filed to challenge the classifications contained in the circular or its marking scheme. In fact, he failed to refer to the relevant circular and based his petition on the circular that was relevant to the admissions to grade 1 in the previous year. In that backdrop, I do not see any reason to apply the ratio decidendi of aforesaid cases in favour of the petitioners.

The Respondents have raised two preliminary objections as,

1. Members of the interview board or the appeal board have not been made parties to this application, and,
2. Petitioners have not appended the applicable circular No. 22/2017.

The Petitioners state that such omissions were due to lack of proper information. Whatever the reason for such omissions, even the merits of the case as elucidated above do not support the application of the Petitioners. Thus, the application of the Petitioners is dismissed without costs.

Judge of the Supreme Court

Murdu N. B. Fernando, PC, J.

I agree.

Judge of the Supreme Court

P. Padman Surasena J.

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 Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 54/2018

K. Nishanthika Pushpa Kumari
No. 23/F/I/3. E.D Dabare Mawatha
Naraheinpita.
For and on behalf of,
Samarasinghe Arachchige Hirundi Udanya.

Petitioner

Vs.

1. R.A.M.R.Herath,
   Principal, Sirimavo Bandaranaike Vidyalaya,
   Colombo 7.

2. Sunil Hettiarachchi,
   Secretary
   Ministry of Education, Isurupaya,
   Battaramulla.

3. Premasiri Epa,
4. Chintha Kanthi
5. Kalyani Samarakoon,
6. Amali Gunasekara,
7. Kapila Prasanna

All of 3rd to 7th Respondents,
C/o Principal,

Sirimavo Bandaranaike Vidyalaya,
Colombo 7.

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

Respondents

Before : Sisira J de Abrew J

Prasanna Jayawardene PC J

Murdu Fernando PC J

Counsel : Uditha Egalahewa PC with Ranga Dayananda for the Petitioner

Sureka Ahamad SC for the Attorney General

Argued on : 30.8.2018
Decided on : 6.3 .2019

Sisira J de Abrew

The Petitioner in this application alleges that her fundamental rights guaranteed by Article 12(1) of the Constitution were violated by the Respondents when they failed to admit her child to Sirimavo Bandaranaike Vidyalaya, Colombo. This court by its order dated 26.3.2018 granted leave to proceed for alleged violation of Article 12 (1) of the Constitution.

The Petitioner states in her petition that she and her sister live in the house located at No.23/F/1/3, E.D Dabare Mawatha, Naraheinpita; that all seven members of the Petitioner's family including their mother live in upstairs of the said house. The

owner of the house is the mother of the Petitioner. The Petitioner complains that her sister's child who was living in the same house was admitted to Sirimavo Bandaranaike Vidyalaya but her child was not admitted. The most important question that should be decided in this case is whether the Petitioner lives in the said house. The Petitioner in order to establish this matter has produced several documents including bank books and electoral registers. It is not necessary to refer to the said documents one by one. The Principal of Sirimavo Bandaranaike Vidyalaya, the 1st Respondent, rejected the admission of the Petitioner's child on the basis that the Petitioner does not live in the said house. The 1st Respondent has produced the Inspection Reports marked 1R3, 1R4 and 1R5. Learned PC for the Petitioner contended that the said reports should not be considered as the people who inspected the house had not filed affidavits. He further contended that the document marked 1R3 dated 24.10.2017 and 1R4 dated 31.10.2017 should not be considered as they relate to the Petitioner's sister's child. In my view even if they relate to the Petitioner's sister's child if the Petitioner was living in the said house as at 24.10.2017 and 31.10.2017, they become relevant. The date of 1R5 is 12.12.2017. The learned SSC who appeared for the Respondents admitted before us that the person who inspected the house (Principal Isipathana Vidyalaya) had, by mistake, stated the date as 12.12.2017 in 1R5 but it should be corrected as 23.12.2017. Learned PC however relying on the sad mistake contended that the said document should be rejected. The documents referred to above have been produced by the Principal Sirimavo Bandaranaike Vidyalaya along with her affidavit. When I consider all the above material, there is no reason for me to reject the said documents.

On 24.10.2017, when two people (Illangakoon and Gunasekara) went to inspect the said house, the Petitioner and her sister had not been present in the house.

However little later they came to the house. The two inspectors (Illangakoon and Gunasekara) have made observations in the document marked 1R3 that the Petitioner's sister was living in the downstairs of the said house. When the said inspectors made inquiries from the Petitioner regarding the place where she was living she (the Petitioner) had replied she was living in upstairs of the house. She has further said that she could not show inside of upstairs since her mother had gone away taking the keys of the upstairs of the house. The question that arises is as to why her mother took away the keys of the living section of the house if she (the Petitioner) was living in the said section of the house. The time of the inspection was 7.45 a.m.

On 31.10.2017, when two inspectors (Illangakoon and Gunasekara) visited the house they had found that the Petitioner's sister, her mother and her children were living in the downstairs of the house. When they made inquiries about the residence of the Petitioner, the sister of the Petitioner informed them that younger sister of the Petitioner had gone away with the keys of the upstairs of the house and as such the upstairs of the house could not be examined. The Petitioner was not present in the house on this day.

On 23.12.2017 Premasisri Epa who is the Principal of Isipathana Vidyalaya and one Kapila Prasanna on behalf of Sirimavo Bandaranaike Vidyalaya visited the said house again. But they did not meet the Petitioner in this house. On this day they had the opportunity of visiting the upstairs of the house. According to their observation brooms and some plastic items had been stored in the upstairs of this house. Although the Petitioner had claimed that she and her family live in the upstairs of this house, they did not find clothes, books, school bags and shoes of the children. However they observed that the Petitioner's sister and children were

living in downstairs of this house. Even Illangakoon and Gunasekara had made the same observation regarding the downstairs of the house. However the Petitioner along with her counter objections has produced photographs to show that there were certain items such as a bed, a fan and an iron in the upstairs of this house. When I consider all the aforementioned matters, I feel that these photographs had been taken for the purpose of filing the case.

When I consider all the aforementioned matters, it is not possible to conclude that the Petitioner and her family live in the upstairs of the said house. In my view the Petitioner has failed to establish that she and her family live in the upstairs of this house. For the above reasons, I hold that the decision of the 1st Respondents not to admit Petitioner's child to Sirimavo Bandaranaike Vidyalaya is correct and that the Petitioner's fundamental rights have not been violated by the Respondents. For the above reasons, I dismiss the petition of the Petitioner with costs.

Petition dismissed.

Judge of the Supreme Court.

Prasanna 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 application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC /FR/ Application No 58/2018

1. J.M.H. Chandani Jayasundara,
   No. 19/8, Guilford Crescent,
   Colombo 07.

2. B.P. Niyadandupola,
   No. 19/8, Guilford Crescent,
   Colombo 07.

3. Nulara Piyaji Niyadandupola,
   No. 19/8, Guilford Crescent,
   Colombo 07.

Petitioners

Vs,

1. Ms. S.S.K Aviruppola,
   Principal,
   Vishaka Vidyalaya,
   Colombo 05.

2. Ms. Kalani Sooriyapperuma,
   Deputy Principal (Administration)
   Vishaka Vidyalaya,
   Colombo 05.

3. Ms. Sumudu Weerasinghe,
   Deputy Principal (Education & Development)
   Vishaka Vidyalaya,
   Colombo 05.

4. Ms. Jeevana Ariyaratne,
   Deputy Principal (Co-Curricular & Extra- Curricular)
   Vishaka Vidyalaya,
   Colombo 05.

5. Ms. Pushparani Samarasinghe,
   Sectional Head (Primary),
   Vishaka Vidyalaya,
   Colombo 05.

6. L.M.D. Dharmasena,
   Chairman,
   Admissions Appeal Board,
   Vishaka Vidyalaya,
   Colombo 05.

7. Ms. Rukmali Kariyawasam,
   Member,
   Admissions Appeal Board,
   Vishaka Vidyalaya,
   Colombo 05.

8. Sunil Hettiarachchi,
   Secretary,
   Ministry of Education,
   "Isurupaya", Battaramulla.

9. G.N. Silva,
   Zonal Director of Education,
   Colombo District,
   Zonal Education Office,
   Vidatha Mawatha,
   Colombo 02.

10. P. Sirilal Nonis,
    Provincial Director of Education,
    Western Province Provincial Ministry of Education,
    Provincial Department of Education,
    No.76, Ananda Kumaraswamy Mawatha,
    Colombo 07.

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

<u>Respondents</u>

Before: Justice Vijith K. Malalgoda PC
Justice P. Padman Surasena
Justice E.A.G.R. Amarasekera

Counsel: Sanjeewa Jayawardena PC with Nilshantha Sirimanne, Rukshan Senadeera and Uween Jayasinhe for the Petitioners
Dr. Awanthi Perera SSC for Attorney General

Argued on: 13.02.2019

Judgment on: 25.03.2019

Vijith K. Malalgoda PC J

The three Petitioners before this Court, a father, mother and their young daughter who appeared through her parents have alleged violation of the Fundamental Rights of them guaranteed under Article 12 (1) of the Constitution by denying the admission of the 3rd Petitioner to Grade one of Vishaka Vidyalaya Colombo 05.

As revealed before this court the 1st and the 2nd Petitioners being the parents of the 3rd Petitioner minor, applied for admission to grade one of Vishaka Vidyalaya, under the category, children of Residents in close proximity to the school as laid down in clause 7.1 (i) of circular No.22 of 2017 which governed the school admission to the grade one for the year 2018.

Under clauses 7.1 (i) and 7.2 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.

As observed by this court, maximum of 30 marks are allocated for establishing the Residence by the Electoral Register during the past five years and a maximum of 15 marks are allocated for the documents in proof of residency of the parents. Another five marks are allocated for additional documents to confirm the place of residence making a total of 50 marks for establishing the residence of the Applicant.

The balance 50 marks are given for proximity to school from the place of the Residence of the Applicant and under the said circular, 5 marks are deducted to each school comes within the distance between the Residence of the Applicant and the school applied for, which has a primary section where the child can gain admission.

As revealed before us the Petitioners attended the formal interview for the selection of students for grade one at Vishaka Vidyalaya on 16.09.2017 and secured 58.3 marks at the said interview. The Petitioners were issued with a document indicating the marks allocated to the 3rd Petitioner under four headings and a copy of the said document is produced before this court mark P-7. According to P-7, the Petitioners were allocated full marks for establishing the residence by Electoral Register. For establishing the ownership, the Petitioners were allocated only 4.5 marks out of 15 marks and additional documents 3.8 out of 5 marks.

For proximity to the school, the Petitioners were allocated only 20 marks after reducing marks for six schools making the total marks 58.3.

When the Temporary selection list was published on 06. 11. 2017, the name of the 3rd Petitioner was not found on the selected students list, but was appeared in the 7th position on the 'waiting list'. Being aggrieved by the said selection, specially with regard to the reduction of marks under

the heading proximity to school, the Petitioners preferred an appeal under clause 10 of the said circular.

Even at the appeal, marks allocated to 3rd Petitioner were not revised by the appeal board, and in protest the Petitioners refused to sign the mark sheet during the appeal hearing.

As revealed before this court the cut off mark under, children of Residents in close proximity category for the year 2018 was 61.5 and the Petitioners main contention was to challenged the reduction of 10 marks for two schools under proximity to school, comes within the said category.

Both, the Petitioners and the Respondents agree, that 30 marks under close proximity to school was deducted for the following schools,

1. Yasodhara Vidyalaya, Colombo 07
2. Presbyterian Girls School, E.W. Perera Mawatha, Colombo 07
3. Sirimavo Bandaranayake Vidyalaya, Stanmore Crescent , Colombo 07
4. St. Anthony's Balika Vidyalaya, St. Anthony's Road, Colombo 03
5. St. Mary's Balika Maha Vidyalaya, Alwis Place, Colombo 03
6. Vidyathilaka Vidyalaya, Thimbirigasayaya, Colombo 05

However, the Petitioners challenged the reduction of 10 marks for two schools namely, St. Anthony's Balika Vidyalaya and St. Mary's Balika Maha Vidyalaya based on the provisions of the same circular. In this regard the Petitioners relied on a document they obtained from the Zonal Director of Education on 6th December 2017. According to the Petitioners the said letter which is produced marked P-11 before this court, refers to the Buddhist students percentage as 9% and 4% with regard to St. Anthony's Balika Maha Vidyalaya and St. Mary's Balika Maha Vidyalaya, Respectively.

However the Appeal Board of Vishaka Vidyalaya had very correctly refused to entertain the said document since clause 11.6 of the circular 22 of 2017 prohibits the Appeal Board to consider fresh documents in appeal.

However the issuance of P-11 is an eye opener to consider another aspect of the said circular, which was overlooked by the authorities when admitting children under the said category.

In this regard, our attention was drawn to the following clauses of the Guidelines/ Instructions and Regulation regarding admission of children to Grade 1 issued with the circular 22 of 2017 which governed the school admission for the years 2018.

Clause 3.2 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 be accordingly divided among different religions and categories. When the number of applications is less than the number of vacancies set apart for a given category of a religion, remaining vacancies shall be proportionately divided among other categories of the same religion. When there are no applicants from a religion, or when the number of applications from a religion is less than the number of vacancies set apart for that religion, such vacancies shall be proportionately divided among other religions.

Clause 6 (III) Proximity to school from the place of residence

Maximum marks will be given only if the applicant's place of residency is proved and if there are no other Government Schools with Primary sections located closer to the place of residence than the school applied for. In the event of having other Government schools with Primary sections for the admission of the child which are closer to the place of residence than the school applied for marks will be deducted at the rate of 05 marks from the maximum marks for each such closer school.

(Other government primary schools that the child could be admitted means, if the government school concerned has the learning medium the child has applied for / if a girls or boys school or a mixed school appropriate for the child and **If a government school which can admit 10% or more children of the religion to which the child belongs.** (emphasis added)

Since the Petitioners relied heavily on P-11, the Respondent made an attempt to counter the same by submitting an affidavit from the author of P-11, the Zonal Director of Education, the 9th Respondent to the present application.

The 9th Respondent whilst admitting the issuance of P-11 made an attempt to clarify P-11 by submitting that;

5. d) Since the 1st and/or 2nd Petitioners required the information urgently to pursue an appeal regarding the school admission application of the 3rd Petitioner, I immediately issued letter dated 06.12.2017 addressed to the 1st Respondent (P11) setting out the information received from the Principles of St. Anthony's Balika Maha Vidyalaya, Colombo 03 and St. Mary's Balika Maha Vidyalaya, Colombo 03;

e) However, upon further clarifications being sought, it has now transpired that the said information received from the Principles of St. Anthony's Balika Maha Vidyalaya, Colombo 03 and St. Mary's Balika Maha Vidyalaya, Colombo 03 and the letter issued thereupon by me (P11) do not accurately capture the number of Buddhist students admitted to the two schools, for the reasons more fully described below;

f) The Principals of St. Anthony's Balika Maha Vidyalaya, Colombo 03 and St. Mary's Balika Maha Vidyalaya have clarified the basis upon which the percentages of 9% and 4% referred to in subparagraph (c) were initially informed to me on an approximate basis and provided the actual numbers of students of different religions admitted to the two schools during the past 10 years;

A copy of letter the dated 03.04.2018 issued by the Principal of St. Anthony's Balika Maha Vidyalaya, Colombo 03 and copy of letter dated 06.04.2018 issued by the Principal of St. Mary's Balika Maha Vidyalaya, Colombo 03 are annexed hereto marked 9R1 and 9R2 respectively and pleaded as part and parcel hereof.

Explaining circumstances under P-11 was issued, the 9th Respondent proceeded to submit some statistics obtained from the two schools referred to above along with two letters from the principals of those schools.

The 9th Respondent had further submitted that both St. Anthony's Balika Maha Vidyalaya and St. Mary's Balika Maha Vidyalaya are Roman Catholic Private Schools which were vested in the state in terms of Assisted Schools and Training Colleges (Supplementary Provisions) Act No 8 of 1961 read with Assisted Schools and Training Colleges (Special Provisions) Act No 5 of 1960 but there appears

to be no documentary proof of quota reserved at either of the schools for students of religions other than Roman Catholics, at the time of vesting in the Government.

However when considering the specific written guidelines given by the circular, this court cannot simply ignore the said requirement, when the authorities submit that they don't have the required information with them. Out of the two letters submitted by the two Principals, the principal St. Anthony's Balika Maha Vidyalaya had stated that according to the information she could collected, 7%, 10% and 10% of Buddhist students were admitted to the said school during the three years immediately after the said school was vested with the government.

Even though the principal St. Anthony's Balika Maha Vidyalaya had failed to give the required information as at the time, the vesting took place, in the following year, there was only 7% of Buddhist students admitted to the school and it is well below the 10% required under clause 3.2 of the circular 22 of 2017.

In the said circumstances a question will arise as to the eligibility of St. Anthony's Balika Maha Vidyalaya to admit Buddhist students to its grade one, above the 10% requirement under Assisted Schools and Training Colleges (Special Provisions) Act No 5 of 1960 and Assisted Schools and Training Colleges (Supplementary Provisions) Act No 8 of 1961 and in the said circumstances clause 3.2 read with Clause 6 (III) of the guidelines will become a barrie to consider St. Anthony's Balika Maha Vidyalaya as a "other Government primary school that the child could be admitted" to Vishaka Vidyalaya, Colombo 05.

In the absence of similar information with regard to the other school referred to above; i.e. St. Mary's Balika Maha Vidyalaya, this court will refrain from making any observation, but we emphasize the requirement of the authorities to abide by the rules laid down in the circular, since it

is the paramount duty of the relevant authorities to fulfill the desire of any applicant, if they are eligible to come within the provisions of the circular.

As observed by this court the 3rd Petitioner was allocated 58.3 marks at the interview as well as at the appeal hearing. Cut off mark under the category the application was considered was 61.5 marks and obtaining additional 3.2 will make the 3rd Respondent eligible to gain admission to Vishaka Vidyalaya, Colombo 05.

When considering the conclusion this court had already reached with regard to St. Anthony's Balika Maha Vidyalaya that the said school cannot be considered as a "other government primary school that the child could be admitted," the 3rd Petitioner is entitled to receive 5 marks reduced by the authorities for the said school, increasing the total marks obtained at the interview to 63.3 marks, making the 3rd Petitioner eligible to gain admission to grade one Vishaka Vidyalaya, Colombo 5.

The Petitioners have alleged the violation of their fundamental rights guaranteed under Article 12 (1) of the Constitution which deals with the right to equality and equal protection of law. The guarantee of equality ensures that among equals the law should be equal and should be applied equally.

When considering the totality of the evidence placed before this court I hold that the 3rd Petitioner is entitled to obtain 63.3 marks making her eligible to gain admission to grade one of Vishaka Vidyalaya, Colombo 05 under the category of "Children of Residents in close proximity to the school," thus the Petitioners have established that their fundamental rights guaranteed under Article 12 (1) of the Constitution had been infringed by the Respondents.

Whilst confirming that the Petitioners Fundamental Rights guaranteed under Article 12 (1) of the Constitution had been infringed by the above conduct of the Respondents, I direct the 1st Respondent to take steps to admit the 3rd Petitioner to grade one or to the appropriate grade of Vishaka Vidyalaya, Colombo 05.

Judge of the Supreme Court

Justice P. Padman Surasena

I agree,

Judge of the Supreme Court

Justice E.A.G.R. Amarasekera

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 17 and 126 of the Constitution.

Ratnayaka Weerakoonge Sandya Kumari,
No: 4, Main Street,
Meegahatenna.

Petitioner

Case No: SC FR 75/2012

-Vs-

1) Mr. Lakshitha Weerasinghe,
Sub Inspector of Police,
Police Station Meegahatenna.

2) Mr. Shanthalal (3534)
Sergeant,
Police Station Meegahatenna.

3) Mr. Himala Rajapakse,
Officer-In-Charge,
Police Station Meegahatenna.

4) Mr. Lalith Pathinayake,
Senior Superintendent of Police,
SSP office, Nagoda,
Kalutara.

5) Mr. N.K.Illangakoon,
Inspector General of Police,
Police Head Quarters,
Colombo 1.

5A) Mr. Pujith Jayasundara,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

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

Respondents.

Before: Buwaneka Aluwihare, PC. J.,
L.T.B. Dehideniya, J. and
Murdu N.B.Fernando, PC. J.

Counsel: Rasika Dissanayake for the Petitioner
J.M. Wijebandara with Y.S.Shehani for the 1st and 2nd Respondents.
Ms. S. Herath, SSC for the 3rd to 6th Respondents.

Argued on: 06.08.2018

Decided on: 18.12.2019

Murdu N.B. Fernando, PC. J.

The Petitioner is an Attorney-at-Law and by the Petition dated 24-02-2012 alleged the infringement of her fundamental rights guaranteed under Article 11,12(1) and 13 of the Constitution.

Thereafter on 29-05-2012 an Amended Petition was filed seeking among other relief, the following:

i) a Declaration that the 1st and 2nd respondents and/or the State have infringed the petitioner's fundamental rights guaranteed under Article 11 of the Constitution;

ii) a Declaration that the 1st to 5th respondents and/or the State have infringed the petitioner's fundamental rights guaranteed under Article 12(1), 12(2) and 14(1)(g) of the Constitution; and

iii) that the 1st to 3rd respondents and all other police officers involved, concerned and/or responsible for the ill treatment and obstruction of the petitioner in the performance of her duties as an Attorney-at-Law be dealt with by way of a disciplinary action.

Leave to proceed was granted to the petitioner by this Court on 28-09-2012 for the alleged violation of Article 11 and 12(1) of the Constitution.

The relevant facts as narrated by the petitioner is as follows: -

On 27-01-2012, the petitioner went to the Meegahatenna police station to surrender a suspect wanted in a case pending before the Magistrate Court of Matugama. She met the 3rd respondent, the Officer In Charge of the police station at his official quarters at about 8.30 am and on his instructions proceeded to the police station and met the 1st respondent, the Officer In Charge of the crimes division of the Meegahatenna police.

She informed the 1st respondent that she came to surrender a suspect. At once the 1st respondent attempted to assault the suspect. She told the 1st respondent not to assault the suspect and to follow the due process of law.

Thereafter an exchange of words took place between the petitioner and the 1st respondent and she was compelled to meet the 3rd respondent again and requested that the suspect be produced before the Magistrate Court. The 3rd respondent directed the petitioner back to the 1st respondent and informed her that he would speak to the 1st respondent.

The petitioner once again met the 1st respondent and requested that relevant entries be made and she be issued with the reference number of the log entry, as proof of production of the suspect before the police station. At that moment, the 1st respondent verbally abused the petitioner and told her to stay outside until she was summoned.

Whilst she was standing outside the 1st respondent's office, the 1st and 2nd respondents came out and insulted the petitioner and when she asked the 1st and 2nd respondent to mind their language the petitioner was further abused and she was even threatened with imprisonment. The petitioner tendered to this court affidavits of her husband (who accompanied her to the police station since she was in family way), her client and his parents to substantiate this incident.

The petitioner alleged the behavior of the 1st and 2nd respondents caused her severe pain of mind and humiliation which required medical treatment. Further the petitioner pleaded that she verily believed that the said distress and trauma caused her to miscarry the pregnancy. The petitioned produced two laboratory reports with regard to her pregnancy and termination thereof dated 24-01-2012 and 09-02-2012.

The facts stated by the 1st and 2nd respondents in their objections is as follows: -

The petitioner arrived at the police station at around 6.45 am on 27-01-2012 and informed that she came to surrender a suspect.

Since it was time for the change of shifts and duty and officers rostered for day duty had not reported to their desks to take down necessary notes and statements, the petitioner was requested by the 1st respondent to stay out until she was called. The petitioner was annoyed by this request. Hence, the petitioner was asked to take a seat in the 1st respondent's room itself. The petitioner sat and got the suspect who was wanted in connection with the offence of rape and stabbing also to sit and demanded that the process be immediately attended with and the suspect be produced in Court before 9.00 am. The petitioner also wanted the suspect to leave the police station with her.

Then the 1st respondent inquired from the suspect, whether he was in hiding after committing two offences. An exchange of words took place again and the 1st respondent informed the petitioner that he could arrest the suspect since he is wanted in connection with a serious crime. Thereafter, the petitioner walked out of the 1st respondent's office and went towards the 3rd respondents official quarters.

The petitioner returned again and acted in a manner unbecoming of an Attorney-at-Law and loudly insulted police officers in general, which prompted the 2nd respondent (who was resting at the barracks after his night shift and who recognized the petitioner as a Lawyer appearing in the Magistrate Court) to come to the defence of the police officers. The 1st and 2nd respondents produced before this Court the extracts of the Police Information Book to substantiate their version.

The 1st and 2nd respondents further averred, that the petitioner used political affiliations and demanded that the 1st respondent apologizes to the petitioner but the 1st respondent did not tender an apology. The petitioner also complained to the 5th respondent which resulted in a departmental inquiry against the 1st and 2nd respondents but the petitioner failed to establish the allegations levelled against the said respondents.

The 4th respondent, the Senior Superintendent of Police, Kalutara in his objections filed before this Court stated, that he appointed the Assistant Superintendent of Police Aluthgama to conduct an inquiry with regard to the incident and based on the said inquiry the 4th respondent submitted his report to the 5th respondent. The said report and the statements recorded at the inquiry were produced before this Court by the 4th respondent. The statements recorded were of the petitioner, her husband, the 1st, 2nd and 3rd respondents, three other police officers attached to the Meegastenna police station and an independent eye witness to the incident who was present at the police station. The 4th respondent in his objections further stated that the petitioner had informed the Inquiry Officer that she cannot produce any witnesses to substantiate her allegations. The 4th respondent also averred before this Court, that the Inquiry revealed that the petitioner behaved in an unruly manner within the police station and abused the 1st and 2nd respondents causing much humiliation and disgrace to them as well as to the police officers stationed at the police station.

The petitioner in her counter affidavit filed before this Court stated, that she was attached to the Walallawita Pradeshiya Sabha as a Legal Officer and admitted that she informed the political authority (a named senior Cabinet Minister) about the incident who got down the 1st respondent to the Pradeshiya Sabha and admonished him. The petitioner also stated that the 4th respondent SSP, has falsified under oath to save his subordinate officers.

Having referred to the factual matrix of this application as given by the parties, let me now consider the said facts pertaining to the incident to ascertain whether the petitioner's fundamental rights guaranteed under Article 11 and 12(1) of the Constitution have been violated by the respondents.

The said two Articles reads as follows: -

Article 11 - "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"

Article 12(1) - "all persons are equal before the law and are entitled to the equal protection of the law,"

The Counsel for the petitioner in his submissions, relied on three grounds to justify granting of the relief prayed for in the petition. The said grounds were that verbal abuse amounts to a violation of Article 11 of the Constitution, the usual conduct of the 1st respondent and the breach of 'Police Rules 2012' by the 1st respondent. It is observed that there is no reference to the 2nd respondent in respect of the 2nd and 3rd grounds.

Let me consider the 3rd ground relied on by the petitioner, i.e. the breach of 'Police Rules 2012' in the first instance. These rules were published in the gazette notification bearing no. 1758/36 dated 18-05-2012 and were produced before this Court together with the written submissions of the petitioner.

It is observed that these rules issued by the Inspector General of police under Section 55 of the Police Ordinance is cited as 'Appearance of Attorney-at-Law at police stations' and lays down certain guidelines to be followed. In Clause two it states that the rules shall be followed by all police officers of whatever rank, serving in every police station in Sri Lanka.

Clause three states, that every Attorney at-Law shall be treated cordially and courteously and given a fair and patient hearing. Clause four goes onto state that no police officer shall use physical force on an Attorney at-Law or resort to the use of abusive language or any other form of intimidatory conduct. Clause ten refers to the manner in which an officer of the police force who violates the rules should be dealt with viz. punishable under the provisions of Section 55 of the Police Ordinance and be subjected to a disciplinary inquiry conducted by the Department of Police.

The 'Police Rules 2012' were promulgated after the alleged incident. Therefore, I do not wish to place any reliance on the said rules in order to determine whether the 1st respondent breached the said rules or whether the petitioner's fundamental rights were violated by the 1st respondent in view of the breach of the rules.

However, this Court observes that a disciplinary inquiry had been conducted on the instructions of the 5th respondent; and that the petitioner had failed to lead evidence to establish the allegations levelled against the 1st and 2nd respondents, especially the use of abusive language or that the 1st respondent commited a wrong as alleged by the petitioner. Consequent to the inquiry the recommendation of the 4th respondent had been to advise the 1st respondent, to act in a more cordial and friendly manner when dealing with the public. It is also observed that the 1st respondent had already been transferred out of the station consequent to the alleged incident and prior to the holding of the inquiry.

In the aforesaid circumstances, we see no merit in the said submission of the petitioner pertaining to the breach of "Police Rules" by the 1st respondent.

The 2nd submission of the Counsel for the petitioner before this Court was the 'usual conduct' of the 1st respondent. To substantiate the allegation of 'usual conduct' the petitioner relied on a fundamental rights Application bearing No SC/FR 331/2014 filed before this Court in which the 1st respondent tendered an unqualified apology to the petitioner therein.

Upon perusal of the petition and the journal entries of the said application (tendered to this Court together with the petitioner's written submissions) we observe, that the petitioner of the said application is a person belonging to the Muslim faith who had been arrested at the instigation of a 3rd party on a false charge and assaulted and produced before the Magistrate Court on a 'B' report, in the aftermath of the March 2014 riots at Dharga Town, Aluthgama. This incident has happened two years after the alleged incident complained of in the instant application. The petitioner has not referred to any other instance in which the conduct of the 1st respondent has been wanting.

In the said circumstances, we see no reason to come to a finding detrimental to the 1st respondent in respect of his 'usual conduct' as adverted to by the Counsel for the petitioner, based only upon the above said incident. Hence, we see no merit in the said submission.

The 3rd and final submission of the Counsel for the petitioner is in respect of the use of abusive language by the 1st and 2nd respondents. It was submitted that the said conduct of the 1st and 2nd respondents was a violation of the Petitioner's fundamental rights guaranteed under Article 11 of the Constitution.

Prior to discussing the said submission, I wish to observe that the petitioner has refrained to make any submissions, in respect of the violation or an imminent infringement of the

fundamental rights guaranteed under Article 12(1) of the Constitution by either one or any of the respondents and/or the State, as prayed for in the Amended Petition filed before this Court.

In the said circumstances, it is not necessary for me to consider Article 12(1) of the Constitution or its violation by either one or any of the respondents.

Nevertheless, in the interest of justice, I have considered the facts envisaged in the petition against the 3rd to the 6th respondents and I am of the view that the said facts do not support a violation of Article 12(1) of the Constitution by the aforesaid respondents against the petitioner.

With regard to the violation of Article 12(1) of the Constitution by the 1st and 2nd respondents, I wish to consider same in the light of the submissions made by the petitioner with regard to Article 11 of the Constitution.

The petitioner submits that she being a Lady Lawyer was abused and harassed inside a state institution established to maintain law and order by persons entrusted with the duty to secure the rights of the citizens and that the unbearable distress and the trauma caused the petitioner to miscarry within a period of two weeks into her pregnancy.

There is no medical evidence led before this Court, except the two laboratory reports to establish that the distress and trauma caused the petitioner to miscarry. In the absence of any medical evidence to even establish that the petitioner sought treatment or that the two incidents were remotely connected, or there was causation between the said incidents, I see no reason to find a violation of the petitioner's fundamental rights guaranteed under Article 11 and 12(1) of the Constitution by the 1st and the 2nd respondents solely upon the said misadventure adverted to by the petitioner.

Further, I observe that there is no medical evidence produced before Court to substantiate that use of force or an act of assault was committed on the petitioner by the said respondents. Thus, upon the said ground too, I see no reason to find that the 1st and the 2nd respondents violated the fundamental rights of the petitioner.

Sharwananda CJ in **Namasivayam Vs Gunewardena [1989] 1 SLR 294** held that in the absence of medical evidence to corroborate cruel treatment or torture a Court will not hold that there had been a violation of Article 11 of the Constitution.

The petitioner's main contention is that the petitioner was verbally abused and thus the verbal abuse amounts to a violation the petitioner's fundamental rights guaranteed under Article 11 of the Constitution. To substantiates the said argument the petitioner relies on the recent Judgment of this Court in **Suppaiya Sivakumar Vs Sargent Jayaratne and others SC FR 56/2012. S.C. Minutes dated 26.07.2018**.

However, I observe that the facts of the above case can easily be distinguished from the instant application. In the case relied upon by the petitioner, Suppaiya Sivakumar who was watching a Hindu religious celebration was assaulted by the police officers with a club, subjected to continuous verbal and physical abuse and dragged on a road continuously being beaten and treated like an offender in front of his relatives and the general public. In the light of the medical evidence produced, Aluwihare J, held that the act of assault and verbal abuse of the petitioner Suppaiya Sivakumar was malicious and completely unwarranted.

His Lordship referred to the Judgment of Shirani Bandaranayake J. in **Abeywickrema Vs Guneratne [1997] 3 SLR 225 at page 228** wherein a passage from Justice A.R.B. Amerasinghe's book on 'Our Fundamental Rights of Personal Security and Physical Liberty' which reads as follows: -

> "Something might be degrading in the relevant sense, if it grossly humiliates an individual before other's or drives him to act against his will or conscience"

was cited with approval and held that the petitioner Suppaiya Sivakumar was subjected to degrading treatment and the conduct of the police officers caused humiliation to the petitioner Suppaiya Sivakumar and held that the said petitioner's fundamental rights guaranteed under Article 11 and 12(1) of the Constitution had been violated.

In my view, no parallel can be drawn between the above case and the instant application.

In the application before this Court, admittedly there was no physical abuse or assault. There had only been an exchange of words between the petitioner and the 1st respondent, which in my view was completely unwarranted.

The petitioner walked into the police station early in the day to surrender a suspect. The petitioner wanted the matter expeditiously dealt with and the suspect be permitted to leave the police station with her which in my view was also completely unwarranted.

The suspect was wanted in respect of committing two offences, rape and stabbing with a knife and evading police. When a suspect is surrended, the police need to take steps and follow the due process of law and statements recorded and required investigations done. The due process should not be hampered with time constraints and dictates of Attorney at-Law watching the interest of the suspect.

The petitioner alleged that as she informed the 1st respondent that she wanted to surrender the suspect the 1st respondent attempted to assault the suspect in front of her and she requested him not to assault her client and then the 1st respondent bluffed about his educational qualifications.

The 1st respondent in his narration referred to the non-availability of officers to take down notes which led to the delay in attending to the matter of the petitioner and that the petitioner who appeared to be annoyed shouted at the police officers saying 'අට පාස් එවුන්', among other derogatory statements.

In all the statements produced before this Court, a reference is made to the utterance of the petitioner 'අට පාස් එවුන්' viz police officers having only a grade eight qualification. The 1st respondent a sub-inspector appeared to have retorted back by saying that he has been to campus. I also observe that in the affidavits filed before this Court annexed to the petition, the petitioner's husband, as well as the suspect and his parents categorically state that the petitioner tendered a letter issued by an ASP of a neighboring police division to the 3rd respondent and there was an exchange of words with reference to the said letter as well. The petitioner is silent on the said matter.

Having weighed the evidence produced I tend to accept the narration given by the 1st and 2nd respondents that the petitioner created a commotion at the police station.

In my view the afore said conduct of an Attorney at-Law at a police station is unwarranted and deplorable, more so when it comes from a Lady Lawyer who has being admitted to the bar only three and a half years back.

Another factor that should be borne in mind is that the office of an Attorney at-Law is also governed by the Supreme Court (Conduct of and Etiquette of Attorney at-Law) Rules of 1988 where it is specifically stated that on Attorney at-Law must not conduct herself in any manner which would be reasonably regarded as unworthy, disgraceful and dishonorable by Attorneys at-Law of good repute.

When analysing the behavior of the petitioner and the 1st respondent based on the affidavits filed before Court, I am reminded of the oft quoted saying that, 'courtesy begets courtesy'.

Independent to the above conduct of the petitioner, let me move onto consider whether by the actions and the behavior of the 1st and the 2nd respondents especially the alleged verbal abuse, violates the petitioner's fundamental right guaranteed under Article 11 and 12(1) of the Constitution.

Amerasinghe J. in **Channa Peiris and others Vs Attorney General and others [1994] 1 SLR 1** made the following observations pertaining to a violation of Article 11 of the Constitution.

(i) the acts and 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; and

(iii) having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavoring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.

In **Gunawardena Vs Perera and others [1983] 1 SLR 305 at page 313**, Soza J stated as follows: -

> "There can be no doubt that the burden in on the petitioner to establish the facts on which she invites the Court to grant her the relief she seeks…the standered of proof is preponderance of probability…. It is generally accepted that within this standard there could be varying degrees of probability. The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This Court when called upon to determine the questions of infringement of fundamental rights will insist on a high degree of probability as for instance a court having to decide a question of fraud in a civil suit would. The conscience of the Court must be satisfied that there has been an infringement."

In the said case, the petitioner a veteran lady politician along with others staged a demonstration and were walking back along the Galle Road. Consequent to an incident that occurred on the way back, she walked into the police station. She alleged that at the police station she was thrown down, kicked and pushed and subjected to cruel and inhuman and degrading treatment which violated her fundamental rights set out in Article 11 of the Constitution. The Court having analysed the evidence held that the allegation of degrading treatment had not been established by proof to the high degree of probability required.

Similarly, in **Mrs.W.K.M. de Silva Vs Chairman Fertilizer Corporation [1989] 2 SLR 399** wherein the petitioner, who was the secretary to the Chairman, came before this Court alleging cruel, inhuman and degrading treatment at the hands of the Chairman. This Court held that although it is clear that the petitioner has been degraded and humiliated in front of her colleagues and subordinates and the conduct speltout would undoubtedly amount to a grossly unfair labour practice, it does not constitute torture or cruel, inhuman or degrading treatment or punishment and fall far short of the degree of mental or physical coercisevenss or viciousness required to fall within Article 11 of the Constitution.

The foregoing judicial decisions of this Court has clearly identified and laid down that a high degree of certainty is required before the balance of probability would tilt in favour of a petitioner endeavoring to discharge the burden of proof with regard to an allegation of torture or cruel, inhuman or degrading treatment.

Having analsed the evidence produced before this Court, I hold that the petitioner has failed to establish her allegation of torture or cruel, inhuman or degrading treatment in the hands of the 1st and 2nd respondents. Thus, I hold that the petitioner rights assured under Article 11 of constitution has not been violated by the said respondent.

The petitioner's has also failed to establish the claim that the petitioner fundamental rights to equality before the law and equal protection of the law pledged by Article 12(1) of the constitution had been violated by the 1st and 2nd respondents.

For the above reasons the application of the petitioner is refused.

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 in terms of Article 126 read with Article17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S C (F R) Application No. 81/ 2010

1. M S K Wickramanayake,
   Balapatthawa,
   Avissawella Road,
   Galigamuwa,
   Kegalle.

2. D C P Kumarasinghe,
   Perakuma Mawatha,
   Medalandawatta,
   Kurunegala.

PETITIONERS

-Vs-

1. Mahinda Balasooriya,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

   1(a). N K Illangakoon,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

   1(b). Pujitha Jayasundera,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

2. Secretary,
   Ministry of Defence Public Security,
   Law and Order,

No 15/5,

Baladaksha Mawatha,

Colombo 03.

3. Vaas Gunawardena,

   Senior Superintendent of Police,

   Office of Senior Superintendent of Police,

   Kurunegala.

4. Ajith Wansanatha,

   Headquarters Inspector,

   Kurunegala Police Station,

   Kurunegala.

   Presently:

   Assistant Superintendent of Police,

   Office of the Assistant Superintendent of Police,

   Galgamuwa.

4. (a)(i) Prof. Siri Hettige - Chairman,
   National Police Commission.
4. (a)(ii) P H Manatunga - member
4. (a)(iii) Mrs Savithri Wijesekara -
   Member.
4. (a)(iv) Y L M Zawahir - Member.
4. (a)(v) Anton Jeyanandan - Member.
4. (a)(vi) Thilak Collure - Member.
4. (a)(vii)Frank de Silva - Member.
4. (a)(viii)N A Cooray - Secretary.

   4(a)(i) to **4(a)(viii)**

   all of them respectively the
   Chairman, members and the
   Secretary of the National Police
   Commission
   Block No 3,
   BMICH Premises,
   Bauddhaloka Mawatha,

Colombo 07.

5. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENTS

Before: Prasanna Jayawardena PC J

Vijith K. Malalgoda PC J

P. Padman Surasena J

Counsel:

J C Weliamuna PC with Pulasthi Hewamanna and Thilini Vidanagamage for the Petitioners.

Viveka Siriwardena DSG for the Attorney General.

Argued on : 14-03-2019

Decided on : 27-08-2019

P Padman Surasena J

The 1st and 2nd Petitioners at the time of the incident relevant to this case were serving in the Kurunegala Police Station respectively as the Headquarters Inspector (hereinafter sometimes referred to as the HQI) and the officer in charge of the administration branch of Kurunegala police station.

It is common ground between the parties

i. that the 3rd Respondent was the Senior Superintendent of Police (hereinafter sometimes referred to as the SSP) in charge of Kurunegala Police division at the relevant time, and
ii. that His Excellency the President of the Republic, by proclamation published in the gazette had declared that the presidential election was to be held on 26th January 2010.

The incident relevant to this application had occurred on the 23rd January 2010 which was just two days prior to the said scheduled date (i.e. 26th January 2010) for the presidential election.

It would be useful at the outset to encapsulate the facts salient to this case. It is as follows.

i. On the 23rd January 2010 the 1st Petitioner being the HQI of Kurunegala police station had attended a meeting held at the office of the Deputy Inspector General (hereinafter sometimes referred to as the DIG) in charge of Kurunegala Police Division to discuss about the security arrangements etc. in the area in view of the impending presidential election scheduled for 26th January 2010. The DIG – Kurunegala (Mahesh Samaradivakara), DIG - in charge of Elections (Anura Senanayake), the SSP - Kurunegala (3rd Respondent) had been present at the said meeting.

ii. The DIG in charge of Kurunegala Police Division had received around 3.30 PM on 23rd January 2010, a telephone call from a senior lawyer namely Mr. Felician Perera Attorney-at-law informing him that a lorry belonging to Sri Lanka Navy bearing registration No. නා. භ. 6284 Was heading towards Kurunegala from Polgahawela carrying counterfeit ballot papers.

iii. Few minutes later, the 1st Petitioner who was the HQI of Kurunegala police station also has received the same information through a telephone call.

iv. Acting on the instructions of the DIG in charge of Kurunegala Police Division, the 1st Petitioner had taken steps to deploy a team of police officers led by the 2nd Petitioner (who was the Officer in charge of administration of Kurunegala police station) to set up a road block near the office of the SSP in Kurunegala. The said team of police officers had commenced checking on the passing by vehicles.

v. As the meeting had ended around 4.15 PM, the 1st Petitioner had left the DIG's office and had taken steps to give necessary instructions to the 2nd Petitioner regarding the apprehension of persons in the suspected vehicle.

vi. Consequently, around 5.10 PM, the team of police officers led by the 2nd Petitioner has taken the above numbered lorry (along with three Navy personnel who had been travelling in the lorry) into custody at a location close to a place called Wehara Junction. Shortly thereafter, the 1st Petitioner also had arrived at that location.

vii. Thereafter, acting on the instructions of the 3rd Respondent, the apprehended suspects and the lorry had been brought to Kurunegala Police Station. At that time, Superintendent of Police Nagahamulla and the 3rd Respondent also had come to the Police Station.

viii. Soon thereafter Mr. Jayawickrama Perera, a member of the opposition of then parliament along with a group of his supporters including Mr. Felician Perera Attorney-at-law (who provided the information) had arrived at the Police Station.

ix. An intense argument had then ensued between the 3rd respondent and the group of people led by the Member of Parliament who had insisted that the apprehended lorry should be inspected. Pursuant to this argument, the 3rd Respondent had reluctantly permitted the inspection of the lorry.

x. Although counterfeit ballot papers (referred to in the information received) had not been found, the police had found the following items stacked inside the lorry;

i) A stock of liquor stored in crates and boxes,

ii) 24 bundles of handbills titled ‘‘හදුනාගත්තොත් ඔබ මා’’

(produced marked **P 6**) and

“කව්ද මේ ...?

කව්ද මේ ...?

කව්ද මේ ...?” (Produced marked **P 7**).

These items had been covered with several empty metal barrels. A collection of photographs of these items including the lorry has been produced marked **P 1**. A compact disk (CD) containing the images of the said items in a video has also been produced marked **P 2**. The contents of the handbills found in the lorry had been printed in both Sinhala and Tamil languages. The said handbills had not disclosed any information leading to the identification of their author or publisher.

xi. At about 6 PM, Mr. Jayarathne Herath a Minister serving in the then government along with a group of his supporters had rushed to the scene. An altercation had then ensued between the said Minister and the aforesaid Member of Parliament. At that stage, the DIG-Kurunegala and DIG-Elections also had arrived at that place.

xii. The politicians who had gathered there had left the police station upon an undertaking given by the DIG-Elections to deal with the defamatory publications according to law. The politicians had left the scene leaving behind a person who was found busy making telephone calls to various persons.

xiii. Around 8 PM, the 3rd Respondent had directed the 1st Petitioner to record statements from three Navy personnel, take into custody the previously mentioned defamatory publications and then release the lorry. Copies of the statements given by the Navy personnel have been produced marked **P 3**. The DIG-Elections (Anura Senanayake), had also made an entry regarding the said incident in the Officers Visiting Book maintained at the Kurunegala Police station, a copy of which has been produced marked **P 4**.

xiv. After the superior officers left the scene the 3rd respondent having had several telephone conversations with several people, to the surprise of the petitioners, had directed the 1st Petitioner to release the stock of liquor and defamatory publications along with the lorry.

xv. The Petitioners had reminded the 3rd Respondent that they would be subjected to disciplinary action if they release the defamatory publications after which the 3rd Respondent himself had taken the key of the lorry and thrown it towards the Navy personnel.

xvi. The said Navy personnel drove away in the lorry with the said defamatory publications after they were re-loaded on to the lorry under the personal supervision of the 3rd Respondent.

xvii. Around 9 PM, the person by the name of Prabath who was left behind by the above mentioned Minister, had abused the Petitioners in filth and threatened them that they would be dealt with after the conclusion of the presidential election.

xviii. The entries made in the Officers' Visiting Book maintained at the Kurunegala police station by Superintendent of Police Nagahamulla and the 3rd Respondent have been produced marked **P 9(a)** and **P 9(b)** respectively.

xix. About 1 week after the conclusion of the presidential election, by the fax dated 6th February 2010, 110 police officers including the 1st Petitioner had been transferred with immediate effect. (Fax dated 6th February 2010 has been produced marked **P 10**). According to **P 10**, the 1st Petitioner has been transferred to a supernumerary position at the Sri Lanka Police College in Kalutara based on exigencies of the service. The Ministry of Defence and Public Security and Law and Order had approved the said transfer.

xx. Upon an order of the Inspector General of Police bearing No. D/MD /ADM/73/2010 dated 6th February 2010; the 2nd Petitioner has been

transferred to Trincomalee. This communication has been produced marked **P 11**.

The Petitioners complain that the above transfers effected immediately after the conclusion of the presidential election 2010 are arbitrary, mala fide and executed for collateral purposes. It is on this basis that they complain that the fundamental rights guaranteed to them under Articles 12(1) and or 12 (2) of the Constitution have been infringed.

Although, the Petitioners in the prayers of their petition have prayed for a declaration by this Court that their fundamental rights guaranteed under Articles 12(1) and 12(2) of the Constitution have been violated, this Court when this application was supported on 01-03-2010, having heard the submissions of the learned counsel for the Petitioners and the submissions of the learned State Counsel who appeared for the Respondents, had decided to grant leave to proceed only under Article 12(1) of the Constitution. Thus, the task of this Court at this moment must be restricted only to ascertain whether anyone or more of the Respondents have infringed the fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution.

It would be opportune at this juncture to consider the position taken up by the respondents. Both Mr. Mahinda Balasuriya then Inspector General of Police who is the 1st Respondent and Mr. Vaas Gunawardena then SSP - Kurunegala (3rd Respondent) have filed affidavits. They in the said affidavits have admitted the following facts;

i. There was a meeting held on the 23rd January 2010 with the presence of the 1st Petitioner and the 3rd Respondent along with other senior officers to discuss about the security arrangements etc. in the area in view of the impending presidential election scheduled.

ii. While the said meeting was going on around 3.30 PM, the Deputy Inspector General in charge of Northwestern Province - East had received a telephone call from a person identified as Felician Perera Attorney-at-law informing him that a vehicle bearing registration No. නා. හ. 6284 was being used to transport counterfeit ballot papers.

iii. Thereafter, the Deputy Inspector General in charge of Northwestern Province - East had instructed the 1st Petitioner to take the said vehicle into custody.

iv. The 2nd Petitioner had consequently taken the above numbered lorry into custody and had brought the said lorry to Kurunegala Police Station.

v. At the time, the said lorry was brought to Kurunegala Police Station, a crowd had gathered there and among them were Mr. Gamini Jayawickrema Perera a Member of Parliament and Mr. Jayaratne Herath a Minister in the then government along with their supporters.

vi. The unrest which prevailed at that time had been solved by DIG (Northwestern Province - East) and DIG (crimes). The 3rd Respondent had also been present there at that time. The respondents have produced the relevant part of the notes made by the 3rd Respondent marked **1R1**.

vii. Upon the inspection of the said lorry, they had not found any counterfeit ballot papers. However, they had found 24 bundles of handbills criticizing the presidential election candidate Mr. Sarath Fonseka and some goods meant for the welfare of Navy officers in the lorry.

viii. At this instance the DIG (Northwestern Province - East) had instructed the 3rd Respondent to release the lorry and the Navy personnel after retaining few handbills as samples and after recording statements of the said Navy personnel. Relevant notes made by the DIG has been produced marked **1R2**.

ix. The 3rd Respondent had accordingly instructed the 1st and 2nd Petitioners to follow the instructions of the DIG.

x. The 1st Petitioner had refused to follow the said instructions, and had entered into an argument with a person amongst the gathering, and had left the scene without obeying the instructions given by the 3rd Respondent. Relevant notes made by the 3rd Respondent has been produced marked **1R3**.

xi. The 1st and 2nd Petitioners were subsequently issued with charge sheets, which have been produced marked **1R4** and **1R5**.

The position taken up by then Inspector General of Police Mr. Mahinda Balasuriya regarding the transfers of the Petitioners are set out in paragraph 8(x) of his affidavit. It is as follows.

"considering the fact that the 1st Petitioner as the HQI and the 2nd Petitioner being the OIC of the Kurunegala Police Station had a

misunderstanding with the 3rd Respondent, over insubordination moreover explained as above, the 1st and 2nd Petitioners were transferred out of the Division of the 3rd Respondent, on exigency of services, namely for the smooth functioning of the Police service within the SSP's Division."

It was the position of the then IGP that it was for administrative convenience that the names of the Petitioners were included in a common list of officers to be transferred.

It would be appropriate at this juncture to briefly outline the counter arguments advanced by the learned Deputy Solicitor General (who will hereinafter sometimes be referred to as DSG) who appeared for the Respondents. It was the submission of the learned DSG that the Respondents have effected the transfers of the Petitioners based on exigencies of service. Learned DSG further submitted that the conduct of the Petitioners showing disobedience and insubordination in refusing to carry out orders given by the superior officers was the primary fact, which precipitated the Respondents to have the Petitioners transferred out of Kurunegala Police Division on the given basis. Moreover, it was the submission of the learned DSG that the transfer of the Petitioners out of

Kurunegala Police Division became necessary to maintain the proper working atmosphere and the chain of command in the police service.

At the very outset of the process of evaluation of the arguments placed by the parties before this Court, it would be relevant to bear in mind that the Respondents do not deny that the Petitioners had taken into custody, copies of some publications defamatory to one of the candidates for the presidential election scheduled to be held on 26th January 2010. Admittedly, this detection had been made on the 23rd January 2010 which was just two days prior to the said scheduled date (i.e. 26th January 2010) of the said election.

In view of the submission made by the learned DSG that the primary fact, which precipitated the Respondents to transfer the Petitioners was the disobedience and insubordination of the Petitioners in refusing to carry out orders given by the superior officers to release the items ceased, it would be necessary to first consider whether the Petitioners were obliged in law to carry out the said instructions. Since what is in issue is an election related incident, I would commence this discussion by referring to some of the relevant provisions of the Presidential Elections Act.

According to section 72 of the Presidential Elections Act No. 15 of 1981, '*every person who, not being a candidate, prints, publishes, distributes or posts up, or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to an election and which does not bear upon its face the names and addresses of its printer and publisher, shall be guilty of an offence*.'

It would be relevant to recall at this stage that the 24 bundles of printed handbills produced marked **P 6** and **P 7** referred to a candidate of the presidential election, which was to be held in two days' time, and the said handbills did not bear upon its face, the names and addresses of their printer and publisher. Thus, whoever had caused the said handbills printed, published or distributed is guilty of an offence under section 72 of the Act.

Further, section 68 of the said Act has prohibited doing certain acts on a polling day. The part relevant would be section 68. (1) which is as follows.

"*no person shall, on any date on which a poll is taken at a polling station, do any of the following acts within the precincts, or a distance of a half a kilometer of the entrance, of that polling station:*

(a) Canvassing for votes;

(b) soliciting the vote of any elector;

(c) persuading any elector not to vote for any particular candidate;

(d) persuading any elector not to vote at the election;

(e) distributing or exhibiting any handbill placard, poster, photograph or drawing or notice relating to the election (other than any official handbill, placard, poster, photograph or drawing or notice) or any symbol allotted under section 20 to any candidate."

I must also take into account the general provisions in section 71 of the Act relating to some offences including an offence under section 68. According to that section [S. 71. (1)] every person who attempts to commit an offence specified in section 68 shall also be liable to the punishment prescribed for that offence.

It is also relevant to note that section 71 (2) of the Act has made every offence under section 68 or section 69 a cognizable offence within the meaning of the Code of Criminal Procedure Act, No. 15 of 1979.

Section 32 of the Code of Criminal Procedure Act No. 15 of 1979 states that it is lawful for any peace officer to arrest without an order from a Magistrate and without a warrant any person who has been concerned in any cognizable

offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

It must also be noted that according to section 56 of the Police Ordinance No. 16 of 1865 as amended, every police officer is under a duty to use his best endeavors and ability to prevent all crimes and offences, and to detect, apprehend and bring all offenders to justice.

Taking into consideration the above factual and legal material, I am of the view that in the given instance there was sufficient material and justifiable grounds for the Petitioners to arrest the three Navy personnel who had been concerned in a cognizable offence. Thus, the Petitioners had performed their duty well within law. Their actions are nothing but what the law of the country had expected of them.

However, the 3rd Respondent had admittedly directed the Petitioners to release the said offenders. The 3rd Respondent has not assigned any acceptable reason for this blatant violation of the prevailing provisions of the law. In the light of the above material it is not difficult for this Court to hold that the orders, the 3rd Respondent has given to the Petitioners, are clearly illegal. The 3rd Respondent had not heeded even the reluctance or

the protest of the Petitioners to carry out his illegal orders. The 3rd Respondent upon the said reluctance of the Petitioners to carry out his illegal orders had forcibly taken the key of the lorry from the Petitioners and given it to the offenders enabling the offenders to drive away with impunity. Not being contented with that, the 3rd Respondent had thereafter taken steps to charge the Petitioners for insubordination. Alas! The only alleged offence committed by the Petitioners is enforcement of the provisions in the prevailing law of the land as law enforcement officers and refusing to carry out illegal orders of a superior officer.

Moreover, it was submitted to this Court by the learned President's Counsel for the Petitioners that the inquiring officer, subsequent to the disciplinary inquiry held against the Petitioners, has exonerated the Petitioners from all the charges framed against them. This is despite the admission by both parties of the issuance of the relevant order by the 3rd Respondent and the refusal to carry it out by the Petitioners.

It would be opportune at this juncture to refer to an interesting judicial precedent on a similar question.

The question whether a soldier is bound to obey illegal order given by his superior came to the fore in the case of A. Wijesuriya and another Vs The State.[1]

The first appellant in that case Lieutenant Wijesuriya, a member of the volunteer force of the Army was the commander of the platoon sent to Kataragama on 16-04-1971, few days after that area was overrun and held by the insurgents for few days. The second Appellant was the second in command of the said platoon.

Both those appellants were indicted on two separate counts for having committed the offences of attempted murder of Premawathie Manamperi by shooting her with Sterling sub-machine guns and causing serious injuries to her on 17-04-1971. Both appellants were unanimously convicted by the jury. The defense raised by the appellants at the trial was a defence under section 69 of the Penal Code on the premise that they acted under the orders of their superior officers. The first appellant being the commander of the said platoon took up the position that he had received orders to "bump off" the deceased, from his superior officer Colonel

[1] 77 NLR 25.

Nugawela who was the Co-coordinating Officer for Hambantota district at the relevant time.

The 2nd appellant in that case sought to draw a difference with regard to his culpability on the basis that he only (unlike the 1st appellant who received the order to shoot the deceased on the previous day) received the order to shoot the deceased at the very time of the shooting took place, from the first Appellant who was his immediate superior (commander of his platoon) and was therefore compelled to act on that spur of the moment.

The Court of Criminal Appeal[2] held that under section 100 of the Army Act (Chapter 357) every person subject to Military Law[3] is only bound to obey the lawful commands given personally by his superior officers.

On this basis the Court of Criminal Appeal held that the order to shoot the deceased who was indeed arrested by Police, and was kept in custody, being manifestly and obviously an unlawful command, the

[2] Chief Justice of the island of Ceylon and Puisne Justices of the Supreme Court were the judges of that Court (vide section 2 of the Court of Criminal Appeal Ordinance).
[3] Vide section 34 of the Army Act.

appellants were not entitled to succeed with their defense even under the Military law.

The Court of Criminal Appeal on the above basis affirmed the conviction of both the appellants in that case.

Moreover, this Court, in the case of Deshapriya Vs Rukmani, Divisional Secretary, Dodangoda and others,[4] also has echoed similar views. The 3rd Respondent in that case who was the Deputy Speaker and a Member of then Parliament, had summoned the Petitioner of that case, a Samurdhi Niyamaka, along with all the other Samurdhi Niyamakas of Dodangoda Divisional Secretary's Division to attend a meeting presided over by him. In the said meeting the said 3rd Respondent (the Deputy Speaker and Member of Parliament) had instructed the Petitioner and the other Samurdhi Niyamakas to canvass amongst the people whom they work with, for support for the People's Alliance candidates for the then impending election. The said Petitioner had declined to follow the said instructions given by the said 3rd Respondent. The 3rd Respondent (Deputy Speaker) had then complained to then Minister of Samurdhi, Youth Affairs and Sports that the said Petitioner had espoused his political opinion in a public

[4] 1999 (2) Sri L R 412.

meeting presided over by him. Upon that complaint, then Minister of Samurdhi, Youth Affairs and Sports had instructed the Commissioner General of Samurdhi (2nd Respondent in that case) to suspend the services of the Petitioner in that case with immediate effect. The Commissioner General of Samurdhi then suspended the services of the said Petitioner with immediate effect. The sole reason for the said suspension was the fact that the said Petitioner had spoken against the instructions given by the said Deputy Speaker.

This Court having considered the material adduced in that case has stated in its judgment as follows.

" ..... As far as the 2nd and 3rd Respondents were concerned, it was not just a case of a suspension for which there was no reason, but one which they knew full well was for a wholly bad reason. That reason was, unashamedly, stated in the letter "A", and it was obvious to them that a suspension for that reason was both unlawful and a gross abuse of power. The 2nd Respondent may have acted - as he says in his affidavit - only because he was ordered to do so by the Minister of Samurdhi, but he should have known that that was an unlawful order which it was his duty to refuse to obey". …. "

In the instant case, the 3rd Respondent has admitted that he had given directions to the Petitioners to release the handbills, lorry and Navy personnel on the instructions of his (3rd Respondent's) superiors.

It is the position of the 3rd Respondent that his superiors having consulted the Hon. Attorney General had decided that no offence had been constituted at the given instance. This Court notes that Hon. Attorney General has been named as the 5th Respondent in the instant case and that no such position has ever been taken up by him at any stage of this case. The learned DSG who appeared for the Hon. Attorney General at no stage informed this Court that Hon. Attorney General was indeed consulted in this instance or that he took such view.

What the 3rd Respondent in his notes (**P 9(b)**) has stated is that DIG Anura Senanyaka had telephoned him and informed him that Hon. Attorney General, upon a query (whether the facts in this instance had constituted an offence) made by the 1st Respondent (IGP), had informed him that no offence had been constituted. According to the 3rd Respondent, it was on that basis that the 1st Respondent had instructed him to release the items and persons in custody.

However, to the surprise of this Court, the 1st Respondent (IGP) in the affidavit filed by him in this case has not adverted to any such position either directly or indirectly. This means that the 3rd Respondent's position, which is only reflected in his notes as mere hearsay material, has not even been supported by the 1st Respondent (IGP) who is said to have given the questionable directions.

In any case, the Hon. Attorney General who was before this Court did not support such factual or legal position. Moreover, in any case the Attorney General in all probability could not have had in his hand any material by that time to study and asses the evidence available or the circumstances leading to this detection in its correct perspective before forming any such opinion. Thus, this Court is of the view that the Respondents have not established by any degree of proof, the fact that the Attorney General was consulted or that he provided the purported advice in this regard. Further, while it is not the position of the 1st Respondent (IGP) that he gave such instructions, there is also no other support forthcoming from any quarter, for the 3rd Respondent's position. This has left the 3rd Respondent to stand or fall with his own version.

In these circumstances, this Court refuses to accept the position that any of the senior Police officers had consulted the Hon. Attorney General before giving questionable directions or that Hon. Attorney General in fact gave such opinion.

Furthermore, if the 3rd Respondent had indeed received such instructions from his superiors, this Court notes with regret that the 3rd Respondent had chosen (unlike the Petitioners) to unhesitatingly and promptly carry out such illegal instructions. Such a situation is pathetic especially in the face of the ability to understand the illegal nature of these instructions by the Petitioners who are the subordinates of the 3rd Respondent.

Further, this Court is of the view that the case at hand and the given set of facts and law applicable to this instance is not complex to the extent that it would have required the prompt attention and advice of Hon. Attorney General.

Moreover, as has been held in the case of Deshapriya Vs Rukmani, Divisional Secretary, Dodangoda and others,[5] (Samurdhi Niyamaka's case) use of the resources of the state including human resources for the benefit

[5] Supra.

of one political party or group is considered unequal treatment because such an unauthorized use would confer an unlawful advantage to one political party or group when a similar facility is denied to its rivals. In the instant case, the state vehicle had been used to transport handbills of the kind prohibited by election laws of the country.

It is to be noted that during the time relevant to the incident pertaining to this case the 17th Amendment to the Constitution was in operation. Article 104 B (4) therein had empowered the Election Commission to prohibit during the period of an election, the use of any movable or immovable property belonging to the State or any public corporation -

i. For the purpose of promoting or preventing the election of any candidate or any political party or independent group contesting at such election;
ii. by any candidate or any political party or any independent group contesting at such election.

This could have been done by a direction in writing by the Chairman of the Commission or of the Commissioner General of Elections on the instruction of the Commission. Once such a direction is made, every person or officer

in whose custody or under whose control such property is for the time being, was duty bound[6] to comply with and give effect to such direction. The Petitioners have drawn the attention of this Court to such notification (marked **P 14**,) issued by the Election Commissioner. It is clear even as per the said directive the respondents could not have lawfully decided to release the lorry, which is a state property as it had been used for purposes, referred to in that directive (**P 14**,).

Considering the above material, it is the view of this Court that this was not an instance where the respondents should have released at that time itself, the suspects or the handbills in their custody. This is particularly so when the presidential election was just two days away. Releasing the suspects along with those handbills at that time could only have paved the way for their distribution as may have been planned by those who were behind it in the eve of the Election Day.

Be that as it may, even if one were to assume that the 3rd Respondent had received such instructions, it would suffice for this Court to state here that the 3rd Respondent has not had any semblance of the forthrightness his subordinate officers had displayed at this instance when they refused to

[6] Article 104 B (4) (b).

carry out such manifestly illegal instructions. If the 3rd Respondent had, in fact received such illegal instructions from his superiors, he was entitled and should have refused to carry out such illegal instructions in the same way his subordinate officers had rightly done.

Since the position taken up by the respondents is that the Petitioners were transferred on the exigencies of the service, reproducing a passage from the judgment of this Court in the case of Tennakoon, Assistant Superintendent of Police Vs T. P. F. De Silva, Inspector General of Police and Others[7] would be relevant. That is also a case, which dealt with the term 'exigency of service'. The said passage is as follows.

"…..Thus the issue for decision becomes narrowed down to this: is this Court bound, or even entitled, to accept the 1st Respondent's subjective assertion as to the lack of a satisfactory working relationship - especially where that is only the unverified and unsupported conclusion of his subordinate? In my opinion, however wide the 1st Respondent's discretion, he cannot simply say that he ordered a transfer "because of the exigencies of service", or "for disciplinary reasons", or "in the interests of the service", or "because of the lack of a harmonious working relationship", and expect

[7] 1997 (1) Sri L R 16.

this Court blindly to accept that assertion. While it is true that Article 126 does not authorize this Court to usurp the 1st Respondent's discretion in regard to transfers, yet it does not allow this Court to accept a mere assertion of that sort - for that would be to abdicate its duty to examine whether the 1st Respondent's conduct fell short of the norms mandated by the fundamental rights, and thus indirectly to invent a new official immunity Senanayake v. Mahindasoma[8]. Let me add that, of course, different considerations would apply where national security is involved. …"

Fernando J in the above case, went on to state thus, 'If a police officer may, with impunity, be transferred on that ground (without any need to consider the reasons for it) what signals would that give, firstly, to the transferred officer as to how he should perform his duties in his new station, and secondly, to his replacement? To act according to law in the public interest or to avoid an unsatisfactory working relationship at all costs? As, for instance, by giving in to an unlawful request either to stifle an investigation into or a prosecution for an offence, or to pursue a frivolous and vexatious charge? The power to transfer exists in order to ensure an efficient service to the public, but without imposing an unfair

[8] SC 41/96, SC Minutes of 14-10-1996.

burden on individual public officers. Transfer on the ground of unsatisfactory working relationship will not only be unfair to the individual but will promote inefficiency and injustice……'

Article 12(1) of the Constitution reads as follows;

"All persons are equal before the law and are entitled to the equal protection of the law".

As has been set out above, the Petitioners were entitled in law to refuse to carry out the illegal instructions they had received to release the handbills, lorry and the Navy Personnel they had taken into custody. It necessarily follows that Respondents are not entitled in law to allege insubordination and subsequently to charge the Petitioners for insubordination on that account. According to the Respondents, it is this so-called insubordination, which had precipitated the Respondents to transfer the Petitioners.

In these circumstances, this Court is of the view that there had been no exigency of the kind alleged by the Respondents. Therefore, the submission of the Respondents that the Petitioners had to be transferred on the exigency of the service must fail.

Further, the above facts disclose clearly that the transfers effected soon after the presidential election on the guise of exigencies of service have been effected arbitrarily, illegally and for collateral purposes. It is therefore the view of this Court that the transfers of the Petitioners, subsequent preferring of charge sheets against them and conducting disciplinary proceedings against the Petitioners are all ab initio void and hence are hereby declared null and void.

Considering all the above material in its totality, this Court is of the view that the 1st Respondent and the 3rd Respondent in the given situation had acted arbitrarily, outside the law and had violated, the fundamental rights guaranteed to the Petitioners under Article 12(1) of the Constitution.

In these circumstances, and for the foregoing reasons, this Court decides that the Petitioners are entitled to a declaration by this Court that their fundamental rights guaranteed under Article 12(1) of the Constitution have been infringed.

Hence, this Court decides to

I. declare that the 1st and 3rd Respondents have violated the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution;

II. declare that the aforesaid purported transfers of the Petitioners reflected in **P 10** and **P 11** are illegal and hence null and void;

This Court thinks this is a fit occasion to commend the forthrightness displayed by the Petitioners even in the face of the aforementioned adversary circumstances. There is no doubt that they had undergone a difficult time for mere upholding the rule of law in the country. Therefore, this Court decides to award a compensation in a sum of Rs. 1,000,000/= to each of the Petitioners payable by the 1st Respondent and the 3rd Respondent in equal shares.

Further, this Court directs that the Petitioners must be deemed for all purposes to have continued to be in service in the ranks they were respectively holding at the time of this incident without a break in service. They will be entitled to all the arrears of their salaries and allowances as well as benefits, which their colleagues would have received during that period in terms of salary, increments, promotions etc.

This Court also directs the Inspector General of Police and the Police Commission to take necessary suitable steps to redress any disadvantage, which may have accrued to the Petitioners regarding their promotions due to their being unlawfully subjected to disciplinary proceedings relating to this incident.

Petitioners are entitled to the costs of this application.

Application is allowed with costs.

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

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S C (F R) Application No. 96/ 2012

1. A H Nethum Prabodha Ranawaka,
   43/15,
   R E De Silva Mawatha,
   Heppumulla,
   Ambalangoda.

2. A H Nadeeka Malkanthi,
   43/15,
   R E De Silva Mawatha,
   Heppumulla,
   Ambalangoda.

PETITIONERS

-Vs-

1. M G O P Panditharathna
   Principal,
   Drarmashoka Vidyalaya,

Ambalangoda.

2. Director,
   National Schools,
   Isurupaya,
   Battaramulla.

3. Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

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

RESPONDENTS

Before: **Buwaneka Aluwihare PC J**

L. T. B. Dehideniya J

P. Padman Surasena J

Counsel: Saliya Peiris PC with Varuna de Seram for the Petitioners.

Rajiv Goonetillake SSC for the Attorney General.

Argued on : 2019 - 03 - 21

Decided on: 2019 – 05 - 30

P Padman Surasena J

The 2nd Petitioner is the mother of the 1st Petitioner who is a minor and whose admission to Grade 1 of Drarmashoka College Ambalangoda, was sought by an application made by the 2nd Petitioner to the said school. Upon the 1st Petitioner becoming unsuccessful in getting the admission to the said school, the 2nd Petitioner has appealed to the Appeals Panel appointed by the School authorities. The Petitioners have not been successful at the said appeal too.

The Petitioners had sought eligibility for admission under the category of applicants who reside in close proximity to the school. The Petitioners have scored a total of 86 marks out of 100 marks, which is the maximum amount of marks that any applicant could obtain.

It is in this backdrop that the Petitioners in their petition have prayed inter alia for the following relief.

I. a declaration that the fundamental rights of the Petitioners guaranteed under Articles 12(1) of the Constitution have been infringed by one or more or all the respondents;
II. a direction on the Respondents to award the correct marks due for the application of the Petitioners; and
III. a direction on the Respondents to admit the 1st Petitioner to Grade I class (for the year 2012) of Dharmashoka College Ambalangoda.

This Court on 16-05-2012 having heard the submissions of the learned counsel for the Petitioner and the submissions of the learned Senior State

Counsel who appeared for the Respondents, had decided to grant leave to proceed in respect of the alleged violations of Articles 12(1) of the Constitution.

Since this court at this instance is dealing with an application for an alleged infringement of a fundamental right in terms of Article 127 of the Constitution, the task before this court is to ascertain whether the respondent school authorities have afforded an equal protection of law to the Petitioners.

It is the claim of the Petitioners that the 1st Respondent and the interview board as well as the aforesaid Appeals Panel wrongly deprived the Petitioners, the correct marks he was entitled to receive for his title deed.

In contradistinction to the above position, the 1st Respondent in his affidavit has taken up the following positions.

i. the Petitioners had submitted only the deed No. 6358 attested by A W Sumanasiri Notary Public on 15-10-1994 [produced marked **R 2(A)**];
ii. the said deed No. 6358 was in the name of the 2nd Petitioner's father A Gnanasiri;
iii. there was an endorsement on the said deed No. 6358 stating that the ownership has been transferred by deed bearing No. 66732 on 22-01-1996;
iv. as the said endorsement gave rise to a suspicion as to the validity of the said deed, the same was verified from the Land Registry of Balapitiya;
v. upon verification, it was revealed that the property in question had been transferred on 22-01-1996 by the 2nd Petitioner's father A

Gnanasiri and two others to L Jayawathie by deed No. 6732 produced marked **R 4**.

vi. thereafter, said L Jayawathie had transferred this property to N. S. S. Mendis by deed No. 7584 on 22-03-2002 produced marked **R 5**.

vii. thereafter, the said N. S. S. Mendis had transferred this property on 26-02-2009 back to the 2nd Petitioner's farther A Gnansiri by deed No. 11818 produced marked **R 6**.

The 1st Respondent has produced the relevant extracts of the Land Registry folio marked **R 7**. Thus, it is the position of the Respondents that the Petitioners were only entitled to marks for the period of their ownership of the said property (i.e. from 26-02-2009 onwards) and that the Petitioners cannot be awarded marks for the previous ownerships held by the other people prior to the execution of the deed No. 11818. Therefore, it is clear that the school authorities could only award three marks for the title deed for the period of ownership held by the father of the 2nd Petitioner, which is less than three years.

As regards the appeal proceedings by the Appeal Panel, the same circular also binds them. Therefore, they too cannot deviate from it. Thus, their action is also within law.

Thus, the Respondent school authorities are entitled to reject the application submitted by the 2nd Petitioner, as she had not obtained sufficient marks to compete with the other applicants who also had applied under the same circular being bound by the same conditions.

Moreover, it is the position of the 1st Respondent that the 2nd Petitioner has attempted to mislead the interview board by producing only the deed

bearing No. 6358 without disclosing the subsequent deeds transferring the relevant property to outsiders.

The 1st Respondent has also brought to the notice of this court that the 1st Petitioner has by this time gained admission to Sri Devananda Vidyalaya which is also a National School and which is in closer proximity to Petitioners' home than Dharmashoka Vidyalaya is.

This Court needs to underscore the fact that the Petitioners at no stage has complained that the respondents had issued the circular produced marked **P 2** unlawfully. The Petitioners' complaint is that the 1st Respondent, the Interview Committee as well as the Appeals Panel erroneously failed to allot full marks they are entitled to as per the said circular.

When adjudicating cases in which the Petitioners have challenged the non-selection of their children to a particular school, the Court needs to always bear in mind that the process of selection of children to a Public school under this circular is always a competitive process. The circular has devised a marking system.[1] It must be borne in mind, as revealed before this Court that it is the same method, the same marking system and the same yardsticks that the respondent school authorities have adopted to evaluate the applications of all applicants for the selection of students to its classes in Grade 1. In the light of this background, this Court cannot see any merit in the argument advanced on behalf of the Petitioners that the respondent school authorities have failed to allot correct marks as per the said marking system affording the equal protection of law to the Petitioners as well.

[1] Clause 6.1 of **P 2**.

Therefore, it is clear that the respondent school authorities have not infringed the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution.

In these circumstances and for the foregoing reasons this Court sees no basis to allow the instant application. Hence, this Court decides to dismiss this application. However, this Court makes no order for costs.

Application is dismissed without 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 in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S C (F R) Application No. 109/ 2015

1. Sri Lanka Nidahas Rubber
   Inspectors' Union,
   96/6,
   Mollamure Avenue 2,
   Kegalle.

2. Chaminda Pasqual,
   No. 32,
   Maddegoda Road,
   Mathugama.

3. R M U B Rathnayake,
   No. 22/8,
   Uda-Peradeniya,
   Peradeniya.

4. Sunanda Rajapakse
   "Chandana",
   Diyagaha,
   Nawimana,
   Matara.

5. J A A Dharmasiri Jayakody,
   No. 181/1,
   Bodinnwatta,
   Koswathugoda,
   Yakkala.

6. H K Jayatissa,
   No. 121/4,
   Gurukura road,
   Mathugama.

7. W J Liyanage
   "Nishani",
   Pahala Gedera,
   Algiliya,
   Thelijjawila.

8. H R A A Jayathilleke Bandara,
   No. 55/6/1,
   Pirisyala,
   Ambepussa.

9. P V M Rajakaruna,
   Wathruwila,
   Kahaduwa.

PETITIONERS

-Vs-

1. R B Premadasa,

   Director General,

   Rubber Development Department,

   No. 55/75,

   Vauxhall Lane,

   Colombo 02.

2. Mrs. Sudharma Karunarathna,

   Secretary,

   Ministry of Plantation Industry,

   No. 55/75,

   Vauxhall Lane,

   Colombo 02.

2A. Upali Marasinghe,

   Secretary,

Ministry of Plantation Industry,

11th Floor,

Sethsiripaya,

2nd Stage,

Battaramulla.

3. Dharmasena Dissanayake,

   Chairman,

   Public Service Commission.

4. A Salam Abdul Waid,
5. Santi Nihal Seneviratne,
6. D Shirantha Wijayathilaka,
7. V Jegarasasingham,
8. S. Ranugge,
9. D L Mendis,
10. Sarath Jayathilake,
11. Dr. Prathap Ramanujam,

All Members of the Public Service

Commission,

No. 177,

Nawala road,

Narahenpita,

Colombo 05.

12. H M G Senevirathne,

    Secretary,

    Public Service Commission,

    No. 177,

    Nawala Road,

    Narahenpita.

13. D Godakanda,

    Director - General,

    Department of Management Services,

    Ministry of Finance and Planning,

    General Treasury,

Colombo 01.

14. Neville Piyadigama,
    Co - Chairman,
    National Pay Commission.

15. J R Wimalasena Dissanayake,
    Co - Chairman,
    National Pay Commission.

16. Wimaladasa Samarasinghe,
    Member,
17. V. Jegarasasingham,
    Member,
18. G. Piyasena,
    Member,
19. Rupa Malini Peiris,
    Member,
20. Dayananda Widanagamachchi,

Member,

21. S. Swarnajothi,

Member,

22. B K Ulluwishewa,

Member,

23. Sujeewa Rajapakse,

Member,

24. H W Fernando,

Member,

25. Prof. Sampath Amaratunga,

Member,

26. Dr. Ravi Liyanage,

Member,

27. W K H Wegapitiya,

Member,

28. Keerthi Kotagama,

Member,

29. Reyaz Mihular,

Member,

30. Priyantha Fernando,

    Member,

31. Leslie Shelton Devendra,

    Member,

32. W.W.D.S. Wijesinghe,

    Member,

33. G.D.S. Chandarsiri,

    Member,

34. W.H. Piyadasa,

    Member,

    All of the National Pay Commission,

    Room No 2 - 116,

    B M I C H,

    Bauddhaloka Mawatha,

    Colombo 07.

35. Hon. Attorney General,

    Attorney General's Department,

Colombo 12.

RESPONDENTS

Before: **Vijith K. Malalgoda PC J**

P. Padman Surasena J

E. A. G. R. Amarasekara J

Counsel: Chamantha Weerakoon Unamboowe with O L Premaratne for the Petitioners.

Rajiv Goonetillake SSC for the Attorney General.

Argued on : 2019 - 02 - 25

Decided on : 2019 - 09 - 25

P Padman Surasena J

The 2nd and 3rd Petitioners are respectively the president and the secretary of the 1st Petitioner trade union. The 4th to 9th Petitioners are also members of the said 1st Petitioner union.

The 2nd to 9th Petitioners are Rubber Development Officers in the Rubber Development Department. Out of them, the 2nd, 3rd, 4th and the 7th, Petitioners had joined the Rubber Development Department in the year 1996 as Rubber Development Officers having sat for the competitive examination held for the recruitment of officers to that post.

The 5th, 6th, 8th and the 9th Petitioners are those who had joined the Rubber Control Department as Rubber Inspectors in the years 1983, 1985 and 1986 and were thereafter absorbed into the Rubber Development Department.

The Rubber Development Department is the successor to the Rubber Control Department, which had been established to exercise the powers and functions stipulated by the Rubber Control Act No. 11 of 1956 as amended.

The Petitioners have produced their appointment letters marked **P 2(a)** to **P 2(h)**. They state that all the Petitioners were recruited in terms of the same scheme of recruitment. The said scheme of recruitment containing the recruitment procedures to grades II, I and a special grade has been produced marled **P 5(a)**, **P 5(b)**, and **P 5(c)** respectively.

In the year 1994, the Rubber Control Department and the Advisory Services Department of the Rubber Research Board were amalgamated by integrating all functional services of the Advisory Services Department of the Rubber Research Board into the Rubber Control Department. This had been done pursuant to a Cabinet decision produced marked **P 6(a)** and **P 6(b)**.

As the Rubber Control Department had ceased to exist with the establishment of the Rubber Development Department, the Petitioners had become employees of the newly established Rubber Development Department with effect from 1st July 1994, and their designations were changed to Rubber Development Officer Grade II. The Petitioners have produced marked **P 7**, the letter issued to the 9th Petitioner informing him of his changed designation.

As per the Cabinet decision (**P 6(a)** and **P 6(b)**) 'Extension Officers' of the Advisory Services Department of the Rubber Research Board were also given the option of joining the Rubber Development Department as 'Rubber Development Officers'. It is the complaint of the Petitioners that the said 'Extension Officers' were subsequently placed under a salary scale higher than the Petitioners consequent to a judgment pronounced by this

Court in the case SC FR 961/97. It appears that those 'Extension Officers' as per the said Cabinet decision are entitled to enjoy the salary and the other benefits as their counterparts in the Rubber Research Board to which they had originally joined.

In terms of the Public Administrations Circular No. 06/2006 (produced marked **P 9**) the Rubber Development Officers were placed in MN-1 Step 6 in the said circular.

Subsequently, upon representations being made by the Petitioners to the 1st Respondent who in turn made representations to the relevant Ministry and also to the National Salaries and Cadre Commission, Rubber Development Officers who were in Grade II were placed at MT-2, Step 6 while Rubber Development Officers who were in Grade I were placed at MT-2, Step 23.

The 1st Respondent by the newspaper advertisement dated 15-03-2015 produced marked **P 17**, had called for applications from persons with qualifications specified therein, for the post of Rubber Development Officers in the Rubber Development Department under a new scheme of recruitment approved by the Public Service Commission on 14-11-2014 produced marked **P 18**. According to the said new scheme of recruitment

the Petitioners have been placed in the category identified as "Supervisory Management Assistant - Technical" with the applicable salary code being MN 3 - 2006 A. the said circular has taken away the requirement of a degree as the threshold qualification. Said circular also has introduced a new grade called "grade III" as the recruitment grade.

Petitioners complain that the requirement of a degree as a threshold qualification had been deliberately taken away to justify the placement of the Petitioners in salary code MN 3 - 2006 A. Petitioners state that the said removal of the requirement of a degree as a threshold qualification for recruitment has resulted in making their post qualitatively inferior and had lowered their status. Petitioners claim that the categorization of the Petitioners as Supervisory Management - Technical" is arbitrary, unreasonable and without any basis. Petitioners claim that in terms of the Public Administrations Circular 06/2006, their service category according to their qualifications and functions should be the category called "Field/Office Based Officers" itemized at 3.7.2 of the said circular and that accordingly they should be placed on the salary code MN 5 - 2006 A.

It is on the above basis that the Petitioners state that the scheme of recruitment approved by the Public Service Commission on 14-11-2014 (**P**

18) is unfair, unreasonable, discriminatory and arbitrary. Accordingly, it is their claim that the said circular has violated their fundamental rights guaranteed under Articles 12(1) and 14 1(g) of the Constitution.

It is on that basis that the Petitioners in this application have prayed inter alia, for following relief.

I. A declaration that the Respondents have infringed the fundamental rights of the Petitioners and those whom they represent, guaranteed under Articles 12(1) and 14(1)(g) of the Constitution,

II. A declaration that the new scheme of recruitment approved by the Public Service Commission on 2014-11-14 is invalid and / void and inoperative,

III. A direction to the Respondents to place the Petitioners and Rubber Development Officers in a service category and salary code commensurate with their existing qualifications and functions.

This Court on 05-10-2015 having heard the submissions of the learned counsel for the Petitioner and the submissions of the learned Deputy Solicitor General for the Respondents had decided to grant leave to proceed in respect of the alleged violations of Articles 12(1) and 14(1) (g) of the Constitution.

The 1st Respondent in his affidavit has taken up the following positions.

1. It had taken over 7 years to finalize the impugned circular, as there were consultations, negotiations and discussions with the Petitioners from time to time. It is his position that what the Petitioners are seeking to challenge in the instant application is the new scheme of recruitment approved by the Public Service Commission on 14-11-2014 produced marked **P 18**, which is the outcome of the said consultations, negotiations and discussions.
2. Although the crux of the Petitioners' objection to the new scheme of recruitment is the removal of the degree as one of the alternate qualifications for recruitment, none of the 9 Petitioners of this application and 42 persons who are said to be similarly circumstanced as the Petitioners, were not graduates at the time of their recruitment. It is his position that few of them had subsequently obtained degrees while serving in the department.

Learned Senior State Counsel in addition to his arguments based on the merits of the case also raised the issue that the Petitioners have failed to file this application within the time frame specified by law.

In contradistinction to the above claim by the Respondents, the Petitioners have taken up the position that it was only when the newspaper advertisement was published on 15-03-2015 (**P 17**), they became aware that a new scheme of recruitment (**P 18**) has been approved by the Public Service Commission on 14-11-2014.

Thus, the first issue that this Court has to resolve is whether the Petitioners' application is out of time.

In order to ascertain whether the Petitioners' application is out of time, it would be opportune at this juncture to apply the principles laid down in the judgment of His Lordship Justice Prasanna Jayawardena PC in the case of Demuni Sriyani de Zoysa and others Vs Chairman, Public Service Commission and others. [1]

When applying the aforesaid principles, one has to sequentially ask the following questions:

(i) (a) When did the alleged infringement occur?; or, if Petitioners claim they became aware of the alleged infringement only sometime after

[1] SC FR 206 / 2008 decided on 09-12-2016.

it occurred, when did they become aware of it or when should they have become aware if it?

(b) If the alleged infringement is in the nature of a continuing one which the Petitioners were aware of, till when did it continue?;

(ii) If the application has been filed more than one month after the latest date determined when considering (a) and (b) above, have the Petitioners established that, they were unable to invoke the jurisdiction of this Court due to circumstances, which were beyond their control and that, there has been no lapse, fault or delay on their part?

(iii) If so, have the Petitioners filed this application within one month of any such disability ending?

As has been held in that judgment, 'the date determined in answer to the first subset of questions will determine the date on which the one month period stipulated in Article 126 (2) commences to run. Quite obviously, if the petition has been filed within one month of that date, it is within time'.

As has been stated before, the Petitioners are seeking to challenge in the instant application the new scheme of recruitment (**P 18**) which the Public Service Commission had approved on 14-11-2014. Thus, it is clear that the alleged infringement of the fundamental rights of the Petitioners had

occurred on 14-11-2014. However, the Petitioners have filed the instant application on 30-03-2015.

As the Petitioners claim that they became aware of the alleged infringement only when the newspaper advertisement (**P 17**) was published on 15-03-2015, this Court needs to ascertain next, as to when had the Petitioners indeed become aware of it or when should they have become aware if it?

The document produced by the 1st Respondent marked **1 R 4** , annexed to his affidavit dated 08-07-2015 shows clearly that the Petitioners had discussed with the 1st Respondent the possibility of making amendments to the approved new scheme of recruitment. This discussion had taken place on 25-11-2014 and the main aim of the Petitioners during the said discussion had been an attempt to place them on the salary code MN 5. The contents of the letter dated 08-12-2014 (**1 R 4**) shows clearly that the 1st Respondent had taken whatever measures possible within his means to support the attempts of the Petitioners. This is further buttressed by the fact that the said letter has been copied to the Secretary of the 1st Petitioner association for its notice. The Petitioners in their joint counter

affidavit have denied being sent a copy of the said letter.[2] This Court while observing that the above denial is a mere statement in their counter affidavit, also observes that the Petitioners have indeed admitted that they had held the discussion on 25-11-2014 described in the said letter dated 08-12-2014 (**1 R 4**). The contents of paragraph 6 of the counter affidavit filed by the Petitioners are clearly against the 1st Respondent with an allegation that a wrong SOR was shown to them. In other words, what the Petitioners have stated is that the 1st Respondent had suppressed from them, the new SOR and misled them. However, this Court decides to reject the Petitioners above position as the 1st Respondent had done everything within his means to support the attempts of the Petitioners. Thus, this Court sees no reason as to why the 1st Respondent should have acted in the way alleged by the Petitioners.

Therefore, this Court rejects the position taken up by the Petitioners that they became aware of the alleged infringement only when the newspaper advertisement (**P 17**) was published on 15-03-2015.

The upshot of the above conclusion is that the Petitioners have failed to file the instant application within one-month time period specified in Article

[2] Paragraph 6 of the counter affidavit dated 07-08-2015.

126 (2) of the Constitution. For those reasons, this Court decides to uphold the issue raised by the learned Senior State Counsel that the Petitioners have failed to file this application within the time frame specified by law.

Therefore, this Court decides to dismiss this application without costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda PC J

I agree,

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara J

I agree,

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application in terms of Article 126 read with Article17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application

No. 113 / 2017

01 Tharushi Navodini Amarasena,
Manipal College of Medical Sciences,
P O Box 155,
Pokhara,
Nepal.

Appearing through her Power of Attorney holder

02 Ramya Rohini Hettige Amarasena,
No. 8 1/1,
Skyline Residencies,

Magazine Road,
Colombo 08.

PETITIONER

-Vs-

01 Sri Lanka Medical Council,
No. 31,
Norris Canal Road,
Colombo 10.

02 Professor Carlo Fonseka,
Chairman,
Sri Lanka Medical Council,
No. 31,
Norris Canal Road,
Colombo 10.

02 (a) Dr. Colvin Gunaratne,
Chairman,
Sri Lanka Medical Council,
No. 31,
Norris Canal Road,
Colombo 10.

Dr. Terrence de Silva,
Registrar,
Sri Lanka Medical Council,
No. 31,
Norris Canal Road,
Colombo 10.

04 Dr. Jayasundara Bandara,
Acting Director General of Health Services,
"Suwasiripaya",
No. 385,
Rev Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

03(a) Dr. Anil Jasinghe,
Acting Director General of Health Services,
"Suwasiripaya",
No. 385,
Rev Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

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

RESPONDENTS

Before: Buwaneka Aluwihare PC J

L. T. B. Dehideniya J

P. Padman Surasena J

Counsel:

Uditha Egalahewa PC with Ranga Dayananda for the Petitioner.

Manohara de Silva PC with Chathura Galhena instructed by Ms Bashini Hettiarachchi for the 1st to 3rd Respondents.

Indika Demuni de Silva PC ASG with Sureka Ahmad SC for the 4(a) and 5th Respondents.

Nuwan Bopage with Chathura Weththasinghe for the Intervenient - Petitioner.

Argued on: 21-03-2019, 29-03-2019, 02-04-2019, 09-05-2019.

Decided on: 01 - 11 - 2019.

P Padman Surasena J

At the outset, it must be mentioned here that the learned counsel for all the parties have agreed that the issues to be decided by this court in the cases bearing No's. SC FR 134/2017 and SC FR 113/2017 are substantially the same. Hence, they agreed that it would suffice for this Court to pronounce one judgment in respect of both those cases.[1] Therefore, references wherever necessary, would be made to the pleadings of the case No. SC FR 134/2017 although this judgment is primarily based on the pleadings filed in the case No. SC FR No. 113/2017.

The Petitioner is a citizen of Sri Lanka and is a medical student of Manipal College of Medical Sciences (hereinafter referred to as MCOMS). It is the position of the Petitioner that MCOMS is a medical college approved and recognized by the 1st Respondent (Sri Lanka Medical Council, hereinafter sometimes referred to as SLMC).

The Petitioner has Produced a list marked **P 2-b**, which sets out the 'List of Foreign Universities/ Medical Schools/ Institutions Recognized by the Sri Lanka Medical Council under sections 29(1)(b)(ii)(bb) and 29(2)(b)(iii)(bb) of the Medical Ordinance'. This list clearly indicates that MCOMS is a medical college approved and recognized by the 1st Respondent.

The letter dated 24-08-1999 produced marked **P 2-a**, is a letter issued by the Registrar of SLMC informing the Dean and Director of MCOMS that 'the

[1] Vide the minute dated 09-05-2019 in SC FR Application No. 134/2017.

Sri Lanka Medical Council at its meeting held on 23-08-1999 decided to give full recognition to the Manipal College of Medical Sciences, Pokhara, Nepal'.

Thus, MCOMS is a foreign medical college approved and recognized by the SLMC for the purposes of the sections 29(1)(b)(ii)(bb) and 29(2)(b)(iii)(bb) of the Medical Ordinance. The course offered by MCOMS leading to a MBBS degree is a four and half year course. The students of MCOMS who pass the final MBBS examination are also required to undergo for one year, a 'Compulsory Rotational Residential Internship' (hereinafter sometimes referred to as CRRI) before they are awarded the MBBS degree.

For the past seventeen years, those who passed the final MBBS examination at MCOMS but not awarded the MBBS degree owing to non-completion of CRRI were allowed to sit the 'Examination for Registration to Practice Medicine' (hereinafter sometimes referred to as ERPM) held in Sri Lanka. The said ERPM is an examination conducted in terms of section 29 of the Medical Ordinance. Thereafter, those who pass ERPM were allowed to complete their 'internships' in Sri Lanka. MCOMS has awarded the MBBS degrees to those who had successfully completed the 'internship' in Sri Lanka in the aforesaid manner. This practice has been in place without any restriction for the past seventeen years.

In the instant application, the Petitioner complains that a batch of seventeen MCOMS medical students who have passed the final MBBS examination at MCOMS, were refused permission to sit the ERPM in spite of the fact that they had submitted the necessary Provisional Pass certificates issued by MCOMS and paid requisite fees to sit the ERPM. They have been directed to

complete the CRRI in Nepal. This was on the basis that the said CRRI is a part of the MBBS program offered by MCOMS. The Petitioner further complains that the 3rd Respondent (Registrar of SLMC) has refused to grant the said permission without the prior approval of the 1st Respondent (SLMC) and that there is no such decision made by the SLMC to that effect.

According to the Petitioner, this is despite the Vice Chancellor of the Kathmandu University through the ambassador designate of the Embassy of Sri Lanka in Nepal, Chairman of the Nepal Medical Council and the Principal of MCOMS affiliated to the University of Kathmandu by their letters dated 11th August 2016, 21st November 2016 and 23rd November 2016 have informed the 3rd Respondent that the University of Kathmandu, MCOMS and Nepal Medical Council accept the internship completed in Sri Lanka for the purpose of awarding MBBS degree in lieu of one year CRRI to be completed in Nepal and that the said CRRI was not part of the MBBS program. The Petitioner has produced the aforesaid letters marked **P 4-a**, **P 4-b** and **P 4-c**.

It is in the above backdrop that the Petitioner complains that there is an imminent infringement of her fundamental rights guaranteed under Article 12(1) of the Constitution by one or more of the Respondents.

This Court, when this case was supported, having heard the submissions of the learned President's Counsel for the Petitioner, learned President's Counsel for the 1st to 3rd Respondents and the learned Additional Solicitor General for the 4th and the 5th Respondents, by its order dated 09-10-2017,

has granted leave to proceed in respect of the alleged imminent infringement of fundamental rights guaranteed under Article 12 (1) of the Constitution.

Article 12(1) of the Constitution reads as follows;

"All persons are equal before the law and are entitled to the equal protection of the law".

Thus, the task before this Court is to ascertain whether there is any infringement or any imminent infringement of the aforementioned right of the Petitioners by one or more of the Respondents. As I have already mentioned the position primarily taken up by the Petitioner, it would be appropriate at this stage, to also mention here briefly, the position taken up by the Respondents.

The 3rd Respondent (Registrar of SLMC) in his affidavit has taken up the following positions;

i. the 1st Respondent (SLMC) has approved and recognized Five and half year MBBS degree program offered by MCOMS,
ii. the said five and half year degree program of MCOMS has been approved by the SLMC in 1999,
iii. the degree program offered by MCOMS which was submitted for approval by the SLMC in the year 1997 is a degree program which

included one year Compulsory Rotational Residential Internship (CRRI) and therefore the students of MCOMS have to undergo the said CRRI for one year, to become eligible for the award of the MBBS degree by MCOMS,

iv. the said CRRI is not an additional training but a part of the said degree programme, and different in both content and scope from the 'employment in a resident medical capacity' for one-year, referred to in section 32 of the Medical Ordinance,

v. it is mandatory for foreign Medical Graduates to complete the MBBS degree in full and then pass the ERPM to obtain provisional registration,

vi. the SLMC, inadvertently and in violation of the provisions of the Medical Ordinance, had allowed the students of MCOMS who had not been awarded MBBS degrees, to sit the ERPM and therefore the SLMC has only rectified the said mistake when the same was brought to its notice in February 2016,

vii. granting permission for the MCOMS students who had not been awarded MBBS degrees, to sit ERPM, is contrary to the provisions of the Medical Ordinance,

viii. the SLMC decided in February 2016 to rectify the said continuing error and the 2nd Respondent has only communicated the said decision in May 2016 to the students of the MCOMS who had applied for registration to sit ERPM as they had not been awarded their MBBS degrees,

ix. the SLMC is not bound to follow the opinion expressed by Hon. Attorney General,

x. there cannot be a legal right created or anticipated by an illegal act.

It would be opportune at this juncture to reproduce section 29 (2) which deals with the criteria upon which a person could be registered provisionally as a medical practitioner for the purposes only of enabling the acquirement of experience which is required for obtaining from the Medical Council, a certificate under section 32 of the Medical Ordinance. It is as follows.

Section 29 (2)

For the purposes only of enabling the acquirement of such experiences as is required for obtaining from the Medical Council, a certificate under section 32, a person shall, upon application made in that behalf to the Medical Council, be registered provisionally as a medical practitioner –

(a) if he is of good character; and

(b) if he –

(i) holds the degree of Bachelor of Medicine of the University of Ceylon or a corresponding university or a Degree Awarding Institute or the General Sir John Kotelawala Defence University; or

(ii) has passed the examination necessary for obtaining a degree of Bachelor of Medicine of the University of Ceylon or a corresponding university or of a Degree Awarding Institute, but has not obtained that degree owing to a delay on the part of that university or Degree Awarding Institute or the General Sir John Kotelawala Defence University in conferring that degree on him; or

(iii) not being qualified to be registered under any of the preceding sub-paragraphs –

aa) is a citizen of Sri Lanka; and

bb)-

i. holds a degree of Bachelor of Medicine or an equivalent qualification of any university or medical school of any country other than Sri Lanka, which is recognized by the

Medical Council for the purposes of this section having regard to the standard of medical education of such university or medical school; or

ii. has passed the examinations necessary for obtaining a degree of Bachelor of Medicine or an equivalent qualification of any university or medical school of any country other than Sri Lanka which is recognized by the Medical Council for the purposes of this section, having regard to the standard of medical education of such university or medical school but has not obtained that degree owing to fact that he has not completed the period of internship required for obtaining that degree and the Director-General of Health Services has permitted him to complete that period of internship in Sri Lanka; and

cc) has passed the special examination prescribed in that behalf by the Medical Council;

(iv) not being qualified to be registered provisionally under any of the preceding sub-paragraphs: –

(aa) is a citizen of Sri Lanka;

(bb) holds a degree of Bachelor of Medicine or an equivalent qualification of any university or medical school of any country outside Sri Lanka, which, on the date on which such person was admitted to such university or medical school, was a degree or qualification which entitled its holder to be registered as a medical practitioner under this ordinance;

(cc) has had an aggregate period of at least five years of efficient and satisfactory service in the capacity of a medical officer.

The Petitioners in both the cases (SC FR No. 113/2017 and SC FR 134/2017) are citizens of Sri Lanka and medical students of Manipal College of Medical Sciences (MCOMS). Since MCOMS is not a medical school in Sri Lanka, it is the provisions in section 29 (2) (b) (iii) (bb) (ii) which determines whether a medical student of MCOMS who pass the examinations necessary for obtaining a degree of Bachelor of Medicine from MCOMS, should be permitted to complete the period of internship required for obtaining that degree.

For the past seventeen years, those who had passed the final MBBS examination at MCOMS but not being awarded the MBBS degree owing to non-completion of CRRI, were allowed to sit the ERPM and complete their

'internship' in Sri Lanka based on a provisional pass certificate provided by MCOMS. It was thereafter that MCOMS had awarded the MBBS degrees to those who had completed the 'internship' in Sri Lanka in the aforesaid manner. The SLMC does not dispute this fact. Although I have mentioned before, the positions 3rd Respondent has taken up in his affidavit, it would be convenient to set down here, the arguments advanced by the learned President's Counsel on behalf of the SLMC. They are briefly as follows;

(i) The SLMC in the past has erroneously granted such provisional registrations.

(ii) This irregularity was brought to the notice of SLMC in the year 2016.

(iii) The internship of MCOMS is totally different from the experience required for obtaining from the Medical Council a certificate under section 32 which is referred to in section 29 (2) of the Medical Ordinance.

(iv) The power to decide whether the persons under such circumstances should be allowed to complete the internship in Sri Lanka, is vested with the Director General of Health Services.[2]

(v) The 'internship' referred to in section 29 (2) (b) (iii) (bb) (ii)is not the 'employment' referred to in section 32 of the Medical Ordinance.[3]

(vi) In contradistinction to the paragraph 19 of the affidavit (dated 16-03-2017) of the Petitioner, the Director-General of Health Services has never permitted in the past, any such student to complete such period

[2] Paragraph 32 of the written submissions filed in case No. SC FR 113/2017 on behalf of the 1st, 2nd and 3rd Respondents.

[3] Ibid paragraph 33.

of internship in Sri Lanka to enable such student to become eligible for the award of MBBS degree by MCOMS.

(vii) The granting of provisional registration to a student who does not possess a Medical Degree is a violation of section 29 (2) (bb) (i) of the Medical Ordinance.[4]

(viii) The said irregular practice has continued for several years.

(ix) The SLMC after consideration, has decided not to grant permission for the students of MCOMS who have not been awarded their MBBS degrees, to sit the ERPM.[5]

According to section 29 (2) (b) (iii) (bb) (ii), it is the Director-General of Health Services who is empowered by the Ordinance to permit, students of MCMOS who have passed the examinations necessary for obtaining a degree of Bachelor of Medicine from MCMOS, but have not obtained their degrees owing to the fact that they have not completed the period of internship required for obtaining that degree, to complete their internships in Sri Lanka.

In the above circumstances, it is the Director-General of Health Services who should confirm before this Court whether he has granted such permission in the past for such MCMOS students to complete their internships in Sri Lanka which had enabled such students to acquire their MBBS degrees consequent to the completion of such internships. However, the Director-General of Health Services who stands as a respondent in this case, despite being

[4] Ibid paragraphs 29 and 30.

[5] Paragraphs 16 and 22 of the affidavit of the 3rd Respondent filed on behalf of the 1st, 2nd and 3rd Respondents and paragraph 47 of the written submissions filed on behalf of the 1st, 2nd and 3rd Respondents in case No. SC FR 113/2017.

represented by a Senior State Counsel, has thought it fit not to file any affidavit in this proceeding. This precipitates this Court to focuss its attention on the illustration (f) of section 114 of the Evidence Ordinance. The said illustration states, "The Court may presume ….. (f) that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it; …." This Court is of the view that the facts and circumstances of the instant case warrants such a presumption by this Court.

Further, the fact that the DGHS has sought an opinion from Hon. Attorney General is another significant factor in this case.

It is to be noted that Hon. Attorney General, by his letter dated 15th March 2017[6] addressed to the DGHS, has informed him that the SLMC cannot at this stage, require such MCOMS students who have passed the examinations conducted by the MCOMS for the granting of the MBBS degree and who have been issued with a provisional Pass Certificate by the MCOMS, to complete an internship in Nepal as a pre-condition for sitting the ERPM. The Attorney General presumably having foreseen the unreasonableness of imposition of such condition, has thought it fit to warn the DGHS in the said letter that any imposition of such a pre-condition on such student would be liable to be challenged by such students in view of the conclusions set out in that letter.

Neither the DGHS nor the SLMC do not appear to have taken the opinion expressed by Hon. Attorney General seriously. The SLMC states that the said opinion was given on a request made by DGHS and not on a request by the

[6] Produced marked **P 19**.

SLMC.[7] The letter **P 19** reveals that the officers of the Attorney General's Department have had consultations with the DGHS and some other officials of the Ministry of Health on 9th March 2017, 10th March 2017 and 15th March 2017 before expressing the said opinion. This is clear proof that the DGHS was definitely aware that the Attorney General of the Country has taken a considered view that any imposition of such a pre-condition at this stage would be contrary to legal principles and liable to be challenged in Courts.

This Court observes that the Director-General of Health Services is an ex officio member of the SLMC in terms of section 12 (1) (g) of the Medical Ordinance. In terms of section 29 (2) (b) (iii) (cc), it is the SLMC, which is empowered to prescribe the special examination which such students are required to pass. The DGHS who is an ex-officio member is silent as to whether he placed the opinion of Hon. Attorney General before SLMC and explained to the SLMC, regarding the dangers of imposition of such condition.

Further, the 3rd Respondent has also taken up the position that the Attorney General did not call for any observations or information from the SLMC with regard to the recognition of MCOMS students and that the 1st Respondent Council therefore has no binding obligation to follow the opinion of the Hon. Attorney General.[8] The letter dated 27-02-2017 produced marked **P 20** signed by the President of SLMC does not support the above averment. The

[7] Paragraph 49-51 of the written submissions filed on behalf of the 1st, 2nd and 3rd Respondents and paragraph 32 of the affidavit dated 02-01-2018 filed by the 3rd Respondent on behalf of the 1st, 2nd and 3rd Respondents.

[8] Paragraph 32 of the affidavit dated 02-01-2018 filed by the 3rd Respondent on behalf of the 1st, 2nd and 3rd Respondents.

said letter states that the SLMC decided at its 574th Council meeting to seek the advice of the Attorney General regarding the issue in question. Proceedings of the said 574th meeting of the SLMC has been produced marked **P 22**. The relevant portion of the said proceedings is as follows;

"*… Dr. Upul Gunasekara said that we have two legal opinions obtained from Mr. Chathura Galhena and Mr. Shibly Azeez related to this matter. He suggested obtaining another legal opinion from the Attorney General through the DGHS. It was decided to prepare a document and submit it to the Attorney General through the DGHS and request for an appointment to meet and explain the issues pertaining to this matter. …* ".

Thus, suffice it to say that the above 'explanation' given by the SLMC, would, in the face of the above facts and circumstances, remain nothing more than a lame excuse for its deliberate refusal to comply with the law of the land presumably for its own vested interests. This only indicates its mala fide conduct.

The letter produced marked **P 28** under the heading "APPROVAL TO SIT ERPM" dated 25th September 2013, sent by the SLMC to a past student of MCOMS who had passed the examinations conducted by the MCOMS for awarding of the MBBS degree and who had been issued with a provisional Pass Certificate by the MCOMS, also sheds light on the procedure adopted by the respondents in the past regarding the MCOMS medical students. It would be worthwhile to reproduce the full text of the said letter here. It is as follows.

"…….. ***APPROVAL TO SIT ERPM***

*The Provisional degree certificate of the final MBBS exam you have obtained from **MANIPAL COLLEGE OF MEDICAL SCIENCES [KATHMANDU UNIVERSITY], POKHARA, NEPAL** is hereby approved by the Sri Lanka Medical Council to enable you to sit the ERPM.*

1. *Please note that this letter does not entitle you to engage in any form of medical practice except internship when eligible, as mentioned below in section [5]. This approval will be withdrawn if you engage in any form of medical practice.*
2. *This approval would enable you to sit the Examination for Registration to Practice Medicine (ERPM) in Sri Lanka.*
3. *The Part A – Multiple Choice Questions (MCQ) of the examination is held periodically. Successful completion of Part A will make you eligible to sit for Part B (Clinical/ Viva Voce) examination.*
4. *If your degree/ diploma course was in a language other than English, it is compulsory that you complete the four-month's familiarization course.*
5. *When you complete the ERPM successfully (Part A & B), you should apply to the Sri Lanka Medical council for a Certificate of Completion of the ERPM and for Provisional Registration. After obtaining Provisional Registration you should apply to the Director General of Health Services to perform a one year's period of Internship.*
6. *After successful completion of Internship, you could apply to the Sri Lanka Medical Council for Full Registration as a Medical Practitioner by submitting the Evaluation Certificate and the Certificate of Experience (Internship) indicating satisfactory completion of Internship.*

Yours faithfully

Dr. H M S S D Herath

Acting Registrar

Copy to: The Director General of Health Services **.....** "

The above document in unequivocal terms shows that SLMC has recognized that the MCOMS students with the Provisional degree certificate of the final MBBS exam obtained from MCOMS, as being eligible to sit the ERPM.

Moreover, it is to be noted that the ' Guidelines issued by SLMC to the Sri Lankan Graduates with foreign medical/dental qualifications who wish to practice medicine/dentistry in Sri Lanka' [9] states "*... If you have not been awarded the degree but completed the final exam and issued a Provisional Pass Certificate, you would receive approval to sit ERPM/ERPDS. If you fulfil the criteria, the Council would issue you a Letter of Approval of Degree/ Approval to sit ERPM/ERPDS. ....*" [10] This too precisely indicates the procedure the SLMC had previously followed.

Further, the information revealed from the fourth paragraph of the letter (produced marked **P 23**) dated 10th May 2017 addressed to the 3rd Respondent by the Manipal College of Medical Sciences would also be relevant at this point. It is as follows.

"*.... Upon completion of the Final MBBS examination, the Provisional Pass Certificate (PPC) is issued to MCOMS graduates enabling them to take up internship appointments in the countries approved by the Kathmandu University. Kathmandu University has permitted overseas MCOMS graduates to undertake the internship in their home countries since the rotational internship done in Nepal (CRRI) is mandatory only for Nepal graduates. Once*

[9] Produced marked **P 17**.
[10] Paragraph 2 of the said Guidelines.

Nepal students complete CRRI, the Nepal Medical Council grants them full registration to work independently in Nepal. CRRI is a 12 month paid employment. … "

This clearly indicates that the requirement to complete the 12 months long CRRI in Nepal is the counterpart of 'acquirement of experience required for obtaining from the Medical Council a certificate under section 32' in Sri Lanka.

All the above factors converge on the point that the practice that had been adopted by the respondents until the time they had made the impugned decision has been to allow the students of MCOMS who had acquired the Provisional Pass Certificate to sit the ERPM to enable them to acquire the experience (referred to in section 29) required for obtaining from the Medical Council, a certificate under section 32 of the Medical Ordinance.

Thus, those who had enrolled in the MCOMS when the said practice was in place are entitled to entertain a legitimate expectation that the respondent authorities namely the DGHS and the SLMC would extend the same practice already in place, to them as well. There is no reason whatsoever, for them to doubt about the existence of such an expectation. After all, Article 12 (1) is all about affording that kind of protection to all citizens of this country. Any citizen of this country is entitled to that right.

Sudden action by the SLMC to suspend the existing practice, has clearly infringed the fundamental right guaranteed by Article 12 (1) in respect of those who had already enrolled in the MCOMS with the legitimate expectation that the said existing practice would continue.

In any case, in terms of section 29 (2) of the Medical Ordinance, the SLMC has only been empowered to consider the followings, in respect of such students of MCOMS.

That is whether such applicant;

(i) is of good character; and[11]

(ii) is a citizen of Sri Lanka,[12]

(iii) has passed the examinations necessary for obtaining a Degree of Bachelor of Medicine but has not obtained that degree owing to the fact that he has not completed the period of internship required for obtaining that degree, [13]

(iv) has been permitted by the Director-General of Health Services to complete the relevant period of internship in Sri Lanka.[14]

This is because the MBBS degree awarded by MCOMS has been recognized by the Medical Council for the purpose of the said section having regard to the standard of medical education of the said medical school.

The fact that for the last seventeen years, those who were under similar circumstances, namely those who had passed the final MBBS examination at MCOMS but not awarded the MBBS degrees owing to non-completion of CRRI, were allowed to sit the ERPM and complete the 'internships' in Sri Lanka based on provisional pass certificate provided by MCOMS, would clearly establish a legitimate expectation that the Director-General of Health

[11] Section 29 (2) (a) of the Medical Ordinance.
[12] Section 29 (2) (b) (iii) (aa) of the Medical Ordinance.
[13] Section 29 (2) (b) (iii) (bb) (ii) of the Medical Ordinance.
[14] Ibid.

Services would permit those who had enrolled in the MCOMS when the said practice was in place, to complete the period of internship (CRRI) in Sri Lanka.

As it is now time to make the concluding remarks, it would not be out of place to refer to the case of Dayarathna and others Vs. Minister of Health and Indigenous Medicine and others.[15] That is one of the instances in the past where this Court was called upon to consider the legality of the actions of altering the existing policy of a public institution to the detriment of the legitimate expectation of those who had relied on the pre-existing policy.

Petitioners of that case who were eligible for enrolment to follow the course of training leading to the award of the certificate of competency as Assistant Medical Officers had applied in response to the notification and sat a competitive examination. They were so placed on the results of the examination as to be qualified to follow the said course of training. The next step was the holding of an interview to verify the basic qualifications such as the date of birth, citizenship, and the educational qualifications. That interview was not held.

Then, the Secretary, Government Medical Officers' Association (GMOA) informed the Minister of Health and Indigenous Medicine as follows; " As at present the Government is not in a position to assure employment to all medical graduates and the intention of the government is to post qualified doctors to the peripheries. Therefore we see no justification to restart the

[15] 1999 (1) Sri. L. R. 393.

AMP training course and our members would not participate in any component of the training programme."

Accordingly, the Minister sought the approval of the cabinet to fill the existing and future vacancies in the cadre of Assistant Medical Practitioners with medical graduates and to offer the petitioners of that case, the option of following the course for Paramedical Services/Public Health Inspectors, if they so desire. The said petitioners were therafter invited to apply for training as Pharmacists, Medical Laboratory Technologists and Public Health Inspectors.

The said petitioners contended that, having regard to the established practice based upon the past actions and settled conduct of the first, second and third respondents in that case and their predecessors in office, they (the petitioners in that case) had a legitimate expectation of being provided with the training leading to the award of the certificate of competency as Assistant Medical Officers.

This Court holding that the second respondent has infringed the fundamental rights of the said petitioners guaranteed by Article 12 (1) of the Constitution, directed the respondents in that case to hold the relevant interviews and provide the petitioners in that case, the said scheme of training.

It is worthwhile reproducing the following paragraphs from the judgment[16] of His Lordship Justice Amerasinghe;

[16] Ibid. at pages 411-413.

" .... It comes to this : in terms of existing legislative policy, both Medical Graduates and Assistant Medical Practitioners are qualified in specified circumstances to practice medicine and surgery. Having regard to published information, representations and past executive practice which the petitioners relied on in applying for the course of training and sitting the prescribed examination, they had a legitimate expectation that they would, upon satisfying the prescribed conditions, be provided with "a course of training for the examination leading to the award of the certificate of competency as Assistant Medical Officers". The respondents decided that it was preferable or necessary to employ Graduate Medical Officers to fill the vacancies of Assistant Medical Officers and to offer the petitioners a course of training leading to their qualification as Pharmacists, Medical Laboratory Technologists - described by the Minister as "paramedical services" - or as mere Public Health Inspectors, thereby resiling from the advertised scheme, representations and established practices.

No opportunity was given to the petitioners to argue why the change of policy should not affect them: they were faced with a situation where a change of policy had been made without their knowledge and when it had been decided that they might apply for some other, inferior, course "if they so desire". It was perhaps an unsatisfactory way in which the petitioners were dealt with by the first to third respondents from an administrative point of view. Moreover, legally, the respondents failed to observe their duty. When a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably: cf. R. v. Secretary of State of the Home Dept, exp. P. Khan[17]; R. v. MAFF, ex p. Hamble Fisheries. [18] Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against unequal treatment arbitrarily, invidiously, irrationally or otherwise unreasonably dealt out by the executive. "They focus on formal justice and the rule of law, in the sense that the rules of natural justice help to

[17] *Rex v. Secretary of State of the Home Dept., ex. P. Khan* (1985) 1 ALL ER 40, 46.
[18] *R. v. MAFF ex. P. Hamble (*Offshore Fisheries Ltd.,*)* (1995) 2 All ER 714, at 731.

ensure objectivity and impartiality, and facilitate the treating of like cases alike. Procedural rights are also seen as protecting human dignity by ensuring that the individual is told why he is being treated unfavourably, and by enabling him to take part in that decision." Craig. [19]

In addition to the procedural opportunity required by law, there is a substantive requirement that there must be an overriding public interest if a change of policy were to set at nought an individual's prior expectation: R. v. Secretary of State for the Home Dept.[20]; R v. MAFF, ex p. Hamble Fisheries.[21] There was no such interest claimed in the matters before me. For all the involved explanations of the first respondent in his Cabinet memorandum and that of the second respondent in his affidavit, essentially the change of policy was based on the preference of the interests of one of two classes of persons recognized by the Legislature as entitled to practice medicine to the other. The conflicting interests were those of the Graduate Medical Officers and the Assistant Medical Practitioners. The first, second and third respondents, considered the views of the Trade Union known as the General Medical Officers' Union on behalf of Graduate Medical Officers and yielded to their pressure of non-cooperation in the matter of conducting the advertised course of training. Neither the views of the Assistant Medical Practitioners nor those of the petitioners were sought. The decision of the respondents, and recommendations to the Cabinet effecting a change of policy did not depend either upon considerations of public interest weighed against private interests or even upon an informed consideration of conflicting private interests.

The change of policy, in the circumstances, may nevertheless affect the future, having regard to the fact that the legislature and executive are free to formulate and reformulate policy;. however, it is the duty of this Court to safeguard the rights and privileges, as well as interests " deserving of protection such as those based on legitimate expectations, of individuals. In my view, the legitimate expectations of the petitioners with regard to the

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[19] P. P. Craig, Legitimate Expectations: A Conceptual Analysis, (1992) vol. 108 LQR 79 at 86.
[20] supra.
[21] supra.

"Scheme of Training" as described in paragraph 11 of the Gazette notification of 10.05.1996 survive the policy change that has taken place. ... "

The above extract from the said judgment is self-explanatory and hence needs no further elucidation.

The document produced marked **P 1 (b)** by the Petitioner in SC FR 134/2017 shows that the said Petitioner (Madushika Bridget Rajapakse) had commenced the MBBS degree programme in MCOMS in the year 2011. Further, the document produced marked **P 1 (a)** by the Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) shows that the said Petitioner has passed the final MBBS held in MCOMS in October/November 2016. This letter has been issued on 18th January 2017. The said documents clearly establish that the Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) is a student who had enrolled in the MCOMS when the aforesaid practice of allowing the students of MCOMS who had acquired the Provisional Pass Certificate to sit the ERPM to enable them to acquire the experience (referred to in section 29) required for obtaining from the Medical Council a certificate under section 32 of the Medical Ordinance. Therefore, the said Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) is entitled in law to be permitted to sit the ERPM to enable her to acquire the experience required for obtaining from the Medical Council, a certificate under section 32 of the Medical Ordinance.

The Petitioner in SC FR 113/2017 (Tharushi Navodini Amarasena) is admittedly a medical student who has been studying in MCOMS. She has not adduced any material to establish that she possesses a Provisional Pass

Certificate issued by MCOMS. It is not clear as to when she had joined MCOMS. She has not proved before this Court that she is entitled in law to be permitted to sit the ERPM to enable her to acquire the experience required for obtaining from the Medical Council, a certificate under section 32 of the Medical Ordinance. Due to that reason, this Court is unable to hold that her rights have been infringed. Therefore, this Court is not in a position to grant the relief prayed in her petition although this Court for the reasons set out above, has accepted the arguments commonly advanced by the learned President's Counsel who appeared for the Petitioners in both the aforementioned applications.

In these circumstances, with regard to the application in SC FR 134/2017, this Court decides to;

a) declare that the Respondents except the 5th Respondent have infringed the fundamental rights of the Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) guaranteed under Article 12(1);
b) declare that the decision taken by the 1st Respondent not to allow those who had passed the final MBBS examination at MCOMS but not awarded the MBBS degrees owing to non-completion of CRRI, to sit the ERPM to enable them to complete the 'internships' in Sri Lanka based on provisional pass certificate provided by MCOMS, is null and void and has no force or avail in law, in respect of those who had enrolled in the MCOMS when the aforesaid practice of allowing such students to sit the ERPM was in place,;
c) declare that the decision taken by the 1st Respondent not to allow the Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) to sit

ERPM without completing the Compulsory Rotational Residential Internship (CRRI) in Nepal, is null and void and has no force or avail in law;

d) direct the 1st to 4th Respondents to allow the Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) to sit the ERPM examination upon furnishing the provisional pass certificate issued by the MCOMS,
e) direct the 1st Respondent to pay to the Petitioner in SC FR 134/2017 (Madushika Bridget Rajapakse) a compensation in a sum of Rs. 500,000/=

In view of the granting of above relief, this Court is of the view that no further decision in respect of SC FR 113/2017 is necessary.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare PC J

I agree**,**

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya J

I had the privilege of reading the judgement written by my brother judge Justice Padman Surasena. I am in agreement with the findings of his Lordship other than the amount ordered as compensation.

This court, in violation of fundamental rights applications does not consider the amount of damages that has been incurred to the Petitioner. The court does not call for evidence to establish the amount of damages. The Petitioner is paid a compensation in recognising that his fundamental rights are being violated.

Under these circumstances, I order only Rs. 100,000.00 be paid as compensation.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Chapter III of the Constitution of the Democratic Socialist Republic of Sri Lanka in terms of Article 17 read together with Article 126

Galgana Mesthrige Priyanthi Perera
'Aluthgedara',
Wilhara, Labbala

PETITIONER

Case No. SC.FR 139/2016

1. Rubber Research Institute

2. N. V. T. A. Weragoda,
Chairman,
Rubber Research Institute.

3. W. M. Gamini Seneviratne,
Director,
Rubber Research Institute.

4. A. H. Kularatne,
Acting Deputy Director
Administration,
Rubber Research Institute

All of Rubber Research Institute,
Telawala Road,
Ratmalana.

5. Upali Marasinghe,
Secretary to the Ministry of
Plantation Industries

6. Hon. Naveen Dissanayake,
Minister of Plantation Industries.
Both of Sethsiripaya,
11th Floor, 2nd Stage,
Battaramulla.

7. Professor M. Thilakasiri,
Sri Lanka Institute of Development Administration,
No.28/10, Malalasekara Mawatha,
Colombo 7.

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

RESPONDENTS

BEFORE: Buwaneka Aluwihare, PC, J,
H. N. J. Perera, J &
L. T. B. Dehideniya, J.

COUNSEL: Harith De Mel for the Petitioner.

N. Wigneswaran, SSC, for the Attorney-General.

ARGUED ON: 28th June, 2018

DECIDED ON: 14th March, 2019

ALUWIHARE, PC, J:

The Petitioner is an Experimental Officer of the Rubber Research Institute, coming under the purview of the 1st Respondent Board. Her complaint is that the Respondents, through an arbitrary scheme is preventing the Petitioner from presenting herself for an interview for the promotion as a Research Officer.

The Petitioner, at the time the present application was filed, had been employed at the Rubber Research Institute in the capacity of Experimental Officer for a period of 16 years. She had referred in her petition, to a plethora of qualifications she is possessed with and states that she is adequately qualified for the post of Research Officer of the Institute. Her qualifications are not disputed by anyone for the recruitment of the Post of Research Officer.
The recruitment for the post of Research Officer is carried out along a "Scheme of Recruitment and Promotion" recommended by the Chief Executive Officer of the Rubber Research Institute of Sri Lanka which had received the concurrence/approval of the Secretary of the line Ministry, as well as of the Director General, Department of Management Services. The approval dated 13.03.2011 is marked and produced as(P3), and dated 13.03.2011.

The said document clearly stipulates the procedure for recruiting Research Officers. Both external as well as internal candidates are eligible to apply, provided that they possess the requisite educational qualifications. As there is no dispute as to the requisite academic qualifications, it would not be necessary to refer to them here.

Once the applications are called through public advertisement in the print media, prospective candidates are required to sit for a written competitive examination. The candidates who secure marks 50% or above are required to face a structured interview and the appointments are made purely in the order of merit at the interview. One other relevant factor that needs to be referred to here is that, the number of recruits is to be

decided as per the cadre vacancies within the category. It is to be noted that there had been no challenge to the "Scheme of Recruitment and Promotion" (P3) up to this date.

Petitioner's Position

Petitioner had joined the Rubber Research Institute under the "Graduate Scheme" entry to a non-cadre post of 'Research and Development Assistant" on 15th August, 2000 (P4).

In the year 2005, (eleven years before the recruitment that is challenged in the present case), two vacancies had arisen in the post of Research Officer. Three candidates had been successful at the examination, including the Petitioner; however, the other two candidates had filled the two vacancies. Although the Petitioner alleges arbitrary allocation of 25 marks to the external candidates as there had been no challenge to this alleged arbitrary allocation of marks, it would not be relevant to delve into such matters here as what is challenged in these proceedings is the recruitment carried out in the year 2016.

In the year 2009 another vacancy had arisen and two candidates had been successful including the Petitioner. At this point too, the other candidate, despite being of 57 years of age, had been selected to fill the vacancy at the interview.

The Petitioner faced a similar situation in 2011 where again, a candidate other than the Petitioner had been selected at the interview.

In 2012 two further vacancies had arisen and again the Petitioner had been successful at the written test. According to the Petitioner, she was informed that due to the fact that she had gone on no pay leave she was not selected.

Although the Respondents have denied some of the assertions made by the Petitioner, none of the instances referred to above had been challenged. The Petitioner, however, asserts that the instances referred to above are indicative of various irregularities committed by the officials in charge of the administration at the 1st Respondent's Institute.

The Petitioner states that she and another candidate were successful in the written test held in January 2015. The interviews however had not been held due to the non-adherence to the scheme of recruitment, and subsequently the 1st Respondent Board has taken steps to cancel both the written examination and the interviews. The 2nd Respondent, the Chairman of the 1st Respondent Board in his objections filed in these proceedings has stated that several external candidates and two internal candidates were successful at the written test but his predecessor, the then Chairman of the 1st Respondent Board, after considering the complaints made by internal candidates and on the instructions of the Secretary to the relevant line ministry (the 5th Respondent) had cancelled the interviews scheduled. As evidenced by "R8", the Secretary to the Ministry of Plantations by his letter dated 23.12.2015 had directed the Director of the Rubber Research Institute (5th Respondent) to call for fresh applications for the post of Research Officer and to conduct the examination through the Sri Lanka Institute of Development Administration (SLIDA) in accordance with the Scheme of Recruitment.

The Petitioner complains that the cancellation of the interviews after being successful at the examination had prejudiced her rights, as the process prevented her from presenting herself for an interview.

It must, however, be reiterated that the events referred to above have little or no direct bearing on the present application as none of the decisions complained of, had been challenged by the Petitioner at the appropriate moment.

Subsequent to these events, the Petitioner as well as a trade union has had a series of correspondence with several of the Respondents placing her grievances. (P10, P11 and P12).

In February 2016, a fresh written competitive examination was held to fill 16 vacancies for the post of Research Officer. According to the Petitioner, six of these vacancies are for Research Officers with a chemistry background and ten Research Officers of other backgrounds.

Although the Petitioner makes the allegation that the authorities of the Rubber Research Institute allowed late applicants also to sit the examination, the 2nd Respondent had categorically denied that permission was granted to apply for the posts advertised after the closure of the applications.

The Petitioner also asserts that the test that was held was different in content, in that unlike on the previous occasions where the knowledge of chemistry was tested, on this occasion it was Intelligence Quotient (IQ) test. The Petitioner alleges that the sudden change was predicated to provide advantage to the external candidates. She also states that the results of the competitive written tests were not displayed by SLIDA, contrary to their normal practice. The Petitioner states that the internal candidates were verbally informed that none of the internal candidates had been successful at the examination.

It is the assertion of the Petitioner that the collective conduct of the 1st to the 8th Respondents from 2013 onwards had been arbitrary in order to systematically discriminate the Petitioner as an internal candidate to be able to present herself for a promotion.

This Court granted the Petitioner leave to proceed on the alleged infringement of her fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution.

The Petitioner, however, as referred to earlier had not challenged any of the recruitment processes that took place before 2016.

Thus, the only issue before us is whether the process adopted to select candidates to fill the vacant positions of Research Officers to the Rubber Research Institute had infringed the fundamental rights of the Petitioner.

In the objections filed by the 2nd Respondent, he has explained the processes adopted by Rubber Research Institute before 2011. However, since the introduction of the Scheme of Recruitment in 2011, the Institute is required to adhere to the process stipulated therein, with regard to the recruitment of Research Officers. The said aspect is dealt under the "Scheme of Recruitment for Academic and Research" category [AR1] (P3a).

In terms of clause 5.4 of P3a the recruitment Procedure is stipulated as follows:

> **5.4 Recruitment Procedure:**
> Recruitment will be done after calling for applications through a public advertisement or a Newspaper advertisement and on the results of a written competitive examination and a structured interview conducted by the appointing authority.
>
> **5.4.1 Written Competitive Examination:**
> Subject for the examination is given below:

Aptitude Test

This paper will be designed to test the aptitude of the candidate.

Candidates should secure at least 50% of the marks to pass the recruitment examination.

5.4.2 Interview:

Marks allocated for the interview are as follows:

- Relevant additional experience - 30 Marks
- Relevant additional qualifications - 30 Marks
- Other achievements - 15 Marks
- Performance at the interview - 25 Marks

~~~~~~~~~~

100 Marks

=======

Appointments will be made purely in the order of merit at the interview.

Although the Petitioner alleges that by January, 2016 there were 16 vacancies for Research Officers—6 officers with a chemistry background, and 11 of other backgrounds—the scheme of recruitment however, does not make such a differentiation. It only requires the prospective candidates to face an "Aptitude Test" and the only inference that the Court can draw is that all candidates have to sit for a common paper. Furthermore, the Scheme of Recruitment does not make a distinction between internal and external candidates.
~~~~~~~~~~

In that context the Petitioner has failed to establish before this Court that she has been discriminated among the same class of people.

In the counter affidavit filed by the Petitioner it is stated that the decision to change the subject specific Test to an IQ Test was done arbitrarily. The prospective candidates as referred to earlier are required to sit an "Aptitude test" and there is no material before us to come to a finding that the paper the candidates faced in 2016 was not an aptitude test. The Petitioner also has averred that the Respondent's own recruitment process is incapable of finding suitable persons to be appointed as Research Officers, which I feel is a policy matter best left to the 1st Respondent Institution.

At every turn the 1st Respondent-Institution had permitted the Petitioner to sit for the test and on each of the occasions where she had obtained the requisite marks was called for an interview. Nowhere has she alleged that the successful candidates were less suitable or not sufficiently qualified to be appointed as Research Officers.

On the last occasion she faced the examination she had been informed that she had failed to obtain the requisite marks. In the interest of justice and for the sake of transparency the 1st Respondent institution must take steps to have the results made public. However that alone is not sufficient to ground a complaint of infringement of Articles 12(1) and 14(1)(g) of the Constitution and the Petitioner has failed to establish unequal or discriminatory treatment in respect of the grievance complained of.

Accordingly, I hold that the alleged violation under Articles 12(1) and 14(1)(g) have not been established.

The application fails and is accordingly dismissed.

In the circumstances of the case, I make no order as to costs. All interim orders made in this case are hereby vacated.

Application dismissed.

JUDGE OF THE SUPREME COURT

Justice H. N. J. 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 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S C (F R) Application No. 140/ 2019

1. Khalique Jauffer,
2. Mohamed Shaheem Khalique Jauffer,
   (Minor)
   Both of 562/16 (also referred to as 562/16 B),
   Lower Bagatalle Road,
   Colombo 03.

PETITIONERS

-Vs-

1. B A Abeyrathna,
   Principal,
   Royal College,
   Colombo 07.

2. Thushantha Amaratunga,

3. Uditha Malalasekara,
4. D K Wickramasinghe,
5. Lalith Ganewatte,

   1st to 5th Respondents are all members of the Interview Board (on admission of children to Grade 1 - year 2019),
   C/O Royal College,
   Colombo 07.

6. Sanjeewa Tharanga Leelarathne,
7. D S P Kalubowila,
8. L M D Dharmasena,
9. Y I Liyanage,
10. Dilani Suriyarachchi

    6th to 10th Respondents are all members of the Appeal and Objection Investigation Board (on admission of children to Grade 1 - year 2019),
    C/O Royal College,
    Colombo 07.

11. Jayantha Wickremanayake

    Director, National Schools,
    Ministry of Education,
    Isurupaya,
    Battaramulla.

12. Padmasiri Jayamanne
    Secretary to the Ministry of Education,
    Ministry of Education,
    Isurupaya,
    Battaramulla.
13. Akila Viraj Kariyawasam,
    Minister of Education,
    Ministry of Education,
    Isurupaya,
    Battaramulla.
14. Hon. Attorney General,
    Attorney General's Department,
    Hulftsdorp,
    Colombo 12.

RESPONDENTS

Before: **Buwaneka Aluwihare PC J**

P. Padman Surasena J

E. A. G. R. Amarasekara J

Counsel: Viran Corea with Sarita de Fonseka and Thilini Widanagamage for the Petitioners.

Rajiv Goonetillake SSC for the Attorney General.

Argued on : 23 - 10 - 2019

Decided on: 01 - 11 - 2019

P Padman Surasena J

The 1st Petitioner is the father of the 2nd Petitioner who is a minor and whose admission to Grade 1 of Royal College Colombo, was sought by an application[1] made by the 1st Petitioner to the said school. Upon the 2nd Petitioner becoming unsuccessful in securing the admission to the said school, the 1st Petitioner has appealed to the Appeals Panel appointed by the School authorities. The Petitioners have not been successful at the said appeal too.

At the outset, this Court needs to bear in mind that the process of selection of children to Public schools is conducted in accordance with the provisions of the circular dated 31st May 2018 produced marked **P 2** by the Petitioners. The 1st Respondent also has produced the said circular marked **R 1**. The said process envisaged by the said circular is a competitive process. According to clause 6.0 of this circular, a specified percentage of children are admitted to Grade 1 in public schools in each year, from each of the six categories set out below.

I. 50% of children of residents in close proximity to the school,
II. 25% of children of parents who are Past Pupils of the school,
III. 15% of children who are brothers/sisters of students already studying in the school,
IV. 05% of children of parents who are employed in an institution engaged in work directly related to public school education under the Ministry of Education,
V. 04% of children of parents of Government institutions/corporations/Statutory Boards/State Banks, who are

[1] The application submitted by the 1st Petitioner has been produced by the 1st Respondent annexed to his affidavit marked **R 2**.

transferred on the exigencies of Government service or on annual transfer schemes,

VI. 01% of children of parents returning to the country after been abroad for some time.

As the process of admission of children to Grade 1 in public schools is a competitive one, the circular has devised a marking system[2] relating to each of the above categories. The school authorities, after evaluation according to the marking scheme, prepares a list placing all the applicants according to the marks they have scored. It is thereafter that the school authorities decide on a cut-off mark and admit only the children who are placed above the said cut-off mark.

In the instant case, the 1st Petitioner (father) had sought admission of his son (the 2nd Petitioner) under the category of applicants who reside in close proximity to the school. It would be convenient as requested by the learned counsel for the Petitioners, to turn at this stage to some of the averments in the affidavit dated 20th September 2019, filed by the 1st Respondent who is the Principal of the school relevant to this application. Paragraph 11 and 12 are reproduced below for convenience.

Paragraph 11

"In terms of proximity, marks were deducted for two schools more proximate to the Petitioner than Royal College; (i) Mahanama College and (ii) Thurstan College Colombo. Thus the Petitioner was awarded 32 marks for proximity."

Paragraph 12

[2] Clauses 6.1 to 6.6 of **P 2** (also marked **R 1** by the 1st Respondent).

"In total, the Petitioners' school admission application was awarded 55.2 marks. The cut off mark was 57.15 marks and hence the 2nd Petitioner was not selected for admission to Grade 1, Royal College."

This Court can observe that the marking scheme embodied in this circular is designed to pave the way for the parents to admit their children to the Public school closest to their residence more conveniently than to the others. However, if a parent wishes to admit the child to a school of his or her choice which is not the public school closest to his residence, then he will lose four marks each in respect of each of the other public school situated closer to the residence of such parent than the school of his or her choice. [3]

According to paragraph 11 of the affidavit filed by the 1st Respondent the Petitioners' marks have been deducted in respect of two schools namely;

(i) Mahanama College and

(ii) Thurstan College Colombo.

This was on the basis that the said two schools are situated closer to the Petitioners' residence than Royal College. It is in this manner that the school authorities have calculated and awarded 32 marks to the Petitioners for the close proximity of their residence to Royal College.

However, as has been pointed out by the learned counsel for the Petitioners, clause 7.2.4 of the circular marked **P 2**,[4] has specified the criteria to be adopted when making a decision to deduct marks for the presence of other public schools situated closer to the residence of the applicant than the school of such applicant's choice. (i.e. the school, such applicant has applied for). It is important to note that the said clause 7.2.4 does not authorize

[3] Clause 7.2.4 of **P 2** (**R 1**)
[4] (Also marked **R 2** by the 1st Respondent).

deduction of marks for the mere presence of other Public schools closer to the residence of the applicant than the school of such applicant's choice.

Accordingly, marks must be deducted only in respect of any public school to which the child of such applicant could be admitted as per the criteria set out in the said clause. In the instant case, marks can be deducted only in respect of any public school to which the 2nd Petitioner could be admitted as per the criteria set out in the said clause (clause7.2.4).

This Court bearing in mind, the provisions in clause7.2.4 must now consider whether the deduction of four marks when evaluating the Petitioners' application by the school authorities for the presence of Mahanama College in closer proximity to the Petitioners' residence than Royal College.

As has been pointed out by the learned counsel for the Petitioners, letter dated 02nd August 2018 produced by the Petitioner marked **P 27 (a)** has confirmed that Mahanama College admits only the Buddhist children. According to the said letter, that is the reason given by Mahanama College for the rejection of the Petitioners' application for that school. Thus, it is clear that Mahanama College would not have admitted the 2nd Petitioner to Grade 1 of that school under any circumstance due to the sole reason that the Petitioners are not Buddhists. Therefore, it is clear that the deduction of four marks from the marks of the Petitioners for the presence of Mahanama College in closer proximity to the Petitioners' residence than Royal College is unlawful. This is because Mahanama College cannot be considered in terms of clause 7.2.4 of the circular, as a school falling under the category of schools specified in that clause for the purpose of deducting such marks.

It was the position of the learned counsel for the Petitioners that he is able to advance several arguments to show that there are several instances

where School authorities have unlawfully deprived the Petitioners marks which should have been otherwise lawfully awarded to them. However, in view of the fact that it is less than two more marks which the Petitioners need, to secure the admission of the 2nd Petitioner to Royal College, the learned counsel for the Petitioners informed Court at the very commencement of the argument, that he would be content if the Court upholds his argument that the school authorities should not have deducted four marks in respect of Mahanama College on the basis that Mahanama College is situated in closer proximity to the residence of the Petitioners than Royal College and held that Mahanama College is a school falling under the category of schools specified in clause 7.2.4 of the circular for the purpose of the application of the Petitioners.

As the deduction of four marks from the marks of the Petitioners for the presence of Mahanama College in closer proximity to the Petitioners' residence than Royal College is unlawful, the total of the marks scored by the Petitioners in respect of their application should have been 59.2 marks. This is well above the cut-off mark of 57.15 marks. This means that the school authorities are obliged to admit the 2nd Petitioner to Royal College Colombo 07.

Although the Petitioners have advanced strong arguments to establish that they are in fact residing in the address No. 562/16 and that the premises bearing No. 562/16 and the premises referred to as 562/16 B are one and the same and that the Petitioners have used both numbers inter-changeably, it would be unnecessary for this Court to make any pronouncement in that regard as this Court is able to grant the relief prayed for by the Petitioners in the instant application only upon the above conclusion.

This Court on 30-05-2019 having heard the submissions of the learned counsel for the Petitioners and the submissions of the learned Senior State Counsel who appeared for the Respondents, had decided to grant leave to proceed in respect of the alleged violations of Article 12(1) of the Constitution.

Article 12(1) of the Constitution reads as follows;

"All persons are equal before the law and are entitled to the equal protection of the law".

The above facts demonstrate that the school authorities have failed to apply the law in its correct perspective in respect of the application of the 1st Petitioner seeking to admit his son (the 2nd Petitioner) to Royal College Colombo 07. The respondent school authorities are obliged to adopt the same method, the same marking system and the same yardsticks set out in the circular marked **P 2**, to evaluate the application of the Petitioners also when they select students to the classes of that school in Grade 1.

In these circumstances and for the foregoing reasons, this Court holds that the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution have been infringed. Therefore, the Petitioners are entitled to the declaration they have prayed from this Court.

Hence, this Court decides to;

I. declare that the failure of the 1st to 10th Respondents to admit the 2nd Petitioner to Grade 1 of Royal College Colombo 07 has infringed the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution;

II. direct the 1st to 10th Respondents to admit the 2nd Petitioner to Grade 1 of Royal College Colombo 07 on the basis that they have scored more marks than the cut-off mark as pointed out above.

In all the circumstances of this case, this Court decides to award neither compensation no costs.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare PC J

I agree,

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 17 and 126 of the Constitution.

RAVINDRA GUNAWARDENA KARIYAWASAM
Chairman, Centre for Environment and Nature Studies,
No. 1149, Old Kotte Road, Rajagiriya.

PETITIONER

SC FR Application No. 141/2015

VS.

1. **CENTRAL ENVIRONMENT AUTHORITY**
   No. 104,Denzil Kobbekaduwa Road, Battaramulla**.**
2. **CHAIRMAN, CENTRAL ENVIRONMENT AUTHORITY**
   No. 104, Denzil Kobbekaduwa Road, Battaramulla.
3. **SRI LANKA ELECTRICITY BOARD**
   P.O. Box 540, Colombo 2.
4. **CHAIRMAN, SRI LANKA ELECTRICITY BOARD**
   P.O. Box 540, Colombo 02**.**
5. **CHIEF MINISTER, NORTHERN PROVINCE**
   No. 26, Somasundaram Avenue, Chundukuli, Jaffna.
6. **PONNUTHURAI AYNGARANESAN, MINISTER OF ENVIRONMENT, NORTHERN PROVINCE**
   No. 295, Kandy Road, Ariyalai, Jaffna.
7. **CHAIRMAN, VALIKAMAM SOUTH PRADESHIYA SABHA**
   Valikamam.

8. **NORTHERN POWER COMPANY (PVT) LTD.**
   No. 29, Castle Street, Colombo 10.
9. **HON. ATTORNEY GENERAL**
   Attorney General's Department,
   Colombo 12.
10. **BOARD OF INVESTMENT OF SRI LANKA**
    Level 26, West Tower, World Trade Center, Colombo 1.
11. **NATIONAL WATER SUPPLY AND DRAINAGE BOARD**
    P.O. Box 14, Galle Road,
    Mt. Lavinia.

RESPONDENTS

1. **DR. RAJALINGAM SIVASANGAR**
   Chunnakam East, Chunnakam.
2. **SINNATHURAI SIVAMAINTHAN**
   Chunnakam East, Chunnakam.
3. **SIVASAKTHIVEL SIVARATHEES**
   Chunnakam East, Chunnakam.

ADDED RESPONDENTS

BEFORE: Priyantha Jayawardena, PC, J.
Prasanna Jayawardena, PC, J.
L.T.B. Dehideniya, J.

COUNSEL: Nuwan Bopage with Chathura Weththasinghe for the Petitioner.
Dr. Avanti Perera, SSC for the 1st to 4th, 9th, 10th and 11th Respondents.
Dr. K.Kanag-Isvaran,PC with L.Jeyakumar instructed by M/S Sinnadurai Sundaralingam and Balendra for the 5th Respondent.
Dinal Phillips,PC with Nalin Dissanayake and Pulasthi Hewamanne instructed by Ms. C.D.Amarasekera for the 8th Respondent.

	K.V.S.Ganesharajah with Ms. Deepiga Yogarajah, Ms. Suppiah Sugandhini and Ms. A.Gayathry instructed by Ms. Sarah George for the Intervenient Petitioners-Added Respondents.
ARGUED ON:	08th February 2018, 07th March 2018 and 04th October 2018.
WRITTEN SUBMISSIONS FILED:	By the Petitioner on 23rd November 2018. By the 1st to 4th and 10th Respondents on 06th April 2018 and by the same Respondents together with the 11th Respondent on 16th November 2018. By the 08th Respondent on 04th April 2018 and 17th December 2018.
DECIDED ON:	04th April 2019.

Prasanna Jayawardena, PC, J

Chunnakam is a town situated about 10 kilometres north of Jaffna city. The town sits on the main Jaffna-Kankesanthurai road and the Jaffna-Kankesanthurai railway line. The area is densely populated. It is a hive of commercial and agricultural activity. There are several renowned Hindu temples including the Maruthanamadam Anjaneyar temple, some Christian churches and several schools and offices in the area. The famed Kandarodai [Kadurugoda] archaeological site and Kadurugoda Viharaya are close to Chunnakam.

In this application, the petitioner complains that the 8th respondent company has operated a thermal power station in Chunnakam in a manner which has polluted groundwater in the Chunnakam area and made groundwater unfit for human use. The petitioner accuses the Central Environmental Authority ["CEA"] , the Ceylon Electricity Board ["CEB"], the Provincial and Local Authorities, the Board of Investment of Sri Lanka ["BOI"] and the National Water Supply and Drainage Board ["NWSDB"], who are named as the 1st to 7th respondents and 10th and 11th added respondents, of having failed to enforce the law against the 8th respondent and of having failed to stop the 8th respondent polluting groundwater and having failed in their duty to act in the best interests of the public. The petitioner states that, thereby, the respondents have violated the fundamental rights guaranteed to the petitioner and to the residents of the Chunnakam area by Articles 12 (1) of the Constitution

The respondents deny these charges. They say that electricity services in the Jaffna peninsula had been disrupted during the war and that, while the war was underway, the 8th respondent commenced constructing its thermal power station in 2007, in order to provide electricity to the residents of the Jaffna peninsula. The respondents say that this thermal power station commenced its operations in 2009 and that, as soon as conditions permitted after the end of the war in 2009, the respondents have taken adequate measures to ensure that the 8th respondent's thermal power station does not cause pollution. The respondents state that they have complied with the provisions of the law and that, from 2010, the 8th respondent has operated its thermal power station under the authority of duly issued Environmental Protection Licenses, and without causing pollution of groundwater or other components of the environment. The respondents state that they have duly performed their duties and responsibilities. They also state that the 8th respondent cannot be held solely responsible for any pollution of groundwater which may have occurred in the past.

In addition to submitting detailed pleadings, the parties have produced a mass of documents in support of their respective positions.

It will be useful to firstly describe the historical background which led to the establishment of the 8th respondent's thermal power station in Chunnakam.

Historical background

Since 1958, a significant portion of the electric power requirements of residents of the Chunnakam area and the other areas of the Jaffna Peninsula were serviced by the State owned "Chunnakam Power Station" [sometimes referred to as the "Central Power Station"] situated in Chunnakam and operated by the CEB. It was a diesel fired 14 MW thermal power station which stood on a large area of land possessed by the CEB. That land is within the general area of the Chunnakam town.

During the war, the functioning of the CEB's Chunnakam Power Station was hampered and its output was reduced. This led to two independent power producers being requested to install and operate power stations in the Jaffna peninsula during the war. One of these was a thermal power station which used heavy fuel oil/diesel to fire its generator sets and was owned by a Company named "Aggreko". It commenced operating during the war and continued for close to a decade until it was closed down in or about 2012. It was located in Chunnakam within the land possessed by the CEB and very close to the CEB's Chunnakam Power Station. The other thermal power station is said to have been operated by another independent power producer in the Kankesanturai area.

However, the combined power output from these three thermal power stations was insufficient to meet the needs of the residents of the Jaffna peninsula during the war. In this background the 8th respondent company [*ie:* "Northern Power Company (Pvt) Ltd"] was incorporated in 2007 to carry on the business of power generation and supply. The 8th respondent then entered into an agreement with the BOI in terms of which the 8th respondent agreed and undertook to set up and operate a thermal power station in the Jaffna peninsula. In pursuance of this agreement, the 8th respondent took on lease from the CEB an allotment of land within the CEB's aforesaid land in Chunnakam. The 8th respondent constructed its thermal power station on that leased land. It was in very close proximity to the CEB's existing Chunnakam Power Station. The 8th respondent's thermal power station used heavy fuel oil/diesel to operate its generator sets [the 8th respondent company is referred to as the *"Northern Power Company (Pvt) Ltd"* or *"Northern Power"* or *"NPCL"* or *"NPC"* in the documents produced in this application and cited later on in this judgment. Any such references will mean the 8th respondent].

After the end of the war, the CEB decommissioned its ageing and inefficient Chunnakam Power Station in or about the end of 2012 and replaced it with a new thermal power station which uses heavy fuel oil/diesel to operate the generator sets and has a power generation capacity of approximately 24 MW. This also stood within the land possessed by the CEB and very close to the other three thermal power stations. This new thermal power station was christened the *"Uthuru Janani"* Power Station. It commenced generating electrical power in early 2013.

It should also be mentioned that to two oil tanks within the CEB's premises were extensively damaged in 1990-1991 and a very large quantity of fuel oil/diesel flowed on to the adjacent land. This formed what the residents of the area dubbed the *"oil kulam"* [oil pond]. In 2012, the CEB filled up this "oil *kulam"* with earth and constructed a Grid Station on that area of land.

The petition and interlocutory orders made by Court

The Petitioner describes himself as a public-spirited citizen who is the chairman of an organization named "The Centre for Environment and Nature Studies". He says this organization works towards preserving the environment. The petitioner states that he files this application in the public interest and on behalf of the residents of the Chunnakam area. The documents marked "P1" to "P23" are annexed to the petition.

The petitioner named the CEA [mistakenly referred to as the "Central Environment Authority" by the petitioner] and its Chairman as the 1st and 2nd respondents; the CEB [mistakenly referred to as the "Sri Lanka Electricity Board" in the caption of the petition] and its Chairman as the 3rd and 4th respondents; the Chief Minister of the Northern

Province and the Minister of Environment of the Northern Province as the 5th and 6th respondents; the Chairman of the Valikamam South Pradeshiya Sabhawa as the 7th respondent; the aforesaid "Northern Power Company (Pvt) Ltd" as the 8th respondent; and the Hon. Attorney General as the 9th respondent.

The petitioner states that no Initial Environmental Examination Report ["IEER"] or Environmental Impact Assessment Report ["EIAR"] was prepared prior to the 8th respondent commencing its project in 2007 to construct a thermal power station in Chunnakam. The petitioner goes on to make out that the 8th respondent had increased the power generation capacity of its thermal power station to 24MW in 2010 but that no EIAR was prepared even at that stage.

Thereafter, the petitioner states that the 8th respondent's thermal power station uses *"heavy oil"* to fire its generator sets and complains that *"the disposal of petroleum wastage"* from the 8th respondent's thermal power station has caused *"massive environmental pollution"* by the oil contamination of groundwater and wells and other water sources in the Chunnakam area, including the water intake well used by the NWSDB to supply pipe-borne water in the area. The petitioner pleads that, in 2013 and 2014, the NWSDB had tested groundwater obtained from wells within the Chunnakam area and detected that the Oil and Grease content of well water in the Chunnakam area was *"considerably above the permissible level"* in an area up to 1.5 kilometres around the 8th respondent's thermal power station.

The petitioner accuses the respondents of having *"failed to take effective steps to resolve the* [aforesaid] *issues"* and also accuses the CEA of colluding with the 8th respondent and permitting the 8th respondent's thermal power station to operate until 09th October 2014 without an Environmental Protection License ["EPL"]. The petitioner holds out that the first EPL held by the 8th respondent was the EPL dated 09th October 2014 issued by the BOI and marked "P23", which was issued *"almost 1 decade from the establishment of the power station".*

The petitioner states that, upon proceedings being instituted in the Magistrate's Court of Mallakam by residents of the Chunnakam area, who complained that the operation of the 8th respondent's thermal power station was polluting the environment and creating a public nuisance, the learned Magistrate had issued a stay order on 27th January 2015 restraining the operation of the 8th respondent's thermal power station. The 8th respondent had, by a revision application made to the High Court, obtained permission to carry out maintenance work only.

On the aforesaid basis, the petitioner pleads that the respondents have violated the fundamental rights guaranteed by Articles 12 (1) and 12 (2) of the Constitution to citizens of this country who reside in the Jaffna Peninsula and the petitioner by:

(i) having failed or refused to enforce the law against the 8th respondent and, in particular, the CEA having refused to enforce the law against the 8th respondent; (ii) having failed to act in the best interests of the public and, thereby, having breached the *"Doctrine of Public Trust"*; and (iii) having denied the residents of the Chunnakam area of their legitimate expectation to have clean water for their use and endangering their safety and health.

The petitioner prayed for an interim order staying power generation at the 8th respondent's thermal power station; a declaration that the petitioner's fundamental rights guaranteed by Articles 12 (1) and 12 (2) of the Constitution had been violated by the respondents; and several declarations to the effect that the operation of the 8th respondent's thermal power station is contrary to the law and must cease; that the EPL marked "P22" [should read "P23"] is null and void; for the award of compensation; and for other related reliefs.

This Court granted the petitioner leave to proceed under Article 12(1) of the Constitution and directed the 8th respondent to stop the function of generating electrical power at its thermal power station. It was also ordered that the BOI and the NWSDB be added as the 10th and 11th respondents. Three persons who had instituted the aforesaid proceedings in the Magistrate's Court of Mallakam sought to intervene and were added as respondents.

During the course of the hearing, we permitted the parties to tender several documents which shed some light on the issue before the Court. These documents included a statement which the 8th respondent, without prejudice to the positions it has taken in this application, wished to tender setting out possible remedial action which could be taken with regard to the allegations made by the petitioner.

The respondents' positions

Three affidavits have been tendered on behalf of the **CEA** together with documents marked "2R1" to "2R21".

The CEA takes up the position that the 8th respondent's thermal power station generated only 15 MW and, consequently, there was no requirement for an IEER or an EIAR to be conducted prior to the 8th respondent commencing its project in 2007.

The CEA pleads that the 8th respondent has operated its thermal power station in Chunnakam with the necessary approvals and Environment Protection Licenses. The CEA states that the 8th respondent applied for an EPL in 2009 and that the CEA inspected the 8th respondent's thermal power station on 27th October 2009 and issued an EPL for the period from 20th May 2010 to 19th May 2011. The CEA states that subsequent EPLs were issued by the BOI since the 8th respondent's project was

approved by the BOI and the BOI is statutorily empowered to issue EPLs with the concurrence of the CEA. Thus, the BOI has issued the EPL marked "10R5" for the period from 15th September 2011 to 14th September 2012, the EPL marked "10R10" for the period from 17th April 2013 to 16th April 2014 and the EPL marked "P23" for the period from 20th September 2014 to 29th September 2015.

The CEA states it has *"continuously conducted inspections pertaining to alleged oil contamination of water in the Chunnakam area"* and that EPLs were issued to the 8th respondent "*since it has been found by such inspections that any contamination cannot be definitively traced to the activities of the 8th Respondent.".* The CEA also pleads that, on 30th September 2014, it imposed a condition that the 8th respondent must obtain a Scheduled Waste Management License.

An affidavit was tendered on behalf of the **CEB** together with the documents marked "3R1" to "3R7". The CEB also takes up the position that the 8th respondent's thermal power station generated only 15 MW and, therefore, an IEER or EIAR under Part IV C of the National Environmental Act was not required. The CEB's position is that none of the actions of the CEB have given rise to the petitioner's application.

In addition, the CEB pleads that it requested the Industrial Technology Institute ["ITI"] to investigate and furnish a report on whether the operations of the 8th respondent's thermal power station had contributed to environmental pollution and that ITI's report *"did not conclusively provide an opinion as to whether the 8th respondent had contributed to well water contamination with oil at Chunnakam…."* The CEB states it submitted ITI's report to the CEA. However, neither the CEB nor the CEA produced ITI's report.

The CEB has also later produced part of a Power Purchase Agreement dated 23rd March 2007 entered into between the CEB and the 8th respondent and an amendment to that agreement dated 20th December 2007 marked "X1" and "X2" respectively together with a letter dated 15th October 2013 sent by the CEB to the 8th respondent marked "X3" and an inspection report marked "X4".

The **Chief Minister of the Northern Provincial Council** states, in his affidavit, that *"the activities of the 1st and/or 2nd and/or 3rd and/or 4th and/or 8th and/or 10th and/or 11th Respondents are beyond my control and/or supervision."* and goes on to state that *"it is the 1st and/or 2nd and/or 3rd and/or 4th and/or 10th and/or 11th Respondents who are responsible for the violations set out in the Petition, if any."*. The Chief Minister adds that the Northern Provincial Council continues to supply water transported in bowsers to meet the needs of the residents of the Chunnakam area.

The **8th respondent [Northern Power Company (Pvt) Ltd]** filed a statement of objections which was supported by an affidavit affirmed to by its Chief Executive Officer.

The documents marked “8R1” to “8R25” are annexed. Thereafter, the 8th respondent has filed a further affidavit dated 31st August 2016 annexing a bundle of documents compendiously marked as “A5”. The 8th respondent has also filed a copy of Emergency (Generation of Electrical Power and Energy) Regulation 1 of 1997 published in Gazette Extraordinary No. 966/11 dated 12th March 1997 and a letter dated 28th November 2016 addressed to the 8th respondent’s Attorney-at-Law by the NWSDB.

The 8th respondent pleads that the petitioner has wilfully suppressed the fact that the CEB’s *“Uthuru Janani”* thermal power station is located very close to the 8th respondent’s thermal power station and alleges that the petitioner has filed this application *“solely targeting the 8th Respondent for extraneous purposes.”*. The 8th respondent pleads that the petitioner has suppressed the following facts and their adverse environmental impact on groundwater in the Chunnakam area: (i) the destruction of two oil tanks in 1990-1991and massive outflow of fuel oil/diesel onto an area of land located close to where the 8th respondent’s thermal power station is now sited; (ii) that the CEB had been discharging oil waste onto an area of land located close to the 8th respondent’s thermal power station; and (iii) the existence of an *“oil kulam*” [oil pond] in the area until 2012 and the fact that it was filled up with earth and a Grid Station was constructed thereon. The 8th respondent also pleads that the petitioner has not visited or even seen the 8th respondent’s thermal power station and that the petitioner has *“…. instituted these proceedings on matters hear-say without verifying matters.”* The 8th respondent avers that the petitioner has sought to mislead Court and has misrepresented material facts to Court.

The 8th respondent pleads that the petitioner has failed to produce any evidence to substantiate his allegation that the operation of the 8th respondent’s thermal power station has polluted groundwater in the Chunnakam area.

Thereafter, the 8th respondent specifically denies the petitioner’s allegation that the operation of the 8th respondent’s thermal power station has polluted groundwater in the Chunnakam area. In support of that position, the 8th respondent has produced a report dated 24th July 2015 prepared by the ITI marked “8R5”. This is the report which was referred to by the CEB and which was not produced by either the CEB or the CEA. The 8th respondent has also produced, marked “8R4”, an evaluation report by a committee appointed by the CEA which had evaluated ITI’s report marked “8R5”. In fact, the CEA has also produced this evaluation report marked “2R15”.

In support of its denial of having polluted groundwater in the Chunnakam area, the 8th respondent has also produced a report dated 23rd June 2015 prepared by the Norwegian Geotechnical Institute for the National Building Research Organization [“NBRO”] marked “8R6” and another report prepared in June 2015 by a group named “Tamil Australian Professionals, Australia” marked “8R7”. A report prepared in March

2016 by the Water Resources Board and a report prepared in September 2015 by a group of `experts' appointed by the Northern Provincial Council are among the documents which have been compendiously marked as "A5" by the 8th respondent.

The 8th respondent avers that terrorist activities during the wartime period deprived the residents of the Jaffna peninsula of electrical power supplied through the national grid. In these circumstances, and at the invitation of the Government, the 8th respondent, in 2007, commenced a project to install a thermal power station in Chunnakam. As a result of practical difficulties including the absence of a branch office of the CEA functioning in the Jaffna Peninsula in 2007, no institution was in a position *"to travel to Chunnakam to inspect and make such an assessment"* prior to the end of the war in 2009. The 8th respondent pleads that, as soon as practicable after the end of the war in May 2009, the 8th respondent has obtained the necessary EPLs and the issue of these EPLs confirms that the 8th respondent was operating *"within the parameters of the law."*.

The 8th respondent states that the electrical power needs of the people of Sri Lanka require that the 8th respondent's thermal power station be permitted to resume supplying electrical power to the national grid. In this connection, the 8th respondent has marked as "8R20" a letter dated 24th March 2016 addressed to the 8th respondent by the General Manager of the Ceylon Electricity Board [the 3rd respondent] stating *"….. CEB on our part wishes to have your generation commenced at your earliest which will certainly support the prevailing energy/power shortage*. *We certainly wish to confirm the urgency of commencement of power generation from Northern Power Plant at Chunnakam. We therefore, kindly request you to present this request <u>as an issue of national importance</u> to the courts and make a request to get at least an interim release to commence the generation at your earliest."*;

The 8th respondent states it has structured its internal waste management processes so as to deal with wastewater and waste oil formed during the power generating operations of its thermal power station and that it does not discharge waste oil but, instead, sells waste oil to several buyers. The 8th respondent avers that the well within its premises is used to supply drinking water and that tests have established that the groundwater in this well is free of pollutants.

The 8th respondent has also taken up the position that, consequent to the Emergency (Generation of Electrical Power and Energy) Regulation 1 of 1997 published in Gazette Extraordinary No. 966/11 dated 12th March 1997, there was no requirement for an Environmental Impact Assessment or an Initial Environmental Examination to be conducted prior to the commencement of the 8th respondent's project to set up a thermal power station in 2007 or at the time the 8th respondent commenced generating electrical power at the thermal power station in 2009.

An affidavit was filed on behalf of the **BOI** together with the documents marked "10R1" to "10R15".

The BOI states that, on 23rd August 2007, it approved the proposal submitted by the 8th respondent to set up a thermal power station in Chunnakam and that the 8th respondent was required to set up the thermal power station and commence generating electrical power within a period of two years. The BOI states that *"during this period there were no institutions to carry out tests or any feasibility studies or any monitoring organizations mainly due to the war situation in Jaffna."*.

The BOI states that it issued the aforesaid EPLs marked "10R5", "10R10" and "P23" after the BOI and the CEA conducted joint inspections of the 8th respondent's thermal power station and obtained analytical reports where required. The BOI avers that it issued these EPLs with the concurrence of the CEA. The BOI also pleads that the EPL marked "P23" was issued subject to the condition that the 8th respondent should obtain a Scheduled Waste Management License from the 1st respondent.

The BOI pleaded that it *"specifically denies that the alleged oil contamination could be attributed to the 8th Respondent Company, and states that, EPL have been periodically issued after inspection by the relevant authorities the CEA and the Respondent, and that this Respondent nor the CEA would have issued a license to carry on a project unless they were satisfied that, conditions in the license have been strictly adhered to.".*

Lastly, the **NWSDB** has filed two reports prepared by the NWSDB and marked "11R1" and "11R2".

The issues that have to be decided

Drawing from the positions taken by the parties in their pleadings and the documents produced by them, the issues which have to be decided in this application are:

1. Whether the 1st to 7th respondents [or any of them] were required to obtain and consider an IEER or EIAR prior to the 8th respondent commencing the project to construct a thermal power station in 2007 or at some time thereafter during the operation of the thermal power station and, if so, whether the 1st to 7th respondents [or any of them] have failed to perform their statutory and regulatory duties in that regard ?

2. Whether the 8th respondent was prohibited by law, from operating its thermal power station without the authority of an EPL and, if so, whether the 1st to 7th respondents [or any of them] have failed to perform their statutory and regulatory duties in that regard ?

3. Whether wastewater and petroleum waste products discharged from the 8th respondent's thermal power station has caused oil contamination and pollution of groundwater and soil in the area ?

4. Whether such failure on the part of the 1st to 7th respondents [or any of them] to perform their statutory and regulatory duties in respect of the matters referred to in the aforesaid three issues has violated the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution ?

5. Whether the continued operation of the 8th respondent's thermal power station will cause further oil contamination and pollution of groundwater and soil in the area ?

These issues have to be considered in the context of the relevant statutory and regulatory provisions which govern both: (i) the 8th respondent in the implementation of its project to construct the thermal power station and then in the operation of the thermal power station; *and* (ii) the duties and functions of the 1st to 7th respondents with regard to approving the 8th respondent's project to construct the thermal power station and the regulating the operation of the thermal power station.

Therefore, the relevant statutory and regulatory provisions must be ascertained first.

Statutory and regulatory framework

With regard to the relevant **statutory framework**, the National Environmental Act No. 47 of 1980 established the CEA with the powers, functions and duties of making recommendations relating to national environmental policy and the conservation of natural resources and engaging in related research, educational and advisory activities. However, the Act did not invest the CEA with the power or a duty to effectively control pollution and degradation of the environment or to prevent persons from engaging in activities which pollute or degrade the environment.

This lacuna in the aforesaid Act was felt with the shift to a more open economy in the 1980s and an increase in the number of industries and projects which could affect the quality of the environment. This gap was rectified, to an extent, by the enactment of the National Environmental (Amendment) Act No. 56 of 1988 and the National Environmental (Amendment) Act No. 53 of 2000. These amending acts conferred on the CEA the additional powers, functions and duties of: coordinating all regulatory activities relating to the discharge of wastes and pollutants into the environment and the protection and improvement of the quality of the environment; regulating, maintaining

and controlling sources of pollution of the environment; requiring the submission of proposals for new projects and changes in existing projects for the purpose of evaluating their impact on the environment; and requiring local authorities to comply with and give effect to recommendations relating to environmental protection and the prohibition, prevention or control [as the case may be] of environmental pollution.

In pursuance of these additional powers, functions and duties conferred on the CEA, the aforesaid Act No. 56 of 1988 introduced a new Part IV A titled *"ENVIRONMENTAL PROTECTION"*, a new Part IV B titled *"ENVIRONMENTAL QUALITY"* and a new Part IV C titled *"APPROVAL OF PROJECTS"*.

Part IV A of the National Environmental Act, as amended, ["the Act"] contains provisions which prohibit the carrying on of any activities which cause pollution [termed *"prescribed activities"*] except under the authority of an EPL and in compliance with the terms, standards and conditions which are specified in that EPL and which are specified in the Act and regulations made under the Act.

Part IV B of the Act contains provisions which regulate the discharge or emission of waste in to inland waters, the atmosphere and soil; which prohibit the pollution of inland waters, the atmosphere and soil in a manner which makes any such component of the environment poisonous, noxious, unclean or detrimental to the health and safety of human beings, fauna and flora, and other related provisions.

The provisions of Part IV C of the Act introduce a special procedure for granting approval to implement projects which, in very general terms, may be described as being either: (i) specified types of large scale projects which, by the nature and magnitude of the scale of their operations, are likely to have a significant effect on the environment; or (ii) specified types of projects of whatever magnitude which are located in or near areas identified to be environmentally significant or sensitive. Both types of projects are termed *"prescribed projects"* in Part IV C of the Act.

With regard to the relevant **regulatory framework**, the 2nd respondent [Chairman of the CEA] has referred to and relied on the Order dated 18th June 1993 and published in Extraordinary Gazette No. 772/22 dated 24th June 1993 made by the Minister under section 23Z of Part IVC of the Act [mistakenly referred to as section 23Y by the 2nd respondent]. This Order is included in the document marked "2R1" by the 2nd respondent and has been subsequently amended by the Order dated 16th February 1995 published in Extraordinary Gazette No. 859/14 dated 23rd February 1995 and Order dated 27th October 1999 published in Extraordinary Gazette No.1104/22 dated 05th November 1999. Those amendments are not relevant to the present application.

The aforesaid Order dated 18th June 1993 lists the *"prescribed projects"* which require approval under the special procedure introduced by Part IVC of the Act for the implementation of any such project.

The document marked "2R1" also contains the `National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993' dated 18th June 1993 made by Minister under section 23CC of Part IVC read with section 32 of the Act and published in Extraordinary Gazette No. 772/22 dated 24th June 1993. It should be mentioned that these regulations were subsequently amended by the amendment dated 21st November 2000 published in Extraordinary Gazette No. 1159/22 dated 22nd November 2000. This amendment is not relevant to the present application.

The aforesaid National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 set out the procedure to be followed by a project approving agency when considering an application for approval of the implementation of a *"prescribed project"* under the provisions of Part IV C of the Act.

When examining the relevant regulatory framework, it is necessary to also refer to:

(i) The Order dated 21st November 2000 made under the provisions of section 23A of the Act listing the *"prescribed activities"* for which an EPL is required. This Order was published in Extraordinary Gazette No. 1159/22 dated 22nd November 2000.

The aforesaid Order was rescinded and replaced by the Order dated 14th January 2008 made under the provisions of section 23A of the Act and setting out a revised list of *"prescribed activities"* for which an EPL is required. That Order was published in Extraordinary Gazette No. 1533/16 dated 25th January 2008;

(ii) The Regulations dated 08th January 1990 and titled `National Environmental (Protection and Quality) Regulations No. 1 of 1990' made under the provisions of section 32 of the Act and published in Extraordinary Gazette No. 595/16 dated 02nd February 1990, which govern the issue of EPLs and Scheduled Waste Management Licenses and also specify tolerance limits relating to the composition of various types of waste which may be discharged into the environment. These regulations were amended on 02nd July 1990 by the amendment published in Extraordinary Gazette No. 617/7 dated 05th July 1990 and on 25th April 1996 by the amendment published in Extraordinary Gazette No. 924/12 dated 23rd May 1996.

These aforesaid regulations were rescinded and replaced by the `National Environmental (Protection and Quality) Regulations No. 01 of 2008' dated 14th January 2008 made under the provisions of section 23A and 23B of the Act and published in Extraordinary Gazette No.1534/18 dated 01st February 2008.

In my view, the aforesaid Orders and Regulations are relevant to the issues before us and should be considered when determining this application even though the parties have not referred to or relied on them. This is particularly so since, in an application of this nature, which has the flavour of public interest litigation and which raises important issues regarding the right of a section of the citizens of this country to have their sources of water protected from pollution, this Court should endeavour to consider relevant facts of which the Court is entitled to take judicial notice. In this regard, I am of the view that, even though the parties have failed to mention these Orders and Regulations, the provisions of section 57 of the Evidence Ordinance read with the provisions of section 32 and section 23A of the Act and section 2 of the Interpretation Ordinance amply entitle this Court to take these Orders and Regulations into consideration when determining this application - *vide:* DE SILVA vs. DON FRANCIS [1924 2 Times Law Reports 4] and SIVASAMPU vs. JUAN APPU [38 NLR 369].

Next, it is evident that the previous Order dated 21st November 2000 and previous Regulations dated 08th January 1990, as amended, were in force up to 14th January 2008 and were, on that day, rescinded and replaced by the aforesaid Order dated 14th January 2008 and the aforesaid Regulations dated 14th January 2008. It is necessary to decide which Regulations and which Order are relevant to the present application.

In this regard, although the 10th respondent [the BOI] entered into the agreement marked "10R2" with the 8th respondent on 31st August 2007, the Indenture of Lease marked "P4" between the 8th respondent and the 3rd respondent [Ceylon Electricity Board] was entered into only on 24th October 2007. Thus, it would appear that the 8th respondent obtained possession of the site only at or about the time "P4" was executed. Accordingly, it can be reasonably assumed that, in the common course of business, the substantial implementation of the 8th respondent's project to construct and operate a thermal power station got underway in early 2008. As set out later on, it is also established that the 8th respondent applied for an EPL and commenced operating its thermal power station in 2009.

In these circumstances, the Order and Regulations which are relevant to this application are: (i) the Order dated 14th January 2008 setting out a list of *"prescribed activities"* for which an EPL is required; and (ii) the `National Environmental (Protection and Quality) Regulations No. 01 of 2008' dated 14th January 2008 which govern the issue of EPLs and Scheduled Waste Management Licenses and also specify tolerance limits relating

to the composition of various types of waste which may be discharged into the environment.

Having identified the relevant provisions of the statutory and regulatory framework, it is time to examine and decide on the aforesaid five issues which arise in this application.

Whether the 1st to 7th respondents [or any of them] were required to obtain and consider an IEER or EIAR submitted by the 8th respondent prior to the 8th respondent commencing the project to construct a thermal power station in 2007 or at some time thereafter during the operation of the thermal power station and, if so, whether the 1st to 7th respondents [or any of them] have failed to perform their statutory and regulatory duties in that regard ?

It is evident from the statutory framework set out in Part IV C of the Act and the procedure set out in the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 that the submission and consideration of an IEER or EIAR is only necessary in the case of *"prescribed projects"* which require the approval of the *"project approving agency"* for the implementation of any such project - *ie:* for projects which fall within the description of *"prescribed projects"* as listed in the aforesaid Order dated 18th June 1993 .

Thus, section 23BB (1) in Part IVC of the Act stipulates that any project approving agency from which approval for the implementation of a *"prescribed project"* is sought, must require the project proponent to submit an IEER or an EIAR which contains the prescribed information and particulars. Section 23BB (1) authorises the project approving agency to decide which type of report is required in the first instance. On the same lines, clauses 5 to 12 of the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 also envisage that an IEER or an EIAR is only required in the case of *"prescribed projects"* and require the project approving agency, in consultation with the CEA and after taking into account the views of relevant state agencies and the public where necessary, to decide whether an IEER or an EIAR should be submitted by the project proponent.

It should be mentioned here that, as apparent from the definition in section 33 of the Act, an IEER is in the nature of a written report which assesses whether the *"prescribed project"* will have a significant impact on the environment and will, therefore, require the preparation of a [more detailed] EIAR. As also apparent from section 33 of the Act, an EIAR is, in a nutshell, a comprehensive report which sets out a detailed description of the *"prescribed project"*, identifies its avoidable and unavoidable adverse environmental effects, assesses the possible alternatives which might be less harmful to the environment, sets out reasons why such alternatives have been rejected, describes the

resources which are required and must be committed to the *"prescribed project'* and contains, where available, an environmental cost-benefit analysis etc.

Thereafter, section 23BB (2) to 23BB (5) in Part IVC of the Act stipulate that, once an EIAR relating to a *"prescribed project"* is submitted, the public must be notified that the EIAR can be inspected and that any member of the public is entitled to submit his comments on the EIAR. A person who submits his views is entitled to be heard, where appropriate. The project approving agency has a duty to consider the views of the public when deciding whether to grant approval for the implementation of the *"prescribed project"*. Notice of approval granted for the implementation of a *"prescribed project"* must be published. Where the project approving agency requires the submission of only an IEER by the project proponent, the IEER is deemed to be a public document and is open to inspection by the public. Corresponding provisions are stipulated in clauses 11 to 15 of the `National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993'.

Thus, it is apparent from the statutory and regulatory framework that the submission and consideration of an IEER or EIAR [as the case may be] is a *sine qua non* for a *"project approving agency"* to consider granting approval to implement a *"prescribed project"*.

It is now necessary to ascertain the stage at which a project proponent who wishes to embark on a *"prescribed project"* must obtain approval from the *"project approving agency"* for the implementation of the project. In this connection, section 23AA in Part IVC of the Act states that a project proponent *"…will be required to obtain approval under this Act for the implementation of such prescribed projects."* In the context in which the word *"implementation"* is used in section 23AA, the word has to be taken in the sense of *"to put (a decision or plan) into effect"* set out in the Shorter Oxford Dictionary [5th ed. Vol. 1 at p. 1330]. Thus, the term *"implementation"* used in section 23AA would include any work on the physical implementation of the project from the stage of groundwork on the site and its environs onwards. This view is supported by clause 5 and 6 of the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 which require that a project proponent who wishes to embark on a *"prescribed project"* must apply for approval under Part IVC *"as early as possible"*.

As stated earlier, an IEER or EIAR [as the case may be] must be thereafter submitted by the project proponent and the *"prescribed project"* has to be evaluated by the project approving agency and the CEA to determine its likely impact on the environment. Provision is made for the public to have their say where a *"prescribed project"* may have a significant impact on the environment and an EIAR has been submitted. The project approving agency can grant or refuse approval for a *"prescribed project"* only after these

steps are taken. These safeguards would be lost if the proponent is allowed to proceed with the physical work required for the project prior to or pending the grant of approval.

Thus, there can be no doubt that, in the case of *"prescribed projects"*, approval under Part IV C of the Act must be obtained from the project approving agency *prior* to the commencement of any form of groundwork on the project or other activity which could have an effect on the environment.

It is also apparent from the material before us and is, in fact, undisputed that, in the event the 8th respondent's project to construct and operate a thermal power station in Chunnakam constituted a *"prescribed project"* which required approval under Part IV C of the Act for the implementation of the project, the relevant *"project approving agency"* was the CEA and/or the BOI.

Having made those observations, I turn to considering whether the statutory and regulatory framework required that an IEER or EIAR relating to the construction or operation of the 8th respondent's thermal power station had to be obtained and considered by the CEA or BOI, at any stage.

The first question which then arises is whether the 8th respondent's project to construct and operate a thermal power station in Chunnakam constituted a *"prescribed project"* which required the approval of the CEA or the BOI [as the *"project approving agency"*] for the implementation of the project - *ie:* approval granted under the provisions and procedure set out in Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993.

In this regard, Item (9) of the aforesaid Order dated 18th June 1993 made under provisions of section 23Z of the Act and marked "2R1" states that only projects for the *"Construction of thermal power plants having generation capacity exceeding 25 Megawatts at a single location or capacity addition exceeding 25 Megawatts to existing plants"* are to be regarded as *"prescribed projects"* which require approval under Part IVC of the Act.

It is seen that Item (9) of the Order marked "2R1" has two limbs. The first limb includes projects for the *construction* of a new thermal power station which will have a power generation capacity of more than 25 megawatts from its inception. As for the second limb of Item (9), it is plain to see that the words *"capacity addition exceeding 25 Megawatts to existing plants"* have to be read as meaning any *addition* of power generation capacity to an existing thermal power station which results in that thermal power station acquiring a *total* power generation capacity of more than 25 megawatts after the addition. It is evident that these words cannot be read so as to confine the applicability of Item (9) to only the capacity of the *addition* to the power generation capacity of the thermal power station. Such an interpretation will result in an

unacceptable situation where any project proponent will be able to flout the aforesaid statutory and regulatory scheme and avoid obtaining approval under Part IV C of the Act by simply adopting a `two-stage approach' of commencing with a power generation capacity of just under 25 MW and later adding power generation capacity of under another 25 MW and, thereby, ending up with a thermal power station with a power generation capacity far in excess of 25 MW without obtaining the required approval under Part IV C of the Act. Such a result would, obviously, make a mockery of the provisions of the Part IVC of the Act and Item (9) of the Order marked "2R1" and render them nugatory.

Thus, the question of whether the 8th respondent's project to construct and operate a thermal power station in Chunnakam constituted a *"prescribed project"* will depend on whether the thermal power station was envisaged to have a power generation capacity exceeding 25 MW either: (i) at the stage of construction in 2007; *or* (ii) by the addition of power generation capacity at any subsequent time during the operation of the thermal power station.

To first consider whether the 8th respondent's thermal power station had a power generation capacity exceeding 25 MW at the time it was *constructed*, the letter dated 06th September 2011 marked "P3" sent by the CEB to the 8th respondent proceeds on the basis that the 8th respondent was to be leased the CEB's land for the purpose of a *"15MW Power Project to Supply Power to Jaffna Peninsula Handing Over the Chunnakam Site."* The subsequent lease agreement marked "P4" dated 24th October 2007 by which the CEB leased this land to the 8th respondent also refers to the 8th respondent's proposal to construct a 15 MW diesel power plant on the CEB's land. The power purchase agreement dated 23rd March 2007 between the CEB and Northern Power Company marked "X1" also refers to the 8th respondent constructing and operating a 15 MW thermal power station. Thereafter, the Inspection Report marked "2R2" prepared by three officers of the CEA who inspected the 8th respondent's thermal power station on 27th October 2009 have recorded that, at the time, the power generation capacity of the thermal power station was 15 MW.

In the light of this material, it can be reasonably concluded that the 8th respondent's project initially envisaged constructing and operating a thermal power station with a power generation capacity of 15 MW and that, at the time the power station was constructed in 2009, it had a power generation capacity of 15 MW. Accordingly, it is clear that the 8th respondent's project did not fall within the category of *"prescribed projects"* at the time of construction in 2007 because the proposed power generation capacity did not exceed the 25 MW threshold specified in Item (9) of the Order marked "1R1". A perusal of the petition shows that the petitioner also does not suggest that, at the time the 8th respondent's thermal power station was constructed in 2008-2009, it had a power generation capacity exceeding 25 MW.

Next, it is necessary to examine whether the 8th respondent, thereafter, *increased* the power generation capacity of its thermal power station to over 25 MW *at any time during the operation* of the power station.

In paragraphs [12] to [14] of his petition, the petitioner makes out that, in or around the year 2010 or shortly thereafter, the 8th respondent increased its power generation capacity to a level above 25 MW without the submission and consideration of an IEER or EIAR. In reply, the CEA and the CEB take up the position that the 8th respondent's thermal power station has not, at any stage, had a power generation capacity exceeding 25 MW. The 8th respondent has denied the averments in paragraphs [12] and [14] of the petition and, thereby, denied that the power generation capacity exceeded 25 megawatts. However, the 8th respondent has, somewhat curiously, refrained from stating the power generation capacity. The 8th respondent's silence on this relevant issue is telling and suggests a reluctance to reveal the power generation capacity of its own thermal power station. The BOI has remained entirely silent on this issue.

The only documents produced by the petitioner in support of his allegation that the power generation capacity of the 8th respondent's thermal power station was increased by 24 MW in 2010, are the letter dated 01st November 2010 sent by the CEB to the CEA marked "P6" and the letter dated 30th November 2011 written by the CEA marked "P7". In "P6", the CEB refers to a proposal *"to install 3 or 4 Diesel Engine Power Plant having a cumulative capacity of 24MW of power at Chunnakam in the Jaffna Peninsula."* Similarly, in "P7", the CEA refers to *"INITIAL ENVIRONMENTAL EXAMINATION - PROPOSED 24 MW DIESEL POWER PLANT PROJECT - CHUNNAKAM. JAFFNA"*.

The CEB and CEA have categorically stated that these two letters refer to the CEB's project to set up its *"Uthuru Janani"* power plant in Chunnakam, which generates 24 MW. A perusal of "P6" and "P7" confirm the truth of this statement. Thus, the petitioner's contention that the letters marked "P6" and "P7" prove that 8th respondent increased its capacity by 24 megawatts in 2010, has to be firmly rejected. The petitioner's references to "P6" and "P7" are misleading. The resulting questions of whether this misrepresentation was material and deliberate will be considered later.

However, the matter does not end there. The aforesaid amendment dated 20th December 2007 marked "X2" to the Power Purchase Agreement dated 23rd March 2007 between the CEB and the 8th respondent marked "X1" envisages that the 8th respondent would subsequently increase its guaranteed power generation capacity to 30 MW. Thereafter, the letter dated 16th January 2008 from the BOI to the 8th respondent company which has been annexed to the documents marked "8R3" by the 8th respondent, bears the heading *"DUTY FREE IMPORT - 30MW POWER PROJECT-CHUNNAKAM"* and states *"We wish to inform you that the BOI has granted approval to*

your company to import Partial shipment of Diesel Power Plant for Thermal Power Plant at Jaffna as indicated… on duty free basis…"

This material shows that, although the project initially proposed by the 8th respondent was to construct a thermal power station with a power generating capacity of 15 MW, there was a plan to subsequently increase the power generation capacity to 30 MW at some later point in time after the thermal power station was constructed. The material before us also suggests that this plan to subsequently increase the power generation capacity to 30 MW [or more] was implemented at some time prior to the third quarter of 2012.

In this connection, the investigation report prepared by the ITI for submission to the BOI and marked "10R7" states that the 8th respondent's thermal power station was inspected on 23rd and 24th October 2012 and that, at the time, there were *"…six HFO* [heavy fuel oil] *driven diesel generators of 6MW capacity each"* and that the *"…plant is in continuous operation with contract agreement to generate 30MW electricity".* Further, both the *"INVESTIGATION REPORT ON OIL CONTAMINATION OF GROUND WATER AT CHUNNAKAM AREA, JAFFNA"* dated 17th November 2014 compiled by the Deputy Director General - Environmental Pollution Control of the CEA and marked "2R9" and the report prepared subsequent to an inspection conducted on 25th February 2015 by the CEA and marked "2R14" state that the 8th respondent's thermal power station had a power generation capacity of 30MW. The report dated 24th July 2015 also prepared by the ITI marked "8R5" refers to the 8th respondent's thermal power station having a power generation capacity of 36 MW.

The fact that the power generation capacity of the 8th respondent's thermal power station was subsequently increased is put beyond doubt by the letter dated 15th October 2013 sent by the CEB to the 8th respondent and marked "X3". This letter refers to the 8th respondent having submitted a *"commissioning test report"* confirming the *"commissioning"* of a thermal power station on 30th September 2013 with a *"Maximum Plant Capacity recorded during the test"* of 27 MW on 30th September 2013. The thermal power station referred to in the letter can only be the 8th respondent's thermal power station which is the subject matter of this application. In this letter, the CEB has also referred to the 8th respondent's letter dated 07th October 2013 by which the 8th respondent had *"confirmed that the plant was commissioned at 27 MW"*.

Thus, it has been established that the 8th respondent's thermal power station had acquired a power generation capacity of at least 27 MW by 30th September 2013, at the latest. This, perhaps, accounts for the 8th respondent's telling silence on the power generation capacity of its own thermal power station, which I referred to earlier.

Learned Senior State Counsel has, very correctly and in the best traditions of the Attorney General's Department, furnished the aforesaid amendment marked "X2' and letter marked "X3" to Court and, in written submissions, has acknowledged that, at least from 30th September 2013 onwards, the 8th respondent's thermal power station had a power generation capacity which exceeded 25 MW.

Thus, the material placed before us establishes that: (i) at the time the 8th respondent's project to construct a thermal power station commenced, it envisaged having a power generation capacity under 25 MW and, therefore, did not fall within the category of a *"prescribed project"* which required the submission and consideration of an IIEER or EIAR for the grant of approval under Part IVC of the Act; (ii) however, subsequently, additional power generating capacity has been introduced which endowed the 8th respondent's thermal power station with a power generating capacity far in excess of 25 MW.

As set out earlier, by operation of Item (9) of the Order dated 18th June 1993 marked "2R1" the work done by the 8th respondent to effect that said *addition* of power generation capacity [at some time prior to 30th September 2013] constituted a *"prescribed project"* which required the submission and consideration of an IEER or EIAR and approval for implementation under and in terms of the procedure set out in Part IV C of the Act. Further, Clause 17 of the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 stipulates that a project proponent is required to inform the project approving agency of any *"alteration"* to a *"prescribed project"* in respect of which approval for implementation has been obtain under Part IV C of the Act and states that the project proponent is required to obtain *"fresh approval"* in respect of that *"alteration"* after submitting a *"supplemental report"* in respect of the proposed *"alteration"* to the *"prescribed project"*.

Thus, it is crystal clear that the 8th respondent was required to obtain approval from the CEA or BOI under Part IV C of the Act for the implementation of the project to add power generation to the 8th respondent's thermal power station As observed earlier, this process required the CEA or the BOI to obtain and consider an IEER or EIAR and, in the case of an EIAR afford the public an opportunity to submit their comments on the proposed addition of power generation capacity and, where appropriate, be heard. The CEA or BOI had to go through this process before deciding whether to grant or refuse approval to implement the proposed *addition* of power generation capacity.

However, it is common ground that the 8th respondent has not sought approval under Part IVC of the Act. It is also common ground that the 8th respondent has not submitted an IEER or EIAR to the CEA or the BOI at any stage and the CEA and BOI

acknowledge that they have not, at any stage, required the 8th respondent to submit an IEER or EIAR.

Instead, it is seen that the 8th respondent has made an *addition* to the power generating capacity of its thermal power station to bring the total power generating capacity to a level in excess of 25 MW *without* applying for approval under Part IVC of the Act. It is evident that the CEA and the BOI have taken no action in this regard despite the fact that the said *addition* of power generating capacity constituted a *"prescribed project"* which required approval under Part IV C of the Act including the obtaining and considering an IEER or an EIAR.

This constitutes a violation of the provisions of Part IV C of the Act and non-compliance with the procedure set out in the `National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993' and a failure on the part of the CEA and/or the BOI to fulfil their statutory and regulatory duties with regard to the consideration and approval or refusal of a *"prescribed project"* including obtaining and considering an IEER or an EIAR.

The question of whether this failure on the part of the CEA and/or BOI violated the fundamental rights guaranteed by Article 12 (1) of the Constitution to the residents of the Chunnakam area and the petitioner will be considered later.

Learned Senior State Counsel has submitted that, due to conditions prevailing in the Jaffna peninsula at the time the project to add power generation capacity was implemented, it was not feasible to go through the procedure stipulated in Part IV C of the Act. Learned Senior State Counsel also submits that the stage of conducting an IEER or EIAR has long passed and that it was not feasible to conduct an IEER or an EIAR at this stage. The merits of these arguments will be considered later.

Whether the 8th respondent was prohibited, by law, from operating its thermal power station without the authority of an EPL and, if so, whether the 1st to 7th respondents [or any of them] have failed to perform their statutory and regulatory duties in that regard ?

Section 23A (2) in Part IV A of the Act prohibits any person from carrying on a *"prescribed activity"* except under the authority of an EPL.

Item 73 in Part A of the aforesaid Order dated 14th January 2008 setting out a revised list of *"prescribed activities"* for which an EPL is required under section 23A of the Act, declares that "*Electrical power generating utilities excluding standby generators and hydro or solar or wind power generation"* are a `*prescribed activity*'.".

It is common ground that the 8th respondent had constructed and was operating a thermal power station. It hardly needs to be said that a thermal power station is an *"electrical power generating utility"* falling within the description set out in the aforesaid Item 73.

Thus, it follows that the 8th respondent was prohibited from carrying on the operation of its thermal power station unless the 8th respondent had obtained an EPL which authorised its operation.

In this regard, it should be mentioned that section 23A (2) in Part IV A of the Act envisages that an EPL under the provisions of the Act [such as the EPL which the 8th respondent was required to obtain] is to be issued by the CEA. However, since the 8th respondent is a *"licensed enterprise"* within the meaning of section 5 read with section 20A and Schedule D of the Board of Investment of Sri Lanka Law No. 4 of 1978, as amended, the BOI is also empowered to issue an EPL to the 8th respondent with the concurrence of the CEA.

The CEA and the BOI acknowledge that the 8th respondent was required to obtain an EPL to carry on the operation of its thermal power station and, as mentioned earlier, have listed the EPLs issued to the 8th respondent.

For purposes of clarity, the EPLs issued to the 8th respondent and the periods of validity of these EPLs are set out below in the form of a table:

EPL	Period of Validity
Referred to in "2R16" [issued by the CEA]	20th May 2010 to 19th May 2011.
"10R5" [issued by the BOI]	15th September 2011 to 14th September 2012.
"10R10" [issued by the BOI]	17th April 2013 to 16th April 2014
"P23" [issued by the BOI]	30th September 2014 to 29th September 2015

It is now necessary to examine at which point of time the 8th respondent was required to obtain an EPL. In this connection Section 23A (2) of the Act stipulates that *"No person shall carry on any prescribed activity except under the authority of a license…"* [*ie:* an EPL] and *"in accordance with such standards and other criteria as may be prescribed under this Act."* [*ie:* National Environmental Act]. Similarly, clause 2 in Part I of the National Environmental (Protection and Quality) Regulations No. 1 of 2008 prohibits any person from carrying on a prescribed activity except under the authority of an EPL. Thus, it appears that section 23A of the Act read with clause 2 of the aforesaid

Regulations envisages that an EPL must be obtained *before* the commencement of a *"prescribed activity".*

The requirement that an EPL must be obtained *before* the commencement of a *"prescribed activity"* is put beyond any doubt by clause 14 of the aforesaid regulations which states *"Any person who operates a prescribed activity shall obtain a license from the Authority prior to the commencement of such activity."* The requirement that an EPL must be obtained *before* the commencement of a *"prescribed activity"* is also reflected in clause 5 (1) of these regulations which specifies that an application for an EPL must be submitted at least thirty days prior to the commencement of a *"prescribed activity"*.

Thus, the statutory and regulatory requirement was that the 8th respondent had to obtain an EPL from the CEA [or the BOI] *before* the 8th respondent commenced *"carrying on"* the activity of its thermal power station - *ie: before* the 8th respondent commenced operating its thermal power station and generating electrical power.

In this regard, the letter dated 20th May 2010 written by the CEA to the 8th Respondent and marked "2R16" reveals that the 8th Respondent applied to the CEA on 12th October 2009 for the issue of an EPL. The Inspection Report marked "2R2" shows that there were 35 employees at the thermal power station on 27th October 2009. The observations made in "2R2" by the inspecting officers note that *"Waste water/Effluent is black in colour: waste water is not treated: discharged in to an open land"; "Air emission: 5th chimney is not functioning properly"*; *"Noise and vibration - High"*. Thereafter, although the format of the inspection report marked "2R2" provided for the inspecting officers to state whether they recommended that an EPL be issued or refused and to make their comments with regard to that recommendation, the inspecting officers have not made any recommendation or comments in that regard on "2R2".

The fact that the 8th respondent had 35 employees on site at Chunnakam on 27th October 2009 and the other contents of the inspection report including the aforesaid observations suggests that the thermal power station was in operating condition by 27th October 2009. Accordingly, it can be reasonably assumed that the 8th respondent was ready to commence commercially operating its thermal power station on or soon after 27th October 2009.

In these circumstances, the CEA had to reach a decision as to whether the 8th respondent's application should be allowed and an EPL be issued [subject to the standard conditions or subject to such specific or special conditions as the CEA may decide] or whether the application should be refused and an EPL denied. When doing so, the CEA had to act on the basis of clause 7 of the aforesaid National Environmental (Protection and Quality) Regulations No. 1 of 2008 which stipulate that an EPL should

be issued only if the CEA was satisfied that the 8th respondent will not contravene the provisions of the Act and any regulations made thereunder; that no irreversible damage or hazard to the environment or any person or any nuisance will result from the operations of the 8th respondent and that the 8th respondent has taken adequate steps for the protection of the environment in accordance with the requirements of the law.

The CEA has stated that, having taken the steps required under the law to satisfy itself that the 8th respondent was entitled to be issued an EPL, it issued an EPL to the 8th respondent for the period 20th May 2010 to 19th May 2011 and forwarded the EPL to the 8th respondent by the letter marked "2R16". Although a copy of this EPL has not been produced, I accept the statement by the Chairman of the CEA that this EPL was issued, but that the copy has been misplaced. Regrettably, the 8th respondent has not seen fit to produce a copy of this EPL despite the fact that this EPL would have been in its possession.

In any event, it has been established that, from 20th May 2010 onwards, the 8th respondent has operated under the authority of an EPL issued by the CEA.

However, it is seen that, although the 8th respondent applied for the EPL on 12th October 2009 and the 8th respondent's thermal Power Plant was inspected by the CEA on 27th October 2009, the EPL was issued almost seven months later, on 20th May 2010. The CEA has not stated what action it took with regard to the 8th respondent's application for an EPL during that period. None of the other respondents have shed any light on what transpired during this period of more than half a year.

Therefore, the inescapable conclusion is that the 8th respondent did not have any authority to commence operating its thermal power station until the EPL was granted on 20th May 2010.

Since the petitioner has alleged that the 8th respondent operated its thermal power station without the authority of an EPL, it is necessary to ascertain whether the 8th respondent commenced operating its thermal power station only after obtaining the EPL on 20th May 2010 or whether the 8th respondent operated its thermal power station *without* the authority of an EPL prior to the issue of the EPL on 20th May 2010.

In this regard, the 8th respondent, the CEA [which had a Provincial Office - Northern Province in Jaffna as seen from the documents before us], the CEB [on whose land the 8th respondent is sited and who purchased electrical power from the 8th respondent] and the BOI [who approved the 8th respondent's project as a *"licensed enterprise"* approved by the BOI] would have also known when the 8th respondent commenced operating its thermal power station. But, the CEA, the CEB and the BOI have been silent on this issue. In fact, a reading of the affidavits filed on behalf of these three respondents could even leave one with the impression that the 8th respondent commenced operating its

thermal power station at or about the time the EPL was issued on 20th May 2010. As for the 8th respondent, its affidavit only states that the 8th respondent *"commissioned the power generating plant in the year 2009 and the Environmental Protection License has been granted subsequently by the issuing authority for the operation of power plant."*. The words chosen by the 8th respondent suggests that, at some time in 2009, the thermal power station was commissioned and was ready to commence operating but that commercial operations began subsequently with the issue of the EPL. Having said that, the 8th respondent has refrained from stating the date on which its thermal power station actually commenced its commercial operations.

Despite this coyness on the part of the respondents with regard to stating the date on which the 8th respondent's thermal power station commenced commercial operations, that date can be found in the letter dated 24th February 2015 sent by the CEB to the CEA and marked "2R11"/"3R1" which contains a statement that, *"Northern Power Company (Pvt) Ltd (Company) has entered into Power Purchase Agreement (PPA) with Ceylon Electricity Board (CEB) and has been supplying electrical energy to CEB from their power plant at Chunnakam, Jaffna with effect from December 10, 2009."*. There is no reason to doubt the CEB's categorical statement in this letter that the 8th respondent's thermal power station has been operating on a commercial basis from 10th December 2009 onwards.

There is also no reason to think that, once the 8th respondent commenced commercial operations on 10th December 2009, it would have stopped those commercial operations unless it had been ordered do so by the CEA or another duly authorised authority. There is no suggestion that such an order was made.

Thus, it follows that the 8th respondent operated its thermal power station, from 10th December 2009 onwards for more than five months until the EPL was issued on 20th May 2010. The 8th respondent did so *without* the authority of an EPL. This was in violation of the express prohibition stipulated in section 23A of the Act. The CEA has not done anything to prevent this violation of the law.

To move on, the validity of the aforesaid EPL issued by the CEA ended on 19th May 2011. Clause 8 of the National Environmental (Protection and Quality) Regulations No. 1 of 2008 required the 8th respondent to submit an application for renewal of the EPL at least three months before 19th May 2011. However, as revealed in the letter dated 10th June 2011 sent by the CEA to the BOI and marked "10R3", the 8th respondent had submitted a renewal application to the CEA on 09th May 2011, which is only ten days before the EPL expired. The CEA has not stated that it took any action in respect of this lapse on the part of the 8th respondent.

Instead, the CEA has sent the letter dated 10th June 2011 marked "10R3" to the BOI stating that the 8th respondent is a *"licensed enterprise"* in terms of the BOI Law and, therefore, the renewal of the EPL should be handled by the BOI. The BOI has then considered the 8th respondent's application for renewal of the EPL and, as mentioned in the letter dated 07th September 2011 marked "10R4" sent by the CEA to the BOI, the BOI and the CEA carried out a joint inspection of the 8th respondent's thermal power station before the CEA gave its concurrence for the renewal of the EPL. The BOI has then issued the EPL marked "10R5" on 15th September 2011, as set out in the aforesaid table.

Thus, during the period from 20th May 2011 to 15th September 2011, the 8th respondent did not hold an EPL.

There is no suggestion that the 8th respondent suspended or ceased operating its thermal power station during this period when it did not hold the authority of an EPL. In fact, there is no suggestion by any of the parties that, after the 8th respondent commenced operating its thermal power station on a commercial basis on 10th December 2009, it suspended or stopped commercial operations at any point in time until the Magistrate's Court of Mallakam issued the Order dated 27th January 2015 marked "8R15/8R15(a)" suspending the operation of the thermal power station. The 8th respondent would have been receiving a lucrative income from the sale of electrical power to the CEB and it is unlikely that the 8th respondent would stop operating its thermal power station unless it was directed to do so by the CEA or another lawfully authorised entity or due to a technical breakdown or as a result of the CEB ceasing to purchase electrical power from the 8th respondent. There is no suggestion of such an occurrence.

Therefore, it can be reasonably concluded that the 8th respondent operated its thermal power station during this period of more than three months and three weeks from 20th May 2011 to 14th September 2011 without the authority of an EPL. This was in violation of the express prohibition stipulated in section 23A of the Act. The CEA and the BOI have not done anything to prevent this violation of the law.

During the validity of the aforesaid EPL marked "10R5", the BOI received a letter dated 28th December 2011 marked "10R6" sent by the CEA stating that the Chairman of the Valikamam South Pradheshiya Sabha and two community organizations in the Chunnakam area had made complaints regarding *"noise, air emission and discharge of wastewater containing oil causing pollution to the surrounding environment."* from the 8th respondent's thermal power station. There is no material before us which suggests that the CEA or the BOI took action, during the period of validity of the EPL marked "10R5" which ended on 14th September 2012, to look into these complaints and ascertain whether the 8th respondent was causing pollution.

Instead, the BOI has, on 19th October 2012, requested the ITI to inspect the 8th respondent's thermal power station and its operating practices and submit a report on whether oil waste generated by the thermal power station was contaminating wells in the areas and, if so, what measures should be taken to rectify that problem. The ITI carried out an inspection on 23rd and 24th October 2012 and submitted the report marked "10R7". The report recommended several corrective measures steps which should be taken by the 8th respondent to prevent the discharge of oil contaminated wastewater onto the surrounding environs. The BOI has sent the letter dated 31st October 2012 marked "10R8" to the 8th respondent instructing the 8th respondent to implement the recommendations in "10R7". Subsequently, the 8th respondent has sent the letter dated 21st November 2012 marked "10R8(1)" to the BOI stating that it had implemented these recommendations. Thereafter, as set out in the letter dated 27th March 2013 marked "10R9" sent by the CEA to the BOI, a joint inspection of the 8th respondent's thermal power station was carried out by the CEA and the BOI and the CEA gave its concurrence for the renewal of the EPL. The BOI has then issued the EPL marked "10R10" on 17th April 2013, as set out in the aforesaid table.

Thus, during the period from 15th September 2012 to 17th April 2013, the 8th respondent did not hold an EPL. It can be reasonably concluded that the 8th respondent operated its thermal power station during this period of seven months. This too was in violation of the express prohibition stipulated in section 23A of the Act. The BOI and the CEA have not done anything to prevent this violation of the law.

The aforesaid EPL marked "10R10" was valid until 16th April 2014. The letter sent by the BOI to the 8th respondent dated 06th June 2014 and marked "10R11" reveals that the 8th respondent submitted an application for the renewal of the EPL marked "10R10" only on 07th April 2014 - *ie:* nine days before the expiry of that EPL - despite the requirement that an application for renewal must be submitted at least three months before the expiry of the EPL which is sought to be renewed. Here too, there is no indication that the BOI took any action in respect of this lapse on the part of the 8th respondent.

In any event, upon receipt of the application for renewal of the EPL, the BOI has inspected the 8th respondent's thermal power station and sent a letter dated 06th June 2014 marked "10R11" directing the 8th respondent to obtain an analytical report of the stack emissions produced at the thermal power station - *ie:* a report on the gases and solids emitted from the smoke stacks [chimneys] at the thermal power station. The BOI states that the 8th respondent submitted the report but the BOI has not produced such a report. Instead, the BOI has produced report dated 13th August 2014 marked "10R12" which is a test report of a sample of *"Treated wastewater"*.

Thereafter, as stated in the letter dated 30th September 2014 marked "10R13", the CEA has given its concurrence for the renewal of the EPL subject to the condition that the 8th

respondent must obtain a Scheduled Waste Management License ["SWML"] under and in terms of the provisions of the Act.

The BOI has then issued the EPL marked "P23" on 30th September 2014, as set out in the aforesaid table. The present application was filed during the period of validity of this EPL marked "P23".

Thus, during the period from 16th April 2014 to 30th September 2014, the 8th respondent did not hold an EPL. Here too, it can be reasonably concluded that the 8th respondent operated its thermal power station during this period of more than five months without the authority of an EPL. This was again in violation of the prohibition stipulated in section 23A of the Act. The BOI and the CEA have not done anything to prevent this violation of the law.

Subsequently, the CEA has issued, to the 8th respondent, the SWML dated 10th November 2014 marked "10R15". Item 18 of this SWML states that this license is issued in respect of the generation of the following types of Scheduled Waste at the 8th respondent's thermal power station:

(i) Spent oil and grease used for lubricating industrial machines - Item NO11 of the *"List of Scheduled Wastes"* specified in Schedule VIII of the aforesaid National Environmental (Protection and Quality) Regulations No. 1 of 2008;

(ii) Sludge from oil storage tank - Item NO16 of the *"List of Scheduled Wastes"* specified in Schedule VIII of the aforesaid regulations.

As set out above, the material before us clearly establishes that the 8th respondent has operated its thermal power station for several lengthy periods of time from 10th December 2009 onwards, without the authority of an EPL and that the CEA and the BOI have done nothing to prevent this violation of the law. It has also been established that, although the 8th respondent commenced commercial operations on 10th December 2009, the CEA and BOI required the 8th respondent to obtain an SWML only on 30th September 2014 - *ie:* nearly five years later.

Have wastewater and petroleum waste products discharged from the 8th respondent's thermal power station caused oil contamination and pollution of groundwater and soil in the area ?

In order to decide this issue, it is necessary to first examine whether, in fact, groundwater, well water and soil in the area surrounding the 8th respondent's thermal power station has been polluted by oil contamination. In the event it is established that groundwater, well water and soil in the area has been polluted, it will be necessary to then ascertain whether the operations of the 8th respondent's thermal power station

have caused or contributed towards that pollution. Deciding these questions will require careful consideration of the many reports which have been produced by the parties and a large number of documents. That will, unavoidably, be a lengthy process. It is best approached by examining the material before us in a chronological sequence.

To turn to the first question of whether groundwater, well water and soil in the area surrounding the 8th respondent's thermal power station has been polluted by oil contamination.

It is apparent that, from 2008 onwards, residents of the Chunnakam area have complained of pollution in groundwater and soil in the area around the *"Chunnakam Power Station Complex"* [*ie:* the CEB's aforesaid land in Chunnakam within which four thermal power stations have operated - namely, the CEB's Chunnakam Power Station, Aggreko's thermal power station, the 8th respondent's thermal power station and CEB's *"Uthuru Janani"* thermal power station]. Thus, the report marked "8R7" prepared by the group named "Tamil Australian Professionals, Australia" states that the *"Chunnakam South Farmer's Organisation"* had sent a letter dated 21st October 2008 to the Government Agent of Jaffna raising concerns regarding pollution of soil and groundwater in the vicinity of the Chunnakam Power Station Complex. Further, the letter dated 28th December 2011 marked "10R6" sent by the CEA to the BOI shows that three community organisations in the Chunnakam area had complained, *inter alia*, regarding the discharge of oil contaminated wastewater polluting the aforesaid area in 2011.

I am inclined to give weight to these complaints which have been made by residents of the area who have first-hand and day-to-day knowledge and will be aware of signs of noticeable pollution in groundwater and soil in the area in which they live, farm and work. In my view, these complaints indicate that groundwater and soil in the area surrounding the Chunnakam Power Station Complex bore traces of pollution from 2008 onwards.

Next, in the year 2012, the letter dated 09th October 2012 marked "P10" written by the NWSDB to the CEB states that the well water in the NWSDB's intake well in the Chunnakam area has been contaminated with petroleum waste and that the NWSDB has been compelled to stop distributing pipe borne water from that intake well. The NWSDB has also stated that tests done by the NWSDB have established oil contamination of well water in 2012. Similar complaints are made by the NWSDB in its letter dated 12th October 2012 marked "P11" and its letter dated 11th October 2012 [on the reverse of "P11"], both of which were addressed to the CEA.

The contents of the aforesaid letters also have to be given weight since the NSWDB would have had first-hand knowledge of the difficulties encountered when it discovered that its intake well in the Chunnakam area was contaminated. The NWSDB would also

have first-hand knowledge of the results of the tests it had done. Further, the report marked “2R9” submitted by the CEA to the Mallakam Magistrate’s Court acknowledges that an analytical report dated 29th July 2012 prepared by the NWSDB showed that well water in the Chunnakam area had been contaminated with oil and did not meet the minimum specified standards for potable water specified by the Sri Lanka Standards Institute in SLS 614:1983.

To move on to the years 2013 and 2014, the NWSDB’s report marked “P21” is based on a study during which officers of the NWSDB’s Regional Laboratory, Jaffna analysed samples of well water collected from 150 wells in the Chunnakam area to ascertain the Oil and Grease content in those samples. This report states that tests done during the period from November 2013 to August 2014 established that well water in 109 [73%] of the 150 wells which were tested had Oil and Grease content which was higher than the then maximum permissible level for potable water of 1 mg/Litre specified in SLS 614:1983. It is apparent that the NWSDB’s Regional Laboratory, Jaffna has applied SLS 614:1983 which was in force till or about 28th August 2013. Since that date, the revised SLS 614:2013 has been in force. The said revised SLS 614:2013 was in force at the time this application was filed and remains in force to this day. It specifies that the maximum permissible level of Oil and Grease content in potable water is only 0.2 mg/Litre.

The NWSDB’s report marked “P21” concludes *“From the above facts, we can conclude that the oil concentration of the water is high in the surrounding of the Chunnakam power station and spread out from this point. It is already spread up to 1500 surrounding and the contaminants moved towards the north.”*.

Thereafter, the Water Quality Reports issued by the Regional Laboratory, Jaffna of the NWSDB and marked “P13” to “P20” record that the Oil and Grease content in samples of well water drawn on 31st July 2014 from fifteen wells situated in the Chunnakam area ranged from 1.3 mg/Litre to 8.3 mg/Litre.

Further, CEA’s report marked “2R9” states that the Oil and Grease content in samples of well water obtained a few months later on 07th November 2014 from the six wells in the Chunnakam area ranged from 2 mg/Litre to 7 mg/Litre.

To proceed to the year 2015, the CEA’s report marked “2R14” states that 20 samples of well water collected on 25th February 2015 had lower Oil and Grease Content that samples of water that had been analysed in previous years and *“indicates decreasing trend of oil in **ground water**.”*.

Another report prepared in 2015 is the report marked “8R5” dated 24th July 2015 which has been prepared by the ITI at the request of the CEB. For the purposes of preparing the report marked “8R5”, the ITI has analysed samples of water obtained on 23rd and

24th March 2015 from 82 wells situated within a two kilometre radius of the 8th respondent's thermal power station. Further, the ITI had analysed 07 soil samples from sites which had signs of oil contamination and were within or close to the 8th respondent's thermal power station and 01 control sample from a site which had no signs of oil contamination and was located about 01 kilometre south west of the 8th respondent's thermal power station.

In the report marked "8R5", the ITI has stated that Oil and Grease content exceeded a level of 0.2 mg/Litre in 44 of the 82 wells [54%] from which samples of water were extracted. The highest level of Oil and Grease content found in a sample of well water tested by the ITI for the purposes preparing the report marked "8R5" was 6.2 mg/Litre.

The standard of 0.2 mg/Litre has been correctly adopted by the ITI since that was the applicable standard at the time of preparing "8R5" [and at present] as specified by the Sri Lanka Standards Institute in SLS 614:2013.

It is relevant to note the ITI found that 51 of the 82 wells [62%] that were tested had not been maintained by the residents and were dirty due to the presence of garbage dumps, stagnant water and mud puddles around the well and that there had been debris - such as plastic bottles/containers, polythene bags and empty pesticide bottles in 46 out of the 82 wells.

The results of the analyses of soil samples revealed high levels of Oil and Grease contamination of soil [at varying depths from the surface] in all 07 sites which were within or close to the Chunnakam Power Station Complex and no oil contamination in the control sample extracted from the site which was about 01 kilometre away.

Yet another report which emerged in 2015 is the report dated 23rd June 2015 marked "8R6" which has been prepared by the Norwegian Geotechnical Institute ["NGI"] at the request of the NBRO. However, a perusal of "8R6" makes it clear that the officers of the NGI had obtained samples of water from only seven wells and then assessed these samples based solely on visual and olfactory observations on the colour, shine, viscosity and smell of the water. No analysis was done. No samples of soil were examined.

Another report prepared in 2015 is the report dated June 2015 and marked "8R7". It has been authored by a group named "Tamil Australian Professionals". It has been prepared after analysing samples of well water collected in March 2015 from 12 wells located close to the Chunnakam Power Station Complex. "8R7" states that, in order to ascertain the content of only petroleum-based contaminants, the analyses of samples of well water obtained for the purpose of "8R7" was done using sophisticated techniques [gas chromatography, mass spectrometry, partition-gravimetric methods and hexane

extractable gravimetric method] so as to measure the content of specific petroleum-based products only.

The report marked “8R7” states that the analyses done for purposes of preparing “8R7” did not detect *“traces of petroleum products”* in any of the twelve samples of well water which were analysed for the purposes of the report. The report also states that *“The results of this analysis indicate that O&G (HEM)* [“Oil and Grease”] *for all twelve water samples were below the limits of detection.”* It appears that “8R7” has set the *“limit of detection”* at 1mg/Litre - *vide:* p.23 of “8R7”. This indicates that the authors of “8R7” have disregarded Oil and Grease content below 1 mg/Litre when they made the aforesaid observation. However, as stated earlier, from 28th August 2013, the maximum permissible Oil and Grease content in potable water specified by the Sri Lanka Standards Institute is only 0.2 mg/Litre. Therefore, the observation in “8R7” that no Oil and Grease content was detected in w-ell water has to be discounted to the extent that the applicable standard for potable water specified by the Sri Lanka Standards Institute has not been applied in “8R7”.

In any event, the report marked “8R7” goes on to state that *“Absence of evidence for the presence of petroleum hydrocarbons in water samples during the study cannot be used as evidence for the absence of petroleum pollution of the Chunnakam aquifer. Although the results show good insight into the potential presence of petroleum hydrocarbons, the authors stress that twelve samples cannot represent the vast and diverse Chunnakam aquifer. Undoubtedly, oil traces and distinct smells were reported from a number of drinking and irrigation wells in and around Chunnakam. It is quite likely that the hydrocarbon plume moved from CPSC* [the Chunnakam Power Station Complex referred to earlier] *after the monsoon rains, but hydrocarbon levels reduced over time due to physical, chemical and microbial degradation in soil and water matrices.”*. “8R7” also states that *“All observations and reports confirmed the presence of oil traces in the wells in recent years without substantive evidence of the nature of the oil.”*

The last report prepared in 2015 is a report dated September 2015 prepared by an `Experts Committee’ appointed by the Northern Provincial Council.

The report states that, during the period from 09th February 2015 to 24th March 2015, samples of well water were obtained from 93 wells located within a radius of 2 kilometres of the Chunnakam Power Station Complex. In addition, for control purposes, samples of well water were obtained from 09 wells located in other areas outside the Chunnakam aquifer.

These samples of well water had been analysed to ascertain FOG content [Fat, Oil and Grease] using gravimetric methods and to ascertain BTEX content [Benzene, Toluene, Ethyl Benzene and Xylene] using Gas Chromatography.

The report states that well water in 16% of the wells that were tested had FOG content above 2 mg/Litre. However, this report does not state how many of the wells that were tested had FOG Content above 0.2 mg/Litre which is the standard for potable water specified by the Sri Lanka Standards Institute. Since the reports states the well water in as much as 16% of the wells had FOG content as high as 2 mg/Litre, it can be reasonably presumed that well water in much more than 16% of the wells would have had FOG Content above 0.2 mg/Litre, which is the maximum permitted Oil and Grease content in potable water.

The report states that none of the wells that were tested had more than a mere trace of BTEX content.

The report by the `Experts Committee' states that the findings of high levels of Oil and Grease content in well water reported in NWSDB's report marked "P21" are inaccurate due to an arithmetical error in the calculation of test results. The `Experts Committee' says the test results in "P21" should have been divided by a divisor of 300, presumably because 300 ml samples of well water were tested to determine Oil and Grease content. The authors of the report marked "8R7" also state *"there is an apparent error"* in the results reported in "P21". By a motion dated 31st March 2017, the 8th respondent has filed a copy of a letter dated 28th November 2016 written by the NWSDB which states that the test results in "P21" were, in fact, correct since a divisor of 300 had been used though that fact had inadvertently been not been stated in "P21". The NWSDB has categorically stated *"….. we confirm that the value mentioned in the report are correct."*.

The report marked "8R7" authored by the group named "Tamil Australian Professionals" also questions the validity of the process of testing for Oil and Grease content used in the NWSDB's report marked "P21" and other reports prepared by the NWSDB which had found high levels of Oil and Grease content in well water. "8R7" comments that the analyses done by the NWSDB for those reports included a range of non-petroleum based oils [such as natural oils and vegetable oils] in addition to petroleum based hydrocarbons when Oil and Grease content was reported. In its letter dated 28th November 2016, the NWSDB has acknowledged that the tests done by NWSDB had only checked the Oil and Grease content of the samples of well water and had not checked specifically for the content of petroleum-based hydrocarbon contaminants such a fuel oil and lubrication to the exclusion of non-petroleum based oils

However, it appears to me that a common sense approach should be taken when looking at this question and take into account the facts that: (i) it is acknowledged by the

authors of the report marked “8R7”, the `Experts Committee’ and the NWSDB that the tests done by NWSDB to ascertain Oil and Grease content of well water would have detected the presence of petroleum based hydrocarbon contaminants such as fuel oil and lubricating oil as constituting part of that Oil and Grease content; (ii) the tests were carried out on samples of well water obtained from the general vicinity of the Chunnakam Power Station Complex in which thermal power stations have operated for a long period of time and are said to have discharged significant amounts of used oil and oil contaminated wastewater onto the surrounding environs; (iii) there is no material which suggests there were significant sources of non-petroleum based contaminants which could have added Oil and Grease content to groundwater in the Chunnakam area; and (iv) although the `Experts Committee’ have stated that samples of well water obtained from distant aquifers in Vadamaradchi, Thenmaradchi and Kayts have also recorded Oil and Grease content above the permitted levels, there is no suggestion that the Oil and Grease content in those samples approached the high levels recorded in well water in the general vicinity of the Chunnakam Power Station Complex.

It appears to me that, when these four factors are taken into account, the probability is that the Oil and Grease content detected in the samples of well water tested by the NWSDB had a significant percentage of petroleum-based hydrocarbon contaminants such as fuel oil and lubricating oil discharged from the several thermal power stations and seeping from the oil *kulam* within the Chunnakam Power Station Complex.

For the reasons set out above, I am not inclined to disregard the results recorded by the NWSDB in “P21” and other reports. In this connection, it is relevant to note that the results recorded by the NWSDB in “P21” and other reports during the period 2012 to 2014 are not dissimilar to the results recorded in tests done by the CEA in 2014 and by the ITI in 2015.

The most recent reports have been prepared in 2017. They are the NWSDB’s reports marked “11R1” and “11R2”. The report marked “11R1” states that, during the period from July 2016 to February 2017, the NWSDB tested samples of well water extracted from 160 wells located within a 4 mile radius of the aforesaid Chunnakam Power Station Complex and that well water in 35 [22%] of the 160 wells contained Oil and Grease content which was higher than 0.2 mg/Litre. The well water in 06 [4%] of these wells contained Oil and Grease content which was above 1 mg/L. Well water in the remaining 125 [78%] of these wells were not contaminated with Oil and Grease.

In “11R1”, the NWSDB has concluded that well water found in wells within a 1.3 kilometre radius of the aforesaid Chunnakam Power Station Complex is *“still under O&G* [Oil and Grease] *contamination and well water of the area is not suitable for drinking purposes as per SLS 614,2013.”*

In “11R1”, the NWSDB also concludes that the tests done by the NWSDB during the period from November 2013 up to February 2017 have *“showed a reduction of O&G concentrations in well water.”*.

The report marked “11R2” was prepared by a Research Committee appointed by the NWDSB and sets out, in detail, the information which has been summarized in “11R1”. The report marked “11R2” states *“It can be observed clearly that the contamination is presently localized to wells located near the CPS* [*ie:* the Chunnakam Power Station Complex] *and contaminated wells cannot be observed away from the power station. ….. the presence of O&G is within a distance of 1.3 km radius from centre point of CPS which is oriented in the Northern and Southern directions from the power plant and O&G is not present in areas beyond 1.3 km radius from the centre point of CPS.”*.

To conclude, the picture that emerges from these reports and documents is clear and establishes that groundwater in the area around the Chunnakam Power Station Complex has been contaminated with oil from 2008 onwards. Test reports establish that the level of contamination was significant in 2012, 2013 and up to 2014 and then has shown a trend of declining from 2015 onwards. However, oil contamination of groundwater was still significant in the vicinity of the Chunnakam Power Station Complex in 2016 and 2017.

To now turn to the second question of whether the operations of the 8th respondent’s thermal power station have caused or contributed towards that pollution.

To start with the years 2009 and 2010 - *ie:* prior to the 8th respondent’s thermal power station commencing commercial operations on 10th December 2009 and the following year - the inspection report marked “2R2” records that, on 27th October 2009, untreated black coloured wastewater and effluent was being discharged onto an *“open land”*. The CEA’s report marked “2R9” states that, at this time, the 8th respondent had not put in place *“adequate mitigatory measures for Pollution control”* and that oil contaminated water was being discharged onto an adjoining land. Similarly, the CEA’s later report marked “2R14” states that *“Northern Power Plant was established in 2009 during war period without adequate measures for pollution control such as oil separators or any type of treatment for oil contaminated waste water prior to discharge. They discharged contaminated water into another adjoining land belongs to CEB. It is observed as another `oil kulam’ situated very close vicinity (about 200m distance). Occasional diesel spillages and the disposal of oil contaminated rags and spent oil filters etc. accumulated at the back yard of Northern Power Plant which was disposed in the open space may also have contributed in some extent for the pollution caused. The inspections carried out on 2009-1-27 by the CEA confirmed this situation and upon instructions given, the rectification and mitigation measures were adopted.. As a result an oil-water separation*

system has been installed and subsequently the Environmental Protection License (EPL) has been issued by the Board of Investment (BOI) with the concurrence of the CEA (Since this is a BOI-approved project) in 2013 due to the conformity with the relevant wastewater discharge standards stipulated by the CEA. In 2014 the Hazardous Waste Management License (HWML) has also been issued to this power plant due to the fact that the handling of sludge generated by the treatment system was satisfactory.".

In the following year - *ie:* 2011 - the letter dated 28th December 2011 marked "10R6" establishes that that three community organisations in the Chunnakam area had complained *"regarding noise, air emission and discharge of wastewater containing oil to the surrounding environment."* caused by the 8th respondent's thermal power station.

To move to the year 2012, the letter dated 03rd September 2012 marked "P9" sent by the Medical Officer - Health of Uduvil to the 8th respondent states that the Medical Office visited the 8th respondent's thermal power station on 29th August 2012 following complaints made by persons living in its vicinity. The Medical Officer states he observed that *"There was no proper disposal system available to dispose the used oil (Scraps oil)"* and *"The Storing tanks of the used oil were leaking and oil was found in the earth."*. The Medical Officer goes on to say *"In this regard, I request you to renovate the storing tanks of the used oil and made a proper structure to dispose the waste and used oil without harming the environment as early as possible."*. Further, the letter marked "2R4" sent by the CEA to the BOI states that investigations by the CEA in 2012 had found that the 8th respondent's thermal power station was discharging untreated wastewater into the surrounding environs even in 2012. This observation made by the CEA in 2012 lends credence to the complaint made by the NWSDB in its aforesaid letter dated 09th October 2012 marked "P10" that the disposal of *"petroleum waste"* from 8th respondent's thermal power station had contaminated the NWSDB's intake well in Chunnakam.

The condition of the 8th respondent's thermal power station in 2012 is described in the report marked "10R7" prepared by the ITI after a team of officers from the ITI conducted an inspection on 23rd and 24th October 2012. The report states that it had been observed that oil leaked from all six generators and was collected in trenches. Although these trenches are not connected to the drain system, oil was seen in the storm water drains *"due to poor housekeeping practices"*. The report also highlights that wastewater generated by the maintenance and overhauling of the engines in the thermal power station was directed into an Oil Trap. The first compartment of the Oil Trap had accumulated a *"large volume"* of oil contaminated wastewater which flowed into a storm water drain and was discharged onto an adjacent land within the CEB's premises. The report states that this oil contaminated wastewater would be *"absorbed into the ground."*. The report states that oil sludge collected from the Oil Trap is collected and

stored in sludge storage tanks prior to sale to a third party. The report also states that some of the *"housekeeping practices"* at the 8th respondent's thermal power station required improvement and that in some instances the 8th respondent had followed *"bad practices"* with regard to the containment, collection and disposal of oil contaminated substances. The report recommended that improvements be made to the efficacy of the Oil Trap and that the 8th respondent's *"housekeeping practices"* be remedied. It was also recommended that the 8th respondent treat the wastewater *"to comply with relevant effluent discharge standard."*. The report also observes that there was no oil contamination in the well located within the 8th respondent's premises.

The report marked "8R6" prepared by the NGI also refers to the condition of the 8th respondent's thermal power station in 2012. This report states that officers of the NGI found that, until 2012, *"oil wastes"* generated by the 8th respondent's thermal power station had been *"directly released to the environment in the Northern part of the plant."*. The report states that satellite pictures taken during the period from 2009 to 2012 had shown "dark areas" - which appeared to be oil - on the land adjacent to the northern boundary of the 8th respondent's premises. The oil contamination of the site at that time is also recorded in two photographs which had been provided to the NGI. Even at the time of the inspection by officers of the NGI in 2015, traces of this oil contamination had been seen at the site. The officers of the NGI had also seen evidence of a drain system which led from the 8th respondent's thermal power station onto the land adjacent to the northern boundary of the 8th respondent's premises.

To move on to 2014, the report dated 17th October 2014 marked "2R6" prepared by a team of officers representing the CEA, the Ministry of Health, the NWSDB, the Pradeshiya Sabha and a representative of the public, records that, when these officers inspected the 8th respondent's thermal power station on 15th October 2014, there was an Oil Separator which was used to separate and collect oil mixed in wastewater generated when servicing the generator sets and other equipment. The collected oil was then stored in a Sludge Storage Tank. Oil which leaked from the generator sets and other equipment was directed into Oil Collection Pits and then pumped into the Sludge Storage Tank. The report marked "2R6" does not mention a defect or inadequacy in the aforesaid apparatus set up by the 8th respondent to collect and store waste oil produced in the course of the operations of its thermal power station. However, "2R6" states that storm water collected within the premises of the 8th respondent's thermal power station and was then discharged onto an oil contaminated open land, despite the 8th respondent having been previously instructed [on 29th November 2013] to refrain from this practice. Further, the report does not state the manner in which wastewater emitted from the Oil Separator was disposed of.

Finally, to consider the condition of the 8th respondent's thermal power station in 2015, the report dated 24th July 2015 marked "8R5" prepared by the ITI and submitted to the

CEB, is informative. This report observes that oil spills and discharges of oil contaminated wastewater and oil sludge can occur in one or more of the following four stages of the operation of an oil fired thermal power station: (i) in the course of the delivery of fuel oil/diesel and lubricating oils and their transfer to storage tanks; (ii) from leakage of fuel oil/diesel and lubricating oils from engines and other machinery during the operating processes of a thermal power station; (iii) as a result of the practices followed for the treatment and disposal of oil contaminated wastewater and oil sludge; and (iv) from accidents which result in spillages of fuel oil/diesel, lubricating oils, oil contaminated wastewater and oil sludge

With regard to stage (i) referred to above, the report marked "8R5" states that the Unloading Bay area [where fuel oil/diesel and lubricating oils are delivered] was not concreted and, further, there were no drains which could collect and contain any inadvertent oil spillages in the course of delivery and transfer of fuel oil/diesel and lubricating oil to storage area. The ITI has observed that, consequently, there was a high possibility of oil contamination of the surrounding areas, particularly during periods of rain and flows of storm water. In fact, the officers of ITI who conducted the audit had observed evidence of past oil spillages from the Unloading Bay. Next, the report states that the fuel oil/diesel and lubricating oils delivered to the 8th respondent's thermal power station were transferred to a *"Bulk Storage Tank Farm"* which had three fuel oil/diesel storage tanks and an oil sludge storage tank. All four tanks were in satisfactory condition. However, there were cracks in the concrete floor of the Bulk Storage Tank Farm [upon which these tanks were placed] and the wall around this area had cracks and holes. The ITI has observed that, consequently, there was a possibility of oil contamination of the surrounding areas, particularly during periods of rain and flows of storm water.

With regard to stage (ii) referred to above, the report states there was evidence of oil leaks/spillages in the area of the Fuel Treatment Unit. With regard to the Power Generation Unit, the six fuel oil/diesel powered engines were in satisfactory condition other than for some evidence of oil leaks/spillages in that area. With regard to the Workshop and Maintenance Bay, there was evidence of oil leaks/spillages in that area. The ITI has observed that there was a possibility of leaked/spilt oil in these three areas being washed out of the 8th respondent's premises, particularly during periods of rain and flows of storm water.

With regard to stage (iii) referred to above, the report marked "8R5" examined the manner in which the 8th respondent's thermal power station managed oil contaminated wastewater generated during the course of the operations of the bulk storage tank farm, fuel treatment processes, power generation processes and repairs and maintenance processes. The report states that, since 2012, oil contaminated wastewater generated from the bulk storage tank farm, fuel treatment processes and power generation

processes has been directed to three Gravity Oil Separators which separate the oil content from the wastewater. The oil content which is thereby separated, forms *"oil sludge"* which is then collected in Sludge Tanks. The wastewater is treated and is used for gardening purposes within the 8th respondent's premises. Since 2012, oil contaminated wastewater generated from the workshop and maintenance area has been directed to a separate Oil Trap which has four compartments and is designed to separate the oil content in the wastewater and discharge wastewater which does not contain oil. This wastewater is also used for gardening purposes within the 8th respondent's premises. The ITI has recommended that this Oil Trap [used for the workshop and maintenance area] be upgraded by adding a Gravity Oil Separator to enhance its efficacy. The audit reports that, since 2010, the 8th respondent has sold, to third parties, oil sludge collected at its thermal power station.

The officers of ITI had noted that, during periods of rain and flow of storm water, rain water flowing over the several operational areas in the 8th respondent's thermal power could bypass the aforesaid waste management systems and directly enter the storm water drains which were then discharged onto adjacent lands. The ITI has observed that, thereby, there is a high possibility that storm water flowing out of the 8th respondent's premises would be contaminated with oil and cause oil contamination of soil and groundwater in the surrounding areas.

With regard to stage (iv) referred to above, the report states that the 8th respondent did not make available documents which were maintained to record spillages of oil and waste.

The results of the analysis of soil samples set out in the ITI's report marked "8R5" are instructive. The samples extracted from the two sites identified as "SS3" and "SS4" and which are on the allotment of land adjacent to the northern boundary of the 8th respondent's thermal power station, recorded very high levels of Oil and Grease contamination [up to 32,834 mg/kg] when compared to the levels of Oil and Grease contamination in the other sites which were tested. A high level of Oil and Grease contamination [up to 1490 mg/kg] was also seen in the site identified as "SS5" which is the location where Aggreko's thermal power station had been located. That was close to the site identified as "SS4" and proximate to the northern boundary of the 8th respondent's thermal power station. The soil sample extracted from the site identified as "SS7" which is within the premises of the 8th respondent's thermal power station also recorded a much lesser but still high level of Oil and Grease contamination [up to 949 mg/kg]. A lower level of Oil and Grease contamination [up to 263 mg/kg] was seen in the soil sample extracted from the site identified as "SS1", which is on the north-western boundary of the CEB's *"Uthuru Janani"* thermal power station.

A high level of Oil and Grease contamination [up to 1770 mg/kg] was present in the soil sample extracted from the site identified as "SS2", which is where the two oil tanks damaged during the war [in 1990-1991] were located. A higher level of Oil and Grease contamination [up to 3230 mg/kg] was present in the soil sample extracted from the site identified as "SS6", which is close to where the *"oil kulam"* was located.

Based on the data obtained from its study, the ITI has concluded in "8R5", *inter alia*, that the possibility of oil contamination in soil [and, thereby, groundwater] is high due to *"The processes and activities carried out in the unloading bay, contaminated storm water management practices and historical disposal practices of NPCL* [*ie:* the 8th respondent]".

The report of the `Experts Committee' appointed by the Northern Provincial Council states with regard to the 8th respondent's thermal power station, *"Disposal of Petroleum products/waste oil in the open ground by the NORTHERN POWER plant Is ecologically and environmentally unacceptable. This location has been found to have very high oil content in the soil matching the Northern power lubricant in the GC study* [Gas Chromatography]*."* The report also stated *"It is very clear that the oil/water outlet from the Northern power plant (having the same lubricant as Uthuru Janani) has caused the oil pollution at soil test sites 3 and 4, which is also indicated in the environment Audit report of the ITI"*.

Finally, the report marked "8R5" states that a test report issued by the NBRO and dated 13th August 2014 [*ie:* "10R12] had found that *treated* wastewater discharged at the 8th respondent's thermal power station could be described as *"Clear water"* with an Oil and Grease content of 6.5 mg/Litre and complied with the standard specified for Industrial Wastewater [*ie:* a maximum of 10mg/Litre] in the EPL which was then in force. It may be mentioned here that the EPL issued to the 8th respondent states

Finally, it is necessary to examine the Order dated 27th January 2015 made by the Magistrate's Court of Mallakam. The translation marked "8R15(A)" shows that the learned Magistrate inspected the 8th respondent's thermal power station and the CEB's *"Uthuru Janani"* thermal power station, on the invitation of the 8th respondent and the other parties to the case of the Magistrate's Court. With regard to the 8th respondent's thermal power station, the learned Magistrate has stated in his order *"However, oil leaks are found on the electric machines of the 1st respondent* [*ie:* the 8th respondent in the present application] *and such leakage is spread at many places around the electricity generating station. It is observed that many drainage lines are created and oil waste is allowed to spread on the ground and oil leakage was also observed there. Large tanks collecting waste water and waste oil and found open without protection and waste water and waste oil stored there. No proper waste management is followed. It is not known that how oil waste of electricity power generating machines is disposed."*.

When the reports marked “10R7”, “2R6” and “8R5” are read together, it is seen that, by October 2012, the 8th respondent had installed Oil Traps, Gravity Oil Separators and a Sludge Tank which were designed to remove oil content from wastewater prior to wastewater being discharged into the surrounding environs. However, the report marked “8R5” observes that, even in July 2015, there were a still few shortcomings in the waste management system, procedures and practices in the 8th respondent’s thermal power station and that there was still a possibility of oil contaminated storm water flowing from the 8th respondent’s thermal power station onto adjoining lands. The Order of the learned Magistrate also reports oil leaks and spillages in the 8th respondent’s premises.

To conclude, the picture that emerges from the reports and other documents is clear and establishes that, from 2008 onwards and up to about 2012, the 8th respondent’s thermal power station had been discharging oil contaminated wastewater onto an adjoining land and has, thereby, caused oil contamination of groundwater in a large area of land around the Chunnakam Power Station Complex and also caused oil contamination of soil in the vicinity of the 8th respondent’s thermal power station. Further, during this period, the waste management system, procedures and practices in the 8th respondent’s thermal power station have been inadequate and there was a likelihood that leakages of oil from machinery and inadvertent spillages of oil within the 8th respondent’s thermal power station would have been washed out on to adjoining lands *via* the drainage system and also permeated into the soil within the 8th respondent’s premises and, thereby, caused further oil contamination of groundwater and soil in the area.

The reports and documents before us lead, plainly and inevitably, to these conclusions and require no `technical expertise’ or knowledge on the part of the Court to arrive at these conclusions. This is not a case where petitioner calls upon the Court to rule on the soundness of an EIAR as was the case in PUBLIC INTEREST LAW FOUNDATION vs. CENTRAL ENVIRONMENTAL AUTHORITY [2001 3 SLR 330] or the environmental impact of a proposed project as was the case in AUSTRALIA CONSERVATION FOUNDATION INCORPORATED vs. MINISTER FOR THE ENVIRONMENT AND ENERGY [2017 FCAFC 134], cited by learned Senior State Counsel. Reaching the conclusions set out above certainly does not require us to *“sit in judgment over the cutting edge of scientific analysis”* to use the words of Rajendra Babu J in the Supreme Court of India in ND JAYAL vs. UNION OF INDA [AIR 2004 SC 867 at para 19].

The material before us in the reports marked “P21”, “2R9”,” “2R14”,“8R5”,“8R6” and “10R7” indicates that, the operations of the CEB’s Chunnakam Power Station has been a significant cause of oil contamination of groundwater and soil in the Chunnakam area

until that thermal power station was decommissioned in or about 2012-2013. The operations of Aggreko's thermal power station also appear to have caused some extent of oil contamination of the surrounding environs. The very large quantity of fuel oil/diesel which flowed out of the two oil tanks damaged in 1990-1991 and the oil *kulam* which formed on the land near the CEB's Chunnakam Power Station were also significant causes of oil contamination of groundwater and soil in the Chunnakam area.

Consequently, the 8th respondent is certainly not the sole cause of oil contamination of groundwater and soil in the Chunnakam area. There were several actors and causes for that pollution.

But, quite obviously, where there is clear evidence to establish that the 8th respondent caused oil contamination of groundwater and soil, the fact that there were other polluters who did the same, did not give the 8th respondent the license to pollute and does not absolve 8th respondent from being held accountable for the pollution it caused. Similarly, fact that there were other polluters did not entitle the CEA and the CEB to fail to perform their statutory duties and responsibilities with regard to enforcing the law in respect of the operations of the 8th respondent's thermal power station.

Have the 1st to 7th respondents [or any of them] failed to perform their statutory and regulatory duties in respect of the matters referred to in the aforesaid three issues and, if so, has such failure on their part violated the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution ?

As mentioned earlier, the CEA has, under and in terms of the Act, the power, function, duty and responsibility to, *inter alia,* require: the submission of proposals for new projects and changes in existing projects for the purpose of evaluating their impact on the environment; to regulate, maintain and control sources of pollution of the environment; to coordinate all regulatory activities relating to the discharge of waste and pollutants into the environment; and to protect and improve the quality of the environment. When the BOI acts under the provisions of the Board of Investment of Sri Lanka No. 4 of 1978, as amended, and exercises and performs powers, duties and functions conferred on or assigned to the CEA by the National Environmental Act, the BOI has the same powers, functions, duties and responsibilities.

The provisions of the Ceylon Electricity Board Act No. 17 of 1969, as amended and the provisions of the National Water Supply and Drainage Board Law No. 2 of 1974, as amended, do not appear to directly place similar duties and responsibilities on the CEB and the NWSDB, respectively. No material has been placed before us which suggests that the Northern Provincial Council and its Chief Minister had a direct role to play with

the regard to the approval of projects and issue of EPLs relating to the 8th respondent's thermal power station and monitoring its operations.

Thus, it is evident that the aforesaid fourth issue will be limited to examining whether the CEA and/or the BOI have failed to perform their statutory and regulatory duties and, if so, whether the CEA and/or the BOI have, thereby, violated the fundamental rights guaranteed to residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution.

It should be mentioned that the 8th respondent is a company incorporated under the provisions of the Companies Act No. 07 of 2007. The State does not own any shares in it and does not have direct or indirect control over its management. Thus, the 8th respondent is not an agency or instrumentality of the State and the acts or omissions of the 8th respondent cannot be regarded as executive or administrative action in terms of Article 17 of the Constitution. However, this would not affect the jurisdiction vested in this Court to direct the 8th respondent to comply with an Order giving effect to a remedy for loss or damage which may have been caused by any acts or omissions of the 8th respondent which have polluted the environment, in the event the 8th respondent is held responsible or partly responsible for such pollution.

It is necessary to first consider whether the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution were violated by the CEA and the BOI failing to ensure that the 8th respondent obtained prior approval to increase the power generating capacity of its thermal power station - *vide:* the first issue considered earlier.

In this regard, I have held earlier that the 8th respondent had implemented an *addition* to the power generating capacity of its thermal power station to bring total power generation capacity to a level in excess of 25 MW *without* applying for approval under Part IV C of the Act and without complying with the procedure set out in the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993. It has also been held that the CEA and BOI have taken no action in this regard, despite the fact that the said *addition* of power generation capacity constituted a *"prescribed project"* which required approval prior to implementation. As stated earlier, this approval process required the submission of an application seeking approval for the implementation of the project and the submission and consideration of an IEER or EIAR by the CEA and BOI.

As held earlier, this constituted a failure on the part of the CEA and/or the BOI to fulfil their statutory and regulatory duties.

It should be mentioned that the BOI is a *"project approving agency"* listed in the aforesaid Order dated 18th June 1993 made under Section 23Y of the Act, as amended. Therefore, the BOI had the statutory power to approve *"prescribed projects"* in terms of Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993.

As also stated earlier, in June 2011, the BOI assumed the powers and duties conferred on the CEA by the Act in respect of the 8th respondent's thermal power station after receiving the CEA's letter dated 10th June 2011 marked "10R3" which stated that the renewal of the EPL should be handled by the BOI. This indicates that, from then on, the BOI was the primary *"project approving agency"* which had the duty and responsibility of ensuring that approval for the implementation of any *"prescribed project"* proposed by the 8th respondent was obtained in accordance with Part IV C of the Act and the aforesaid Regulations No. 1 of 1993 [after submission of an IEER or EIAR].

As observed earlier, this addition of power generation capacity had taken place sometime after the 8th respondent commenced operating its thermal power station on 10th December 2009. The earliest indication that the 8th respondent's thermal power station had a power generation capacity above 25 MW is ITI's report marked "10R7" which states that the 8th respondent had *"…six HFO driven diesel generators of 6MW capacity each*" when ITI's officers carried out an inspection on 23rd and 24th October 2012. Thus, it appears that the implementation of the project to increase power generation capacity had commenced in or shortly prior to 2012. At that time, the relevant *"project approving agency"* was the BOI. Therefore, the BOI is primarily responsible for the failure to ensure that the 8th respondent submitted an IEER or EIAR and obtained approval under Part IV C of the Act and in accordance with the aforesaid Regulations No. 1 of 1993.

At the same time, as stated earlier, the BOI is required to act in consultation with and after having obtained the concurrence of the CEA when considering granting approval to implement a *"prescribed project"*. The aforesaid Regulations No. 1 of 1993 make it clear that the CEA performs a significant role in the approval of *"prescribed projects"* by another *"project approving agency"* including at the stages of deciding whether an IEER or EIAR is required and, thereafter, when considering the IEER or EIAR which has been submitted and evaluating the comments made by the public and deciding whether to grant or refuse approval for the implementation of the *"prescribed project"* - *vide:* clauses 5, 6, 7, 9, 11, 12, and 13 of these Regulations.

Therefore, the CEA must also bear responsibility for the failure to ensure that the 8th respondent obtained the requisite approval prior to the implementation of the project to add to the power generation capacity of its thermal power station.

It should be mentioned that the BOI, as the *"project approving agency"* [under Part IV C of the Act] and *"licensing authority"* [under Part IV A of the Act] and the CEA [which had a provincial office - Northern Province in the Jaffna peninsula] could not have been unaware of the fact that the 8th respondent had, in or about 2012, embarked on a project to add to the capacity of its power generation project, especially when the CEA and BOI say they conducted joint inspections of the 8th respondent's thermal power station.

As stated earlier, *"prescribed projects"* which require approval under Part IV C of the Act are those which are likely to have a significant impact on the environment, and which must, therefore, be examined carefully with the submission of an IEER or EIAR to the project approving agency, before approval is granted to implement such projects.

In BULANKULAMA vs. MINISTRY OF INDUSTRIAL DEVELOPMENT [2000 3 SLR 243 at p.315], Amerasinghe J refers to the 'Guide for Implementing the EIA Process, No. 1 of 1998' issued by the CEA states *"The purposes of environmental impact assessment (EIA) are to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognized and taken into account early in project design. EIAs are intended to foster sound decision making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding environmental consequences and take actions that protect, restore and enhance the environment."*

These observations by Amerasinghe J refer to the vital function that an EIAR performs in ensuring that the adverse environmental impact of a *"prescribed project"* are minimised by identifying them after hearing the public and, thereafter, formulating methods to counter these adverse environmental impacts, as far as is possible.

The importance of obtaining and carefully considering IEERs and EIARs before permitting the implementation of a "*prescribed project"* is highlighted in Principle 17 of the Rio Declaration on Development and the Environment, 1992 ["the Rio Declaration"] which states *"Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."*

The insistence on obtaining and considering an IEER or EIAR before permitting the implementation of a "*prescribed project"* is a practical and effective method of putting into effect the `Prevention Principle' and its ally, the `Precautionary Principle' which are guiding lights of modern environmental law. As Burnet-Hall observes [Environmental Law 3rd ed. at p.88], *"The prevention principle has a meaningful role where foreseeable environmental harm is likely as a consequence of proposed action; the precautionary principle comes into play where not only the likelihood of harm, but also its nature and extent, may all be uncertain."*. These principles are based on the common sense dictate

that a society should seek to avoid environmental damage which may result from proposed projects, by exercising care, foresight and forward planning. Simply put, that, as the old adage says, *"It is better to be safe than sorry."* The approach that States should be guided by the `Precautionary Principle' where there is an element of uncertainty with regard to the environmental harm that may be caused by a proposed project is highlighted in Principle 15 of the Rio Declaration, which states *"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*

Further, as mentioned earlier, the procedure set out in Part IV C of the Act and the aforesaid Regulations No. 1 of 1993 gives the public an opportunity to comment on, and where required, be heard on a *"prescribed project"* in respect of which an EIAR is submitted and to inspect an IEER in the cases in which only an IEER is submitted. This is an important right vested in the residents of the area where a *"prescribed project"* is to be located, who are the persons who will be directly affected by that project. They are given the right to state their views and have them considered before a *"prescribed project"* is approved. In fact, this right extends to all members of the public who have concerns regarding the environmental impact of a *"prescribed project"*.

The importance of public participation in this process is captured in Principle 10 of the Rio Declaration which states, *"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."* In Sri Lanka, the provisions of the Act and aforesaid Regulations reflect Principle 10 of the Rio Declaration.

On these lines, Amerasinghe J emphasised in in GUNARATNE vs. THE HOMAGAMA PRADESHIYA SABHAWA [1998 2 SLR 11 at p.16] that *"Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved."*.

The Rio Declaration has the weight of having been agreed to by over 170 countries including Sri Lanka. In BULANKULAMA vs. MINISTRY OF INDUSTRIAL DEVELOPMENT [at p. 274], Amerasinghe J referred to and applied the Principles of the Rio Declaration stating *"Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as `soft law'. Nevertheless, as a Member of the*

United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a *part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions."*. In WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS [2009 1 SLR 337 at p.358-359], Tilakawardane J observed *"Although the international instruments and constitutional provisions cited above are not legally binding upon governments, they constitute an important part of our environmental protection regime. As evidenced by the decision of this court in Bulankulama v. Secretary, Ministry of Industrial Development, they constitute a form of soft law, the importance and relevance of which must be recognized when reviewing executive action vis-a-vis the environment."*.

In the light of these observations made by two eminent judges of this Court, I have no hesitation in being guided by the Principles of the Rio Declaration when considering the importance of ensuring that an IEER or EIAR is obtained and considered prior to granting approval for the implementation of a *"prescribed project"* and in determining the significance of a failure to do so by the BOI and/or CEA.

In my view, these observations highlight the vital importance of the CEA and the BOI ensuring the submission and consideration of an IEER or EIAR and giving the public an opportunity to make their comments and, where required, be heard, prior to the grant of approval for the implementation of a *"prescribed project"*. This procedure is an essential safeguard put in place by the Act to ensure that the possible adverse environmental effects of *"prescribed projects"* are ascertained and minimised. Therefore, this procedure had to be followed by the BOI and the CEA and could not be dispensed with.

The BOI and the CEA were required to perform these duties and obligations vested in them by the provisions of Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 keeping in mind that doing so was not only their statutory and regulatory duty but also that these powers have been conferred on them in the public trust. This Court has, in several decisions such as WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS, SUGATHAPALA MENDIS vs. CHANDRIKA KUMARATUNGE [2008 2 SLR 339], ENVIRONMENTAL FOUNDATION LTD vs. MAHAWELI AUTHORITY OF SRI LANKA and PREMALAL PERERA vs. TISSA KARALIYADDE [SC FR 891/2009 decided on 31st March 2016], recognised and given effect to the public trust doctrine.

In the renowned "Mono Lake Case" [33 Cal. 419 at p.21], the Supreme Court of California stated *"Thus the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect*

the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust". This oft cited observation highlights the duty placed on the State and its agencies to protect the environment and the fact that this duty is vested in the State and its agencies as the trustees of the public. Thus, Broussard J observed [at p.2] *"….. public trust protects environmental and recreational values…."*

Consequently, the BOI and the CEA's duty to ensure that the provisions of Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 [including obtaining and considering an IEER or EIAR] were strictly complied with prior to the 8th respondent implementing its project to add power generation capacity, were statutory and regulatory duties and powers conferred on the BOI and the CEA in the public trust. A failure to duly perform those duties and duly exercise those powers amounts to a breach of the public trust reposed in the CEA and the BOI.

Next, in WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS [at p. 356] Tilakawardane J. stated "*The constitution in Article 27 (14) of the directive principles of state policy enjoins the state to protect, preserve and improve the environment. Article 28 refers to the fundamental duty upon every person in Sri Lanka to protect nature and conserve its riches."*. In ENVIRONMENTAL FOUNDATION LTD vs. MAHAWELI AUTHORITY OF SRI LANKA [2010 1 SLR 1 at p.19], Ratnayake J observed "*Although it is expressly declared in the Constitution that the Directive principles and fundamental duties 'do not confer or impose legal rights or obligations and are not enforceable in any Court of Tribunal' Courts have linked the Directive principles to the public trust doctrine and have stated that these principles should guide state functionaries in the excise of their powers.*"

The CEA and BOI which are agencies of the State are to be guided by these directive principles and fundamental duties when carrying out their statutory and regulatory duties. The Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to. Thus, where a petitioner complains of a violation of his fundamental rights arising from the breach of a statutory or regulatory duty by the State or an agency of the State, a demonstration that the violation is also in contravention of one or more of the Directive Principles of State Policy, will lend strong support to his case.

In the present application, the petitioner's complaint that the BOI and the CEA have failed to perform their duty of ensuring that the provisions of Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993

[including obtaining and considering an IEER or EIAR] were complied with when the 8th respondent increased the power generating capacity of its thermal power station, point to a failure on the part of BOI and the CEA to give effect to Article 27 (14) of the Constitution which declares that one of the Directive Principles of State Policy is that the State [and its agencies] *"….. shall protect, preserve and improve the environment for the benefit of the community."*.

Further, the State and its agencies are undoubtedly required to assist or undertake infrastructure projects, large scale agricultural projects, industrialisation projects and other development projects which are aimed at achieving economic progress, an equitable division of prosperity and a good standard of living and quality of life for all Sri Lankans. At the same time, it must be ensured that such endeavours are geared to achieve `Sustainable Development'. It is hardly necessary to say here that projects in the name of `Development' which harm the environment result more in a deterioration in the quality of life of people of the country which comes inevitably with the destruction of the environment, than in true development. Thus, in VELLORE CITIZENS WELFARE FORUM vs. UNION OF INDIA [1996 Indlaw SC 1075 at para.11], the Supreme Court of India observed *"The traditional concept that development and ecology are opposed to each other, is no longer acceptable. `Sustainable Development' is the answer."*.

This approach is reflected in Principle 1 of the Rio Declaration, which declares *"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."* and Principle 4 which asserts that *"In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."*. It may be mentioned here that the term `Sustainable Development' emerged in 1987 in the Brundtland Commission's report titled *"Our Common Future"* which succinctly described `sustainable development' as *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*. In WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS, Tilakawardane J. described sustainable development [at p. 359] as *"The phrase 'sustainable development' encapsulates the meaning that natural resources must be utilized in a sustainable manner, in keeping with the principle of intergenerational equity. This requires that the State as the guardian of our natural resource base does not compromise the needs of future generations whilst attempting to meet and fulfill the present need for development and commercial prosperity or short term gain."*.

It is very clear that the provisions of the Act are designed to promote sustainable development and that there is a duty placed on the CEA [and the BOI when it performs duties vested in the CEA by the Act] to ensure sustainable development as far as

is practical and possible. It is evident that the processes and procedures set out in Part IV C the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 which stipulate that prior approval must be obtained for the implementation of a *"prescribed project"* with the submission and consideration of an IEER or EIA, are designed to enable the CEA and BOI to promote sustainable development. Thus, a failure on the part of the CEA and the BOI to duly perform those duties and duly exercise those powers will amount to breach of the statutory duty placed on the CEA and the BOI to promote and ensure sustainable development.

Finally, to consider the question of whether the scope of Article 12 (1) of the Constitution extends to environmental rights in appropriate circumstances, the Supreme Court of India has firmly declared that the people of that country have a fundamental right to a clean environment as part of the right to life guaranteed by Article 21 of the Constitution of India. Thus, in ND JAYAL vs. UNION OF INDA [at para. 22], the Supreme Court of India stated "*In a catena of cases we have reiterated that right to clean environment is a guaranteed fundamental right."*.

In Sri Lanka, Tilakawardane J., in WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS stated [at p. 356], *"The right of all persons to the useful and proper use of the environment and the conservation thereof has been recognized universally and also under the national laws of Sri Lanka. While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of inter generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12 (1) of the Constitution."*.

While I am in respectful agreement with Justice Tilakawardane, I wish to add that, in my view, when Article 12 (1) of the Constitution is read in the light of Article 27 (14) of the Constitution, it vests in the citizens of Sri Lanka a fundamental right to be free from unlawful, arbitrary or unreasonable executive or administrative acts or omissions which cause or permit the causing of pollution or degradation of the environment. In this connection, I note that in ASHIK vs. BANDULA, O-I-C WELIGAMA [2007 1 SLR 191 at p.193], Silva CJ mentioned that the Court was acting in the public interest *"to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12 (1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution."*.

Further, with regard to the case before us, it seems to me that when Article 12 (1) guarantees that *"All persons are equal before the law and are entitled to the equal protection of the law"*, it vests in the residents of the Chunnakam area a constitutionally guaranteed right to be protected by the provisions of the National Environmental Act to

the same extent that residents elsewhere in the country would be protected by the same Act. This, in turn, grants the residents of the Chunnakam area the right to legitimately expect that the CEA and BOI will fulfil their duties under the Act and the applicable Regulations in relation to the 8th respondent's thermal power station and not act in breach of these duties, just as these statutory authorities are required to do and have done in relation to comparable projects anywhere else in the country. Therefore, an arbitrary or unreasonable failure on the part of the CEA and the BOI to perform their duties under the National Environmental Act and the regulations made thereunder which causes loss, damage and inconvenience to the residents of the Chunnakam area, will entail a violation of their rights guaranteed by Article 12 (1).

I might add that, access to clean water is a necessity of life and is inherent in Article 27 (2) (c) of the Constitution which declares that the State must ensure *"the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities."*. It is public knowledge that the majority of the people of our country have ready access to clean water which is provided by the apparatus of the State. It is also undisputed that prior to the pollution of groundwater in the Chunnakam area referred to earlier, the residents of that area had clean water. Thus, the pollution referred to earlier has deprived the residents of the Chunnakam area of access to clean water. They have, thereby, been placed at a significant disadvantage when compared to residents elsewhere in the country.

To move on, it has been established that the BOI and the CEA have acted in breach of the provisions of Part IV C of the Act and in disregard of the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 and have failed to obtain an IEER or EIAR and failed to ensure that the 8th respondent obtained prior approval for the implementation of its project to increase the power generation capacity of the thermal power station.

The aforesaid failures on the part of the BOI and CEA constitute a blatant violation and disregard of their statutory and regulatory duties described above and a failure to discharge the public trust vested in them These failures on the part of the BOI and CEA have exacerbated the pollution of groundwater in the Chunnakam area and of soil in the vicinity of the 8th respondent's thermal power station. These failures have denied the residents of the Chunnakam area and the general public of their rights under the Act and the aforesaid Regulations No. 1 of 1993. This includes the residents of the area being deprived of their right to comment on the proposed addition of power generation capacity and, where necessary, to be heard in that regard and have their views taken into account by the BOI and the CEA. There can be no doubt that these omissions,

inaction and failure on the part of the BOI and the CEA to perform their statutory and regulatory duties have caused loss, damage and prejudice to the residents of the Chunnakam area and the general public.

For these reasons and keeping mind the principles set out earlier, I hold that the failure on the part of the BOI and the CEA to act in terms of the provisions of Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 and to ensure that an IEER or EIAR was submitted and considered and prior approval was obtained for the implementation of the 8th respondent's project to add to the power generation capacity of its thermal power station, was arbitrary and unreasonable and in breach of the public trust reposed in the BOI and the CEA and, thereby, constituted a violation of the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12(1) of the Constitution.

As stated earlier, learned Senior State Counsel has submitted that, due to conditions prevailing in the Jaffna peninsula at the time the project to add power generation capacity was implemented, it was not feasible to go through the procedure spelt out in Part IV C of the Act. There is no merit in this submission since, as stated earlier, the addition of power generation capacity took place in or about 2012, which was long after conditions of normalcy and a fully functional civilian administration and bureaucracy were in place in the Jaffna peninsula. It is evident from the documents before us that the CEA had a Provincial Office in Jaffna at the time. Furthermore, it is public knowledge that the BOI had an office in Jaffna from 2010 onwards. Therefore, I see no reason why the BOI and CEA could not have ensured that the procedure spelled out in Part IVC of the Act and the aforesaid Regulations No. 1 of 1993 was followed by the 8th respondent prior to increasing the power generating capacity of the thermal power station.

Learned Senior State Counsel went on to submit that the stage of conducting an IEER or EIAR has long passed and that it was not feasible to conduct an IEER or an EIAR at this stage. It is now about seven years since the addition of power generation capacity. The environmental impact of the operation of the 8th respondent's thermal power station with the additional power generating capacity has been established with the passage of time and is seen in the material referred to earlier. In these circumstances, I see no purpose in going through the IEER/EIAR process at this stage.

To now consider whether the fundamental rights guaranteed to residents of the Chunnakam area and the petitioner by Article 12 (1) of the Constitution were violated by the CEA and BOI permitting the 8th respondent to operate its thermal power station without the authority of an EPL [*vide:* the second issue considered earlier], it is evident from the statutory and regulatory framework in part IV A of the Act and the National Environmental (Protection and Quality) Regulations No. 01 of 2008, that the CEA and

thereafter the BOI with the concurrence of the CEA, had statutory and regulatory duties to: (i) ensure that the 8th respondent operated its thermal power station only under the authority of an EPL; and (ii) a duty to ensure that all EPLs issued to the 8th respondent stipulated the standards and criteria which are prescribed under the Act, which the 8th respondent must adhere to in the operation of its thermal power station - *vide* section 23A (2) which states that *"No person shall carry on any prescribed activity except under the authority of a license…"* and *"in accordance with such standards and other criteria as may be prescribed under this Act."*. Further, the BOI or CEA were entitled to specify [if circumstances required] more stringent standards than those prescribed in the Regulations - *vide* clause 3 in Part I of the aforesaid Regulations.

Thereafter, as stated earlier, clause 7 in Part 1 of the aforesaid Regulations No. 01 of 2008 specifies that the CEA or BOI shall issue an EPL only if it is satisfied that *"the license will not be used to contravene the provisions of the Act or any regulations made thereunder"*; *"no irreversible damage or hazard to any person, environment or any nuisance will result from the acts authorized by the license"*; and *"the applicant has taken adequate steps for the protection of the environment in accordance with the requirements of the Law".*

Thus, it is clear that the CEA and the BOI [when it performed the duties and exercised the powers of the CEA] were the `licensing authorities' under and terms of the provisions of Part IV A of the Act and the aforesaid Regulations No. 01 of 2008 and the `guardians' entrusted with the statutory and regulatory duty of authorising, monitoring and, where necessary, policing the operation of any business or entity which carries on a *"prescribed activity"* which can have an impact on the environment, as contemplated in Section 23 A of Part IV A of the Act.

These provisions highlight the critical importance of the CEA and BOI ensuring that an EPL was issued to the 8th respondent only after the CEA and the BOI were satisfied that the 8th respondent had taken adequate steps to ensure the operation of its thermal power station will not cause harm or damage to the environment and of ensuring that the 8th respondent operated its thermal power station only with the authority of a valid EPL.

However, as I have already held, the CEA has, in derogation of its duty under the aforesaid statutory and regulatory provisions, permitted the 8th respondent to operate without the authority of an EPL for a period of over five months from 10th December 2009 to 19th May 2010. Thereafter, the BOI has, in derogation of its duty under the aforesaid statutory and regulatory provisions, permitted the 8th respondent to operate without an EPL for a period of three months and three weeks from 20th May 2011 to 14th September 2011, for a period of seven months from 15th September 2012 to 16th April

2013, and for a period of more than five months from 17th April 2014 to 29th September 2014. With regard to these latter three periods of time, the CEA has been complicit in permitting the 8th respondent to operate without an EPL because the CEA was undoubtedly aware of this breach and, in terms of the Act, the CEA had knowledge, responsibility and authority in relation to the issue of EPLs by the BOI.

I have earlier held that the operation of the 8th respondent's thermal power station caused oil contamination of groundwater in the Chunnakam area and of soil in the vicinity of the thermal power station.

The terms and condition of the four EPLs issued to the 8th respondent stipulate, *inter alia*, that *"Fuel shall be stored in properly sealed tanks. Adequate precautionary measures shall be taken to avoid any accidental spillages of fuel oil in the storage/dispensing/ handling point"*; *"Cleanliness and good house keeping practices especially in and around the wastewater treatment plant shall be adopted"*; "*All wastewaters arising from the operations shall conform to the `Tolerance Limits for Discharge of Industrial wastewater into Inland Surface Waters' prior to discharge"*; *"No oil or grease shall be discharged into surface water or to the ground"*; and *"No wastewater shall be discharged into storm water drains"*.

It is plain to see that, if the CEA and BOI had acted diligently to perform their statutory duties and obligations and: (i) ensured that the 8th respondent did not commence operating its thermal power station until it was ensured that no harm would be caused to the environment as a result of its operation; and, thereafter, (ii) ensured that the thermal power station operated in strict compliance with these terms and conditions stipulated in the EPLs, the pollution caused by the 8th respondent could have been avoided, or at the least minimised to the extent permitted by law.

The CEA and BOI have claimed that inspections of the 8th respondent's thermal power station did not reveal any irregularities in the management and disposal of wastewater and other effluents. But these claims are contradicted and disproved by the reports and other material before this Court. Therefore, these claims made by the CEA and BOI must be rejected.

Another area that causes concern is the fact that the CEA and the BOI were placed on notice by the complaints received from the public in 2011 and the findings of the ITI in the report marked "10R7" in 2012 that oil contaminated wastewater from the 8th respondent's thermal power station was ending up on an open land and that the measures adopted by the 8th respondent to contain oil leakages were patently inadequate. The report marked "2R2" of the CEA itself had observed that the 8th

respondent was discharging oil contaminated wastewater onto open land in 2009. The CEA's report marked "2R14" recognised the existence of another oil *kulam* on the land adjoining the 8th respondent's premises onto which the 8th respondent had been discharging oil contaminated wastewater. It is hardly necessary to say that an "oil *kulam*" cannot form overnight. Thus, the CEA's own report marked "2R14" recognises that the 8th respondent had been discharging oil contaminated wastewater onto an adjoining land over a considerable period of time.

Section 23D of the Act empowered the CEA or BOI to suspend or cancel the EPL if the 8th respondent carried out the *"prescribed activity"* [*ie:* operated its thermal power station] in violation of the terms, standards and conditions specified in that EPL and/or in the Act and regulations made under the Act. Similarly, clause 9 of the National Environmental (Protection and Quality) Regulations No. 01 of 2008 required the CEA and the BOI to suspend or cancel an EPL where continued discharge, deposit or emission of waste into the environment as a result of the *"prescribed activity"* has adversely affected the beneficial use of the environment.

However, it is evident that neither the CEA nor the BOI has attempted to use these powers vested in them to ensure that the 8th respondent complied with the terms and conditions stipulated in the EPLs issued to the 8th respondent.

I must also advert to the fact that the letter dated 30th September 2014 marked "10R13" reveals that the first time the CEA and BOI realized that the nature of the 8th respondent's operations required a SWML, was in September 2014. This was a very belated realisation since a rudimentary knowledge of the nature of operations of a thermal power station and common sense would make one aware that a thermal power station will produce oil contaminated wastewater, waste oil and sludge. Thus, the report marked "8R5" prepared by the ITI and submitted to the CEB states that oil-fired thermal power stations *"can become a possible source of soil and water contamination with oil, if the raw materials (fuel and lube oil stocks) and liquid/solid wastes (oily water and oil sludge) are not managed properly."*. Further, the report marked "10R7" prepared by the ITI and submitted to the BOI in October 2012 [*ie:* almost two years before the 8th respondent was required to obtain a SWML] made a specific recommendation that the 8th respondent should treat wastewater *"to comply with relevant effluent discharge standards."*. Thus, the CEA and the BOI should have realised, long before 30th September 2014, that the 8th respondent must be required to obtain a SWML. The fact that this realisation was reached only on 30th September 2014 - almost five years after the thermal power station commenced commercial operations - suggests incompetency or disinterest or a deliberate overlooking of an essential requirement.

It is evident that the aforesaid failures on the part of the CEA and BOI to perform their aforesaid duties and obligations vested in them by the provisions of Part IV A of the Act and the National Environmental (Protection and Quality) Regulations No. 01 of 2008 have resulted in harm to the environment and adversely affected the daily lives of the residents of the Chunnakam area, who have suffered substantial inconvenience, prejudice and loss.

Before concluding this section, it should be mentioned that the ITI's report dated 10th September 2019 marked "8R9" indicated that the water in the well within the 8th respondent's premises was not contaminated with oil. However, that cannot negate the substantial evidence which was discussed earlier, which establishes that the discharge of oil contaminated wastewater from the 8th respondent's thermal power station has contaminated groundwater in the Chunnakam area and soil in the vicinity of the thermal power station. In this regard, it has to be recognised that the quality of water in the well within the 8th respondent's premises could be an anomaly caused by factors such as the depth of the well, the impermeable nature of its construction and the passage of time.

I have previously held that the failure on the part of the CEA and BOI to perform their duty under the provisions of the Act and the National Environmental (Protection and Quality) Regulations No. 01 of 2008, to prevent the 8th respondent from operating its thermal power station without the authority of an EPL [for several periods of time] and to enforce the terms and conditions of the EPLs which were issued to the 8th respondent from time to time, has exacerbated the pollution of groundwater in the Chunnakam area and soil in the vicinity of the 8th respondent's thermal power station and caused prejudice to the residents of the Chunnakam area and the petitioner [who is a member of the public]. If the CEA and BOI had acted diligently to fulfil their duties and prevented the 8th respondent from operating without the authority of an EPL for several periods of time and also ensured that the 8th respondent adhered to the terms and conditions specified in the EPLs that were issued from time to time, the pollution caused by the 8th respondent could have been avoided, or at the least minimised to the extent permitted by law.

For these reasons and applying the principles set out earlier, I hold that the aforesaid failures, omissions and inaction on the part of the CEA and the BOI were arbitrary and unreasonable and in a breach of the public trust reposed in the CEA and the BOI and, thereby, constituted a violation of the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12(1) of the Constitution.

I now turn to considering whether the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12(1) of the Constitution have been

violated by the CEA and BOI permitting the 8th respondent to cause oil contamination of groundwater in the Chunnakam area and of soil in the vicinity of the thermal power station - *vide:* the third issue considered earlier.

Under and in terms of the Act, the CEA and the BOI had the duty and responsibility of regulating, maintaining and controlling sources of pollution of the environment and of protecting and improving the quality of the environment.

It is painfully evident that the CEA and the BOI have failed to perform these duties and responsibilities *vis-à-vis* the operation of 8th respondent's thermal power station which caused oil contamination of groundwater in the Chunnakam area and of soil in the vicinity of the thermal power station. As a result, the pollution of groundwater in the Chunnakam area and soil in the vicinity of the 8th respondent's thermal power station has been exacerbated and the residents of the Chunnakam area and the petitioner [who is a member of the public] have been prejudiced.

For these reasons and applying the principles set out earlier, I hold that the failure on the part of the CEA and BOI to perform their statutory and regulatory duties under the provisions of Act and the National Environmental (Protection and Quality) Regulations No. 01 of 2008 and prevent the 8th respondent from operating its thermal power station in a manner which caused oil contamination of groundwater in the Chunnakam area and of soil in the vicinity of the thermal power station, was arbitrary and unreasonable and in breach of the public trust reposed in the CEA and the BOI and, thereby, constituted a violation of the fundamental rights guaranteed to the residents of the Chunnakam area and the petitioner by Article 12(1) of the Constitution.

Before concluding this section, I should refer to the 8th respondent's submission that the petitioner has misrepresented the effect of the letters marked "P6" and "P7" and held out that these letters related to the 8th respondent's thermal power station. The 8th respondent submits that the petitioner had also suppressed the fact that EPLs had been issued prior to "P23". It has to be recognised that, as is often the case in public interest litigation, the petitioner was hampered by a lack of access to documentation in the hands of the respondents and I am unable to conclude that these alleged misrepresentations were deliberate. More importantly, the alleged misrepresentations are not material in the light of the issue before the Court. I am not inclined to dismiss this application solely on the basis of these alleged misrepresentations.

The 8th respondent has also submitted that the petitioner has not produced evidence to establish that the 8th respondent caused contamination of groundwater, as alleged in the petition. I cannot agree with this submission since the reports marked "P13" to "P21" produced by the petitioner confirm oil contamination of groundwater in the Chunnakam

area in which the 8th respondent's thermal power station is located. No doubt there were other thermal power stations in the same area. But, that fact alone does not warrant a dismissal of the petitioner's application. It is also pertinent to note that the quality of groundwater in the Chunnakam area has shown a trend of improving after the operations of the 8th respondent's thermal power station were suspended by the Magistrate's Court in January 2015.

The 8th respondent has tendered a copy of the "Emergency (Generation of Electrical Power and Energy) Regulations 1 of 1997" made under Section 5 of the Public Security Ordinance. This regulation declares that the provisions of, *inter alia*, the National Environmental Act shall be of no force or effect in so far as they relate to the generation of power and energy. The 8th respondent has submitted that, by operation of this regulation, there was no need for an EIAR at the time of setting up and commencing the generation of power at the 8th respondent's thermal power station. There is no merit in this contention since, as determined earlier, the addition of power generation capacity to the 8th respondent's thermal power station occurred sometime in 2012 and the State of Emergency ended before that, in September 2011. Thus, by 2012, this Emergency Regulation had lapsed, if it had not been revoked or lapsed earlier.

Will the continued operation of the 8th respondent's thermal power station cause further pollution of groundwater in the Chunnakam area ?

As mentioned earlier, the level of oil contamination of groundwater in the Chunnakam area has shown a trend of declining from 2012 onwards.

The material before us, including the most recent Inspection Report dated 14th July 2017 prepared by the BOI and marked "X4", establishes that there are Centrifugal Separators, a Skimmer, Oil Gravity Separation Tanks, Oil Traps, Pumps and a Sludge Tank now installed in the 8th respondent's thermal power station to collect waste oil and sludge and also that oil contaminated wastewater is treated before being discharged. It has also been established that the 8th respondent has, in recent years, sold its waste oil to third parties. Wastewater generated during the course of the operation of the 8th respondent's thermal power station now appears to be in conformity with the Tolerance Limits specified in the EPL marked "P23". This is confirmed by the test report marked "10R12" issued by the NBRO which tested a sample of wastewater obtained from the 8th respondent's thermal power station on 20th June 2014 and found it to be in conformity with the relevant Tolerance Limits.

In these circumstances, it can be reasonably concluded that the resumption of operations of the 8th respondent's thermal power station [which have been suspended

from 27th January 2015 onwards] is unlikely to cause further contamination or pollution of the surrounding environs provided it is ensured that: (i) the waste containment and management machinery, equipment and apparatus in the 8th respondent's thermal power station [including any additional machinery, equipment or apparatus which may now be required] are in good working order; and (ii) good and efficient practices, procedures and processes are carefully followed by the 8th respondent with regard to the containment and management of waste products generated in the course of the operations of its thermal power station in strict compliance with the criteria and standards stipulated in the Act and Regulations made thereunder.

Orders

It has previously been held that the CEA and BOI have violated the fundamental rights guaranteed by Article 12 (1) of the Constitution to the residents of the Chunnakam area and the petitioner [as a member of the public]. A declaration to that effect is hereby made.

The petitioner has prayed for an order from this Court directing that the 8th respondent's thermal power station must cease all operations. I do not think that such an order would be justified or reasonable at this stage in view of the conclusion that the resumption of operations of the 8th respondent's thermal power station is unlikely to cause further contamination or pollution of the surrounding environs provided the conditions referred to above are met. Further, the permanent shutting down of the 8th respondent's thermal power station would be unwise and also irresponsible in the light of the prevailing need for additional electrical power generating capacity to service the demands of the National Grid.

However, the 8th respondent is permitted to resume operating its thermal power station provided adequate measures are taken to ensure that doing so would not cause contamination or pollution of the surrounding environs, except as may be permitted by a duly issued EPL.

Accordingly, I direct that the 8th respondent is permitted to resume operation of its thermal power station upon obtaining an EPL and a SWML from the BOI and/or CEA and subject to the 8th respondent's strict adherence to the terms and conditions stipulated in that EPL and SWML, the National Environmental Act and the regulations made thereunder.

The BOI and the CEA are permitted to issue an EPL and SWML to the 8th respondent only after the BOI and the CEA, in consultation with the NWSDB, issue a written

certificate that: (i) the machinery, equipment and apparatus of the 8th respondent's thermal power station [including any additional machinery, equipment or apparatus which may now be required] have been checked and found to be in good working order and adequate to ensure that no pollution or contamination of the surrounding environs will be caused by the operation of the 8th respondent's thermal power station, except as may be permitted by a duly issued EPL and SWML; and (ii) the practices, procedures and processes adopted by the 8th respondent have been checked and found to be sufficient, adequate and efficient so as to ensure that waste oil, wastewater and other waste products generated in the course of the operations of the 8th respondent's thermal power station are contained within the 8th respondent's premises and are then managed and/or treated and/or processed in a manner which ensures that the eventual discharge or disposal of waste oil, treated or processed wastewater and other waste products are in strict conformity with the terms, conditions and Tolerance Limits stipulated in the National Environmental Act and the Regulations made thereunder

The CEA and BOI are directed to obtain consultancy services of the ITI in this exercise and any certificate issued in pursuance of this Order should be confirmed as correct by the ITI.

In the event an EPL and SWML are issued and the 8th respondent's thermal power station resumes operations, the BOI and the CEA, in consultation with the NWSDB and with the assistance of the ITI, are required to conduct quarterly inspections of the 8th respondent's thermal power station commencing from the date of resumption of operations. These quarterly inspections should investigate and verify whether the 8th respondent's thermal power station is operating in compliance with the terms, conditions and Tolerance Limits specified in the EPL and SWML and the standards and criteria specified in the National Environmental Act and regulations made thereunder.

In the event a quarterly inspection reveals that the operations of the 8th respondent's thermal power station are not in compliance with any of the aforesaid terms, conditions, Tolerance Limits, standards and criteria, the BOI and CEA are directed to immediately take appropriate steps under the National Environmental Act and regulations made thereunder to prevent environmental harm, degradation or damage being caused including, where appropriate, suspending the operation of the 8th respondent's thermal power station until corrective action is taken and the effectiveness of such corrective action is verified.

Further, in the event an EPL are SWML being issued and the 8th respondent's thermal power station resumes operations, the BOI and the CEA, in consultation with the NWSDB and with the assistance of the ITI, are also directed to identify a minimum of 50

wells representatively located within a 1.5 kilometre radius of the 8th respondent's thermal power station and, on a quarterly basis from the date of resumption of operations, test samples of well water obtained from these wells to ascertain the Oil and Grease content and BTEX content [Benzene, Toluene, Ethyl Benzene and Xylene] in these samples of well water.

In the event these quarterly tests show an increase in the Oil and Grease content and/or BTEX content, the BOI and the CEA, in consultation with the NWSDB and with the assistance of the ITI, are directed to investigate and ascertain whether it is likely that the operations of the 8th respondent's thermal power station have caused such increase. If such investigations find that it is likely that the 8th respondent is responsible, the BOI and CEA are directed to immediately take appropriate steps under the National Environmental Act and regulations made thereunder to prevent environmental harm, degradation or damage being caused including, where appropriate, suspending the operation of the 8th respondent's thermal power station until corrective action is taken and the effectiveness of such corrective action is verified.

In the event the 8th respondent's thermal power station operates for a period of one year from date of the first resumption of operations without adverse results being determined at the quarterly inspections and quarterly tests of well water, similar inspections shall be carried out half-yearly and similar tests of well water shall be carried out half-yearly, in the course of the next year. The rest of the conditions specified above will apply *mutatis mutandis*.

In the event the 8th respondent's thermal power station operates during that year without adverse results being determined at the half-yearly inspections and half-yearly tests of well water, the operation of the 8th respondent's thermal power station can continue to operate subject to the usual regime under the National Environmental Act and regulations made thereunder.

It is an oft-cited and applied principle of environmental law that the "Polluter Pays". This is reflected in Principle 16 of the Rio Declaration, which states *"National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.".*

In VELLORE CITIZENS WELFARE FORUM vs. UNION OF INDIA [at para. 12], the Supreme Court of India observed *"The `Polluter Pays' principle has been held to be a sound principle by this Court"* and went on to state *"The `Polluter Pays' principle as*

interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.". When granting relief [at para. 36], the Supreme Court ordered, *inter alia*, *"An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area."*. The Supreme Court of India applied the `Polluter Pays' Principle directed the polluter to pay compensation in several later cases such as S. JAGANATH vs. UNION OF INDIA [AIR 1997 SC 811], M.C. MEHTA vs. KAMALNATH [1997 1 SCC 388] and RAMJI PATEL vs. ANGRIK UPBHOKTA MARG DHARSHAK MANCH [2000 3 SCC 29].

In Sri Lanka, in WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS [at p.362], Tilakawardane J stated *"While the polluter pays principle internalizes the costs of pollution to corporate or individual polluters, the principle of public accountability extends this liability towards corrupt or incompetent regulators for the most egregious instances of mis-regulation."*. In BULANKULAMA vs. MINISTRY OF INDUSTRIAL DEVELOPMENT [p. 305] Amerasinghe J stated, *"The costs of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of the project"*.

This is an appropriate case to apply the "Polluter Pays" principle. I direct the 8th respondent to pay compensation in a sum of Rs.20 million to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area by the contamination of groundwater in the Chunnakam area and of soil in the vicinity of the 8th respondent's thermal power station. Article 126 (4) of the Constitution vests ample jurisdiction in this Court to make the aforesaid Order, which is just and equitable in the circumstances of this case.

The 8th respondent is hereby directed to pay a sum of Rs. 20 million within three months of today. This sum is to be paid to the credit of a special fund which is to be administered by the NWSDB under the control of a panel consisting of a representative each of the NWSDB, BOI, CEA and the 8th respondent. The aforesaid payment of Rs. 20 million will establish that fund and shall be paid to the credit of a bank account under the control of that panel. The panel will be headed by the representative of the NWSDB.

The members of panel and the institutions they represent shall be collectively and individually responsible for distributing this sum of Rs. 20 million among persons who reside within a 1.5 kilometre radius of the 8th respondent's thermal power station and whose wells have been contaminated with Oil and Grease and/or BTEX, in order to assist those persons to clean and rehabilitate their wells. The members of the panel and the institutions they represent shall be collectively and individually responsible for the integrity of that process. One month prior to commencing the process of distributing this sum of Rs. 20 million among the residents of the Chunnakam area, the panel shall give sufficient notice of the proposed process to the residents of the area within a 1.5 kilometre radius of the 8th respondent's thermal power station, through the Grama Niladhari Divisions in the area.

The distribution of this sum of Rs. 20 million among the residents of the Chunnakam area shall be subject to the condition that only the chief occupant of a household is entitled to be paid out of these monies and that the maximum sum payable to one person is Rs.40,000/-. I direct the aforesaid panel to ascertain, with reasonable certainty, that the persons to whom monies are paid are persons whose wells have been contaminated with Oil and Grease and/or BTEX This mechanism will enable at least 500 residents of the area to be compensated, at least in part, for the loss and damage they have suffered as the result of the oil contamination of groundwater in the Chunnakam area. It is possible that the number of residents who have suffered such loss and damage may exceed 500. Therefore, I direct the panel to ensure that the sum of Rs. 20 million is divided equitably on the basis that the worst affected wells are to be given priority when distributing the payment. The 8th respondent will pay costs which may be incurred for the work of this panel.

Judge of the Supreme Court

Priyantha 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 under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC /FR/ Application No 153/2016

1. **Rajapakashage Nishanthi Karunanayaka,**
   No. 68, Katuwasgoda,
   Veyangoda.

2. **Irosha Niwanthi De Silva,**
   No. 01, 9th Lane,
   Colombo 03.

3. **Hettikankanamalage Don Ayesha Harshani Mali Perera,**
   No. 21, Middle Class National Housing Scheme,
   Mailagashandiya,
   Anuradhapura.

4. **Pathirana Mudiyanselage Kalyani Kusumalatha,**
   No. 31/K, Pollebedda,
   Mahaoya.

5. **Attanayaka Mudiyanselage Renuka Kumari Wijerathna,**
   Polwatta, Pollebedda,
   Mahaoya.

6. **Dissanayaka Mudiyanselage Duleeka Rukshani Thilakarathne,**
   No. 273, Airport Road,
   Anuradhapura.

7. **Harshani Dilrukshi Wanninayaka,**
   No. 810/B, Dharmapala Mawatha,
   Wijayapura,
   Anuradhapura.

8. **Kuruppu Arachchige Chathuri Niroshika,**
   No. 304/27/3, Pinnagollawatta,
   Nittambuwa.

9. **Thise Appuhamilage Dilka Nishani Siriwardana,**
   No. 30/79, Mayadunna,
   Gonagolla,
   Ampara.

10. **Mercy Thanuja Kumari Balaharuwa,**
    Palugaswewa,
    Eppawala.

11. **Kariyawasam Majuwana Gamage Sachee Rangana,**
    Wagoda, Bogaha Handiya,
    Elpitiya.

12. **Konara Mudiyanselage Dushmanthi Thilakasiri,**
    Irrigation Quarters,
    Monaragala

13. **Robol Lenora Imalka Sewwandi,**
    No. 173/7A, Mihindu Mawatha,
    Dehiwala.

14. **Kahandage Manjula Prabodini,**
    Kodamawatta, Kurukudegama,
    Pattiyagedara,
    Bandarawela.

15. **Yaddehi Kandage Shirani Pushpa,**
    No. 96, Diwulpitiya,
    Boralesgamuwa.

16. **Kumarawanni Mudiyanselage Chathurangika Damayanthi,**
    C/O K.W.M. Seneviratne, Bedirukka,
    Mahaoya.

17. Rajapaksha Mudiyanselage
Chathurika Nishanthi Perera,
M42, Kandy Road,
Mahaoya.

18. Hewawasam Ederage Heshani Mashenka,
No. 66, Dambadeniya,
Mahaoya.

19. Wattegedara Dinusha Kumuduni Bandara,
1st Canal Road, New Town,
Padawiya.

20. Rathnayake Mudiyanselage Jeewantha Kumara Jayasinghe,
Rajina Junction,
Thambuttegama.

21. Gulawita Purandarage Samanthi Deepika,
No. 84E, Batuwita Road,
Olaboduwa,
Gonapala Junction.

22. Kottege Lathika Dulanjali,
Road behind the Hospital,
Padawiya.

<u>Petitioners</u>

Vs,

1. **Y. Abdul Majeed,**
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

1A. **S. S. L. Weerasinghe,**
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

1B. **M. Thuraisingham,**
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

1C. **S. Mohanarajah,**
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

2. **Secretary,**
Ministry of Irrigation and
Water Resource Management,
No. 11, Jawatta Road,
Colombo 05.

3. **Secretary,**
Ministry of Public
Administration and Management,
Independence Square,
Colombo 07.

4. **Dharmasena Dissanayaka,**
Chairman,

5. **A.Salam Abdul Waid,**
Member,

5A. **Prof. Hussain Ismail,**
Member,

6. **D. Shirantha Wijayatilaka,**
Member,

7. **Prathap Ramanujam,**
Member,

8. **V. Jegarasasingam,**
   Member,

9. **Santi Nihal Seneviratne,**
   Member,

10. **S. Ranugge,**
    Member,

11. **D.L. Mendis,**
    Member,

12. **Sarath Jayathilaka,**
    Member,

    <u>The 4th to 12th Respondents of all;</u>

    Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita, Colombo 05.

13. **Secretary,**
    Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita,
    Colombo 05.

14. **Director Establishment,**
    Ministry of Public
    Administration and Management,
    Independence Square, Colombo 07.

15. **Director General,**
    Department of Management Services,
    Ministry of Finance,
    Colombo 01.

16. **Hon. the Attorney General,**
    Attorney General's Department,
    Colombo 12.

<u>Respondents</u>

Before: **H.N.J. Perera CJ**
Sisira J. De. Abrew J
Vijith K. Malalgoda PC J

Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam for the Petitioners
Dr. Avanti Perera SSC for the Respondents

Argued on: 05.11.2018

Judgment on: 07.02.2019

Vijith K. Malalgoda PC J

Petitioners to the present application had come before this court alleging the violation of their fundamental rights guaranteed under Article 12 (1) and 14 (1)(g) of the Constitution by the letters of appointment dated 18.08.2015 issued by the 1st Respondent.

This court on 08.09.2016, granted leave to proceed for the said violations as alleged by the Petitioners.

The Petitioners had been recruited to the Irrigation Department at various offices and project sites Island wide and at the time they were recruited all of them had passed the G.C.E. Ordinary Level Examination at least in 6 subjects including Language or Literature and Mathematics.

As submitted by the Petitioners, some of them have recruited as far back as year 2002 and have been granted casual or contract appointments, as Clerks, Management Assistants or Typists.

Having joined the Irrigation Department on casual and/or contract basis, the Petitioners continued to serve the department until Public Administration Circular 25/2014 was issued by the Ministry of Public Administration and Home Affairs on 12.11.2014. (P-24)

At the time the said circular was issued, the Petitioners have served the Irrigation Department as reflected in the following chart;

1st Petitioner	11 years and 11 months
2nd Petitioner	09 years and 02 months
3rd Petitioner	07 years and 04 months
4th Petitioner	06 years and 06 months
5th Petitioner	06 years and 06 months
6th Petitioner	05 years and 02 months
7th Petitioner	06 years and 05 months
8th Petitioner	05 years and 04 months
9th Petitioner	04 years and 08 months
10th Petitioner	04 years and 06 months
11th Petitioner	03 years and 08 months
12th Petitioner	03 years and 05 months
13th Petitioner	02 years
14th Petitioner	02 years and 02 months
15th Petitioner	02 years and 09 months
16th Petitioner	02 years and 04 months
17th Petitioner	02 years and 05 months
18th Petitioner	01 years and 04 months

19th Petitioner 04 years and 05 months

20th Petitioner 01 year and 09 months

21st Petitioner 01 year and 04 months

22nd Petitioner 10 months

The said circular which provided for casual/ contract employees to be made permanent, had provided as follows;

> "The Government has decided as per budget proposals 2015 to grant permanent appointments with effect from 24.10.2014 to the employees who have been recruited and are still in the service on Temporary, Casual (on daily wages), Substitute, Contract or Relief basis to serve in Public Service, Provincial Public Service and State Corporations and Statutory Boards.
>
> 2. Accordingly, permanent appointments are granted to the employees who have completed a continuous and satisfactory service of 180 days in the posts belonging to following service categories as at 24.10.2014.
>
> a) Primary Grade – Unskilled (PL 01) / (U-PL1)
>
> b) Primary Grade –Semi Skilled (PL 02)/ (U-PL2)
>
> c) Primary Grade –Skilled (PL 03)/ (U-PL3)
>
> d) Management Assistant- Non Technical Segment 02 (MN 01)/ (U-MN1)
>
> e) Management Assistant- Technical Segment 03 (MT 01)
>
> f) Management Assistant- Non Technical C1 (MA 1-1)
>
> g) Management Assistant- Non Technical C2 (MA 1-2)

3. It is sufficient for these employees belonging to service categories mentioned in (a), (b) and (c) above, to have passed at least Grade 08/ Year 09 for the purpose of granting permanent appointments. However, the employees belonging to the service categories mentioned in (d), (e), (f) and (g) above, shall have passed G.C.E. (O/L) Examination at least in 06 subjects including Language or Literature and Mathematics.

4. Relevant appointing authorities shall take action to grant permanent appointments with effect from 24.10.2014 to all employees, who become eligible as per the provisions of this circular, in the same posts to which they have been recruited under the service categories mentioned above."

Since the 1st to the 22nd Petitioners referred to above had fulfilled the requirement under Public Administration Circular 25/2014 the appointing authority, the 1st Respondent had taken steps to implement the said circular by appointing the Petitioners to the posts, the Petitioners said to have been recruited by the Irrigation Department.

Accordingly the 1st Respondent had issued letters of appointment on 17.11.2014 appointing the 1st to the 22nd Petitioners to the post of clerk with effect from 24.10.2014 in the Irrigation Department. The said letters of appointment issued to the 22 Petitioners are produced marked P-28 (i) to (xxii).

As complained by the Petitioners before the Supreme Court, the 1st Respondent, the appointing authority by his letters of appointment dated 18.08.2015, ten months after the original letters of appointment issued to them, appointed them to the post of labourer with effect from 24.10.2014 and cancelled the earlier letters issued to them on 17.11.2014.

Being aggrieved by the said decision of the 1st Respondent to appoint the Petitioners as labourers by letter dated 18.08.2015, the Petitioners filed the instant application and in addition to the declaration of their fundamental rights had been violated by the said decision, the Petitioners have further prayed for a declaration that P29 (i) to P29 (xxii) are null and void and that P28 (i) to P28 (xxii) are legally valid.

As further submitted by the Petitioners, they were considered as clerks, Management Assistants, Typists for all purposes of the department and several documents were produced in support of the above contention. In this regard our attention was drawn to several documents including, letters of appointment with regard to the appointments of 3rd and 5th Petitioners for the post of clerks by P3(f), P5(d) and several service letters issued by their immediate supervising officer marked P3(e), P4(g), P5(e), P6(j), P9(h), P10 (i), P17(g) and P20(e) by 3rd, 4th,5th, 6th, 9th,10th,17th and 20th Petitioners

In addition to the above documents, the Petitioners have produced under P-23 (a)-(l) the duty lists issued to some of the Petitioners to establish that the Petitioners were assigned with clerical jobs at their work places.

When considering the material placed before this court I have no doubt that all the Petitioners to the instant application were assigned with duties of Clerks, Computer Programmers, Typists etc. but not as labourers in their respective work places.

Paragraph 4 of the Public Administration Circular 25/2014, which identifies the eligibility criteria of a casual employee to be made a permanent, requires that,

> "Who become eligible as per the provisions of this circular, in the same posts to which they have been recruited under the service categories mentioned above."

Paragraph 5 of the said circular had further provided,

> "Once relevant appointments are granted, it shall be reported promptly to the Director General Management Services in accordance with the specimen attached herewith in order to update the staff of each institution."

As reveled before this court, once the appointments were made by the 1st Respondent as reflected in P28(i)-(xxii), steps had been taken to report the said appointments to the Director General Management Services under the above provision of the circular.

The 1st Respondent, who said to have issued P28-(i)-(xxii) had now taken up the position that, "when information relating to the appointments were reported to the Director General of Management Services as required by the said circular, it was observed by the said Director General that such appointments had been made contrary to the provisions of clause 4 of the said circular. In this regard the 1st Respondent had received specific instructions to adhere to the above provisions of the circular by letter dated 18.03.2015 which reads as follows;

2. ".....ස්ථිර පත්වීම ප්‍රධානය කර ඇති නාම ලේඛනය පරීක්ෂා කිරීමේදී රාජ්‍ය පරිපාලන චක්‍රලේඛ අංක 25/2014 හි විධිවිධානයන්ට පටහැනිව ස්ථිර කර ඇති බව නිරීක්ෂනය කරන ලදී.

3. එසේ ක්‍රියා කිරීම නිසා රාජ්‍ය සේවය තුල දුෂ්කරතා රැසක් මතුවන හෙයින් වාරි මාර්ග දෙපර්තුමේන්තුවේ තාවකාලික, අනියම් (දෛනික) ආදේශක, කොන්ත්‍රාත් හෝ සහන පදනම මත බඳවාගෙන ඇති සේවකයින් සඳහා ස්ථිර පත්වීම ලබාදීමේදී රාජ්‍ය පරිපාලන චක්‍රලේඛ අංක 25/2014 හි 04 වන පරිඡේදයේ සඳහන් පරිදි සේවකයන් බඳවාගත් තනතුරුවලම ස්ථිර කලයුතු හෙයින්, එම විධි විධාන ප්‍රකාරව කටයුතු කර ඒ බැව් මෙම දෙපර්තුමේන්තුව වෙත වාර්තා කරන ලෙස කාරුණිකව ඉල්ලමි."

As further submitted by the 1st Respondent, subsequent letters of appointment issued to the Petitioner as reflected in P29 (i)-(xxii) had been issued, by carefully going through the relevant documents maintained at the respective offices and after being satisfied the exact post to which each and every Petitioner had been recruited by the Irrigation Department. It is the position taken by the 1st Respondent that all the Petitioners before this court had been recruited as casual/ contract labourers and their salaries were paid on check roll maintained at the respective offices, for the payment of salaries to the daily paid labourers.

Even though some of the Petitioners have made an attempt to challenge the above position, their own documents filed before this court had confirmed the position taken up by the 1st Respondent.

I have gone through some of the documents relied by the Petitioners which reads as follows;

a) Service letter issued to the 1st Petitioner P1(h)

බඳවා ගන්නා ලද තනතුර ඃ අනියම් ඉංග්‍රීසි යතුරු ලේඛිකා-

දෛනික කම්කරු වැටුප් ගෙවීමේ පදනම මත

b) Daily paid Employees service record. 2nd Petitioner P2(e)

සේවකයාගේ පදවිය ඃ අනියම් (තදුවිත) කම්කරු

c) Letter of appointment issued to 7th Petitioner P7 (g)(h)

“ඒ අනුව නේවාසික ඉංජිනෙරු කාර්යාලය සඳහා..... අනියම් (තදුවිත) කම්කරු පදනම මත පත්කරවා ගැනීම අනුමත කරමි”

d) Service certificate issue to 8th Petitioner P8(f)

“.....යන අය කම්කරු තනතුරු නාමයෙන් සේවයේ යොදවාගෙන අවම දෛනික වැටුපක් ගෙවනු ලැබුවද”

e) Letter of appointment issued to the 12th Petitioner P12(f)

> “..... දෛනික කම්කරු වැටුප් මත තදුචිත කම්කරු සේවයට බඳවා ගැනීමට මෙයින් අනුමැතිය දෙමි”

f) Service certificate issued to 14th Petitioner P14 (l)

> “..... යන අය කම්කරු තනතුරු නාමයෙන් සේවයේ යෙදවාගෙන අවම දෛනික වැටුප් ගෙවනු ලැබුවද.....”

Even though the 10th Petitioner was careful not to submit any document revealing the fact that she was originally employed as a labourer, the 1st Respondent had submitted the Daily Paid Employees Service Record to confirm that her designation is casual labourer (1CR2).

When going through the above documents, it appears that the Petitioners were recruited as casual labourers and paid the salary of a casual labourer even though some of them have been issued with letters of appointments, service letters and duty lists as Management Assistant, Clerks, Typists and/or Computer Operators.

As observed by me, the circular 25/2014 referred to above, had provided clear guidelines in order to make the casual /contract employees permanent in the government service, based on the service category to which the employee had been previously recruited. Director General Management Service by his letter dated 18.03.2015 advised the 1st Respondent to comply with the provisions of the said circular to avoid in equality among the other employees who will be absorbed to the government service based on the same circular.

In the case of ***C.W. Mackie and Company Ltd. V. Hugh Molagoda, Commissioner General of Inland Revenue and others [1986] 1 Sri LR 300*** the Supreme Court observed that,

> "In order sustain the plea of discrimination based upon Article 12 (1) a party will have to satisfy the court about two things:
>
> 1. That he has been treated differently from others
> 2. That he has been differently treated from persons similarly circumstanced without any reasonable basis."

The Petitioners in the present case has failed to establish both, that they have been treated differently from others and that they have been differently treated from persons similarly circumstanced when implementing the provisions of the Public Administrative circular 25 of 2014.

In the case of ***Elomre Perera V. Major Montegue Jayawickrema Minister of Public Administration and Plantation Industries and others [1985] 1 Sri LR 285*** the Supreme Court held that Article 14 (1) (g) only recognizes a general right in every citizen to do work of particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice.

As observed by me the Petitioners wanted the provisions of Public Administration circular 25/2014 be applicable to them as reflected in P28(i)-(xxii) when they are absorbed to the Government service, but not as reflected in P29 (i)-(xxii). By P29 (i)-(xxii) all the Petitioners were absorbed into the government service as labourers and by issuing those letters of appointment, the Respondents have not violated the Article 14 (1) (g) of the Constitution.

For the reasons given above I see no merit in the application before this court. The Petitioners failed to establish that their fundamental rights guaranteed under Article 12 (1) and 14 (1) (g) had been violated by the conduct of the above Respondents.

This application is accordingly dismissed, I make no order with regard to costs.

Application dismissed. No costs.

Judge of the Supreme Court

H.N.J Perera, 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 under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) Application No. 192/2014

S.C. (F/R) Application No. 193/2014

Petitioners

Adasuriya Mudiyanselage Dinuka Madushan Adasuriya,

Pothuwela, Ganthiriyawa, Bamunukotuwa.

(Petitioner S.C. (F/R) Application No. 192/2014)

1. Wijeyamunige Nadish Srinath Ranatunga,
   'Kusum Nivasa', Horewila,
   Walasmulla.

2. Nuwan Buddhika Bandaranayake,
   53/2/B, Ayurveda Road, Uda
   Aludeniya, Weligalla.

3. Hashan Dhananjaya Wijesinghe,

110/B,
Battagala, Dambara,
Meewanapalaana.

4. Gunasekara Liyanage Janith Kalana,
   21/18, Ranasooriya Mawatha,
   Paniyana,
   Ambalangoda.

5. Athapattu Mudiyanselage Asanka
   Sanjeewa Athapaththu,
   Kalawanegama, Kohumola Road,
   Wariyapola.

6. Aarachchi Mudiyanselage Buddhika
   Dilshantha Bandara,
   Katamillagaswatte, Vellawela,
   Atampitiya.

7. Induwara Wedagedara Pathum
   Madushanka,
   832/162, Hinnarandeniyawatte,
   Gampola.

8. Jasiri Liyanage Waruna Dhananjaya
   Ratnawansha,

Liyanage Trade Centre,
Yakdehiwatte, Niwithigala.

9. Bambagedara Priyantha Dinesh Somasiri,
45, Aanakatawa, Dambulu Halmilla Weva,
Kekirawa.

10. Kannanagarage Don Chanaka Mihiran Wijekoon,
216/2, Kurana, Handapaangoda.

11. Palpolage Don Tharindu Sampath,
Bollunna, Hadigalla Janapadaya,
Baduraliya.

12. Warahena Liyanage Thushan Indika Sampath,
Beligaswatte, Halla, Diwuldeniya.

(Petitioners in S.C. (F/R) Application No. 193/2014)

Vs

Respondents

1. Chief Inspector Malin Perera,
   Officer-in-Charge, Police Station,
   Slave Island.

2. N. K. Illangakoon,
   Inspector General of Police, Police
   Headquarters, Colombo 01.

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

**(Respondents in S.C. (F/R)
Application No. 192/2014 & No.
193/2014)**

BEFORE: Buwaneka Aluwihare, PC, J.
Prasanna S. Jayawardena, PC, J. &
Vijith K. Malalgoda, PC, J.

COUNSEL: J. C. Weliamuna, PC with Pulasthi Hewamanna for the Petitioners in 192/2014.
Upul Kumarapperuma with Muzar Lye for the 1st Respondent.
Sanjeewa Dissanayake, SSC for the AG.

ARGUED ON: 03. 09. 2018

DECIDED ON: 30. 10. 2019

Aluwihare, PC, J.

The Petitioner in SC FR Application 192/2014, an undergraduate of the Allied Health Sciences Faculty, University of Peradeniya following a course in Laboratory Sciences complained of the violation of his fundamental rights under Article 10, 11, 12 (1), 13 (1), 13 (2), 13 (5) and 14 (1) (a) of the Constitution primarily by the 1st Respondent, Officer-in-Charge of the Slave Island Police Station. Twelve other undergraduates following the same course, the Petitioners in SC FR Application 193/2014, complained of the violation of their fundamental rights under the identical Articles of the Constitution referred to above. Leave to proceed in both Applications was granted for the alleged violations of Article 11 and 13 (1). In view of the fact that it was the same incident that gave rise to the violations alleged, both Applications were considered together in a single judgment. For ease of reference, the Petitioner in SC FR 192/2014 is referred to as "Petitioner Dinuka Madushan" and Petitioners in the Application No 193/2014 as "Petitioners in Application 193".

According to the Petitioners, after having taken part in a protest campaign and *satyagraha* held in front of the University Grants Commission on the 16th of May 2014, calling for the re-introduction of a 4-year Allied Health Science Degree, the Petitioners had boarded a bus to travel to Fort.

While the Petitioners were on the bus, two individuals in civilian clothes who claimed to be Police Officers had directed the Petitioner Dinuka Madushan to disembark, stating that there was a warrant for his arrest. When asked to be shown the warrant, a photocopy of a warrant had been shown to the Petitioner Madushan. The particular warrant, however, had been issued against another person, namely one Prabashana Rajapaksa and not the Petitioner. Upon the Petitioner producing his National Identity card and indicating that he was not the person named in the warrant, the said individuals had left the Petitioner alone and had moved to another part of the bus.

A while after this confrontation, the Petitioners had become aware that the bus was being diverted from its designated route. Amidst protests from the other passengers the bus had been driven to the Slave Island Police Station. Approximately 10 police officers in uniform and a cordon of officers in civilian clothing as well as a senior Police Officer had surrounded the bus and all the passengers had been directed to disembark. Accordingly, the Petitioners in Application 193 had also disembarked. They had observed that one of the officers in civilian clothing who had earlier attempted to execute the warrant against Petitioner Dinuka Madushan, in discussion with the senior Police Officer. As the Petitioner Dinuka Madushan was disembarking, he had been informed by the same senior police officer that there was a warrant for his arrest. When the Petitioner stated that the said warrant was not issued against him, he had been shown the original of the warrant, which had been torn in two. The Petitioner had again produced his National Identity Card and had made an attempt to explain that the warrant was in respect of another individual. The Police had then taken his National Identity Card which was later returned to the Petitioner. Upon the senior officer's insistence on arresting the Petitioner some of the students who were with the Petitioner, including the Petitioners in Application 193/2014 had repeatedly told the police officers that the Petitioner should not be arrested as he had not been involved in the commission of any offence.

At this point, according to the Petitioners, the police officers who were present had appeared to be angered by the reaction of the students. According to the Petitioners, some of them had been dragged away using force while subjecting them to assault. The 1st Petitioner in Application 193, Nadish Ranatunga also asserts that during this incident, he was dragged away and then surrounded and assaulted by several police officers in civilian clothing. According to the said Petitioner, he had been kicked and dealt blows with the fists, and as a result of the attack he had fallen. Two police officers in civilian clothing had then dragged the Petitioner into the Police Station.

According to the Petitioners, when they were inside the Police Station, several other uniformed Police Officers had assaulted the 1st, 11th and 12th Petitioners in Application 193. Thereafter, all the Petitioners had been detained in the Police cell. After the assault, the Petitioner Nadish Ranatunge had felt dizzy and had also felt that his vision of the left eye was blurred. The said Petitioner asserts that regardless of the fact that he was bleeding from his left eye and mouth by this time, his requests for medical treatment had been ignored by the Police.

According to the Petitioner Dinuka Madushan, he too had been dragged into the police station while being assaulted by police officers in civilian clothing and detained in the police cell. Soon after, he had been summoned to the office of the 1st Respondent and in the presence of three other senior police officers, informed that even though the name on the warrant was wrong, it was issued for *his* arrest based on a photograph. He was shown a photograph of himself captioned with the name mentioned in the warrant, "Prabashana Rajapakse". Thereafter, the twelve Petitioners in Application 193 were summoned, and the same information relayed to them as well. They were further informed that the Petitioner, Dinuka Madushan had to be detained due to the warrant and the rest of the students had to be detained for obstructing his arrest.

Afterwards, statements had been recorded from all the Petitioners. At around 11.30 p.m. the same day they had been produced before the Fort Magistrate. The Magistrate had directed that they be referred for examination by the Judicial Medical Officer and be remanded until produced before the court on the following Monday, 19th May 2014. The Petitioners had then been taken to the New Magazine Remand Prison.

On the following day i.e. 17th May 2014, the Petitioner and the other students had been produced before a Judicial Medical Officer and two other doctors at the National Hospital. Four of the Petitioners, the 4th, 6th, 9th and 11th Petitioners in Application 193, were admitted to the National Hospital on medical advice while

the Petitioner Dinuka Madushan and the other Petitioners were advised to be admitted to the Prison Hospital. On their return to the Remand Prison the Petitioner Dinuka Madushan had also been admitted to the Prison Hospital until he was produced before the Magistrate's Court, Fort on 19th May 2014. The Petitioner, Nadish Ranathunge (a Petitioner in Application 193) had been given a referral to have his eye examined at the National Hospital.

The Diagnosis Tickets of the 4th, 6th, 9th and 11th Petitioners in 193 which have been produced in these proceedings indicate that all 4 Petitioners were warded at the National Hospital and had complained of trauma to the head due to assault. According to the Patient Assessment Sheet issued by the National Hospital to the 4th Petitioner Janith Kalana, his "vital signs" had been stable and "no neurological" signs had been recorded. He had been subjected to a X-Ray and it is noted in the Sheet that, "cervical spine-clinically normal" and "no orthopedic intervention" meaning no orthopedic treatment was required. Similarly, according to the Patient Assessment Sheet of the 6th Petitioner Buddhika Dilshan, he also has complained of trauma to the head following assault. It is recorded in the Assessment Sheet that there were "no neurological signs" and in addition, "the spine is clinically normal" and "no orthopedic intervention" according to the X-Ray reports.

The findings recorded in the Patient Assessment Sheet of the 9th Petitioner Priyantha Dinesh who also had complained of head injury following assault, is no different to the other two referred to earlier. The X-Ray of his cervical spine had shown that it was clinically normal, and it is also recorded that there were "clinically no other injuries or issues". The Patient Assessment Sheet of the 11th Petitioner Tharindu Sampath again carries similar findings although he too has given a history of head injury following assault. As far as the 11th Petitioner was concerned, his X-Ray findings indicate that both his spine as well as the cervical spine had been "clinically normal" and "no orthopedic intervention" was required. The 3rd Petitioner Hashan Dhananjaya had given a history of assault by the police

with bare hands to the scrotum which is recorded so in the Diagnosis Ticket issued to him on 19th of May 2014 (marked 'P6a'). The following is recorded on his Diagnosis Ticket: "both testicles normal, no hydrocele and no orthopedic problems". It appears that none of the medical records produced on behalf of the Petitioners support the allegation that they were dealt fist blows, kicked and dragged.

On 19th May 2014, the Petitioners who were not warded at the National Hospital, namely the Petitioner Dinuka Madushan and the 1st, 2nd, 3rd, 5th, 7th, 8th, 10th and 12th Petitioners in 193 had been produced before the Fort Magistrate and had been released on bail under case number B/955/14. The officers of the Slave Island Police had informed the Magistrate that the Petitioner in 192/2014 was needed for the case bearing B/7542/1/14, the case in which a warrant is purported to have been issued against him by the Chief Magistrate, Colombo.

The Petitioner Dinuka Madushan had been produced before the Chief Magistrate's Court along with several others regarding case B/7542/1/14 in which it was alleged that a warrant had been issued against the Petitioner. The Petitioner and the others produced with him, however, had been enlarged on bail by the learned magistrate.

On the same day the 1st Petitioner in Application193, (Nadish Ranathunga) had got himself admitted to Ward 72 at the National Hospital. In his Diagnosis Ticket at the National Hospital (marked 'P5a') it is recorded that he had "sub conjunctival hemorrhage- glaucoma suspected". After being examined at the Eye Hospital on the 20th May 2014, the Petitioner had received treatment at the National Hospital until 22nd May 2014.

After being informed by some students that an investigation regarding this incident of arrest and assault was being conducted by the Mirihana Police on 26th May 2014, the Petitioner Dinuka Madushan and all the Petitioners in Application 193 except the 1st Petitioner had reported to the Mirihana Police station where their

statements had been recorded. The Petitioners assert that no further steps have been taken over their complaints.

In the objections filed by the 1st Respondent, the Officer in Charge of the Slave Island Police Station, it is stated that on the 16th of May, 2014 the 1st Respondent was instructed via telephone by the Deputy Director of the Colombo Crime Division to assist in the arrest of a person against whom a warrant had been issued by the Chief Magistrate and that the person concerned was, at the time, travelling in a bus plying via Slave Island.

The 1st Respondent states that even though the name on the National Identity card of the Petitioner and the name on the warrant were not identical, the Officers of the Colombo Crime Division and the Intelligence Bureau of the Western Province who had been on the bus had shown him a photograph of the Petitioner, and the Assistant Superintendent of Police from the Intelligence Bureau of the Western Province had confirmed that the Petitioner was the person in the photograph and had instructed him to arrest the Petitioner. He also states that he is only aware of the fact that the application for obtaining the warrant had been made by the Cinnamon Gardens Police Station.

The 1st Respondent denies the contention that he insisted on arresting the Petitioner and arrested him by force. The Petitioner had been requested to come inside the Police Station and clarify any confusion that might be there. At that point the students who were with the Petitioner had behaved in an aggressive manner. This had led the police officers to arrest the Petitioner and his colleagues with the use of minimum force, for obstructing the police officers from carrying out their duties. In Paragraph 48 of the extract from the Information Book of the Colombo Crime Division Unit 6 (marked 'R6a1') Inspector of Police Hettiarchchi has recorded that when the 1st Respondent attempted to arrest the Petitioner Dinuka Madushan, about 15 students had obstructed the arrest by directing blows at him and pulling at his uniform. It is also recorded that at this point, the police officers of the Slave

Island Police Station had come to the assistance of the 1st Respondent and had subdued those attacking the 1st Respondent and taken them into the Police Station. Excerpts from the Information Book of the Slave Island Police Station (marked 'R9a' & 'R9b') indicate that some Police Officers also had sustained injuries in the altercation between the Petitioners and the Police.

It is contended by the 1st Respondent that, the Petitioner with the injured eye, had that injury on him at the time he was arrested, and that the Petitioner did not sustain the injury in the process of arresting. The 1st Respondent rejects the Petitioners' assertion that the students were denied medical attention and states that the student with the injury to the left eye had refused medical assistance when it was offered to him by the 1st Respondent and that this had been recorded in the Information Book ('R10'). He takes up the position that he and his officers were only providing assistance to the Colombo Crime Division for the arrest of the Petitioner.

While the facts produced before this court are such, I now turn to the analysis of those facts in relation to the alleged violation of Article 11 and 13 (1) of the Constitution in both Applications i.e. 192/2014 and 193/2014.

It would be pertinent at this point to refer to the position taken up by the Petitioner, Dinuka Madushan with regard to his arrest and the arrest of the other 12 petitioners in Application193.

In this regard the averments in Subparagraphs (d), (e) and (f) of paragraph 16 of the affidavit of the Petitioner Dinuka Madushan are relevant and are reproduced below.

> *"(d) Soon thereafter, **I was escorted** to the office of the 1st Respondent OIC. I state that there were approximately 4 senior officers in uniform, including the Respondent OIC, and another individual in civilian clothing.*

(e) ***I was informed*** *by the officers present that a warrant had in fact been issued against me and though the name set out in the warrant was wrong, it had allegedly been issued based on a photograph. At which point,* ***I was shown a photograph of myself,*** *with a caption that read Prabashana Rajapakse.*

(f) Thereafter, the other 12 arrested students were also ***summoned into the room,*** *and were informed of the same and my photograph was shown to all those present.* ***The students were informed that I would have to be detained due to the warrant and the rest of the arrested students had been so arrested for obstructing the police duties*** *and I and the other students were thereafter again detained in the police cells for several hours."*

From the foregoing, two matters are apparent, that is, the Respondents had instructions from their superiors to arrest the person depicted in the photograph and that photograph happened to be of Dinuka Madushan, which the Petitioner Dinuka Madushan himself has admitted in his affidavit.

Alleged violation of Article 13 (1):

Article 13 (1) of the Constitution requires that "*No person shall be arrested except according to procedure established by law."* In the present case there had been two reasons for the arrest of the Petitioner Dinuka Madushan on 16th May 2014, firstly, the alleged warrant issued for the arrest and secondly, the obstruction of police officers from carrying out their duties.

The arrest on an alleged warrant for the Petitioner's arrest

The contents of the "B" report of 19th May 2014 (marked 'P4b') reveals that on 16th May 2014 two other students were arrested on warrants and the Petitioner was arrested based on photographic and video evidence. The reason stated for their

arrest is Unlawful Assembly in connection with the organizing and leading of an unlawful procession held on the same day.

The 1st Respondent avers that the investigation was being handled by the Colombo Crime Division and he was only acting on the instructions that were given to him by the Deputy Director of the Colombo Crime Division to assist in the arrest of a person against whom an warrant had been issued by the Chief Magistrate and he was informed that, the person concerned was, at the time travelling in a bus that was plying via Slave Island . He admits that the name on the warrant was not identical to that on the Petitioner's National Identity Card but that the officers who had been tasked to execute the warrant and who had been on the bus had shown him a photograph and in addition the ASP from the Intelligence Bureau of the Western Province had confirmed that the Petitioner was the person in the photograph and that he should be arrested. This, as referred to earlier, is common ground, that the photograph supplied to the arresting officers was that of the Petitioner Dinuka Madushan.

It appears that the 1st Respondent was following the instructions from the Senior Officer to arrest the Petitioner and was supported by the photograph and confirmation given by the ASP from the Intelligence Bureau of the Western Province. **Section 59 of the Code of Criminal Procedure Act No. 15 of 1979** provides for arrest by a police officer where he is not in possession of the warrant for the time being, thus; *"where a Police Officer has reasonable grounds to believe that a person is one for whose arrest a warrant of arrest has been issued, he may arrest that person in execution of the warrant although the warrant is not in his possession for the time being."* In the present case, this court is of the opinion that the instructions from a superior officer and the photographic evidence and confirmation from a member of the Intelligence Bureau could be considered as reasonable grounds from the perspective of the 1st Respondent to arrest the Petitioner even though the name on the warrant was not identical to the name of

the person sought to be arrested. The likelihood is that there was a *bona fide* mistake as to the **name** of the person who was being sought to be arrested. Especially where the photograph shown to be that of the person sought to be arrested was a photograph of the Petitioner, as claimed by the 1st Respondent which is conceded by the Petitioner Dinuka Madushan. That the photograph which was shown to the 1st Respondent was a photograph of the Petitioner Dinuka Madushan and that he was correctly identified and pointed out to the 1st Respondent by IP Hettiarachchi is recorded in Paragraph 46 of the Information Book of the Colombo Crime Division Unit 6 ('R6 (a1)').

Analysing the scope of the authority to arrest vested in the Police, Wanasundera J. in **Jospeh Perera v Attorney General** 1992 1 Sri LR 199 expressed the view that *"The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand, for an arrest a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices. I should, however, add that the Test is an objective one… This wider discretion vested in the Police is logical and is also necessary for the proper performance of the functions of the Police and for the maintenance of the law and order in the country."* The wider discretion articulated thus is warranted by the circumstances of the present case. The 1st Respondent had sought to arrest the Petitioner Dinuka Madushan which can be termed as reasonable suspicion as it was based on the directions of a senior officer strengthened by the certification given by the investigators handling the case.

Thus, it appears that the 1st Respondent had been under a sincere belief, that he was expected to carry out the arrest and did so under the belief that he was bound by law to do so. There is no allegation that the arrest was carried out in bad faith. Thus the 1st Respondent is entitled to the protection of the general exception embodied in **Section 69 of the Penal Code, which** reads thus; "*Nothing is an offence which is done by a person who is or who by reason of a mistake of fact and not by*

reason of a mistake of law in good faith believes himself to be, bound by law to do it". According to the Respondents, when the Petitioner asserted that he was not Prabhashana Rajapaksha, they had taken steps to verify that with the Intelligence unit and he was instructed to place the Petitioner in custody, thus the bona fides of the arresting officer appears to be clear.

In the case of **Emperor v Gopalia Kallayia** AIR 1924 Bomb. 333 where a policeman had arrested a person whom he believed to be one Giria which in fact he was not, the Court acquitted him on the ground that he made reasonable inquiries and having come to Bombay from an upcountry station to effect the arrest he was honestly mistaken. The same view was taken in the English case of **Lawrence v Hedge** 3 Taunt 14, where it was held that although there was no specific offence disclosed, the arrest was justified by "abundant ground of suspicion".

Although a person should not be deprived of their personal liberty in derogation of the procedure established by law in a manner so as to place that person at a disadvantage, it does not prevent the arrest of a person when there are reasonable grounds to believe that the person in question is a person sought to be arrested by law enforcement authorities, particularly so from the context of the arresting officer.

Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case) [1994] 1 Sri LR 1 at page 62, establishes precedent to the effect that Section 53 of the Code of Criminal Procedure Act No. 15 of 1979 does not set out a requirement that the warrant must be produced at the point of arrest. "In ***Kumaranatunge v Samarasinghe*** followed in ***Sasanasiritissa Thero v De Silva and Others*** Soza, J. clarified: *"Nowhere is service of the detention order made imperative by any rule of law… In fact, even under the Code of Criminal Procedure Act, no service of a charge sheet or Warrant of arrest where the arrest is on a Warrant is provided for. The person being arrested can ask to see the Warrant or order, but there is no legal requirement that it should be served. No legal consequences flow from the non-*

service of the order." While there is no doubt that it is in the interest of natural justice to serve the warrant (as held by Colin Thome J. in ***Nanayakkara v Henry Perera***, in the present circumstances, the failure to serve a warrant issued in the name of the Petitioner Dinuka Madushan does not, in my view amount to a breach of the correct procedure of arrest.

However, the manner in which the officers of the Intelligence Unit had conducted themselves in this instance with regard to the error in the name on the warrant cannot be condoned by this court. It was incumbent upon them to carry out their duties with sufficient care and due diligence and not to inconvenience citizens due to shortcomings in their adherence to duty.

Arrest for obstructing police officers from carrying out their duty

The 1st Respondent states that the Petitioners in Application 193 were arrested for the obstruction of the Police from carrying out their duties. The same was another ground for the arrest of the Petitioner Dinuka Madushan as well. In terms of **Section 32 (1) (f),** of the **Code of Criminal Procedure Act No. 15 of 1979** *"Any peace officer may arrest, without an order from a Magistrate and without a warrant, any person- who obstructs a peace officer while in the execution of his duty…"* The Petitioners themselves have admitted in their petition that they repeatedly objected to the arrest of Dinuka Madushan, as he had not committed any offence. As referred to earlier, IP Hettiarachchi had recorded in the Information Book ('R6a1') that when the arrest of the Petitioner Dinuka Madushan was to be effected, the students conducted themselves in an aggressive manner, and about 15 of them had started assaulting the 1st Respondent and pulling from his uniform. At this point police officers attached to the Slave Island police station had come to their assistance in order to overpower the unruly students. Therefore, it is reasonable to conclude that the Petitioners hindered the police officers in the

execution of their duty as they had not cooperated with the police in clarifying the matter, and had physically resisted the arrest.

Necessity of informing the reason for the arrest of the Petitioners

Article 13 (1) of the Constitution further envisages that *"Any person arrested shall be informed of the reason for his arrest."* Justice Sharvananda in his treatise 'Fundamental Rights in Sri Lanka' at page 141 explains that this provision is *"meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for the arrested person to know exactly what allegation or accusation against him is, so that he can consult his attorney-at-law and be advised by him.*" It has also been held in ***Mariadas Raj v Attorney-General***, FR (Vol 2) 397 that *"The necessity to give reasons serves as a restraint on the exercise of power and ensures that power will not be arbitrarily employed."*

Section 23 (1) of the Code of Criminal Procedure Act No. 15 of 1979 requires that the person making an arrest *"… shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."* Where a number of past cases bear testimony to the dangers of a non-transparent process of arrest, it is in the best interests of the person whose liberty is being curtailed, to know the reason for arrest.

In the present case the Petitioner Dinuka Madushan in the affidavit filed by him in these proceedings admits the fact that he and the others were summoned to the office of the 1st Respondent and informed the reasons for their arrest. Furthermore, at the initial point before arresting the Petitioner Dinuka Madushan (outside the Slave Island Police Station) the 1st Respondent had informed the Petitioner that he would have to be arrested as there was a warrant for his arrest, which fact is not denied by the Petitioners. Given that the 1st Respondent, the OIC of the Slave Island Police Station was only *assisting* the execution of a warrant which had been

obtained by the Cinnamon Gardens Police, it would be setting an unnecessarily high standard to say that he should have informed the Petitioners the nature of the charge or allegation at the outset, in the context where the 1st Respondent had verified that the person to be arrested was the same person that he was in fact arresting. It must also be noted that the warrant itself had been shown to the Petitioners albeit the discrepancy in the name.

Considering the above, I hold that the Petitioner Dinuka Madushan and the petitioners in application 193, have failed to establish that their fundamental rights enshrined in Article 13 (1) had been violated by the respondents.

Alleged violation of Article 11:

Article 11 of the Constitution states that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." If we are to follow the jurisprudence and the precedents laid down by this court with regard to the burden of proof with regard to a violation of Article 11 of the Constitution, the burden is on the Petitioners to establish the violation to the satisfaction of this Court.

In the case of **Vivienne Goonewardene v Hector Perera** 1983 SLR 1 V 305 Ratwatte J. stated; *"Before I deal with the facts, a word about the burden of proof. There can be no doubt that the burden is on the petitioner to establish the facts on which she invites the court to grant her the relief she seeks. This leads to the next question. What is the standard of proof expected of her?" Wanasundera, J. considered the question in the case of* ***Velmurugu v The Attorney General and another*** *and held that the standard of proof that is required in cases filed under Article 126 of the Constitution for infringement of fundamental rights is proof by a preponderance of probabilities as in a civil case and not proof beyond reasonable doubt. I agree with Wanasundera, J. that the standard of proof should be a preponderance of probabilities as in a civil case. It is generally accepted that within this standard there could be varying degrees of probability. The degree of probability required should be commensurate with the gravity of the allegation sought to be proved.*

This court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a Court having to decide a question of fraud in a civil suit would. The conscience of the court must be satisfied that there has been an infringement."

It must be kept in mind that, as Justice Sharvananda in **'Fundamental Rights in Sri Lanka'** at page 71 states, "The Police force, being an organ of the state, is enjoined by the Constitution to secure and advance this right (Article 11) and not to deny, abridge or restrict the same in any manner and under any circumstances."

The 'quality' of the actions of the police in forcing the petitioner, Dinuka Madushan to disembark from the bus he was travelling in and assaulting him must be considered in the light of the circumstances prevailing at the time of the arrest. As far as both the Petitioner Dinuka Madushan and the 1st Respondent are concerned, it is common ground that there was opposition to the arrest of the Petitioner from the Petitioner himself and his colleagues who were in the bus. The severity of their opposition is the point on which the two versions diverge.

Since the police officers attempting to arrest the Petitioner, Dinuka Madushan had in their possession a warrant issued in the name of a person other than the Petitioner, it is natural that the Petitioner and his colleagues would question the arrest. Given the fact that they were returning from a protest urging the government to consider their requests, where some of their student representatives had been arrested by the Police, in all probability the students would have been in a state of mind that would make them react to such a situation with overt suspicion and belligerence. Therefore, it is likely, as the Respondents assert, that the Petitioners acted in an aggressive manner and even assaulted the 1st Respondent and other officers compelling the Police Officers to use force.

It is also common ground that the police officers concerned did not proceed to arrest the Petitioner Dinuka Madushan inside the bus when the Petitioner pointed out that he was not Prabahshana Rajapaksha, the person against whom the warrant

was issued. It is a pointer indicating that the police had not acted arbitrarily. Admittedly the photograph supplied to the police officers was that of the Petitioner. In the circumstances there was a duty on the part of the Petitioner and his fellow students, the Petitioners in Application 193 to cooperate with the law enforcement to sort out the confusion rather than confronting them. Such a conduct is not only expected but also demanded from every law-abiding citizen of this country.

I have considered the admission forms issued to nine of the Petitioners, including the Petitioner Dinuka Madushan, when they were admitted to the Prison Hospital on 17th May 2014, the day after the alleged arrest and assault. (Filed on behalf of the Petitioner by motion dated 19-01-2015). The medical officer had noted "no external injuries" on six of them, including the Petitioner Dinuka Madushan.

If the Petitioners were dragged, kicked and assaulted by the police as alleged, it is reasonable for one to expect injuries even, of a trivial nature. Even the Medico-Legal Report issued to Dinuka Madushan states "there were no injuries found on the body".

In considering the allegation that the injuries to the eye of the 1st Petitioner in Application 193, Nadish Ranatunge, were inflicted by the Police during their attempt to arrest the Petitioner Dinuka Madushan, the court has recourse only to the word of the Petitioners against the word of the Respondents. It is possible that the Petitioner may have behaved in an overtly aggressive manner and received the injury in the attempt to bring him under control. In the absence of any other injuries that denote that the Petitioner was subjected to deliberate physical assault it is difficult to conclude that the threshold necessary to indicate that the Petitioner was subjected to cruel, inhuman or degrading treatment or torture has been reached.

Considering the totality of the material placed before this court, I find the Petitioners have failed to establish the alleged violation of Article 11 of the Constitution to the degree the law requires the Petitioners to do so.

As such, I hold that the Petitioners have failed to satisfy this court that they had been subjected to torture or they have been treated in a cruel, inhuman or degrading manner by the Respondents.

Accordingly, these Applications (SC FR 192/ 2014 and SC FR 193/2014) are dismissed.

Under the circumstances of the case I make no order as to costs.

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA PC

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH 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 under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Tuduge Achalanka Srilal Perera,
'Isura', Wellarawa,
Wellarawa.

S.C. (F/R) Application
No: 198/2011

Petitioner

Vs.

(1) Police Sergeant Ananda,
Police Station,
Madampe.

(2) Inspector of Police Indrajith,
Officer-in-Charge,
Police Station,
Madampe.

(3) Inspector-General of Police,
Police Headquarters,
Colombo 01.

(4) Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondents

BEFORE: Buwaneka Aluwihare, PC, J.
Priyantha Jayawardena, PC, J. &
H.N.J Perera, J.

COUNSEL: Shyamal A. Collure with Rassim Hameed for Petitioner.
Anura Meddegoda with Nadeesha Kannangara for the 1st and 2nd Respondents.
Madhawa Thennakoon, SSC for the 3rd and 4th Respondents.

ARGUED ON: 21.03.2017

DECIDED ON: 22.02.2019

Aluwihare PC. J.,

This is an application under Article 126 of the Constitution and the court granted leave to proceed for the alleged violations of Articles 11, 12 (1), 13 (1) and 13 (2) of the Constitution against the 1st and 2nd Respondents. The facts that gave rise to the violations alleged, are as follows:

According to the Petitioner, on the 24th April, 2011 four persons in civvies had come to the meat stall he runs at the Willaththewa Sunday fair. Handcuffed and blindfolded, the petitioner had been taken away in a vehicle by the four persons. The Petitioner was taken to a thicket and had been subjected to assault intermittently. Sometime later in the day, he had been brought to a building and the blindfold had been removed. At that point the Petitioner had realized that he was at a police station. 1st and 2nd respondents as well as the other three persons who accompanied the 1st Respondent to his meat stall had been present.

The Petitioner alleges that he was assaulted by the 1st Respondent with a club that resembled a walking stick. The Petitioner further alleges that

the blows alighted on his shoulders and the head. In addition, the Petitioner alleges that the 1st Respondent took him to the Crimes Branch of the Police Station and was assaulted again with the club.

Around 8.00 in the evening, again, the Petitioner had been taken in a vehicle, handcuffed and blindfolded, and they had demanded him to hand over the 'items that he had stolen'. This routine had been repeated on the following day i.e. 25th April, 2011. The Petitioner alleges that he was subjected to assault during these journeys, in spite of his denial of any involvement in the alleged incidents of burglary. According to the Petitioner, he had been forced to spend the nights of both 24th and 25th April at two houses, he gathered, which had been burgled. On the 26th morning while travelling in the vehicle the 1st Respondent had received a telephone call from the 2nd Respondent who had told the 1st Respondent not to assault innocent people and bring the Petitioner back to the police station. The Petitioner claims that as instructed by the 2nd Respondent, he was brought back to the police station and put in the police cell. According to the Petitioner, the 1st Respondent had intermittently taken the Petitioner out of the cell and had subjected him to assault.

On 27th April, the 1st Respondent had recorded his statement and, on 28th April, he had been produced before a Medical Officer at the Madampe District Hospital. As he had been threatened by the 1st Respondent who accompanied him, not to divulge the fact that he was assaulted, he had kept silent when he was questioned by the doctor. After having the Petitioner brought back from the hospital, he had been released on police bail on the same day (i.e. 28th April) that was four days after his arrest. According to the Petitioner, he had not been produced before a magistrate from the point of his arrest up to the release.

The Petitioner further alleges that the 1st Respondent handed over to him a piece of paper on which the telephone number of the 1st Respondent was written and demanded that he be paid Rs.50, 000/-if charges are not to be pressed against him. A copy of the said document is marked and produced as P3 which carries the numbers 0779864774 and the writing in Sinhala the name "Ananda". It appears that the number and the letters were scribbled on a piece of paper torn from a prescribed form used by the Police Department, in their official work.

On the very day he was released, he had gone to the Police Head Quarters and had lodged a complaint and the acknowledgement issued by the Police Headquarters is pleaded in these proceedings as P4.

On the following day (i.e. 29th April) the Petitioner had also complained to the Inspector General of Police (the 3rd Respondent) who had directed the Superintendent of Police Chilaw, to conduct an inquiry into the complaint lodged.
On 29th of April, the Petitioner had got himself admitted to the Chilaw General Hospital and on 1st May had been examined by the Judicial Medical Officer. The fact remains that the Petitioner had neither been produced before a court in relation to any offence alleged to have been committed by him, nor had he been charged in relation to any criminal offence.
On a direction given by this court, the Director of the General Hospital, Chilaw had forwarded the Medico Legal Report (MLR) and other medical records pertaining to the Petitioner.

According to the MLR, the Petitioner had given a history identical to the narration of events he had placed before this court by his Petition. In the

history given, however, the Petitioner had not referred to the 2nd Respondent as a person who assaulted him, but had said "Ananda and another policeman hit him."

The doctor had observed, apart from hand cuff marks, seven contusions and one abrasion. The doctor had opined that the injuries are non-grievous in nature and probably caused with a blunt weapon. When one considers the seat of the injuries coupled with the medical opinion; that the injuries have resulted due to blunt trauma, the injuries are undoubtedly compatible with the version of the Petitioner. The Bed Head Ticket indicates that the Petitioner had been rational at the time of admission and no signs of any impairment of the limbs nor had there been any chest or abdominal trauma. The doctor also had noted that the Petitioner had no external injuries.

The 1st Respondent had admitted that he placed the Petitioner in custody because he could not satisfactorily explain his presence at the location where he was arrested and the contradictory answers given by him with regard to his identity and the place of residence. Although the 1st Respondent alleges that he arrested the Petitioner in accordance with the procedure established by law, the 1st Respondent had failed to disclose the alleged offence or offences for which he took the Petitioner into custody.

Every arrest by a police officer, attracts Section 23 (1) of the Code of Criminal Procedure Act and it is mandatory that the person arrested should be informed of the nature of the charge or allegation upon which he is arrested. A bare assertion that the arrest is in accordance with the procedure established by law, falls far short of the standard expected of the applicable legal provision.

In the case of ***Malinda Channa Pieris*** **1994 1 SLR pg. 1,** it was pointed out by the Court;

"*a reason for arrest, a reason to deprive a person of his personal liberty within the meaning of Article 13 (1) of the Constitution must be* ***'a ground for arrest'.*** *There can be no such ground other than a violation of the law or a reasonable suspicion of the violation of the law. Furthermore, personal liberty of a citizen of this country is guaranteed by the Constitution and State has an obligation towards its subjects to ensure that citizens are free to enjoy that right without any fetters, subject, however, to exceptions laid down under the law where that freedom can be restricted and as such, strict compliance of the law is required if the freedom guaranteed under the Constitution is to be curtailed; and there cannot be any derogation from the requirements laid down in the Code of Criminal Procedure Act. The right to be informed of the reasons to arrest is one of the principles of ordinary law which is restated in the second part of Article 13 (1) of the Constitution and provides that* ***"Any person arrested shall be informed of the reason for his arrest"****.*

Former Chief Justice Sharvananda, in his treatise on **Fundamental Rights in Sri Lanka** (page 141) observed as follows;

> *"The requirement that the person arrested should be informed of the reason for his arrest is a salutary requirement. It is meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for the arrested person to know exactly what the allegation or accusation against*

him is so that he can consult his Attorney-at-Law and be advised by him……. A bold statement that the arrestee is a terrorist falls far short of the required standard."

The 1st Respondent has taken up the position that he took the Petitioner into custody on 27th April as opposed to the 24th, the date the Petitioner alleges that he was arrested. In support of the Petitioner's contention, both Sunil Jayantha and A.S. Mohamed Rizvi who were running meat stalls at the same Sunday fair along with the Petitioner, had sworn affidavits (P1 and P2) to the effect that the Petitioner was arrested on the 24th April by four persons around 1.30 p.m. and that they had taken him in a white van which did not carry a Registration plate. Both have stated that the Petitioner was handcuffed and blindfolded.

Interestingly, the 1st Respondent takes up the position that the Petitioner is a person prone to criminal disposition. The position of the 1st Respondent is that he was investigating into a series of cases relating to house breaking and theft that had taken place on the 20th and 21st of April and he was conducting investigations in order to ascertain the identity of the persons responsible for these crimes. In this backdrop, it is quite probable that the 1st Respondent entertained a suspicion with regard to the Petitioner, given the background knowledge the 1st respondent had of the Petitioner. Even if that may have been the case, yet the Respondent had no right to place the Petitioner in custody in the absence of any evidence indicative of any complicity on the part of the Petitioner in the alleged crimes. The Petitioner had pleaded in these proceedings, that he was repeatedly abused both physically and verbally calling upon him to hand over what he is alleged to have removed from the houses that were burgled. On the other hand the 1st Respondent was

conducting investigations into a series of house burglaries. In this backdrop, because of the 1st Respondent's notion that the Petitioner is a person who has a propensity towards criminality, it was very probable that the 1st Respondent would have taken the Petitioner into custody on the assumption that he was involved or had had some complicity in the instances of house breakings which were being investigated. The Petitioner's version that he was repeatedly questioned about the articles removed from the houses that were burgled and the fact that he was taken to a few houses that were burgled, blends with the very investigation the 1st Respondent was conducting at that point of time, thus giving credence to the version of the Petitioner.

On the other hand, if the Petitioner was merely taken into custody on suspicion and was released after questioning without being charged with an offence, rationally would one expect such a person to take the measures the Petitioner had followed? As referred to earlier, on the day he was released, he lodged a complaint with the Police Headquarters, the following day he made complaints to both the IGP the 3rd Respondent, and followed it by a prompt complaint to the Human Rights Commission. All these prompt measures cry the pleas of a person who had suffered at the hands of the police.

Over the years, this Court, in innumerable judgements, had laid down the legal requirements that a police officer is expected mandatorily to follow, when placing a citizen in custody. However, it is regrettable to note that even in this day, it is practiced in the breach. In this context, I wish to cite the case of ***Christie v. Leachinsky 1947 AC 457*** decided by the House of Lords more than half a century ago and which is very much relevant today.

In the case referred to Viscount Simon held:

"Police officers must at common law give a detained person a reason for his arrest at or within a reasonable time of the arrest. Under ordinary circumstances, the police should tell a person the reason for his arrest at the time they make the arrest. If a person's liberty is being restrained, he is entitled to know the reason. If the police fail to inform him, the arrest will be held to be unlawful, with the consequence that if the police are assaulted as the suspect resists arrest, he commits no offence, and if he is taken into custody, he will have an action for wrongful imprisonment.

In the said case, Viscount Simon summarised a police officer's powers of arrest at common law: *'(1) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2) If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. (4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this*

restraint should be imposed. (5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter."

When the versions of the Petitioner and the 1st and 2nd Respondents placed before this Court are considered, I am firmly of the view that the version of the Petitioner is more probable and there is no cogent reason to reject it. Thus, I hold that the arrest of the Petitioner, which led to his detention are both illegal and that the Petitioner has established the violations of his fundamental rights guaranteed under Articles 13 (1) and 13 (2) of the Constitution.

The assertion of the Petitioner that he was assaulted with a staff is amply substantiated by the medical records pertaining to him, pleaded in these proceedings.

The history given by the Petitioner and the injuries sustained by him is compatible with the version of the Petitioner. Thus, I hold that the Petitioner was subjected by the police to physical and mental pain as amounted in law to inhuman and degrading treatment and consequently the Petitioner is entitled to a declaration that the State has acted in violation of his Fundamental Right under Article 11 of the Constitution.

It is alleged that it was the 1st Respondent who arrested the Petitioner, produced him at the police station for further detention and assaulted him on numerous occasions during the period he was kept in custody.

For the reasons set out above, I hold that the 1st Respondent has violated the Petitioner's Fundamental rights guaranteed under Articles 11, 13 (1) and 13 (2).

As far as the 2nd Respondent is concerned, he had taken no part in the arrest, however, the Petitioner would not have been detained at the police station from the 24th to the 28th if the detention was not sanctioned by the 2nd Respondent who was the Officer-in-charge of the Police Station and he was under a duty to satisfy himself that there were sufficient reasons to do so. In addition, the period of detention with the police exceeds the period prescribed by law to keep a person arrested in custody; As such I hold that the 2nd Respondent has violated the Fundamental right of the Petitioner guaranteed under Article 13 (2) of the Constitution.
At this point I wish to consider the material in respect of the 2nd Respondent in relation to violation of Article 11 of the Constitution.

The Petitioner in the history given to the Medico legal officer had stated that he was assaulted by a person called "Ananda" (the 1st Respondent) and another police officer, but had not disclosed the name or the credentials of the 'other officer'. According to the Petitioner, he was arrested by four persons. On the other hand, when the Petitioner, as alleged by him, was taken by the 1st Respondent in a vehicle, the 2nd Respondent had instructed the 1st Respondent 'not to assault innocent persons and to bring the Petitioner back to the police station' although

the Petitioner has pleaded in these proceedings that the 2nd Respondent assaulted him when he was taken to his cubicle.

According to the Petitioner, he had been severely beaten even before he was brought to the police station for about two hours with clubs and again when he was taken out of the police station subsequently, the 1st Respondent is alleged to have assaulted him repeatedly while travelling in the vehicle.

The Petitioner also states that after he was brought back to the police station and put in a cell, the 1st Respondent had taken him out and assaulted him with fists and a club.

However, the medical evidence does not support the Petitioners version to that extent, specifically when one considers the few non-grievous contusions the Petitioner had sustained. This court has held that there should be substantial material before court, to hold a violation under Article 11 of the Constitution.

I am of the view that the Petitioner has failed to establish a violation under Article 11 of the Constitution as against the 2nd Respondent.

Accordingly, I grant the Petitioner the following reliefs:

(1) A declaration that the fundamental rights of the Petitioner under articles 13 (1), 13 (2) and 11 were infringed by the **1st Respondent** by the reason of unlawful arrest on 24th April 2011 his detention from the 24th to the 28th April 2011 and degrading treatment;

(a) Compensation in a sum of Rs. 25, 000 to the Petitioner payable by the State

(b) Compensation in a sum of Rs. 75, 000 to the Petitioner payable by the 1st Respondent.

(2) A declaration that the fundamental rights of the Petitioner under Article 13 (2) was infringed by **the 2nd Respondent** by reason of unlawful detention from 24th April 2011 to the 28th April 2011

(a) Compensation in a sum of Rs. 30, 000 to the Petitioner payable by the 2nd Respondent.

Application allowed

JUDGE OF THE SUPREME COURT

JUSTICE H.N.J. PERERA

I Agree

CHIEF JUSTICE

JUSTICE 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 Application made under and in terms of Article 17 and 126 of the constitution of the Democratic Socialist Republic of Sri Lanka.

SC /FR 241/2016

Mr. Ponnaiya Sivagnanam
15/103, Gunananda Mawatha,
Colombo 13.

PETITIONER

-VS-

1. Hon K.C. Logeshwaran,
   Governor, Western Province,
   109, 5th Floor, Rotunda Tower,
   Galle Road,
   Colombo 03

2. Mr. Ranjith Somawansa,
   Minister of Provincial Education,
   Western Provincial Council,
   4th Floor, 89, Kaduwela road
   "Ranmagapaya"
   Battaramulla.

3. Mr S.G. Wijebandu,
   Secretary to the Ministry of Education – Western Province,
   4th Floor, 89, Kaduwela Road,
   "Ranmagapaya"
   Battaramulla.

4. D.D.P.W.Gunarathna,
   Provincial Director of Education,

Provincial Department of Education,
No 76,
Ananda Kumaraswami Mawatha,
Colombo 07.

4(a) Mr. P. Srielal Nonis,
Provincial Director of Education,
Provincial Department of Education,
No 76,
Ananda Kumaraswami Mawatha,
Colombo 07.

5. Mr. W.M. Jayantha Wickremanayaka,
Zonal Director of Education,
Zonal Education Office,
Vithanage MAwatha,
Colombo 02.

5(a) Mr. G.N. Silva
Zonal Director of Education,
Zonal Education Office,
Vithanage MAwatha,
Colombo 02.

6. Mr. H.M. Chandradasa,
Deputy Zonal Director of Education,
Zonal Education Office
Vithanage MAwatha,
Colombo 02.

7. P. Sathyendra,
Principal,
Kotahena Methodist Tamil Vidyalaya,

Colombo 13

8. Mariyam Shanthana A.C.
Principal,
Mahawatta St. Anthony's College,
Madampitiya,
Colombo 15.

9. Provincial Public Service Commission - Western Province,
109, Main Street,
Battaramulla.

(a) Mr. K. Sarath Gunathilake,
Hon Chairman,
Provincial Public Service Commission – Western Province,
109, Main Street,
Battaramulla.

(b) Mr. A.W.C. Ariyadasa,
Member,
Provincial Public Service Commission – Western Province,
109, Main Street,
Battaramulla

(c) Mr. Sunil Fernando,
Provincial Public Service Commission – Western Province,
109, Main Street,
Battaramulla.

(d) Mr. S.K. Liyanage,

Provincial Public Service Commission – Western Province,
109, Main Street,
Battaramulla.

(e) Mr. K. Paramalingam,
Provincial Public Service Commission – Western Province,
109, Main Street,
Battaramulla.

(f) Mr. J. Paranamana,
Provincial Public Service Commission – Western Province,
109, Main Street,
Battaramulla.

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

RESPONDENTS

BEFORE : **B. P. ALUWIHARE, PC, J.**
P. PADMAN SURASENA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Rushdie Habeeb with Mrs. Shafeena Maharoof instructed by Mrs. Thakshila Serasinghe for the Petitioner.
Rajiv Goonetillake, SSC for the Respondents.

ARGUED ON : 19th June 2019

WRITTEN SUBMISSIONS : Petitioner on the 1st of July 2019
Respondents on the 2nd Of July 2019

DECIDED ON **:** 06th September 2019.

S. THURAIRAJA, PC, J.

The Petitioner i.e. Ponnaiya Sivagnanam, is an Arts Graduate and was appointed as a graduate teacher of the Sri Lanka Teachers Service and has been teaching at Methodist College since 2010, which is a school under the purview of the Western Province Educational Ministry. The Petitioner has filed this Application before us, alleging that his fundamental rights under Articles 11, 12(1), 12(2) and 14(1)(g) of the Constitution have been infringed by the Respondents and leave was granted on 19.10.2017 in terms of Article 12(1) of the Constitution.

The facts of the case, in the chronological order, have been produced as follows for completeness.

The Petitioner was first appointed as a graduate teacher in 1993 to Al Naser Maha Vidyalayam, Colombo 14. He was, later, transferred to the Mutwal Hindu College, Colombo 15, where he served from 1997 to 2004. Following this, he was transferred to St. Johnes College, Colombo 15, where he served from 2004 to 2010 June. The Petitioner has not disputed the aforementioned transfers.

In June 2010, the Petitioner was transferred to Kotahena Methodist Tamil Vidyalayam, Colombo 13. The Petitioner, during his early days at the school, wrote to various authorities about the alleged mismanagement and misappropriation of the school resources by the then Principal of Kotahena Methodist Tamil Vidyalayam (hereinafter referred to as the '7th Respondent'). On 12th May 2016, the Petitioner received a transfer letter to Mutwal Hindu College (hereinafter referred to as the 'First Transfer of Dispute'). The Petitioner made an appeal to the Zonal Director of Education (hereinafter referred to as the '5th Respondent'), protesting the said transfer and instead requested Kalaimagal Tamil Vidyalayam, Colombo 14, since there was an English teaching vacancy in the said school. Awaiting further notice from the 5th

Respondent, the Petitioner intended to continue at the Methodist College, but the 7th Respondent objected to the Petitioner signing in the Register and therefore, the Petitioner requested duty leave until the transfer was corrected.

On 31.05.2016, the Petitioner received a further transfer letter to Fathima Muslim Ladies College, Colombo 12 (hereinafter referred to as the 'Second Transfer of Dispute'). When the Petitioner reported at the said school, the Principal had refused from permitting the Petitioner to sign in the Register stating that as a long standing policy, the School has had only Lady Teachers. The Petitioner had informed the 5th Respondent of the same and had requested duty leave. Thereafter, on 06.06.2016, the Petitioner along with a Teachers' Union Representative had pleaded with the Zonal Director to cancel the transfer and in the alternative, the Petitioner had appealed for a school in Kotahena, where there was a vacancy for a teacher of English.

On 15.06.2016, the Petitioner received a transfer letter to St. Anthony's Tamil Vidyalayam, Madampitiya, Colombo 15 (hereinafter referred to as the 'Third Transfer of Dispute'), but when the Petitioner reported for duty, the Principal of St. Anthony's Tamil Vidyalayam (hereinafter referred to as the '8th Respondent') refused the Petitioner's presence there. The Petitioner complained to the Deputy Zonal Director of Education (hereinafter referred to as the '6th Respondent'), who gave him a letter dated 22.06.2016 (document marked as 'P12') addressing the 8th Respondent, seeking the 8th Respondent to inform the Zonal Director if he does not accept the transfer of the Petitioner. The directive was disregarded by the 8th Respondent.

On the same day, the Petitioner handed over a letter to the 6th Respondent, (document marked as 'P13') who then gave the Petitioner a letter addressing the 7th Respondent (document marked as 'P14'), seeking the 7th Respondent to permit the Petitioner to continue in Kotahena Methodist Tamil Vidyalayam, Colombo 13.

The Petitioner, along with the said letter marked 'P14' reported to Kotahena Methodist Tamil Vidyalayam on 23.06.2016, where the 7th Respondent over a phone call to the 6th Respondent, refused the Petitioner and sought other solutions.

On 11.07.2016, the Petitioner by letter, was directed to report to St. Anthony's Tamil Vidyalayam, again. When the Petitioner reported there, the 8th Respondent refused his reporting at the school.

Thereafter, the Petitioner has filed the present Application before this Court and leave was granted on 19.10.2017 in terms of Article 12(1) of the Constitution.

Having produced the facts of this Application as submitted by the learned Counsel for the Petitioners and agreed to by the learned Counsel for the Respondents, I now turn to consider the grievance of the Petitioners and the corresponding contentions of the Respondents.

Contentions of the parties on the First Transfer of Dispute

In paragraph 8 of the Petition dated 21.07.2016 (hereinafter referred to as the 'Petition'), the Petitioner contends that he had protested the first transfer since he had already served in Mutwal Hindu College between 1997-2004 and alleges that the transfer was contrary to the National Transfer Policy of Teachers Circular No. 2007/20 dated 13.12.2007.

In response to these averments, in the Affidavit of the 5th(a) Respondent dated 24.08.2018 (hereinafter referred to as the 'Affidavit of the Respondent'), it has been stated in paragraph 8, that the transfer was due to the need to balance the teachers available in the zone, as there was vacancy in Mutwal Hindu College and that the transfer had been done in accordance with paragraph 8:2 of the Education Ministry Circular 1/2016.

Contentions of the parties on the Second Transfer of Dispute

In paragraph 10 of the Affidavit of the Respondent, it has been stated that the Principal of Fathima Muslim Ladies College objected to the Petitioner being transferred there.

The Petitioner has contended in paragraph 10 of the Petition that he had objected to the transfer but had reported there for the purpose of continuing duty.

Contentions of the parties on the Third Transfer of Dispute

The Petitioner, in paragraph 16 of the Petition has, in terms of the third transfer, stated that, the treatment by the Principal is due to the influences of the 7th Respondent. Further, the Petitioner, in paragraphs 18 and 20, has *inter alia*, described the transfer procedure as indiscriminate, unlawful, unfair and illegal.

The Respondents, in paragraph 16 of the affidavit, have stated that the Petitioner by his conduct, had demonstrated that he is having difficulty in getting on with the Principals of schools. Moreover, it has been stated in paragraph 17 of the affidavit that, the transfers were all made within the Colombo North Division of the Zone and that other teachers were also transferred.

With regard to the above contentions of the parties, I make the following observations.

In order to constitute an infringement under Article 12(1), there must have been a discriminatory action or an arbitrary action that amounts to a denial of equal treatment or equal protection of the law.

In the case of ***Perera v. Jayawickrema (1985) 1 Sri L.R. 285***, it was observed that-

> *"Discrimination can exist only where two persons or two subjects are treated in different ways. It arises only from two dissimilar treatments and not from similar treatments."*

Therefore, the existence of discrimination mandates dissimilar treatment of similar persons or subjects. I observe that, the petitioner along with other teachers were transferred in order to balance the teachers available in the zone. Therefore, I find that, the Petitioner has not been treated differently from persons who have been similarly circumstanced.

Having eliminated the possibility of differential treatment, I now, find it apposite to consider the ground of arbitrariness under Article 12(1).

In the case of ***Perera v. Monetary Board of the Central Bank and Ors. (1994) 1 Sri L.R. 152***, with regard to promotion/recruitment in the public sector, it was observed that-

> *"Persons are entitled to complain … if they were invidiously or arbitrarily treated by or in the selection process"*

The meaning of arbitrariness with regard to the principles enumerated in Article 12(1) can be understood from the interpretation of Article 14 of the Indian Constitution.

In the case of ***Sharma Transport v. Government of A.P. (2002) 2 SCC 188***, it was observed-

> *"The expression **'arbitrarily' means: in an unreasonable manner**, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."*
>
> *(Emphasis added)*

In the case of ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***, it was observed-

> *"The **principle of reasonableness**, which legally and philosophically, **is an essential element of equality or non-arbitrariness** pervades Article 14 like a brooding omnipresence."*
>
> *(Emphasis added)*

The above view was re-iterated in the case of ***R.D. Shetty v. International Airport Authority, (1979) 3 SCC 489***-

> *"The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law."*

Therefore, it is clear that reasonableness is an essential element of non-arbitrariness.

Considering the facts of the case, I find that the transfer had been done in accordance with paragraph 8:2 of the Education Ministry Circular 1/2016 and the transfers were all within the Colombo North Division of the Zone, for the purpose of balancing the teachers. Therefore, I find that the procedure adopted was reasonable and within the ambit of the prescribed law. Owing to the presence of reasonableness, the transfer procedure becomes non-arbitrary.

In addition to the aforementioned findings, I find it pertinent to make the following observations.

The Petitioner, at the time of the first transfer of dispute, had protested the transfer and requested Kalaimagal Tamil Vidyalayam, Colombo 14, since there was an English teaching vacancy in the said school. Moreover, it is clear from the contents of the Petition that the Petitioner has, since the time of the first transfer, had objections against each of his transfers, even before he could report to the newly assigned work place.

All the transfers that the Petitioner has disputed was well within the zone in very close proximity and were done in accordance with the National Transfer Policy for the purpose of balancing the teachers within the zone. Therefore, I find that the conduct of the Respondent on disputing all of the stated transfers, reflects his intentions to teach English, rather than arts, although he has not specialized in English.

In response to the Respondents' contention that the Petitioner had difficulty in getting along with the Principals of Schools, the Petitioner, in Paragraph 7 of the counter-

objections filed by him, has stated that, he is an "intellectual giant" and that, it is not his conduct that is the cause for the developments that occurred. Considering these submissions, I am of the view that, the reasons for the alleged difficult relationship shared between the Petitioner and the Principals of Schools is not an essential issue that has to be addressed by us for the purpose of determining an Article 12(1) violation with regard to the disputed transfer procedure.

For the reasons already enumerated by me, I find that, the transfer procedure was just and reasonable. Therefore, I find that, there is no violation of the Petitioner's fundamental right under Article 12(1).

Accordingly, I dismiss the Application and grant no cost.

Application dismissed.

JUDGE OF THE SUPREME COURT

B. P. ALUWIHARE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.
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) and 14(1)(g), read with Articles 17 and 126 of the Constitution.

1. Ranasinghe Arachchige Nadeesha Seuwandi Ranasinghe,
   No. 130D, "Saman"
   Walpola Road,
   Ragama.
2. Mohamed Huwais Mohamed Naleef,
   No.7,
   Salawatta Lane,
   Wellampitiya.

PETITIONERS

SC No: SC FR 244/2017 **Vs**

1. Ceylon Petroleum Storage Terminals Limited,
   Oil Installation,
   Kolonnawa.

2. Chairman,
   Ceylon Petroleum Storage Terminals Limited,
   Oil Installation,
   Kolonnawa.

3. Managing Director,

Ceylon Petroleum Storage Terminals
Limited,
Oil Installation,
Kolonnawa.

4. P.D.P.Dharmawansa,
   Deputy General Manager (HR and Admin),
   Ceylon Petroleum Storage Terminals Limited,
   Oil Installation,
   Kolonnawa

5. W.V.S.A. Fonseka,
   Chief Accountant,
   Ministry of Petroleum Resources Development,
   No. 80, Sir Ernest de Silva Mawatha,
   Colombo 07.

6. D.M.H.B.Dasanayake,
   Manager (Internal Audit),
   Ceylon Petroleum Storage Terminals Limited,
   Oil Installation,
   Kolonnawa.

7. K.M.N.A.C.Perera,
   Human Resource Manager,
   Ceylon Petroleum Storage Terminals Limited,
   Oil Installation,
   Kolonnawa.

8. Manoj Siriwardene,

Senior Deputy Manager (Finance),
Ceylon Petroleum Storage Terminals Limited,
Oil Installation,
Kolonnawa

9. R.M.S.K. Rathnayake (11536)

10. R.M.S.M.T. Mahanama (14104)

11. D.R.C.S.Thennakoon (14629)

12. E.G.C.B.Ellagama (16096)

9th to 12th Respondents all of and to be served through the Manager (Internal Audit),
Ceylon Petroleum Storage Terminals Limited,
Oil Installation,
Kolonnawa.

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

RESPONDENTS

Before: Buwaneka Aluwihare, PC. J,
L.T.B Dehideniya, J. and
Murdu N.B.Fernando, PC. J.

Counsel: Harsha Fernando with Chamith Senanayake and Ruvendra Weerasinghe instructed by Jagath Talgaswattage for the Petitioners.
Sanjeewa Jayawardena, PC for the 1st to 4th, 6th to 12th Respondents.
Yuresha de Silva, SSC for AG.

Supported on: 13.06.2018

Decided on: 22.02.2019

Murdu N.B. Fernando, PC.J,

This order is in respect of the Preliminary Objection raised by the 1st to 4th and 6th to 12th Respondents (the Respondents) that the Petitioner's application to this Court is time barred.

The respondents raised the above preliminary objection, when this application in which the petitioners alleged that their fundamental rights were infringed by the respondent's failure to grant the promotion which the petitioners alleged they were duly entitled to, was taken up for support, on the premise that Articles 17 and 126 of the Constitution requires a fundamental rights application to be filed within one month of the alleged violation but the present application had been filed in this Court four months and eight days after the alleged violation.

The petitioners response was that prior to coming before this Court, a complaint was filed with the Human Rights Commission and in view of the provisions of Section 13(1) of the Human Rights Commission Act No 21 of 1996, time freezes and thus, this application is not time barred.

In the extensive written submissions filed before this Court substantiated by judicial authority, the respondents takes up the position that a mere filing of a complaint is not sufficient and that the petitioners should place material before Court to demonstrate that an inquiry is pending, whilst the petitioners takes up the position that up to now, no formal notification has been published indicating the date of promotion of 9th to 12th Respondents and by the inaction of the respondents an artificial lacuna has been created in ascertaining the exact date from which the 30 day time period begins to run and in any event the complaint to the Human Rights Commission has been made within 30 days on the assumption that the promotions were made on a given date, which is in line with the position taken up by the respondents in its written submissions.

In order to consider the time bar objection, certain dates are material and this Court will place reliance only on documents tendered to Court supported by affidavits.

- date of interview	- 20-01-2017
- date of filling the complaint before the HRC (by the two petitioners)	- 23-03-2017 and 24-03-2017
- date of acknowledgement by the HRC	- 29-03-2017
- date of the Fundamental Rights Application	- 14-07-2017

The grievance of the petitioners before this Court is arbitrarial denial of a promotion despite being duly qualified but there is no documentation before Court to ascertain the exact date of promotion. The petitioners position is that up to date no formal notification had been published and becoming aware on or about 03-03-2017 that promotions have been made, complained to the Human Rights Commission within the stipulated time of one month.

The respondents on the other hand takes up the position that on the date the petition was filed before this Court viz. 14-07-2017, there was no pending inquiry at the Human Rights Commission and thus the petitioners cannot rely upon Section 13(1) of the Human Rights Commission Act of No 21 of 1996. No documents have been produced by either party before this Court supported by an affidavit to demonstrate that an inquiry is being held or was held before the Human Rights Commission, excepting the original complaint filed before the Human Rights Commission by the petitioners.

Article 126(2) of the Constitution reads as follows:-

> "Where any person alleges that such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive and administrative action, he may himself or by an Attorney-at-Law on his behalf, within one month there of, in accordance with such rules of Court as may be in force, apply to the Supreme Court……"

Section 13(1) of Human Rights Commission 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 fundaments right by executive or administrative action, the period within which the inquiry in to such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."

The above sections clearly and precisely state that within one month of an infringement, any person may come before the Supreme Court or make a complaint to the Human Rights Commission. Thus, the key word in the above section is the word 'infringement' in order to ascertain the time period of one month for a party to come before the Supreme Court or the Human Rights Commission. The documents produced before this Court does not indicate the date of promotion which the petitioners alleged, infringed their fundamental rights. The petitioners position is that up to date no formal notification had been published and on or about 03-03-2017 becoming aware of the infringement, the two petitioners went before the Human Rights Commission on 23rd and 24th March 2017 respectively, which is within one month of having knowledge of the infringement.

This position is not controverted by the respondents. No documents up to now have been produced before this Court to indicate the date of promotion and or notification of such date of promotion. However, the written submissions of the respondents have been filed upon the basis that promotions to the 9th to 12th respondents were given on 03.03.2017 to be effective from 01.02.2017. The applications before the Human Rights Commission had been filed by the petitioners on 23rd and 24th of March 2017 respectively and acknowledged by the Human Rights Commission on 29.03.2017.

In the above circumstances, the petitioner's contention that they went before the Human Rights Commission within the stipulated period of one month is accepted.

The next question that this Court is called upon to answer is whether the petitioners application dated 14-07-2017 filed before this Court is time barred or not in view of the provisions of Section 13(1) of the Human Rights Commission Act, which stipulates that if a complaint is made to the Commission within one month of the alleged infringement, then the period within which such 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 in terms of Article 126(2) of the Constitution.

The time limit of one month prescribed by Article 126(2) has been considered by this Court on many an instant and consistently the said provision has been treated as mandatory.

Mark Fernando, J. in Gamaethige Vs Siriwardana 1988 (1) SLR page 384 at pages 401 and 402 stated as follows:-

> "The time period of one month prescribed by Article 126(2) has been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioners fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including accent to legal advice) as would be necessary to invoke the jurisdiction of this Court, this Court has discretion, possibly even a duty to entertain an application made within one month after the petitioner ceased to be subjected to such restraint. The question whether there is a similar discretion where the petitioners failure to apply in time is on account of a third paty or some nature or man-made disaster, would have to be considered in an appropriate case when it arises…."
>
> " Three principles are thus discernible in regard to the operation of time limit prescribed by Article 126(2); Time being to run when the infringement takes place; if knowledge on the part of the Petitioner is required ….. time begins to run only when both infringement and knowledge exist….; the

pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of time limit. While the time limit is mandatory, in exceptional cases, on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time"

Thus in very clear terms, this Court has held that one month time period is mandatory, but in an exceptional case or in an appropriate case, court has a discretion, possibly even a duty to entertain an application made out of time.

Human Rights Commission Act No 21 of 1996 was enacted subsequent to the said pronouncement of Fernando, J. in **Gamaethige Vs Siriwardena**.

Aluwihare, J. in **Alawala Vs IGP S.C.F.R 219/2015 – S.C.M. 15.02.2016** at page 8 referring to the provisions of Article 126(2), stated that

> "An exception to this rule, however is found in the Human Rights Commission Act. This Act empowers the Human Rights Commission to entertain complaints in respect of violations of fundamental rights guaranteed by the Constitution."
>
> "In the light of Section 13(1) of the said Act, it is evident that the petitioners could avoid the time bar, if the application to the Human Rights Commission was made within one month of the alleged infringement. By virtue of the aforesaid provision time would not run during the pendency of proceedings before the Commission. This view was fortified in the case of **Romesh Coorey Vs Jayalath (2008) 2 SLR page 43**."

In the above referred case, viz **Romesh Coorey Vs Jayalath,** Shirani Bandaranayake J (as she then was) held, that although the petitioner in the said case had come before the Supreme Court five months after the alleged infringement, since the petitioner had complied with the provisions of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his fundamental right and the

inquiry before the Human Rights Commission was pending, it was quite clear that the Petitioner has filed the fundamental rights application before the Supreme Court within the stipulated time and over ruled the preliminary objection pertaining to time bar raised by the respondent.

Similarly, in the case of **Alles Vs Road Passenger Services Authority S.C.F.R. 448/2009 – S.C.M 22.02.2013** Marsoof, J. relying upon the above referred case of Romesh Coorey Vs Jayalath, over ruled the preliminary objection raised by the respondents with regard to the time bar. The petitioners in the said case had taken up the position that upon being aware of the alleged violation of fundamental rights, a complaint was promptly preferred to the Human Rights Commission and even when the petitioners invoked the jurisdiction of this Court the complaint was pending before the Human Rights Commission.

In the case presently before us, the petitioners have promptly gone before the Human Rights Commission upon being aware of the alleged infringement of fundament rights. Thus, based on the above referred line of judicial authority, as the petitioners have gone before the Human Rights Commission promptly and the matter is pending before the Human Rights Commission and during the pendency of the matter before Human Rights Commission time freezes, the petitioners contention that the application before the Supreme Court has been filed within the stipulated time is accepted. However, the question raised by the respondents is that filling a complaint is not sufficient and an inquiry should commence for the petitioners to rely on the provisions of Section 13(1) of the Human Rights Commission Act.

The respondents heavily relied upon the Judgment of **Kithsiri Vs Faizer Musthapa – S.C.F.R 362/2017 - S.C.M. 10.01.2018** to buttress their argument.

In the said case, the application was filed by the petitioner against the Minister of Provincial Councils and Local Government, Speaker of Parliament and the Election Commission alleging infringement of the petitioner's and such other similarly circumstanced persons fundamental rights by introducing amendments to the Local Authority Elections (Amendment) bill, in violation of the procedure established by law, particularly in terms of the Constitution. In the said case on behalf of the respondents it was pointed out, referring to the dates of the said Bill being published in the gazette, placed in the Order Paper of Parliament, debated in Parliament, Speakers certification and the Bill coming into force as a Law, that the application was time

barred. Although the petitioner relied on the application he made to the Human Rights Commission to get over the time bar objection it was established that the petitioner was very much aware of the impugned acts and had gone before the Human Rights Commission not to have an inquiry conducted by the Human Rights Commission but with the desire of invoking the jurisdiction of this Court and thus, upheld the preliminary objection pertaining to time bar raised on behalf of the respondents.

Aluwihare, J. (with Malalgoda, J. agreeing) further held that the petitioner in his complaint to the Human Rights Commission in his own hand writing had stated his intention of going before the Supreme Court in the future and relied on the said complaint to circumvent the period of limitation referred to in Article 126(2) of the Constitution and thus, the petitioner had not filed the said application with the intention of pursing 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) of the Constitution.

The case before us can easily be distinguished from the case Kithsiri Vs Mustapha referred to above, as the two petitioners in the present case had gone before the Human Rights Commission well within the stipulated period of time to obtain relief for themselves. There is not even an iota of evidence before this Court, to suggest that the petitioners went before the Human Rights Commission with the desire of invoking the jurisdiction of this Court or to circumvent the period of limitation or for any other intention or an ulterior motive. Thus, Kithsiri's case referred to above, has no bearing on the present case as the petitioners in the present case went before the Human Rights Commission in good faith and well within the stipulated time period.

The respondents also placed much reliance on the dicta of Wanasundera, J. in the case of **Manoranjan Vs Chandrasiri S.C.F.R. 261/2013 - S.C.M. 11.09.2014**. The facts of the said case are vastly different to the case before us and can be distinguished. In Manoranjan case, the petitioner who was serving in Jaffna was initially transferred out of the work station he was serving to another work station in Jaffna itself and the petitioner complied with the said transfer. Four months thereafter he was transferred again to Mannar and he made an appeal requesting that he be authorized to resume duties at his original work station. He went before the Human Rights Commission against the second transfer and then came before this Court. The Court

upheld the preliminary objection raised by the respondents that the application made to this Court was time barred, placing reliance that the infringement took place when the petitioner was initially transferred out of his original work station four months earlier and the application made to the Human Rights Commission based on the second transfer was not within the stipulated time period of one month from the alleged violation as specifically provided for in the Human Rights Commission Act, among other reasons. Thus, the dicta of Wanasundera, J. made in obiter, should be viewed under the circumstances pertaining to the said case.

In the case before us the petitioners have established that they went before the Human Rights Commission within the stipulated period of one month and thus the application falls within the provisions of Section 13(1) of the Human Rights Commission Act. The said section clearly states the period within which the matter is pending before the Commission should not be taken into account in computing the period of one month for a person to come before the Supreme Court in terms of Article 126 (2) of the Constitution. Therefore I am inclined to accept the position taken up by the petitioners, that the present application to this Court is not time barred as the complaint of the petitioners to Human Rights Commission clearly falls within the four corners of Section 13(1) of the Human Rights Commission Act.

In the written submissions filed before this Court, much emphasis is placed on the English and Sinhala terms ‘complaint’, ‘inquiry’, and ‘investigate’. I do not think it is necessary to analyze the said terms and or to come to a finding with regard to the workings of the Human Rights Commission, definition of ‘pending’ viz-a-viz inquiry and investigation and the effect of Section 15(1) of the Human Rights Commission Act at this juncture, as the petitioners in the case before us, have clearly established that the petitioners complaint to the Human Rights Commission is well within one month of becoming aware of the alleged infringement of the fundamental right unlike in the two cases referred to earlier, where the complaint was made to the Human Rights Commission in order to circumvent the period of limitation laid down by Article 126(2) of the Constitution and way outside the stipulated time frame given in section 13(1) of the Human Rights Commission Act respectively.

In my view, what is material is for an aggrieved party to make a complaint within the mandatory period. The acknowledgment of the complaint by the Human Rights Commission

would trigger in and set in motion the mechanics and workings of the Human Rights Commission, culminating in a communiqué pertaining to the findings on the complaint. An aggrieved party has no say or control over the proceedings before the Human Rights Commission and cannot be faulted for the delay or non-holding of an inquiry by Human Rights Commission which may be for good and justifiable reasons. The manner and speed of the working of the Human Rights Commission is not within the purview of an aggrieved party and an aggrieved party cannot be penalized for the delay, if any at the Human Rights Commission.

The 3rd case relied on by the respondents, is the case of **Ranaweera Vs Siriwaradena 2008 (1) SLR page 260.** In the said case the petitioner challenged the actions of a fiscal who executed a writ of possession issued by the District Court. Ameratunge, J. overruling the objection raised by the respondents held that an execution of a writ is purely a ministerial act done with judicial sanction and although the Civil Procedure Code sets out the protection available to an officer executing process issued by Court and limits of such protection, that there was no justification to exclude all such acts from the purview of fundamental rights jurisdiction of the Supreme Court. He further went on to state that the plea of time bar is available to the respondent and when the petitioner is put on notice the petitioner has to adduce material before this Court to show that an inquiry is pending before the Human Rights Commission. In Ranaweera's case since the respondent in its objections raised the plea of time bar and the petitioner failed to place any material before Court that an inquiry was pending at the Human Rights Commission, Amaratunga, J. upheld the time bar objection raised on behalf of the respondent.

In the present case before us (unlike in the above case and the two cases referred to earlier and heavily relied upon by the respondents) the plea of time bar has been raised at the stage of supporting for leave to proceed as a preliminary objection and the petitioner as well as the respondents have had no opportunity to place material before Court to show that an inquiry into the complaint has been held by the Human Rights Commission or that an inquiry is still pending. In the said circumstances, I re-iterate the words of Amaratunga, J. (at page 271) in the above said Ranaweera's case, that "in exercising the fundamental rights jurisdiction this Court is

under a duty to act in compliance with the letter and the spirit of Article 4(d) of the Constitution."

I am also mindful of the dicta of Amaratunga, J. in the case of **Kariyawasam Vs Southern Provincial Road Development Authority 2007 (2) SLR page 33** where dismissing the respondents objection that the petitioners application to the Supreme Court was time barred, he stated that since the petitioners application to the Human Rights Commission was within the mandatory period of one month and the Human Rights Commission by calling for a report from the respondent has set in motion the process of holding of an inquiry into the petitioners application, 'the petitioner is entitled to claim the benefit' conferred by Section 13(1) of the Human Rights Commission Act.

When considering the above referred judicial authorities, it is clearly established in a long line of cases this Court has consistently held, that when a matter is promptly referred to and pending before the Human Rights Commission, the time freezes and the said time period is not taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126 (2) of the Constitution. The three cases relied on by the respondents, analyzed and considered in detail by me, are unique in nature and in facts and circumstances and can be easily distinguished from the present application before this Court. In the matter before us, where non-granting of a promotion is being challenged petitioners went before the Human Rights Commission well within time whereas in the afore said three instances respectively, the complaint to the Human Rights Commission was made to circumvent the provisions of the Act, the complaint made was not within the stipulated period of one month as laid down in the Act and the petitioner had failed to place material to rebut the objection raised by the respondent before this Court.

Thus, considering the facts of the case presently before us, I am inclined to take the view that the petitioners are entitled to claim the benefit conferred by Section 13(1) of the Human Rights Commission Act.

In the case of **De Zoysa Vs Dissanayake SC FR 206.2008 –S.C.M. 09.12.2016** Prasanna Jayawardena, J. considering the one month rule enunciated in Article 126 (2) of the Constitution, traced the history and the development of the law pertaining to time bar and whilst holding that it is mandatory, went on to state at page 9, that

> "this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose fundamental rights have been infringed by executive and administrative action, requires Article 126 (2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a petitioner of an opportunity to invoke the jurisdiction of Courts earlier."

For completion of the analysis of the one month rule, Jayawardena, J. (at page 13) referred to Section 13 (1) of the Human Rights Commission Act and stated, that it is a statutorily created interruption but did not delve into greater detail on the provisions of the Human Rights Commission Act, as the Human Rights Commission and a complaint made to the Human Rights Commission were not matters in issue in the said case.

Nevertheless, the rationale referred to in the above quotation that a Court would fail to fulfill its guardianship, if it remains blind to facts and circumstances, and also the dicta of Fernando, J. in Gamaethige case, whether the Court has a discretion where the petitioners failure to apply in time (on account of a third party or some nature or man-made disaster) would have to be considered in an appropriate case when it arises, should be borne in mind when considering the time bar objection raised before this Court.

In the present case, the Petitioners complained to the Human Rights Commission within one month of becoming aware of the promotions being given to the 9th to 12th respondents and came before this Court for alleged violation of fundamental rights after obtaining additional

information under the Right to Information Act No 12 of 2016 and declaring in the petition that a complaint was made to the Human Rights Commission and that the said complaint was acknowledged by the Human Rights Commission.

In the absence of any material adduced before this Court to indicate that the Human Rights Commission had come to a finding pertaining to the complaint made by the petitioner, this Court has to assume that the matter is still pending before the Human Rights Commission and the Human Rights Commission is taking steps with regard to the complaint within the four corners of the Human Rights Commission Act. This Court refrains from commenting on the mechanics and the workings of the Human Rights Commission specifically with regard to the complaint of the petitioner, in view of paucity of documentation before same.

In the above circumstance, I hold that the complaint made by the Petitioners to the Human Rights Commission under Section 14 of the Human Rights Commission Act is within the stipulated time period and in view of the provisions of Section 13(1) of the Human Rights Commission Act, time would not run during the pendency of proceedings before the Human Rights Commission and such time will not be taken into account in computing the period of one month within which an application may be made to this Court in terms of Article 126(2) of the Constitution. Thus, the Petitioners application filed before this Court is not time barred.

For the reasons aforesaid, the Preliminary Objection raised on behalf of the 1st to 4th and 6th to 12th respondents is overruled.

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 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) Application No. 265/2011
S.C. (F/R) Application No. 266/2011
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S.C. (F/R) Application No. 268/2011
S.C. (F/R) Application No. 269/2011
S.C. (F/R) Application No. 270/2011
S.C. (F/R) Application No. 271/2011
S.C. (F/R) Application No. 272/2011
S.C. (F/R) Application No. 273/2011
S.C. (F/R) Application No. 274/2011
S.C. (F/R) Application No. 346/2011
S.C. (F/R) Application No. 347/2011
S.C. (F/R) Application No. 348/2011

Petitioners

H. M. M. Sampath Kumara,
Mamunugama,
Moragollagama.
(Petitioner S.C. (F/R) Application No. 265/2011)

A. Rohitha Amarasinghe,
Aluth-Ala Road,
Paluwa,
Galgamuwa.
(Petitioner S.C. (F/R) Application No. 266/2011)

C. A. H. M. O. Buddhika Atapattu,
147/1, Mapitigama,
Ambanpola.
(Petitioner S.C. (F/R) Application No. 267/2011)

R. R. M. Dhanushka Sanjeewa,
8/10,
Amandoluwa,
Seeduwa.
(Petitioner S.C. (F/R) Application No. 268/2011)

Anesh Imalka Fernando,
Paalasola,
Madurankuliya.
(Petitioner S.C. (F/R) Application No. 269/2011)

N. L. T. Iresha,
134/2,
Japalawatte,
Minuwangoda.
(Petitioner S.C. (F/R) Application No. 270/2011)

Nisshanka Wanigasekera,
13 Post,
Bandaragama,
Pemaduwa.
(Petitioner S.C. (F/R) Application No. 271/2011)

R. A. H. M. Jayatissa Rajakaruna,
230/4,
Sarath Mawatha,
Katunayake.
(Petitioner S.C. (F/R) Application No. 272/2011)

S. P. L. Ranjan Lasantha Perera,
19, St. Xavier Mawatha,
Kimbulapitiya Road,
Akkara 50.
(Petitioner S.C. (F/R) Application No. 273/2011)

H. M. Lalinda Herath,
No 21/09, Yatiyana,

Minuwangoda.

(Petitioner S.C. (F/R) Application No. 274/2011)

M. Pradeep Kumara Priyadarshana

Jambolagahamulla,

Dippitiya,

Mahapallegama.

(Petitioner S.C. (F/R) Application No. 346/2011)

U. G. Nalin Sanjaya Jayatileke,

625/1, Aluthgama,

Nabata,

Malsiripura.

(Petitioner S.C. (F/R) Application No. 347/2011)

M. H. A. Sameera Sandaruwan Hettiarachchi,

Welimada,

Daragala,

Dumkola Watta,

Sameera-Sewana.

(Petitioner S.C. (F/R) Application No. 348/2011)

Vs.

Respondents

1. Officer-in-Charge,
   Police Station,
   Katunayake.

2. Officer-in-Charge,
   Police Station,
   Seeduwa.

3. Deputy Inspector General of Police,
   Negombo DIG Office,
   Negombo.

4. Mahinda Balasooriya,
   Former Inspector General of Police,
   C/O Police Headquarters,
   Colombo 01.

5. N. K. Illangakoon,
   Former Inspector General of Police,
   Police Headquarters,
   Colombo 01.

5A. Pujith Jayasundara,

   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

6. Board of Investment of Sri Lanka,
   West Tower-World Trade Centre,
   Echelon Square,
   Colombo 01.

7. Lt. Gen. Jagath Jayasooriya,
   Commander- Sri Lanka Army,
   Army Headquarters,
   Colombo 03.

8. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.
   (Respondents in all cases)

9. Gamini Lokuge MP
   Hon. Minister of Labour,
   Ministry of Labour & Labour Relations,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.
   (8th Respondent in S.C. (F/R) Application No. 346/2011)

BEFORE: Buwaneka Aluwihare, PC. J.

Priyantha Jayawardena, PC. J.

H. N. J. Perera J.

COUNSEL: J. C. Weliamuna with Pulasthi Hewamanna for Petitioners in 265/11, 267/11, 269/11, 271/11, 273/11, 347/11, 348/11,

Saliya Peiris PC with Anjana Rathnasiri and Harindrini Corea for the Petitioner in 266/11,

Shantha Jayawardena with Chamara Nanayakkarawasam for Petitioner in 272/11,

Chrishmal Warnasuriya with Jayathu Wickramasuriya for Petitioner in 346/11,

Uditha Egalahewa PC with Vishva Vimukthi for Petitioner in 268/11

Eraj de Silva for Petitioner in 274/11 and

N. Anketell for the Petitioner in 270/11,

Parinda Ranasinghe SDSG with Lakmali Karunanayake SSC for Respondents.

ARGUED ON: 01. 11. 2017

DECIDED ON: 05. 04. 2019

Aluwihare PC J.,

The Petitioners, being workers employed in factories situated within the Free Trade Zone, alleged the infringement of their fundamental rights by the Police in quelling a protest held by the Free Trade Zone workers against a proposed bill that would affect them. Counsel representing the Petitioners in all the cases referred to in the caption, were agreeable to consider these applications together in view of the fact that the violations alleged had emanated from one and the same incident and were also agreeable to abide by a single judgement. As such all thirteen petitions were considered together.

Leave to proceed was granted in;

Application no. SC FR 265/2011 for the infringements of Articles 11, 12(1) and 14(1)(b) of the Constitution,

Application no. SC FR 266/2011 for the infringements of Articles 11, 12(1), 13(1), and 14(1)(b) of the Constitution,

Application no. SC FR 267/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 268/2011 for the infringements of Articles 11, 12(1), 13(1), and 14(1)(b) of the Constitution,

Application no. SC FR 269/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 270/2011 for the infringements of Articles 11, 12(1), and 13(1), 14(1)(b) of the Constitution,

Application no. SC FR 271/2011 for the infringements of Articles 11, and 12(1) of the Constitution,

Application no. SC FR 272/2011 for the infringements of Articles 11, 12(1), 13(1) of the Constitution,

Application no. SC FR 273/2011 for the infringements of Articles 11, 12(1), and 13(1) of the Constitution,

Application no. SC FR 274/2011 for the infringements of Articles 11, 12(1) and 13(1) of the Constitution,

Application no. SC FR 346/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 347/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 348/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

In 2011 a bill was tabled, titled the 'Employees' Pension Benefits Fund Bill' which proposed to introduce a pension scheme for private sector workers. The workers of the Katunayake Free Trade Zone (FTZ) entertained an apprehension that this bill would affect their savings related to EPF, ETF, gratuity etc. The Joint Trade Union Alliance (JTUA) which opposed the aforesaid bill held a seminar to educate the workers on the adverse consequences of the bill at the Jayawardene Centre in Colombo. On the 24th of May 2011 a protest organized by JTUA was held with the participation of about 40,000 FTZ workers to demonstrate their opposition to the bill. The protest was held outside the FTZ at the 18th Mile Post since the Police had prevented the protestors from congregating at the Urban Council Grounds in Katunayake. The protest had obstructed vehicular traffic and trains plying along the railway line nearby. At the conclusion of the protest an altercation had occurred, with the Seeduwa Police and having to baton charge and use tear gas. Around 30 protestors had been arrested in the process, who had been later released.

A few days later on 28th May, an impromptu meeting was held at the BOI Auditorium within the FTZ with the participation of the Minister for Labour and representatives of the FTZ workers. The meeting had been attended by other politicians of the Government as well. At the meeting no agreement could be reached by the parties. Following the meeting, leaflets urging the workers to support the bill were distributed by an unidentified group of persons purporting to be members of the JTUA. The leaflets carried the name of the JTUA but it carried the address of a political party. The Police, however, had allowed these persons to distribute leaflets within the FTZ premises. In the early hours of the 29th a large number of posters soliciting support for the bill had also sprung up in and around the FTZ.

In such a volatile backdrop, on the 30th of May 2011 the day on which the alleged violations took place, around 4000 to 5000 FTZ workers had commenced their protest within the FTZ premises around 10.15 am. At the time, around 600 protestors had gathered, and scores of Police Officers had also been present on duty presumably to control the situation had it disturbed the public tranquility. Coincidently, around 11 am on that day, the Seeduwa *Brandex* (sic) Factory had to be closed and the workers sent home due to a contamination of its water supply which had caused diarrhea among the workers. On an earlier occasion i.e. on the 24th the demonstrators had come in a procession and attempted to get the employees of the same factory to join the protest on the 24th. (vide page 3 of the Presidential Committee Report on the incident, the 'Mahanama Tilakaratne Report'). Even though the protest had started peacefully, towards noon the situation had become tense with the number of protestors increasing and stones being pelted on both sides. Even though several politicians had intervened and assured that the bill would not be passed without heeding the views of the FTZ workers, they had continued the protest demanding a credible guarantee of such assurance.

Around 10.30 am pelting of stones had started and stones had been thrown back and forth. The version of the Police is that it had been communicated to the protestors through loudspeakers by the Senior Police Officers that the FTZ workers would be taken out of the purview of the bill and that steps were being taken to broadcast that decision over the media as requested by the protestors (per the statement of objections of the Fourth Respondent) and, later that the bill would be withdrawn (per the statement of objections of the Third Respondent). Despite these guarantees the protestors who had congregated near Gate IV of Phase II of the FTZ had not dispersed but kept moving towards the roads. Thereafter, without warning, stones had been pelted towards the police. Dhanawardene Gurusinghe, Negombo Assistant Superintendent of Police in his affidavit marked as '5R2' with the statement of Objections of the 5th Respondent states that a large amount of stones was pelted at the Police by a group of persons who were about 25 meters behind the protestors, a position taken up by the Inspector General of Police, the 4th Respondent in his Statement of Objection as well. The president of the CMU Union admitted that the stones thrown at them by the Police were thrown back at the Police by them (vide page 7, Presidential Committee report). The Respondents allege that when the police officers who were taken by surprise retreated to the Katunayake police station to avoid further injuries, the protestors had started attacking the police station which was situated about 100m away from Gate IV damaging property within the premises and several police vehicles.

The position taken up by the Respondents is that there was an apprehension that the protestors may barge out of the FTZ causing further damage. The 1st Respondent OIC of the Katunayake Police Station in his statement of Objections had stated that DIG Ravi Wijegunawardena was assaulted by the protestors and had to be hospitalized since he was badly wounded. According to the Respondents Tear Gas was fired to protect the Police Officers retreating from the stone attack. The statements recorded in the Presidential Committee Report and the petitions reveal that it had been around 12.30 pm when the Police had fired tear gas on the

protestors and charged them with batons, iron rods etc. Firearms had also been fired.

I shall first detail the case of each Petitioner and the alleged events that they had had to face on the 30th.

Around 10.15 am the petitioner in **FR application 265/2011, H. M. M. Sampath Kumara** too had joined the protest along with the majority of the workers of the factory where he was employed at. Having been in one of the open areas of the FTZ where the protestors had been gathered, he had started to run towards the *Crystal Martin* factory to escape the charge. While he was running he had been hit by gunfire and had fallen down. He had then been carried into the factory where he worked by several other workers. Due to the critical nature of his injuries the petitioner had been taken to the Negombo Base Hospital where he had had to undergo surgery and was kept in the Intensive Care Unit. Later he was transferred to the Colombo General Hospital where he remained warded. Due to the gunshot injuries received, the petitioner who was 19 years old at the time, has sustained permanent disabilities of a serious nature affecting his reproductive and digestive systems.

Another FTZ worker, 22-year-old Roshen Chanaka succumbed to the injuries sustained due to the shooting.

Following the firing of tear gas and live ammunition and the subsequent charge, the facts reveal that, the police had launched an attack on the factories within the FTZ- Phase II, entering their premises by force, damaging property and indiscriminately attacking those within the respective premises. All the petitioners except the petitioner in SC FR 265/2011 had been assaulted by the police with blunt weapons during this attack. After the attack the Petitioners in SC FR 268/2011, 270/2011, 271/2011, 272/2011, 273/2011, 274/2011, 346/2011, 347/2011 and 348/2011 had been detained at the Katunayake Police

Station before being sent to receive medical treatment. Their affidavits bear testimony to the attack carried out by the police against the workers.

The Petitioner in **FR Application 266/2011, Rohitha Amarasinghe**, an employee of the *Toroid International* Factory had joined the protest with his fellow workers. They had congregated near the *MAS Active* Factory and had gradually moved into the more open spaces of the FTZ. Isolated skirmishes had started to break out between the police and the protestors by this time. He states that around 12.30 pm the police suddenly made a concerted move to disperse the demonstration by firing tear gas and engaging in a baton charge resulting in the workers rushing into the nearby factories for safety. Hundreds of Police officers had then broken into the factories such as *Toroid International, DSL Global* and *Noratel*. The petitioner, having accompanied another protestor who had received an injury during a skirmish into the factory, had been inside the factory at this time. Due to the tense situation outside and having heard gunshots immediately after their return to the factory the petitioner had remained within the factory.

When the police entered the factory premises by force the petitioner along with other workers had fled into the locker room of *Toroid International* and locked themselves in. However, the police had broken down the door with iron rods and dragged them out of the lavatories where they were hiding by this time. The police had also dragged along some female workers, forced them to kneel and had started to assault them. When the petitioner attempted to intervene, he had been assaulted with iron rods and kicked and trampled on. When they were subsequently instructed to leave the factory, the petitioner finding it difficult to walk, had crawled out and on his way, he had been detained by some police officers who forced him to stand against a wall and had assaulted him with a rubber hose. The Petitioner was then dragged towards the Human Resource office of the factory where several other injured workers were gathered and were transported to the Negombo Base Hospital in a van belonging to the factory.

Because of the attack detailed above, the petitioner Amarasinghe had sustained a fracture of his right 3rd finger and contusions to his left upper arm. Having had a known history of Epilepsy for which he had not been on regular treatment for 2 years, the petitioner had also developed fitting attacks while he was in hospital and continues to suffer from panic attacks.

During the charge following the tear gas attack, the petitioner in **SCFR 267/2011, Buddhika Atapattu** who had also joined the protest around 10.00 am, had run back to his factory *Noratel International* where he and several others had been assaulted with iron rods, iron chains and transformer parts (manufactured in the factory) by the Police who had pursued them there. In shielding himself from a blow to the head by an iron rod his wrist had got fractured. Around 1.00pm they had been taken near the FTZ gate where other workers who also had severe injuries had been gathered. There, they had been assaulted by the Police again before being taken to the Negombo Base Hospital.

Having finished the night shift at *A.T.G Gloves* around 6.00 am, Dhanushka Sanjeewa, the Petitioner in 268/2011 had returned to his boarding house nearby. Around 10.00 am the Petitioner had gone to Phase II to withdraw money from the Automated Teller Machine there. The protest had commenced by then and, there had been around 4000 to 5000 workers gathered. When the Petitioner attempted to exit Phase II the police at the gate had refused to allow him to pass through. Thereafter, not being able to leave Phase II the Petitioner too had joined the protest. When the police charge occurred, he had run inside *A.T.G Gloves*. Around 2.00 pm a Sectional Head of the factory had locked the entrance to that area of the factory with the help of the petitioner and some other workers. In the meantime, the police had broken into the factory and 25-30 police officers had demanded that the locked entrance be opened. When those inside did not comply, they had begun to destroy the wooden and glass fixtures outside. Therefore, the Sectional Head had opened the door and the police had entered and assaulted everyone

inside with batons. The petitioner had received blows to his head, left wrist, right arm and torso. The blows on his head had made the petitioner nauseous and he had started to vomit. The workers had then been forced to leave the factory premises and then ordered to kneel down and assaulted again.

Following the assault, they had been taken to the Katunayake Police Station on foot and detained in a cell with 50-60 other workers including those injured due to live ammunition and due to the use of tear gas. Though many had been screaming in pain and the petitioner himself was bleeding they had not been given any assistance by the police. After about three hours, his personal details had been recorded. The police had then announced that the injured would be taken to Negombo Base Hospital and had asked them to come out. Though some had gone out, the petitioner had not joined them due to the uncertainty about what the police would do next. Eventually, he had been released around 5.00 pm and had returned to his boarding place from where a friend had taken him to the Negombo Base Hospital. Reaching the hospital around 6.30 pm the petitioner had been turned away due to overcrowding.

The petitioner in application 269/2011, Anesh Imalka Fernando had reported to work at *Toroid International* around 1.30 pm on the 30th and joined the protestors after putting on his uniform. When the Police charged the protestors, he had run into *Toroid International* and escaped through a door at the rear of the building. However, he had been caught by some police officers and had been assaulted while two police officers held him tightly by the arms. He asserts that the assault continued even after he fell down feeling faintish. After some time, a police officer had shaken him and when he opened his eyes he had again been assaulted with iron rods and kicked by that same officer and then ordered to walk to the main gate of the FTZ. By this time he had noticed two wounds on his hands and when he had told the police officer that he is unable to stand up he had been told to crawl there. When the petitioner tried to stand up he had been assaulted again. However,

the petitioner had managed to walk to the gate with great difficulty and collapsed there. He had seen other workers too being assaulted. Around 3.00 pm he had been taken to the Negombo Base Hospital by his fellow workers and had to have stitches to his head and ears and had been referred to the Eye Clinic. Even by the date of his application to this court, the petitioner states that he continues to suffer from bodily pains accompanied by dizziness. (Medico-legal report states that even though the injuries are non-grievous, if the scar on the forehead becomes prominent after healing, it may disfigure the face and therefore could be categorized as grievous under limb (f) of Section 311 of the Penal Code.)

Being an employee of *Naigai Lanka* the petitioner in application 270/2011, N. L. T. Iresha had joined the protest around 12 noon along with the majority of the workers at the factory. She and other *Naigai Lanka* workers had run back to the factory when the police charged the protestors. However, the police had caught up with them and abused them in contumelious language and had ordered them to kneel on the ground. When they complied, they had been beaten with iron poles repeatedly, resulting in injuries to her upper arms, elbow and torso, several of which resulted in bleeding. After several minutes, the petitioner and the others had been ordered to leave/run and when they attempted to do so they had been assaulted on their back and buttock areas and were physically apprehended. Afterwards, the female workers had been handed over to three women police constables who had been outside *Naigai Lanka.* They had escorted the petitioner and the others on foot to the Katunayake Police Station and had assaulted them on the way as well. They had been repeatedly scolded in abusive language to the effect that they were allowed inside the FTZ to work and not to protest.

At the Katunayake Police Station, when they had attempted to sit on the benches there they had been scolded by a woman police constable and forced to sit on the floor. Then, around 1.00pm they had been taken to the *Crime Branch* of the Police Station and locked inside a room with 8-10 other female workers. Within a period

of about one hour almost 60 female workers had been detained in that room. Due to the crowding the petitioner and several others had suffered from claustrophobic feelings and breathing difficulties akin to asthma or panic attacks. There had been several workers detained in that room who had bleeding wounds, including those sustained from live ammunition and tear gas. They had not been given any first-aid or medical assistance. In addition to these traumatic events, the petitioner states that she heard the screams of persons outside the room whom she believes were male workers. Around 4.30/5.00 pm those of the detainees who had injuries, including the petitioner had been forced onto a bus and taken to the Negombo Base Hospital. The Petitioner's name and address had been taken down by the Hospital Police Post, but no statement had been recorded. However, she had been forced to sign a document by the Police. Due to the injuries sustained, the petitioner has been rendered unable to fully extend or flex her left arm, at the time of the application.

An employee of *Sterling Lanka,* the petitioner in application 271/2011, Nisshanka Wanigasekera had reported for work around 6.45 in the morning of the 30th. Around 9.15 am he had gone to the *Smart Shirt* warehouse situated in Phase II by three-wheeler, accompanied by the driver, Jayatissa and another worker named Nilusha, in order to collect and deliver some samples. When they were returning to *Sterling Lanka* around12 noon the roads had been blocked due to the protest and since they were unable to proceed further by three-wheeler the driver had stopped the vehicle on the side of the road. By this time the police had been behaving in an aggressive manner and minor skirmishes were breaking out between the protestors and the police. When the police made the concerted move to disperse the protestors around 30 police officers had attacked their three-wheeler as well and dragged out the petitioner and his companions. The petitioner asserts that he had been brutally assaulted with iron rods until he lost consciousness and became separated from his companions. He had suffered injuries to his jaw, teeth, nose and fingers of the left arm resulting in bleeding. The petitioner had lost consciousness several times but recalls that he was dragged to

the Katunayake Police Station by two police officers and that he regained consciousness inside a police cell in the company of Jayatissa. There had been about 50 persons detained in the cell, some with injuries from live ammunition and the use of tear gas. Even though the petitioner had been bleeding and vomiting blood and many of the detainees had been screaming in pain, no assistance had been provided by the police. Later, the petitioner had been dragged out of the cell and a woman police constable had recorded the details on his factory identity card. He had been assaulted again before being dragged onto a bus and taken to the Negombo Base Hospital.

The petitioner states that he is unable to recall the details of his hospitalization properly due to the trauma he underwent. However, he recalls receiving stitches to the head and being transferred to the National Hospital immediately via ambulance, since he was vomiting blood. As his jaw and several teeth had broken an iron plate had been inserted into his jaw. His nose had been broken and he had been informed that it would require surgery in the near future. A statement had been recorded from him by an officer in civilian clothing. He had not been shown that statement but had been required to sign some document the details of which he cannot recall. Due to the injuries the petitioner is unable to flex the fingers in his left arm. He has trouble breathing and finds it difficult to move his jaw which causes difficulties when eating. At the time of the application he was undergoing further treatment and was in severe pain.

The Petitioner in application 272/2011, Jayatissa Rajakaruna drove the three-wheeler in which the petitioner in 271/2011(Nisshanka) had been travelling. During the attack on them the police had caused damage to the three-wheeler and assaulted the petitioner on his arms, left leg, back and head with iron rods while some police officers restrained him. He had received a bleeding wound to the head. He was then taken to the Katunayake Police Station on foot. About an hour later he had observed that Nisshanka who had been separated from him earlier was also

put into the same cell and could not even stand unaided and was in severe pain. Around 3.30/4.00 pm the injured workers in the cell had been forced onto a private bus and taken to the Negombo Base Hospital. The petitioner was admitted to Ward 2 which he believes to be the Eye Ward of the hospital and states that during his stay there until the 02nd of June he noticed a heavy police presence at the hospital. The petitioner states that at the date of the application he still finds it difficult to walk in addition to bouts of dizziness.

The petitioner in 273/2011, Ranjan Lasantha Perera an employee of the *Smart Shirt* factory had been within the factory premises when around 12 noon he had witnessed hundreds of protestors fleeing from the police attack and entering the factory premises. He had heard gunfire and had feared for his life. Several dozen police officers had broken open the factory gate and had assaulted the security officers who attempted to prevent them. The factory's security room had been destroyed in the process. Several police officers had opened fire within the factory premises and caused injuries to the fleeing workers and damaged the factory property. He had run to the canteen area of *Smart Shirt* where he and several other workers had been chased by a group of police officers armed with batons and weapons. They had cornered the petitioner and the others and had assaulted them with batons and wooden planks. When the petitioner fell down due to the attack he had been told to stand up and had been assaulted on the head, legs and arms. Due to this he had sustained injuries to his left leg and fractured his right leg. Around 2.00 pm the petitioner had been carried to the Katunayake Police Station by four of the police officers who had assaulted him. The petitioner had been left outside the police station building. Later he had been instructed to go to the police cell and since he could not walk he had crawled into the Police station. Around 4.30 pm he had been carried into a bus by police officers and taken to the Negombo Base Hospital.

The Petitioner in FR Application 274/2011, Lalinda Herath who was employed at the *Global Sports* Factory had not joined the protest even though about 50 workers from his factory had joined it. In their attack on the factories the police had forcibly entered the *Global Sports* Factory by assaulting the Security Personnel and proceeded to assault the Petitioner and his fellow workers. In order to avoid the attack, they had run towards the printing room of the cutting section, during which time the petitioner had been continuously attacked by a police officer. The police had then broken the glass windows of the room and assaulted the petitioner and four others who were taking cover there. The petitioner had been beaten on the ears, head and stomach. After the beating they had been ordered to leave the room two by two holding hands. Then they had been taken to the Katunayake Police Station and detained in a cell for about 45 minutes. They had been checked by police officers and Rs. 2000 which had been in the petitioner's pocket had been taken away. After this period of detention, the petitioner along with other injured workers had been forced onto a bus and taken to the Negombo Base Hospital, where he was admitted for treatment. At the time of filing the application the petitioner asserts that he was still suffering from pain in his ears and his hearing had been impaired. (Medico-Legal Report dated 8th August 2011 by Judicial Medical Officer, Negombo District General Hospital however only records a contusion of 6cm into 3cm on the lower side of the left cheek.)

The Petitioner in application 346/2011, Pradeep Kumara Priyadarshana who was an employee of *Noratel International* had joined the protest around 11.30 am along with the majority of his fellow workers at the factory. The Police had fired tear gas on the protestors gathered near the entrance to Phase II and charged them, throwing stones and other objects at the protestors fleeing them. In paragraph 12 of his petition, the Petitioner states that since several hundred workers converged near *Noratel International* after the charge, they spontaneously decided to engage in a peaceful sit-in/ sit-down there, in which the petitioner too had participated in. The police who had by this time dispersed the protest near Gate IV of Phase II

had proceeded into the FTZ continuing to use tear gas as well as iron rods. While some protestors had been severely injured, the petitioner and others had managed to flee into *Noratel International.* However, police officers had forced their way in to the factory, assaulting the security officers who attempted to prevent them and demolishing the factory security room. Thereafter the police had broken into the factory by breaking doors and windows and had even fired tear gas into the factory causing asthma-like symptoms in some workers. The petitioner and about 75 others had barricaded themselves inside the Production Office on the upper floor. The police had then surrounded the office and threatened them in abusive and contumelious language threatening to open fire if they did not come out. Due to these threats the workers had come out of the office and had been compelled to walk in between about 100 police officers who continuously assaulted them on their way to the exit of the factory. The police had kept up an angry rhetoric that they were allowed inside the FTZ only to work and not to protest. The petitioner's right arm was fractured due to the assault and was bleeding profusely. When the workers came out of the factory they had been ordered to sit down on the ground inside the factory premises, where some workers including a pregnant worker were again assaulted.

According to the Petitioner, Priyadarshana around 1.30 pm these workers had been transported to the Katunayake Police Station by a bus where their personal details were recorded by a woman police constable who verbally abused them for taking part in the protest. An Army officer who appeared to be a high ranking official and another person who appeared to be a local politician had informed them that the enactment of the bill was halted and instructed them to return to the FTZ and inform the protestors within, of this development. Accordingly, the workers had been loaded onto a bus and taken to Phase II where several hundred protestors were congregated. Several army officers who had been on the bus had then instructed them to inform the other protestors that the bill would be halted. At this point, the workers on the bus who were in severe pain due to injuries and

the tear gas attack pleaded with the driver to take them to a hospital whereby they were taken to the Vijaya Kumaratunga Memorial Hospital. Upon admission there, due to the critical nature of their wounds, the petitioner and several others were immediately transferred to the Ragama Teaching Hospital.

Around 1.45 pm on the 30th, the petitioner in application 347/2011, Nalin Sanjaya Jayatileke had made his way to the First Aid Room of *Noratel Lanka* as he had been suffering from a headache. On his way he had noticed that the protestors were being chased by the police while continuously assaulting them with batons. He had also been caught up in this and had been caught by a police officer. When he explained that he had not been engaged in any unlawful activity he had been released by that police officer. However other police officers in the vicinity had ordered that no one should be allowed to leave and then he had been continuously assaulted by several police officers and forcibly taken to the entrance of *Noratel Lanka* where he had been instructed to sit on the ground. Several dozen workers had been forced to sit there and some of them had injuries from live ammunition, iron rods and injuries caused by the firing of tear gas. Around 100 police officers had been present there and several of them had been assaulting the workers seated there. While there the petitioner had been assaulted several times on the back of his head, left side of the jaw, back and the left side of the cheek below the eye. The petitioner had fainted due to the severe pain from the assault especially from the blows below the eye which had caused a fracture. The petitioner had regained consciousness after some time and the police had instructed one of the workers to bring a vehicle belonging to the factory to transport the injured to the factory. Upon a *Noratel Lanka* Nurse who was present there informing the police that their officers were damaging private vehicles and therefore it would not be safe to transport the injured they had agreed to send one of their officers to prevent any such attack. The petitioner and about 10 other workers who had been seriously injured had been taken by van to the hospital. Several of those workers had been unconscious and some had been drifting in and out of consciousness. Whilst within

Phase II the van had been stopped by police and instructed to go to the Katunayake Police Station instead of the hospital. At the Police Station a woman police constable had recorded the personal details of the workers despite the semi-conscious or incoherent state some of them were in. They had been taken to the hospital only afterwards. On the 31st, since the Negombo Base Hospital had been overcrowded with injured workers the petitioner had been discharged against his will and had not been given any documents regarding his treatment. On the 01st of June, as he was coughing up blood the petitioner had attempted to admit himself to the Kandy Teaching Hospital but had been turned away since he did not have any medical reports or official discharge papers. Subsequently, he had been admitted to a private hospital in Kandy since he was bleeding from the mouth. X-rays taken there had revealed that the bone below his left eye had been fractured.

The petitioner in application 348/2011, Sameera Sandaruwan Hettiarachchi had entered Phase II to report to work at *Noratel Lanka* around 1.30 pm. There had been a large number of police officers at the gate and he had been allowed inside only after an extensive security check. He had observed injured workers lying on the ground and some being escorted out of the FTZ by the police. He had heard the gun shots and sounds of altercations. Fearing for his safety the petitioner had quickly made his way to *Noratel Lanka.* Seeing factory workers injured from live ammunition and tear gas being taken to the First Aid Room of the factory he had gone there to offer assistance. When he proceeded to report to work the protestors who were being pursued by the police had started to run in his direction. He had also run into *Noratel International (Pvt) Ltd- New Division* for safety and barricaded the building along with some other workers. The police had surrounded the building, partially broken the door and three police officers had entered the building. They had started to assault the workers nearest to the entrance who happened to be predominantly women. Immediately afterwards the main entrance to the building had been broken open and several dozen police officers had entered the building and assaulted those inside. Being assaulted on the

back of his head the petitioner had lost consciousness. Though he cannot recall the incidents that occurred afterwards, he had been informed by his fellow workers that they had been taken to the Katunayake Police Station in a private van accompanied by a nurse from *Noratel.* The petitioner had given his details to the police-which he does not recall- and then had been taken to the Negombo Base Hospital where he regained consciousness. Due to the assault he had required stitches to his nose and the back of the head. A tooth on the right side of the jaw had also broken. At the time of the application, the petitioner states that due to the injuries he has difficulty breathing, opening his mouth completely and has reduced vision in his right eye.

Infringement of the Freedom of Peaceful Assembly

Article 14(1)(b) of the Constitution recognizes the freedom of peaceful assembly, the qualification being the 'peaceful' nature of the assembly. Therefore, even a protest may be protected under Article 14(1)(b) as long as it remains peaceful. The jurisprudence of the European Commission of Human Rights is to the effect that an assembly may be deemed 'peaceful' where the organizers do not intend violence which results in public disorder. It has been recognized that it is the *intention* to hold a peaceful assembly that is significant in determining whether an assembly is peaceful or not; rather than the *likelihood* of violence because of the reactions of other groups or other factors. Violence or disorder that is *incidental* to the holding of a peaceful assembly will not remove it from the protection of freedom of assembly and association. (emphasis added) ***Christians against Racism and Fascism v. United Kingdom*** (No. 8440/78, Commission decision of 16 July 1980, Decisions and Reports (DR) 21, p. 138)

In ***Bandara and Others v Jagoda Arachchi, Officer-in-Charge, Police Station Fort, and Others*** (2000) 1 Sri LR 225 the Supreme Court, setting out a test for recognizing what maybe considered a peaceful or an unlawful assembly, held that

"An assembly crosses the line of being peaceful when the general behaviour of those assembled leads to a reasonable apprehension that they are likely to cause a disturbance of the public peace," thereby ceasing to enjoy the protection of Article 14(1)(b).

Thus, an assembly of persons can start off as a peaceful assembly with the organizers intending no violence but later on take an unlawful hue if the general behavior of the participants leads to a reasonable apprehension that it is likely to cause a disturbance of the public peace. When a peaceful assembly later takes on an unlawful hue in the above manner it no longer enjoys the full entitlement to the freedom of assembly recognized in Article 14(1)(b). In the event of such an assembly, by the operation of Article 15(7) of the Constitution, it is permissible to impose such restrictions "as may be prescribed by law" imposed *inter alia* "in the interests of... public order".

Since the classification of the assembly in the instant case depends significantly on its impact on public order, it is useful to distinguish what the term denotes, especially as opposed to 'law and order'. In ***Ashok Kumar v Delhi Administration and Others*** 1982 AIR 1143, 1982 SCR (3) 707 it has been observed that "*The true distinction between the areas of "public order" and "law and order" lies not in the nature or quality of the act, but in the degree and extent of its reach upon society…Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.*" (emphasis added) Thus, 'public order or peace' envisages a climate in which the public can go about their routine of daily activities without unusual disturbances. Whether an act constitutes a disturbance of the public order or peace

depends on the extent of its ability to disrupt the usual pace of daily activities of the public.

Accordingly, whether the FTZ workers' protest created a reasonable apprehension of acts which have a sufficient potentiality to disturb the usual flow of the daily activities, must be gauged based on the particular circumstances of the case. The FTZ is an Industrial Zone managed by the Board of Investment (BOI) which is well-fortified with all entry points guarded by BOI Security Personnel and the Katunayake Police. Entry into the FTZ is allowed only to persons granted permission by the BOI. A protest taking place within the FTZ could disturb the activities of the factories but not necessarily the public order since the public do not engage in their daily activities within the zone.

On the 30th, the protest had commenced within the confines of the FTZ near the vicinity of the factories, with the protestors gradually moving out into the more open spaces of the FTZ. That in the run up to the charge by the police there were minor skirmishes taking place between the police and the protestors is a point conceded by the petitioners. This transformation of the protest and the pelting of stones combined with the experience of the protest a few days earlier i.e. the 24th which resulted in the holding up of road and rail traffic culminating in a tear gas attack and a baton charge would have led the police to form a reasonable apprehension that the protestors may exit the FTZ and cause havoc outside. Regarding the alleged attack on the Katunayake Police Station the Presidential Committee has been of the view that a serious attack where the protestors overran the police station and caused serious damage to the property is unlikely in the circumstances. The Committee observes (vide page 15) that the Katunayake Police Station is situated too far away for the protestors within the FTZ near Gate IV to cause serious damage by throwing stones especially since the buildings are covered by trees. The Presidential Committee report expresses the view that had the protestors entered the Police Station premises, at least 500 Police Officers and 16

gazetted Officers had been present there to handle the situation. However, it is possible that the police officers entertained a fear that the protestors would storm the Katunayake Police Station when they congregated in large numbers in the vicinity of Gate IV. Even though a police force of a considerable strength were present at the scene it has to be appreciated that the protestors too amounted to at least 4000 in number and that water cannons which could have been effectively used to keep the protestors at bay and prevent them from spreading out into areas outside the FTZ were not available. In such a context, it is probable that, the police harboured a strong apprehension that the protestors would cause a disturbance of and disruption to the day to day life of the general public if they exited the FTZ. While these facts and the apprehension renders the protest unlawful, the quelling of the protest can only be called extreme due to the use of live ammunition and weapons such as iron rods and nail studded poles. The actions of the Police are by no means proportionate to the protest even though resorted to for the purpose of maintaining public order. Therefore, it is an unwarranted move on the part of the police and not a permissible restriction of Article 14(1)(b).

Justice Sharvananda in his treatise 'Fundamental Rights in Sri Lanka' (vide page 267) points out that "Without legislative authority, the Executive cannot impose any restrictions upon any of the Fundamental Rights guaranteed by Article 14. It is only by a law or regulation having statutory force and not by executive or departmental instructions that a valid restriction on Fundamental Rights can be imposed." The legal provisions made under Section 95 of the Code of Criminal Procedure Act become applicable in respect of the extent of force that can be used to disperse an unlawful assembly.

Section 95(1) of the Code of Criminal Procedure Act No. 15 of 1979 empowers a police officer not below the rank of Inspector of Police to command an unlawful assembly which is likely to cause a disturbance of public peace to disperse and places a duty on the members of such an assembly to disperse upon such command.

It however does not allow the police to unleash unbridled power on the assembly in circumstances where the persons constituting the assembly do not abide by such duty. Section 95(2) categorically states that the police may lawfully use only "such force as is *reasonably necessary* to disperse the assembly." (emphasis added)

While what constitutes reasonable force in dispersing an assembly would depend mostly on the facts of each particular case some general guidelines regarding the use of force have been identified. Force should be used only where absolutely necessary and only as a last resort. The degree of force used must be the minimum required to achieve the lawful objective sought.

Police Departmental Order A19 under B(4) (marked 'A4') categorically states that in dispersing a disorderly and riotous crowd "Under no circumstances can fire be opened unless the crowd is committing or attempting to commit any of the offences contained in the Police 'Firing Orders'". In the present circumstances where the crowd was not committing or attempting to commit any of those offences there is no justification for the Police to open fire on the crowd. Committing or attempting to commit grievous hurt entitles a police officer to open fire on a mob under B(4)(a) of the Police Departmental Order A19 after considering "*whether immediate action is necessary or whether the mere presence of the armed party will not be sufficient to cause the mob to desist.*" A careful consideration of the facts of the case show that that entitlement does not apply here. The 2nd Respondent states that the protestors had been holding several police officers including a senior officer to the ground and assaulting them and did not leave even after shots were fired in the air, compelling him to shoot at the crowd. However, if the events had transpired in that manner it is not possible that the deceased Roshen Chanaka would fall at a point well within the FTZ near the *Crystal Martin* Factory, especially in a context where Inspector of Police, R. P. K. L. Ranasinghe, the subordinate officer who fired under the 2nd Respondent's orders states that he shot at the protestors from about 30 meters away (vide page 43, Presidential Committee

report). It bears evidence that the Police opened fire on a retreating crowd, which conclusion is further consolidated by the fact that the Petitioner as well as the deceased Roshen Chanaka had sustained injuries from shots fired from behind. The Police Departmental Order (A19) states in no uncertain terms that "if any members of the mob are shot in the back, the police will be accused of firing longer than necessary." Thus, the second Respondent and his subordinate Inspector of Police who followed his orders to shoot are liable for using excessive force by shooting when it was no longer absolutely necessary to do so.

The Respondents contend that the shooting was in exercise of the right of private defence of Police Officers and Armed Forces provided for by Article 15(8) of the Constitution in relation to Articles 12(1), 13 and 14. The 2nd Respondent does not state that he was compelled to shoot as an immediate action in order to ensure his own safety. Even if the protestors were attacking Police officers, firing as undertaken here is disproportionate since it is evident that the crowd had been shot at even after it had started to disperse and that a number of bullets had been fired above the knee as shown by the injuries above the knee sustained by several persons. The officers ought to have considered that given the density of the crowd firing in such a manner may prove fatal to the protestors.

In order to classify the assembly of the FTZ Workers on the 30th of May as unlawful, it has been submitted by the Respondents that the requirement to give notice of processions set out in Section 77 of the Police Ordinance has not been complied with. Section 77 of the Police Ordinance No. 16 of 1865 requires that in case a procession is to be held, at least 6 hours' notice should be given to the Officer-in-Charge of the Police Station nearest to where the procession is to commence. Section 77 only requires such notice to be given of 'processions.' Further, the 6 hours' notice requirement presumes that the procession is not a spontaneous one. The evidence which surfaces in the instant case does not support a conclusive declaration on whether the protest was spontaneous or was organized earlier.

The Petitioners state that the protest on the 30th was a spontaneous congregation of the workers within the FTZ who were seeking to demonstrate their opposition to the proposed bill. By the 30th the suspicion of the FTZ workers that their views would not be considered regarding the bill if they did not keep up a protest would have grown stronger, after the protest organized by the JTUA on the 24th failing to bear fruit and the meetings with the Minister and several political figures failing to address their concerns about the bill. The leaflet distribution and poster campaign would have given rise to the notion, that the government was determined to pass the bill. Therefore, it is possible that the assembly of the 30th would have taken place with an element of prior preparation, especially as supported by the crowd quickly swelling from around 600 to 4000-5000 in number, and the displaying of placards as stated by the petitioners in their petitions. S. R. S. Kumari in her Statement to the Presidential Committee (at page 52 of the report) states that there was influence from outside to participate in the protest. Persons who seemed to be outsiders as indicated from their clothes and manner of speaking had given contradictory information about the bill and appeared to be trying to advance the agendas of some outside force. This position finds backing in the Second Respondent's statement where he observed that the manner of speech and behavior of some of the protestors indicated that they were not FTZ workers and that while the workers behaved in a disciplined manner the outsiders used abusive language and acted violently (page 33, Presidential Committee Report), is not corroborated by the other workers except for the ambiguous statement by K. Wasantha Kumara Silva; "උද්ඝෝෂණ වලට සහභාගි නොවීම නිසා ගැටලු ඇති වුනා" (at page 54 of the report). Senarath Rajapakse recalls that workers from other factories came to their gate and requested them to join the protest and they had joined consequently but does not mention any influence from an external force (at Page 68 of the report).

In ***Nurettin Aldemir v Turkey*** (Nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, 18 December 2007) at Paragraph 34 the European Court of Human Rights held that interference in meetings held in opposition to a proposed bill and the force used by the police to disperse the participants, as well as the subsequent prosecution against the applicants, could have had a chilling effect and discouraged the applicants from taking part in similar meetings. Accordingly, it was found to be a violation of Article 11 of the European Charter of Human Rights. In the present case too the circumstances are similar and this court is of the opinion that it was a violation of Article 14(1)(b) of the constitution. The Police has failed to strike an adequate balance between the right to peaceful assembly and maintaining public order thereby violating the rights of the petitioner under Article 14(1)(b).

This court in ***Senasinghe v Karunatilleke, Senior Superintendent of Police, Nugegoda and Others*** [2003] 1 Sri L.R has set out forcefully that; *"The freedom of peaceful assembly, speech and expression are also designed to promote peace and order. It, inter alia, assures the freedom to dissent. The process of decision making in public matters is hereby enriched. If dissent is suppressed there is every likelihood of it taking a devious form which may ultimately endanger peace and order."* The same has to be reiterated given the trajectory of events marked by the incidents of the 30th where the police and the workers were caught up in an opaque climate of confusion heavy with various elements pushing to further their objectives. The state should ensure that its citizens do not feel that dissent will be dismissed without due attention in a fair and democratic manner or, will be suppressed at all costs. More often than not, a protest will get out of hand if the response of the authorities does not kindle confidence in the protestors and they feel that they would have no other means of making their views heard or considered, thus rendering them obsolete. On the other hand, the protestors and the organizations that give them leadership such as Trade Unions have a duty incumbent on them to follow the lawful rules and regulations set out in relation to

protests, not only for the preservation of public order but for the security of the protestors themselves. Where a satisfactory resolution to a problem seems distant and emotions are running high the organizers of a protest should take measures to ensure that the public tranquility is maintained, and no inconvenience is caused to the public who are outside the theatre of protests and no disruption is caused to the public life. This is of paramount importance if they intend to assemble a crowd over the numbers of which they are unable to exercise sufficient control.

Torture or Cruel, Inhuman or Degrading Treatment or Punishment

It is common ground that around 12 noon on the 30th stones had been thrown and that tear gas had been used by the Police. The FTZ workers who had remained within their factories without joining the protest have stated to the Presidential Committee, that they observed stones being thrown on both sides and that gunshots were also heard later, a version common to their statements. This version is plausible when considered together with the 2nd Respondent's statement to the Presidential Committee that he reached the vicinity of Gate IV around 12.55 or 01.00 pm. As he arrived he had been told that DIG Ravi Wijegunawardane and some other officers were being assaulted by the protestors. Subsequently, he had shot in the air upon observing that the protestors were attacking a senior Police officer and other police officers. The 2nd Respondent has stated that since the protestors did not leave the police officers whom they were holding onto the ground and attacking, he shot at the crowd without targeting anyone, thereby causing them to disperse. According to the Confidential Report submitted by the Attorney General regarding the incident (filed consequent to the Order of the Court dated 15.11.2011 prior to leave to proceed being granted) 8 persons had sustained gunshot injuries that day. Inspector of Police R. P. K. L. Ranasinghe, the other police officer who is accused of shooting, has stated that he fired 4 shots into the air and 2 shots below the knee upon the orders of his superior, the 2nd

Respondent. He however, does not mention that he witnessed police officers being assaulted by the protestors. In the absence of any affirmation by way of affidavit by DIG Ravi Wijegunawardane or any other Senior Officer that they were assaulted by the protestors as described by the 2nd Respondent, it is difficult to conclusively pronounce that such assaults had in fact taken place. However, given the climate of confusion and violence that appears to have prevailed and the large number of protestors, the benefit of the doubt has to be given to the 2nd Respondent. In shooting at the crowd he has been driven by the need to disperse the crowd and prevent any further unlawful activities from taking place.

Be that as it may, the police have exceeded the force that they may have lawfully used, as earlier elaborated in this judgment and also in violation of the Police Departmental Order A19. Due to the shooting the Petitioner in application 265/2011 sustained severe injuries to his reproductive system and his rectum was fully injured. The extent of the injuries is such that he has to pass urine and feces in disposable bags. The gunshot injuries of the victims such as those of the Petitioner, injuries to the kidneys as sustained by the deceased Roshen Chanaka and other wounds such as a bullet embedded near the eye of a protestor (vide page 17 of the Presidential Committee report) indicate that the Police opened fire on persons retreating or fleeing and that the shooting was indeed not below the knee only. Even if the protestors had been involved in assaulting Police officers, the actions of the Police are in violation of Departmental Order A19 under B(1) which states that "a crowd must not be punished for an offence already committed and that force can only be used while the commission of the offense is in progress."

In ***Amal Sudath Silva v Kodithuwakku*** 1987 2 SLR 119,127 this court has stated in relation to Article 11 that "*It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs.*

the Police force, being an organ of state, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much this right is enjoyed by every member of the Police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents." The absolute prohibition in Article 11 that no person whatever their conduct shall be subjected to torture or to cruel inhuman or degrading treatment or punishment has been violated by the Police through their violent conduct following the shooting.

The 3rd Respondent in his statement of Objections states that the situation was brought under control by 2.00pm. According to the statements of the FTZ workers recorded by the Presidential Committee (vide page 45-74) following the gunshots there had been an attack by the Police on the factories, which can only be understood as an attack to punish the workers and intimidate them so as to break up the protest and prevent any further opposition. The nature of the wounds on the victims such as injuries to arms, wrists, fingers etc. show that they were sustained in defending themselves from blows dealt with blunt weapons such as nail studded poles, iron rods and wooden poles as described by the workers. The police officers engaged in the attack had worn numberless uniforms, demonstrating an intention to hide the identities of the assailants. It also shows that the attack was a planned one.

The words of the police officers නොපි චණ්ඩි ද? නොපි පොලීසියටත් ගහන්න නේද ආවේ? පොලීසියේ තරම දැන්වත් දැනගනිව්! (vide page 11 of the Presidential Committee Report) as recalled by one of the workers who was assaulted by the Police clearly indicate the intention of the Police officers to punish the workers for their involvement in the protest. The same worker recalls 'an officer with 2 stars' saying "Now it is enough" regardless of which the beating continued. The statements of the victims of the attack contained in the Presidential Committee report bear evidence to the deplorable conduct of the Police officers,

including women police constables who had come to the scene later on. Assaulting security officers who attempted to prevent the Police from entering the factories, hitting pregnant workers and female workers despite pleas for mercy, use of abusive language, removing belongings of workers such as helmets, three-wheeler keys and gold chains, causing damage to the property of factories and assaulting everyone within the factories regardless of whether they were involved in the protest or not is ample evidence of the cruel, inhuman or degrading treatment that was meted out by the Police.

Per the Presidential Committee Report (vide page 22) 268 civilians received treatment from the Negombo Base Hospital, Ragama Hospital and the Vijaya Kumaratunga Memorial hospital whereas 29 police officers had been admitted to hospitals. The number of injured civilians may have been more, since some did not immediately seek medical assistance for fear of reprisals and others due to overcrowding of the hospitals. The large number of civilians injured in contrast to the number of police officers injured point to a brutal crackdown by the police.

The Police had prevented those injured in the shooting and the attack from being taken to the hospital. The area had been cordoned off and the villagers nearby had had to break down parapet walls of factories in order to take the injured to hospitals. The windscreen and shutters of the vehicle into which Roshen Chanaka was put into had been smashed with iron rods by Police officers, thus delaying the vehicle. According to the Medico Legal Report the Petitioner, H. M. M. Sampath Kumara too had been admitted to the Negombo Hospital at 1.57pm, a considerable delay- given the shooting had occurred between 1-1.30pm- in light of his serious injuries. Denying of medical treatment has been held to be cruel treatment in ***Thomas v Jamaica*** (Communication No. 321/1988, UN Doc. CCPR/C/49D321/1988(1993) cited in ***Somawardena v Superintendent of Prisons and Others*** SC App 494/93 Spl SC Minutes 22 March 1995. The deliberate prevention of timely medical attention to persons with serious gunshot wounds

and other wounded persons is a cruel, inhuman or degrading treatment meted out as punishment.

The mass of evidence corroborated by each of the versions of the petitioners set out in their respective petitions as well as the statements of their fellow workers reproduced in the Presidential Committee report is overwhelming in their testimony of the reprehensible conduct of the police in their attack on the factories.

Arbitrary Arrest

Article 13(1) guarantees 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 ***Wickremabandu v Herath*** SC Application 27/88 SC Minutes 6 April 1990 it has been held that Arrest in 13(1) *"includes an arrest in connection with an alleged or suspected commission of an offence, as well as any other deprivation of personal liberty."* The petitioners in applications SC FR 268, 270, 271, 272, 273, 274, 346, 347 and 348 who had been detained in the Katunayake Police Station following the attack of the police on the factories therefore can be considered as arrestees. The Petitioners were not properly informed of the "nature of the charge or allegation" upon which they were arrested as required by Section 23(1) of the Code of Criminal Procedure Act. They were thus not afforded the "opportunity of removing any mistake, misapprehension or misunderstanding" (vide ***Mariyadas Raj v Attorney General and Another*** (1983) 2 SRI L. R. 461) that they had been engaged in any unlawful activity during the protest. Considering these circumstances, the rights of the Petitioners under Article 13(1) have been violated.

The arrests are unlawful in that the police had entered the factory premises by force, in their pursuit of the protestors fleeing from their charge and then deprived

the personal liberty and assaulted workers including the petitioners and others who had been inside their factories either working or not engaging in the protest.

The detention of the petitioners in applications SC FR 268, 270, 271, 272, 273, 274, 346, 347 and 348 in the Police Cell and in a room in the Crime Branch at the Katunayake Police Station amounts to arbitrary detention.

Violation of Article 12(1)

Equality before law and the equal protection of the law guaranteed to all persons by Article 12(1) has been violated by the arbitrary exercise of power by the Police.

In ***Sanghadasa Silva v Anuruddha Ratwatte*** 1998 1 SLR p250 it was stated that *"it is now well settled law that powers vested in the state, public officers and public authorities are not absolute and unfettered but are held in trust for the people to be used for the public benefit and not for improper purposes."* Even though Police officers are charged with the duty of maintaining law and order they cannot exercise the power granted for that purpose in a manner that negates the equality provision. Regardless of the fact that the workers may have joined in the protests and engaged in unlawful activity their entitlement to the protection of the law does not diminish.

Conduct of the Senior Officers

When one considers the events that had taken place immediately prior to the incidents that led to police action on this occasion, it is quite evident that the tension among the FTZ workers was simmering over a period of time. Thus, it could be reasonably deduced that the authorities would have entertained the apprehension that the situation could get unruly or lead to violence as it turned out to be, in the instant case. I am of the view that the state, as the guardian of the

fundamental rights, has a duty to take every precautionary step in ensuring that a riotous situation is quelled with minimum damage both to human lives and property. It was no secret that the FTZ is populated with a sizeable worker community and authorities were put on notice that the days immediately prior, they were emotionally disturbed due to the apprehension that their retirement benefits will be adversely affected as a result of the Bill that was proposed to be legislated. Correctness or otherwise of that apprehension apart, the law enforcement authorities ought to have foreseen the events that unraveled. Thus, derive the duty on their part to take the adequate steps to meet the situation. The manner in which the law enforcement authorities have acted in this instance cannot be complimented and the conduct of the Senior Officers of the law enforcement in the events referred to falls short of foresight and the diligence expected of them. It is needless to stress that using live ammunition to quell a worker protest ought to have been the last resort after exhausting all other practices normally deployed in a situation of this nature. For example, had water cannons been stationed at the site of the protest the Police Officers would not have had to fear that they would be helpless if the crowd exited the FTZ and caused havoc outside and therefore use fatal measures. The 2nd Respondent in his statement to the Presidential Committee observes that had water cannons and adequate riot squads been available the situation could have been easily brought under control. The second respondent in his statement to the Presidential Committee (vide page 38) has stated that when he arrived at the Katunayake Police Station and the vicinity of Gate IV and that there were no senior officers to issue orders to them and that he took the decision to fire. The inaction and the failure of the Senior Officers to issue proper orders has only aggravated the situation. The IGP states that two trained Riot Squads were placed at the two exit gates of the FTZ, a number clearly insufficient, as indicated by the turn of events where officers not specially trained for handling crowds dealt with the protestors, with grave consequences.

A particular 'Notice to all employees' produced in the Presidential Committee report (vide page 18) refer to the IGP's views on the demonstrations on the 24th - "they were unhappy about the unlawful assembly and violation of law and order due to the actions taken by the workers on the 24th May at 18th Mile Post, Katunayake. Further he expressed that repetition of such unlawful actions will not be tolerated in the future." This view that the protestors' right to demonstrate their opposition to the bill extends only to an arbitrary extent that the Police thinks acceptable and not to the full extent guaranteed by the Constitution and, any action in excess can be quelled mercilessly appears to be the general attitude of the Police towards the protestors as later manifested in the violence they unleashed against them.

In ***Sanjeewa, Attorney-at-Law on behalf of Gerald Mervyn Perera v Suraweera*** [2003] 1 Sri LR 317 SC 'The duty imposed by Article 4(d) to respect, secure and advance fundamental rights...extends to all organs of Government and the Head of the Police (The Inspector General of Police) can claim no exemption…A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization."

State Liability

Per Amerasinghe. J. in ***Saman v Leeladasa (1989) 1 SLR 1*** "*The test of liability relates to the performance or purported performance of his official duties and not to his rank or position in the official hierarchy. If the act was done within the scope of the express or implied sense of the authority of the public officer concerned, there is executive or administrative action in the relevant sense…Where there is no express or implied, authority, the act of the public officer may nevertheless be regarded as executive or administrative action if it could be inferred from the*

circumstances-that the act was done with the intention of doing good to the State and not for his own purpose. In such a case of ostensible authority it may be no defence that the officer concerned was acting beyond his power or authority and even in disregard of a prohibition or special direction provided, of course, that the act was incidental to what the officer was employed to do." It follows from this view that the state with which the primary duty to safeguard fundamental rights enshrined in the Constitution lies, is liable for the inaction of the Respondents.

Since the identities of the police officers who perpetrated the concerted charge and the subsequent attack on the factories have not been specifically identified, it is not possible to pin individual liability on individual officers.

Declarations and Compensation

Upon consideration of the material placed before the court, I am of the view that the Petitioners have established that their fundamental rights have been violated and each of the Petitioners is entitled to a declaration to that effect;

Accordingly, I declare that the fundamental rights of

a) H. M. M. Sampath Kumara, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 265/2011)
b) A. Rohitha Amarasinghe, under Articles 11, 12(1), 13(1) and 14(1)(b) had been violated (SC FR 266/2011)
c) C. A. H. M. O. Buddika Atapattu, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 267/2011)
d) R. R. M. Dhanushka Sanjeewa, under Articles 11, 12(1), 13(1) and 14(1)(b) had been violated (SC FR 268/2011)
e) Anesh Imalka Fernando, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 269/2011)

f) N. L. T. Iresha, under Articles 11, 12(1), 13(1) and 14(1)(b) had been violated (SC FR 270/2011)
g) Nisshanka Wanigasekera, under Articles 11 and12(1) had been violated (SC FR 271/2011)
h) R. A. H. M. Jayatissa Rajakaruna, under Articles 11, 12(1) and 13(1) had been violated (SC FR 272/2011)
i) S. P. L Ranjan Lasantha Perera, under Articles 11, 12(1) and 13(1) had been violated (SC FR 273/2011)
j) H. M. Lalinda Herath, under Articles 11, 12(1) and 13(1) had been violated (SC FR 274/2011)
k) M. Pradeep Kumara Priyadarshana, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 346/2011)
l) U. G. Nalin Sanjaya Jayatileke, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 347/2011)
m) M. H. A. Sameera Sandaruwan Hettiarachchi, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 348/2011)

I am of the view that this is a fit matter to consider payment of compensation to the Petitioners. In deciding the quantum of compensation to be awarded the court took into consideration the gravity of the injuries sustained by the Petitioners and the court also took in consideration that some of the petitioners have not taken part in the protest but are victims of circumstances. Accordingly;

a) In SC FR Application No. 265/2011 the Petitioner H. M. M. Sampath Kumara is awarded a sum of Rs. 250,000 as compensation.

b) In SC FR Application No. 266/2011 the Petitioner A. Rohitha Amarasinghe is awarded Rs.75,000 as Compensation.

c) In SC FR Application No. 267/ 2011 the Petitioner C. A. H. M. O. Buddika Atatpattu is awarded Rs. 75,000 as compensation.

d) In SC FR Application No. 268/2011 the Petitioner R. R. M. Danushka Sanjeewa is awarded Rs. 50,000 as compensation.

e) In SC FR Application No. 269/2011 the Petitioner Anesh Imalka Fernando is awarded Rs. 50,000 as compensation.

f) In SC FR Application No. 270/2011 the Petitioner N. L. T. Iresha is awarded Rs.75,000 as compensation.

g) In SC FR Application No. 271/2011 the Petitioner Nisshanka Wanigasekara is awarded Rs. 100,000 as compensation.

h) In SC FR Application No. 272/2011 the Petitioner R. A. H. M. Jayatissa Rajakaruna is awarded Rs. 75,000 as compensation.

i) In SC FR Application No. 273/2011 the Petitioner S. P. L. Ranjan Lasantha Perera is awarded Rs. 100,000 as compensation.

j) In SC FR Application No. 274/2011 the Petitioner H. M. Lalinda Herath is awarded as Rs. 40,000 as compensation.

k) In SC FR Application No. 346/2011 the Petitioner M. Pradeep Kumara Priyadarshana is awarded Rs. 75,000 as compensation.

l) In SC FR Application No. 347/2011 U. G. Nalin Sanjaya Jayatileke is awarded Rs. 75,000 as compensation.

m) In SC FR Application No. 348/2011 the Petitioner M. H. A. Sameera Sandaruwan Hettiarachchi is awarded Rs. 50,000 as compensation.

The compensation awarded to the Petitioners referred to above is payable by the State.

Applications allowed.

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J. PERERA

I agree

CHIEF JUSTICE

JUSTICE 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 application under Articles 17 and 126 of the Constitution.

DR. AJITH C.S. PERERA
Chief Executive/Secretary General,
"IDIRIYA", No. 18/1, Arthur's Place,
Dehiwala.

PETITIONER

SC FR Application No. 273/2018

VS.

1. **HON. DAYA GAMAGE**
   Minister of Social Services and Social Welfare and the Chairman of the National Council for Persons with Disabilities,
   80/5, Govijana Mandiraya,
   Rajamalwatta Avenue, Battaramulla.

2. **HON. FAISER MUSTHAPA**
   Minister of Provincial Councils, Local Government and Sports,
   No. 330, Dr. Colvin R. de Silva Mawatha, Colombo 02.

3. **HON. SAJITH PREMADASA**
   Minister of Housing and Construction, 2nd Floor,
   "Sethsiripaya", Battaramulla.

4. **HON. PATALI CHAMPIKA RANAWAKA**
   Minister of Megapolis and Western Development,
   17th and 18th Floors, "Suhurupaya".
   Subhuthipura Road, Battaramulla.

5. **HON. AKILA VIRAJ KARIYAWASAM**
   Minister of Education,
   "Isurupaya", Pelawatta, Battaramulla.

6. **HON. (MRS.) THALATHA ATUKORALA**
   Minister of Justice and Prison Reform,
   Superior Courts Complex,
   Colombo 12.

7. **SRI LANKA TOURISM DEVELOPMENT AUTHORITY**
   No. 80, Galle Road, Colombo 03.

8. **THE URBAN DEVELOPMENT AUTHORITY**
   6th and 7th Floors, "Sethsiripaya",
   Battaramulla.

9. **HON. ATTORNEY GENERAL**
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

BEFORE:	Prasanna Jayawardena, PC, J. V. K. Malalgoda, PC, J. Murdu N.B. Fernando, PC, J.
COUNSEL:	Petitioner appeared in person. Rajitha Perera, SSC for the 8th and 9th Respondents.
ARGUED ON:	29th November 2018.
WRITTEN SUBMISSIONS FILED:	By the petitioner on 11th December 2018.
DECIDED ON:	18th April 2019.

Prasanna Jayawardena, PC, J,

The background to this application

The petitioner graduated from the University of Colombo in 1975 with a B.Sc (Hons.) Degree. Subsequently, he read for and was awarded a M.Sc. He later qualified as a Chartered Chemist. He is a Fellow of the Institute of Chartered Chemistry, Ceylon, and a Fellow of the Royal Society of Chemistry, London. He has been awarded an Honorary Ph.D. His working career included a period when he was a lecturer in the Department of Chemistry of the University of Colombo and, thereafter, employment as a senior manager at two multi-national companies. The petitioner was also accredited as a Test Umpire by the Sri Lanka Cricket Board [as it then was].He led a physically active life. In 1992, the petitioner was gravely injured and left with paraplegia when a wayside tree fell on to his car. Since then, the petitioner has actively campaigned to resolve the difficulties which physically disabled people face in day-to-day life in the community. In 2005, the petitioner founded an organisation named "IDIRIYA". That organisation works on *"disability related access issues"* which affect physically disabled people in day-to-day life.

On 19th May 2009, the petitioner filed SC FR Application No. 221/2009 pleading that he was filing the application in the public interest and for and on behalf of persons with disabilities. He pleaded, *inter alia*, that *"the non-implementation and (non-) enforcement in full of the provisions of the Protection of Rights of Persons with Disabilities Act No. 28 of 1996 and the Disabled Persons (Accessibility Regulations) Regulations No. 1 of 2006"* have violated the fundamental rights guaranteed by Article 12 (1), Article 14 (1) (g) and 14 (1) (h) of the Constitution to the petitioner and others who are similarly circumstanced. The petitioner prayed for an array of reliefs.

On 24th March 2009, the petitioner was granted leave to proceed under Article 12 (1) and Article 14 (1) (g) of the Constitution. Subsequently, this Court made an initial Order and an Order on 14th October 2009 clarifying its previous Order. Later, the Court made a final Order dated 27th April 2011 granting the reliefs set out in that final Order. The said final Order dated 27th April 2011is reproduced *verbatim* below:

"This case is called for the purpose of clarifying the order that was recorded on 14/10/2009.

After hearing the submissions, the Court replaced the order made on 14/10/2009, with the following order:

This Court recognizes that people have different levels of ability to move freely, and that many - specially the growing numbers of Seniors, Disabled Persons and Pregnant Mothers are restricted in their movement.

This Court further recognizes that in terms of the protection of the Rights of Person with Disabilities Act No. 28 of 1996, as amended, and the regulations made thereunder, no person should be discriminated against on the ground of disability and their mobility restricted in a manner which precludes or impedes them from enjoying equally their inherent right for access, safety and accommodation in day-to-day life at man-made public buildings, public places and facilities provided there.

Accordingly, this Court orders that Parts of NEW public buildings or public spaces, specially toilet facilities as defined in the Accessibility Regulations No. 01 of 2006 made under the Protection of Persons with Disabilities Act No. 28 of 1996, as amended, hereafter shall be designed and constructed in accordance with the `design requirements' specified in the regulations in force.

The Court further orders that compliance with this Court order is mandatory in order to gain approval of building plans, to certify buildings on completion and to issue the certificate of conformity and to issue the certificate of conformity and hence all authorities that are empowered to do so shall refrain from doing so in respect of all constructions which would violate this order.

Failure to comply with the Court order shall be a serious punishable offence and shall attract punitive repercussions as set out in the law.

These proceedings are terminated. In case of any violation a fresh action could be filed to deal with that situation.".

Subsequently, the petitioner filed motions dated 03rd May 2013 and 14th May 2013 and moved that a further Order be made including newly constructed public structures and facilities within the scope of the aforesaid Order. In pursuance of these motions, this Court heard the petitioner and learned Deputy Solicitor General on 17th June 2013 and made the following Order on the same day, which is reproduced *verbatim*:

"This Court has heard Mr. Ajith Perera, the Petitioner in person. Court has also heard Deputy Solicitor General, Mr. Rajaratnam.

Mr. Rajaratnam brings it to the notice of Court that by Circular No. MSS/7/8/ACC dated 04th October 2012 very comprehensive directions have been given to ensure compliance with the court order and that it has been addressed to all the Ministries, all Provincial Ministries and Secretaries and all District Secretaries. This Court makes the observation that the Circular is very comprehensive and would encourage the Agencies of the State to implement the Circular to ensure that those of them who are otherwise disabled or with restricted ability to be given every opportunity to integrate freely with the community.

The Registrar is directed to communicate this order to the Secretary of the Ministry of Social Services forthwith.

The learned Deputy Solicitor General is requested to ensure that the Circular is given its full effect by directing the authorities to take immediate steps to sensitize the private sector to the need to take cognizance of the aforementioned circular and to take appropriate steps in compliance.".

Circular No. MSS/7/8/ACC referred to in the aforesaid Order, has been issued by the Secretary to the Ministry of Social Services. It is addressed to all Secretaries to the Ministries, all Chief Secretaries of the Provincial Councils and all District Secretaries. The Circular, *inter alia*, draws the attention of the addressees to the `Disabled Persons (Accessibility) Regulations No. 1 of 2006' made under the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 and the amendment dated 18th September 2009 to these Regulations. The Circular states that all public buildings and public places must provide access facilities for persons with disabilities which are in compliance with the aforesaid regulations, should be constructed in a manner which complies with the aforesaid regulations and that newly constructed public buildings should not be issued a certificate of conformity unless they are constructed in compliance with the aforesaid regulations. The Circular also draws the attention of the addressees to the Order dated 27th April 2011 made by this Court in SC FR Application No. 221/2009 and a previous Cabinet Decision dated 29th April 2009. The Circular directs that access facilities for persons with disabilities must be provided, before 16th October 2014, in all public buildings coming under the purview of the addressees. The documents referred to in the Circular were annexed to the Circular.

As mentioned earlier, the Order dated 27th April 2011 in SC FR Application No. 221/2009 had permitted the petitioner to make a new application, in the event the Order was violated.

The petitioner's present application

On 03rd September 2018, the petitioner filed the present SC FR Application No. 273/2018, by way of a petition and affidavit. He later filed an amended petition.

The respondents to the present application are: (i) the Hon. Minister of Social Services and Social Welfare *and* Chairman of the National Council for Persons with Disabilities; (ii) the Hon. Minister of Provincial Councils and Local Government; (iii) the Hon. Minister of Housing and Construction; (iv) the Hon. Minister of Megapolis and Western Development; (v) the Hon. Minister of Education; (vi) the Hon. Minister of Justice and Prison Reform; (vii) the Sri Lanka Tourism Development Authority; (viii) the Urban Development Authority and (ix) the Hon. Attorney General.

The petitioner states that he makes this application in the public interest and on behalf of a large number of people in Sri Lanka who have physical disabilities which impede their mobility. He says he files this application to secure their basic human dignity

The petitioner refers to section 23 (2) and section 23 (3) of the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996, as amended by Act No. 33 of 2003 ["the Act"]. The petitioner states that, in pursuance of the statutory powers vested in him by the Act, the Minister, has made the `Disabled Persons (Accessibility) Regulations No. 1 of 2006' published in the Extraordinary Gazette No. 1467/15 dated 17th October 2006 as amended by the Regulation dated 18th September 2009 published in the Extraordinary Gazette No. 1619/24 dated 18th September 2009. [The `Disabled Persons (Accessibility) Regulations No. 1 of 2006' as amended by the Regulation dated 18th September 2009 are hereinafter compositely referred to as "the Regulations"].

The petitioner pleads that the aforesaid Regulations specify the manner in which various parts or areas of public buildings, public places and places where common services are available, shall be designed so that persons with disabilities can safely and easily access those places. The Regulations also declare that all existing public buildings, public places and places where common services are available, must be brought into conformity with the provisions of the Regulations within an aggregate period of 11 years from when the Regulations became operative.

Further, the Regulations specify that no certificate of conformity shall be issued in respect of the construction or renovation of any public building or structure located in a public place unless the related building plan conforms to the `performance specifications' and 'designs' set out in the Regulations.

The petitioner points out that Government of Sri Lanka was a signatory to the United Nations Convention on the Rights of Persons with Disabilities ["UNCRPD"] on 30th March 2007 and has, subsequently, ratified the UNCRPD on 08th February 2016.

The petitioner pleads that, despite the Regulations and the aggregate period of 11 years granted for compliance and despite the aforesaid Order made in Application No.SC FR 221/2009, there has been no *"satisfactory or meaningful"* compliance with provisions of the Regulations in numerous public buildings, public places and places where common services are available. The petitioner further pleads that certificates of conformity have been frequently issued for newly constructed or renovated public building or public structures, despite the fact that that these buildings or structures do not conform to the requirements, `performance specifications' and 'designs' set out in the Regulations.

The essence of the plaintiff's application is his complaint that the aforesaid non-compliance with the provisions of the Act and the Regulations, has placed the petitioner and others who are similarly circumstanced, in a position where they cannot access a large number of public buildings, public places and places where common services are

available *or* where they have to face difficulties and have their safety jeopardised when they access such buildings and places. The petitioner pleads that, thereby, he and other persons with disabilities who are similarly circumstanced, are subject to unfair and unlawful discrimination, disadvantage and marginalisation.

Accordingly, the petitioner pleads that the failure of the respondents to ensure the enforcement of and compliance with the provisions of the Act and the Regulations, has resulted in a continuous violation of the fundamental rights guaranteed by Article 12 (1), 12 (2) and 14 (1) (h) of the Constitution to the petitioner and others who are similarly circumstanced.

Further, the petitioner refers to proposed large-scale projects for the provision of public facilities and infra-structure and urges that it is essential that when these large-scale projects are implemented, their design and construction must be in compliance with the requirements, `performance specifications' and 'designs' set out in the Regulations.

The petitioner prayed for, *inter alia*, a direction that the respondents shall forthwith take all necessary measures to ensure that the provisions of the Act and the Regulations are fully implemented and enforced - *vide:* prayer (b); and a direction to the respondents to issue regulations, rules or by-laws which will have the effect of making owners and occupiers of premises and structures falling within the ambit of the Act and the Regulations liable for non-compliance with the provisions of the Regulations - *vide:* prayers (c) and (d).

Notices were served on all nine respondents. When this application was subsequently taken up on 20th September 2018, learned Senior State Counsel appeared and stated that he had limited instructions from the 1st respondent and that he wished to also get instructions from the 8th respondent. The 2nd to 7th respondents were not represented, despite the service of notice on them.

Thereafter, this application was taken up on 04th October 2018. Learned Senior State Counsel appeared for the Hon. Attorney General. Having heard submissions, this Court granted the petitioner leave to proceed under Article 12 (1) and Article 14 (1) (h) of the Constitution.

When this application was next taken up on 15th November 2018, learned Senior State Counsel stated that he appeared for the 8th respondent - the Urban Development Authority - in addition to appearing for the 9th respondent - the Hon. Attorney General. On that day, Court fixed this application to be taken up for argument on 29th November 2018. Court also directed learned Senior State Counsel to contact the 1st to 7th

respondents and ascertain whether they had any instructions to give in this matter. In pursuance of that request, learned Senior State Counsel undertook to contact the Secretaries to the relevant Ministries and obtain their instructions, if any. We will proceed on the basis that this was done.

Subsequently, an affidavit dated 21st May 2019 affirmed to by the Acting Director of the National Secretariat for Persons with Disabilities has been filed. The documents marked "R1" to "R20" are annexed to this affidavit.

At the time this affidavit was filed, the National Secretariat for Persons with Disabilities was placed under the purview of the Ministry of Housing and Social Welfare, as stated in the affidavit. However, with the subsequent appointment of a new Cabinet of Ministers in January this year, the National Secretariat for Persons with Disabilities now comes under the purview of the Ministry of Primary Industries and Social Empowerment.

The Acting Director of the National Secretariat for Persons with Disabilities takes up the position that the State and its agencies have taken and continue to take measures to implement and ensure compliance with the provisions of the Act and the Regulations. On that basis, he denies that there has been any violation of the fundamental rights of the petitioner.

When the application was taken up for argument on 29th November 2018, the petitioner made submissions in person and learned Senior State Counsel made brief submissions. The 2nd to 7th respondents did not enter an appearance and were not represented despite having been served notice of this application and despite being later contacted by learned Senior State Counsel to ascertain their instructions, if any. They are, undoubtedly, aware of this application but have chosen not to appear and be represented in these proceedings. In these circumstances, the 1st to 8th respondents will all be bound by the judgment and orders made in this application.

Determination

In its 2012 Census, the Department of Census and Statistics reported that an estimated 8.6% of the people of Sri Lanka have some form of disability. That means one in every twelve people of our country has to deal with his or her disabilities in the course of living their day-to-day lives. This is not the case only in Sri Lanka. The same difficulties are faced by persons with disabilities in all parts of the world.

The then Secretary General of the United Nations highlighted this when, on the occasion of the `International Day for Persons with Disabilities' on 03rd December 2009, he observed:

"We are all vulnerable to disability, temporary or permanent, especially as we grow older. In most countries, at least one person in ten is disabled by physical, mental or sensory impairment. A quarter of the global population is directly affected by disability as care-givers or family members. Persons with disabilities encounter many disadvantages. They are often the poorest and most excluded members of society. Yet they routinely show tremendous resilience, and achieve great heights in all spheres of human endeavor.".

Ban Ki-moon was referring to the spirit of resilience and commitment to achievement which persons with disabilities share with others in the community. That spirit and commitment was well illustrated when Helen Keller, who was left both blind and deaf at the age of nineteen months as a result of a disease and went on to graduate *phi beta kappa* from Radcliffe College and become a famed author, traveller and social and political activist, declared *"I am only one; but still I am one. I cannot do everything, but I can still do something; I will not refuse to do something I can do."*. The Supreme Court of India cited this declaration in the recent decision of JEEJA GHOSH vs. UNION OF INDIA [2016 Indlaw SC 381 at para. 29], referred to later on. However, it should be mentioned that it has been said Keller was quoting the author, Edward Everett Hall.

These remarks serve to highlight the now widely accepted norm that the duties of a State to its people, include taking reasonable and adequate measures to ensure that persons with disabilities - who comprise a significant portion of the community - have the opportunity to go about their day-to-day activities and live fulfilling and successful lives, just as others in the community have that opportunity.

Historically, society tended to deal with this by endeavouring to provide medical care, health care and taking other measures aimed at assisting persons with disabilities to improve their physical capabilities and by providing separate facilities for the accommodation, welfare and protection of persons with disabilities. This approach came to be known as the `medical model' of the State dealing with the need to support persons with disabilities.

However, from the late 1960s onwards, an alternative approach gained wide acceptance. It was based on the experience that the `medical model' approach often resulted in a degree of marginalisation and sometimes even isolation of persons with disabilities from the rest of the community. This experience gave rise to the belief that difficulties encountered by persons with disabilities when living their day-to-day lives could be more effectively countered by *also* taking measures to ensure that such

persons were able to live their day-to-day lives on a platform of equality with others in the community. The theory was that this could be achieved to a significant extent by providing facilities which enabled persons with disabilities to easily access and use public buildings and public facilities, to receive information, to communicate, to learn and to work in the community together with others; and by changing any negative attitudes which the community may have towards persons with disabilities. The underlying belief was that effecting improvements in the way society was organised to meet the needs of persons with disabilities will enable them to integrate with the community, as equals. This approach was termed the `social model of disability' by the British academic, Prof. Michael Oliver.

The `social model' of dealing with obstacles faced by persons with disabilities in their interaction with the community, rests on the premise that a State should provide equal opportunities for persons with disabilities to live, learn and work in the community along with other members of the community. Judith Heumann, the renowned disability rights activist who served as the Special Advisor on disability rights to the State Department of the United States of America, summed up the effectiveness of this approach, when she observed *"disability only becomes a tragedy for me when society fails to provide the things we need to lead our lives - job opportunities or barrier-free buildings, for example. It is not a tragedy to me that I am living in a wheel chair"*.

Wide acceptance that an approach on the lines conceptualised by the `social model' was a necessary concomitant of the `medical model' approach, was one of the factors which led to the United Nations General Assembly adopting the `Standard Rules on the Equalization of Opportunities for Persons with Disabilities' on 20th December 1993. The 22 Rules therein were formulated, drawing from the key concepts of both models referred to earlier, to guide States in their efforts to assist persons with disabilities by *inter alia*: (i) providing medical care, rehabilitation and support services; *and* (ii) by providing access facilities, educational assistance, employment opportunities, recreational and cultural opportunities, increasing public awareness of the rights of persons with disabilities and other social initiatives, which are aimed at ensuring that persons with disabilities could participate on an equal footing with others in the day-to-day affairs of the community.

To move one, it is evident from the discussion set out earlier that in today's world, there is recognition of a duty placed upon each State to provide persons with disabilities with the opportunity to live their day-to-day lives on a platform of equality with others in the community.

In keeping with this duty, the Parliament of Sri Lanka passed the Act and the Regulations were made. It should be mentioned that this was done long prior to the UNCRPD, which was signed by Sri Lanka in 2007 and subsequently ratified in 2016.

Some years later, the National Policy on Disability formulated by the Ministry of Social Welfare in 2003, stated that:

"The National Policy on Disability promotes and protects the Rights of People who have Disability in the spirit of social justice. ***They will have opportunities for enjoying a full and satisfying life and for contributing to national development their knowledge, experience and particular skills and capabilities as equal citizens of Sri Lanka****."*. [emphasis added].

A perusal of the provisions of the Act and the National Policy on Disability make it clear that the stated policy of the State is to protect, promote and advance the rights of persons with disabilities and, in the course of doing so, to, *inter alia,* ensure that equal opportunities are provided for persons with disabilities so that they are not placed at a disadvantage *vis-à-vis* others and are not subjected to discrimination or marginalisation.

It also evident from a perusal of the provisions of the Act and the Regulations made thereunder, that the State has undertaken a duty to implement this policy and has given the discharge of that duty statutory and regulatory sanction, by means of the provisions of the Act and the Regulations.

Thus, the Long Title of the Act states it is *"AN ACT TO PROVIDE FOR …. THE PROMOTION, ADVANCEMENT AND PROTECTION OF RIGHTS OF PERSONS WITH DISABILITIES IN SRI LANKA ….."*.

The Act sets up the `National Council for Persons with Disabilities'. The Council is chaired by the Minister and has 20 other members, all of whom are appointed by His Excellency, the President.

Section 12 of the Act declares that:

"The principle function of the council shall be to ensure the promotion, advancement and protection of the rights of persons with disabilities.".

Section 13 of the Act lists 22 specific functions which the Council is required to perform in the performance of its duties relating to its aforesaid principal function. Among them is section 13 (*b*) of the Act which requires the Council to:

"take all such measures as are necessary ….. to promote the furtherance of, and safeguarding, the interests and rights of persons with disabilities.".

Section 5 (*j*), section 5 (*k*), section 5 (*o*) and section 5 (*p*) of the Act are particularly relevant to the present application. These statutory provisions state that the functions of the Council include:

"to ensure a better standard of living for persons with disabilities"; *"to ensure that the requirements of persons with disabilities are met adequately."*; *"to encourage and provide facilities for full participation by persons with disabilities in all activities"*; and *"to introduce programmes to make the physical environment accessible to persons with disabilities and implement schemes to provide access to information and communication by persons with disabilities."*.

In pursuance of the aforesaid policy of protecting, promoting and advancing the rights of persons with disabilities and ensuring that persons with disabilities are treated equally with others and provided equal opportunities, section 23 (2) stipulates that:

"No person with a disability shall, on the ground of such disability, be subject to any liability, restriction or condition with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use, whether on the payment of a fee or not."

Thereafter, section 23 (3) provides that:

"The manner and mode of providing facilities to allow access by disabled persons to public buildings, public places and common services, shall be as prescribed.".

Section 25 of the Act empowers the Minister to make Regulations in respect of any matter required by this Act.

In pursuance of section 23 read with section 25 of the Act, the Minister made the Regulations [which were referred to earlier]. These Regulations set out, in a structured manner and in considerable detail, the design and performance specifications which must be present in public buildings, public places and places where common services are available and which must be adhered to when constructing or renovating public buildings, public places and places where common services are available. This was done in order to ensure that persons with disabilities could, as far as is reasonably possible, access public buildings, public places and places where common services are available and use the facilities in those places and, thereby, participate on an equal footing with others in the day-to-day affairs of the community.

The Regulations also stipulate requirements which apply to vehicles used for public transport such as buses, trains, aircraft and ships. Further, the Regulations specify additional safety measures to be installed in public areas for the guidance of persons who are visually impaired.

A perusal of the amended petition establishes that the scope of the petitioner's application is his complaint with regard to non-compliance with the Regulations in public buildings, public places and places where common services are available. The petitioner's application does not refer to or canvass the implementation of section 23 (1) of the Act which stipulates that no person with a disability will be discriminated against on the ground of that disability in recruitment for employment or admission to an education institution.

Keeping in mind the scope of the petitioner's application which is before us, some of the Regulations which are relevant to the subject matter of the present application are reproduced *verbatim* below:

Regulation 2 (1), as amended by the Regulations stipulates that:

"The provisions of these regulations shall be applicable to all ***public buildings****,* ***public places and to places where common services are available****, to which buildings, places and services persons with disabilities have access.* [emphasis added]

Provided that ***all existing public buildings, public places and places where common services are available, shall within a period of eight years from the coming into operation of these regulations, be made accessible to persons with disabilities in compliance with the provisions of these regulations****."*. [emphasis added]

Thereafter, Regulation 3 (1) and Regulation 3 (2) specify that:

" 3 (1) No person shall construct any public building or structure in any public place or re-construct or renovate any public building or structure in any public place unless any plan which relates to such building or structure conforms.

(a) to the performance specifications as set out in Part I of the Schedule I to these regulations; and

(b) to the designs as set out in Part II of the Schedule I to these regulations.

3 (2) *No certificate of conformity shall be issued by any `relevant authority' in respect of any building, construction, reconstruction or renovation of a public building, unless the relevant authority is satisfied that the plan referred to in subsection (1) conforms.*

(a) *to the performance specifications as set out in Part I of the Schedule I to these regulations; and*

(b) *to the designs as set out in Part II of the Schedule I to these regulations."*.

Regulation 4 (1) and Regulation 4 (2) require that:

" 4 (1) Adequate space as specified in Part IIA of the schedule I to these regulations shall be allocated for persons using mobility devices such as wheel chairs, crutches and walkers, in any public building, public place or place where common services are available.".

" 4 (2) A minimum of five percentum (5%) of all houses in housing schemes having a minimum of twenty (20) units shall be constructed in accordance with the designs relating to the different parts as specified in part IIB of Schedule I to thee regulations.".

Regulation 5 states that:

" In order to provide persons using mobility devices such as wheel chairs, crutches and walkers and for the persons moving with the assistance of another person with easy access to any public building, public place or place where common services are available, the following part of any public building, public place or place where common services are available, shall be designed in accordance with the design requirements specified in Part IIB of schedule I to these regulations.

1. *Parking areas;*
2. *Pathways and corridors;*
3. *Ground and floor surfaces;*
4. *Pavements, public roads and pedestrian crossings (kerb ramps);*
5. *Hand rails and grab bars;*
6. *Steps and stairs;*
7. *Ramps;*
8. *Lifts and elevators;*
9. *Doorways and entrances to any public buildings;*
10. *Toilets;*
11. *Parks, zoos and other places of recreation;*
12. *Bus stops;*
13. *Railways stations;*
14. *Windows, bed rooms, basins, kitchens, storage space, tables, switches and outlets, lighting and communication system."*

Regulation 10 defines *"public buildings"* as:

"buildings used for

(i) residential purposes, including staff residences located within multiple dwellings and high rise residential units and tenements;

(ii) for commercial purposes, including office buildings, hotels, motels, inns, guest houses and other public lodgings, shopping centres, super markets, restaurants, general wholesale and retail stories and car parks;

(iii) industrial purposes, including factories and work shops and ware houses;

(iv) community, social and educational purposes including educational institutions, schools, hospitals, nursing homes, medical center dispensaries, home for elderly persons, temples, churches and mosques and other religious places, police stations, courthouses, assembly halls, village halls, community centres, auditoriums, convention halls, libraries, museums, exhibition halls, public toilets and such other buildings; and

(v) recreational purposes, including cinema halls, theatres, concert halls, opera houses, art galleries, stadiums, sports complexes, sports venues and other places of recreation.".

Further, Regulation 10 describes *"public places"* as including:

"pedestrian crossings, walkways, pavements, roads, streets, off-street and on-street parking spaces, out door staircases, steps, lifts, traffic signals and sign parks, botanical gardens, zoological gardens and places of tourist interest and attraction;".

Regulation 10 also defines *"common services"* as:

"(a) public transportations services and facilities connected to such public transportation and shall include passenger buses, passenger trains, bus stops, depots and terminals, railways stations, air crafts, airport terminal buildings and airports and water transport;

(b) public communication services and facilities connected to such communication services and shall include post offices, communication centres and telephone booths.".

Finally, Regulation 10 defines *"relevant authority"* as:

" `relevant authority' means any local authority or any officer, persons or body of persons appointed for the purpose of granting approval for any construction or reconstruction of any public building or for the purpose of issuing the required licenses or permits in connection with vehicles providing public transportation under any written law.".

Schedule I [consisting of Part I, Part II A and Part II B] of the Regulations, sets out the design and performance specifications which must be followed when constructing or renovating public buildings, public places and places where common services are available. Thereafter, Schedule II [consisting of Part I and Part II] of the Regulations, lists the design and performance specifications which are to be followed with regard to vehicles used for public transport and associated facilities. Lastly, Schedule III of the Regulations set out safety measures to be taken in relation to visually impaired persons.

It is unnecessary, for the purposes of this judgment, to describe those design and performance specifications. It will suffice for the purpose of illustration to mention that: (i) Part I of Schedule I referred to in Regulation 3 (1) (*a*) requires, *inter alia*, that entrances and exits to high-rise residential units, post offices, banks, financial service institutions and shops shall be accessible by a ramp which conforms to the designs specifications set out in Part IIB of Schedule I to the Regulations; and (ii) community centres, auditoriums, concert halls, assembly halls, cinemas, theatres, village halls and other places of public assembly shall be accessible to persons with disabilities and shall provide doorways and accessible toilet facilities which conform to the designs specifications set out in Part IIB o Schedule I to the Regulations.

Having referred to the relevant statutory provisions and Regulations, it is necessary to now consider the material placed before us by the petitioner and the respondents with regard to the petitioner's complaint that numerous public buildings, public places and places where common services are available, do not comply with the requirements of the Act and the Regulations.

Before doing so, it would be apt to observe with regard to the subject matter of the application before us, that the aforesaid provisions of the Act, Regulations and the National Policy on Disability make it clear that the State's duty of protecting, promoting and advancing the rights of persons with disabilities, requires the State and its agencies to, *inter alia*, ensure that public buildings and public facilities are designed and constructed in a manner which ensures that persons with disabilities can enter, exit and use such public buildings and public facilities with relative ease and without danger.

The petitioner pleaded in his amended petition that, despite the extension of the time limit given for compliance with the requirements of the Regulations, "….. *compliance with the Regulations has still not been achieved, hence this new Petition."*. He goes on to state *"…… on receipt of numerous complaints and grievances by the General public, as well as Medical Practitioners, about Continuous failures to comply with your Lordship's Court Order …… he personally visited at his own cost several NEW*

constructions and several more modifications to existing constructions, and has observed the correctness of their grievous complaints as many building parts recognised in the Regulations, Toilets, Steps & Railings and Ramps in particular, either have NOT been built at all or incorrectly positioned or their construction violates the mandatory requirements set out in Gazette No. 1,4657 dated 17th October 2006.". In his affidavit, the petitioner has, referring to aforesaid complaints and grievances voiced by members of the public, stated *"I have personally visited reputed hospitals, city hotels, supermarkets and shops and even places of education and have observed the correctness of their cries and recognised the fear for the safety of their life."*. Further, the petitioner has made statements in his affidavit to the effect that, despite the Order dated 27th April 2011 made in SC FR Application No. 221/2009, he has observed that several new buildings have been issued certificates of conformity even though these new buildings do not comply with the provisions of the Act and the Regulations. The affidavits marked "X3(a)" and "X3(b" furnished by two senior and reputed medical practitioners set out their personal observations that several new hospitals do not provide adequate access facilities, toilets and washing facilities which can be easily and safely used by persons with disabilities. Further, the photographs and other documents referred to by the petitioner when he made submissions, support his statements referred to earlier.

To turn to the material placed before us by the respondents, the documents marked "R2" to "R4", "R6" to "R12K" and "R20" indicate that the 1st, 4th and 8th respondents have been cognizant of the need to ensure compliance with the requirements of the Act and the Regulations and have sought to ensure that compliance by issuing several instructions and circulars to local authorities, government departments, boards, statutory institutions, State agencies and public officers, they control or work with.

Thereafter, the letters and documents marked "R14" to "R18f" relate to the Project to construct a Light Rail Transit System in Colombo, the Western Region Aero City Development Project, the Colombo Port City Development Project and the Multi-Modal Transport Hub at Makumbura and several projects in Kandy under the Strategic Cities Development Project. These letters and documents give a heartening indication that new large scale projects coming under the aegis of the Ministry of Megapolis and Western Development and the Urban Development Authority are being planned keeping in mind the aforesaid obligation and duty of the State to provide persons with disabilities with facilities which comply with the provisions of the Act and the Regulations.

It is important that all other similar projects to be undertaken by the State and its agencies or approved by the State and its agencies, follow the same path.

However, although those letters and documents give a measure of assurance with regard to the future, what of the present ?

In this regard, the letters marked “R13a” to “R13e” written by the Bank of Ceylon, the Department of Posts, the Sri Lanka Transport Board and the Sri Lanka Railway establish that these State agencies are aware of the need to provide facilities in their premises and transport systems, which comply with the provisions of the Act and the Regulations. It also appears that the Bank of Ceylon and particularly, the Department of Posts have endeavoured to comply with these requirements and achieved considerable success within the limitations they faced. However, it seems that the Sri Lanka Transport Board and the Sri Lanka Railway are yet at the stage of planning for compliance over a period of time. Overall, the letters marked “R13a” to “R13e” reveal that much remains to be done to achieve compliance with the provisions of the Act and the Regulations within the premises and public transport systems of these institutions. It appears that, by and large, compliance with the provisions of the Act and the Regulations is still not more than work-in-progress or work in the pipeline, despite the many years which have elapsed since the Regulations were made.

It would be not unreasonable to infer that much the same position is likely to prevail in the case of many other agencies of the State.

In fact, the National Policy for Disability categorically stated, in 2003:

“The majority of public buildings are inaccessible to wheelchair users and other people who have mobility disability and use walking aids. Most urban workplaces, educational and vocational training institutions and public buildings have steps at the entrance, are often multistoried and not always have lifts. People in wheelchairs cannot use public transport. In rural areas many roads are not tarred and often have very uneven surfaces. Bus services are scarce. But even when there are services many individuals are unable to use them because they are inaccessible –the height of buses, doorways too narrow etc. Only 55% of people who have mobility disability use buses and even less – 36% - use trains. Taking all the disability groups together the figures are not much better – only 73% travel by bus and 45% by train. Most people who have disability (83%) use three wheel taxis to get around, which is an added expense. Inaccessibility to transportation severely limits employment and educational opportunities for this group of individuals. Among inaccessible places which people who have disability need to use are banks and places of religious worship. Toilets in most public buildings, hotels, rest houses, cinemas, theaters, schools etc. are inaccessible due to narrow entrances and the arrangement of fittings.”.

There is no material before us which suggests that there has been a tangible improvement in across-the-board compliance with the requirements specified in the

Regulations, despite 16 years having passed since the National Policy on Disability made the aforesaid observations in 2003.

In these circumstances, the unavoidable conclusion is that there has been and there continues to be, substantial non-compliance with and non-enforcement of the provisions of the Act and the Regulations.

It should be said here that a perusal of the Regulations leaves one with the impression that the Regulations are comprehensive and easily understood. It also appears that the Regulations have been tailored in a manner which enables compliance without causing unreasonable difficulty or unbearable expense, especially in the case of new constructions and new acquisitions. In other words, the Regulations do not seem to call for taking measures which overstep the benchmark of "*reasonable accommodation"* fixed by the States Parties to the UNCRPD and defined in Article 2 of the UNCRPD as:

"necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;".

Thus, the stark truth is that there has been large scale non-compliance with the Regulations despite the passage of about 13 years since the Regulations were made and the passage of more than one and half years after the expiry of the time limit allowed for compliance.

It follows that the fault lies not in the Regulations but in compliance by the State and its agencies with the Regulations, if I am to paraphrase Cassius in Shakespeare's Julius Caesar [Act I Scene ii Line 140-141]. It seems that much the same problem exists in neighbouring India too, which led Sikri J to observe in JEEJA GHOSH vs. UNION OF INDIA [at para. 2]:

"India also has come out with various legislations and schemes for the upliftment of such differently abled persons, but the gap between the laws and reality still remains.".

I must now turn to the question of whether large scale non-compliance with the Regulations has violated the fundamental rights guaranteed by Article 12 (1) and Article 14 (1) (h) of the Constitution to the petitioner and other persons with disabilities who are similarly circumstanced.

In this connection, it has been estimated, as mentioned earlier, that about 9% of the population of Sri Lanka have disabilities. Among them are war heroes, senior citizens,

students and others. The petitioner is a member of this group. There are close to two million others in Sri Lanka, who will fall within that broad category.

There can be no doubt that the aforesaid failure on the part of the State and its agencies to satisfactorily implement and enforce the provisions of the Act and the Regulations, has caused substantial prejudice to the petitioner and other persons with disabilities who, due to that failure on the part of the State and its agencies, are prevented from accessing numerous public buildings, public places and places where common services are available and using the facilities within these places or have difficulty and are sometimes placed in danger of injury, when accessing such places and using the facilities within these places.

It is clear from the record in the previous SC FR Application No. 221/2009 and the eventual Order dated 27th April 2011 that the Order was not based upon the consent of the respondents. Thus, when making the Order, this Court undoubtedly proceeded on the basis that the petitioner had established discrimination and a violation of his fundamental rights. The present application is on comparable facts. Further, the failure to comply with the Act and the Regulations despite the lapse of several more years aggravates the position and lends great force to the petitioner's present complaint. As mentioned earlier, the Order in SC FR Application No. 221/2009 expressly granted the petitioner the right to make a fresh application in the event of non-compliance with the Act, Regulations and Order.

In these circumstances, I need look no further to reach the conclusion that, in the present application too, the material placed before us and referred to earlier, entitles the petitioner to a declaration that his fundamental rights have been violated.

However, it will be useful to further consider the manner in which the failure on the part of the State and its agencies to satisfactorily implement and enforce the provisions of the Act and the Regulations, violates the fundamental rights guaranteed by Article 12 (1) of the Constitution to the petitioner and others who are similarly circumstanced.

When doing so, it is relevant to keep in mind that the UNCRPD was signed and later ratified by Sri Lanka. Article 3 (*f*) of the UNCRPD declares that one of its eight General Principle is *"Accessibility"*.

Thereafter, Article 9 (1) declares that all States Parties to the UNCRPD:

"….. *shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and*

communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and rural areas …..".

No doubt, this undertaking given by the State when it signed and ratified the UNCRPD does not amount to law in our country until Parliament enacts legislation giving effect to that undertaking. Nevertheless, this Court has recognised that International Conventions of this nature entered into by Sri Lanka form a type of *"soft law"* which may be taken into account when reviewing executive or administrative action and inaction in relation to fundamental rights - *vide:* BULANKULAMA vs. MINISTRY OF INDUSTRIAL DEVELOPMENT [2000 3 SLR 243 at p.274], WIJEBANDA vs. CONSERVATOR GENERAL OF FORESTS [2009 1 SLR 337 at p.359] and the recent decision in KARIYAWASAM vs. CENTRAL ENVIRONMENTAL AUTHORITY [SC FR 141/2015 decided on 04th April 2019].

In the recent case of JEEJA GHOSH vs. UNION OF INDIA, the petitioner, who is an activist for disabled rights, was `de-boarded' from a commercial airline because she had cerebral palsy. That was in breach of the published `Civil Aviation Requirements'. The petitioner sought the intervention of the Supreme Court of India, *inter alia*, by way of writs and directions requiring the respondents to comply with the applicable `Civil Aviation Requirements". The Supreme Court of India, holding with the petitioner, commented [at para. 39]:

"In international human rights law, equality is founded upon two complimentary principles: non-discrimination and reasonable differentiation. ***The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights****.* ***Equality not only implies preventing discrimination (example the protection of individuals against unfavourable treatment by introducing anti-discrimination laws) but also goes beyond in remedying discrimination against groups suffering systematic discrimination in society****.* ***In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.*** *The move from the patronising and paternalistic approach to persons with disabilities represented by the medical model to viewing them as members of the community with equal rights has also been reflected in the evolution of international standards relating specifically to disabilities, as well as moves to place the right of persons with disabilities within the category of universal human rights.".* [emphasis added].

The Supreme Court of India went on to state [at para. 42]:

"The subject of the rights of persons with disabilities should be approached from the human rights perspective, which recognised that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of

disability. ***This creates an obligation on the part of the State to take positive measures to ensure that in reality persons with disabilities get enabled to exercise those rights.*** *There should be insistence on the full measure of general human rights guarantees in the case of persons with disabilities, as well as developing specific instruments that refine and give detailed contextual content to those general guarantees. There should be full recognition of the fact that persons with disability were integral part of the community, equal in dignity and entitled to enjoy the same human rights and freedoms as others."*. [emphasis added].

These words of the Supreme Court of India fortify the observation I made earlier in this judgment that the aforesaid provisions in our Act and Regulations exist to implement the policy of the State that persons with disabilities must be provided the opportunity to live their day-to-day lives on a platform of equality with others in the community, and that there is a duty placed upon the State and its agencies to implement and ensure compliance with the aforesaid provisions of the Act and the Regulations.

It is also plain to see that the Act and the Regulations have been enacted and made by way of *`affirmative action'* under the authority of Article 12 (4) of the Constitution which recognises that special provisions may be made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons. Fernando J observed in RAMUPPILLAI vs. PERERA [1991 1 SLR 11 at p.13]:

"Paragraph (2), (3) and (4) of Article 12 are essentially explanatory and declaratory of the principle of equality and do not add to or detract from that principle. Article 12 (4) in particular does not authorise `affirmative action' for women, children and disabled persons, but out of an abundance of caution, declares that nothing in Article 12 shall prevent affirmative action; apart from proved `inequality';".

As observed earlier, having enacted the Act, declared a Policy and made the Regulations, the State and its agencies have a duty to implement and ensure compliance with the provisions of the Act and the Regulations so that persons with disabilities are provided the opportunity to live their day-to-day lives on a platform of equality with others.

However, the material placed before us demonstrates that there has been a failure on the part of the State and its agencies to satisfactorily implement, comply with and enforce the provisions of the Act and the Regulations. It follows that this failure on the part of the State and its agencies has denied the petitioner and others who are similarly circumstanced, of the opportunity to live their day-to-day lives on a platform of equality with others in the community *vis-à-vis* their ability to access numerous public buildings, public places and places where common services are available and use the facilities within these places. Further, that failure on the part of the State and its agencies has

denied the petitioner and others who are similarly circumstanced, of the protection held out to them by the provisions of the Act and the Regulations with regard to their ability to access numerous public buildings, public places and places where common services are available and use the facilities within these places.

Accordingly, I hold that the failure on the part of the State and its agencies to satisfactorily implement, comply with and enforce the provisions of the Act and the Regulations has denied and continues to deny the petitioner and others who are similarly circumstanced, of the opportunity of equality and the protection assured to them by the provisions of the Act and the Regulations and, thereby, has violated the fundamental rights guaranteed by Article 12 (1) of the Constitution to the petitioner and others who are similarly circumstanced.

In my view, the aforesaid determination will suffice for the purposes of deciding this application. I see no necessity to proceed further to consider whether there is also a violation of Article 14 (1) (h) of the Constitution.

Before proceeding to deal with the Orders and Directions which should be issued, I would like to mention in passing, that it seems to me that the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country. As Aharon Barak, former Chief Justice of Israel has commented [Human Dignity – The Constitutional Value and the Constitutional Right (2015)]:

"Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights.". and *"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that united the human rights into one whole. It ensures the normative unity of human rights."*.

Thus, it seems to me that when Article 12 (1) declares that *"All persons are equal before the law and are entitled to the equal protection of the law"*, it entitles persons with disabilities to be protected from an arbitrary or unreasonable failure on the part of the State and its agencies to satisfactorily implement, comply with and enforce the provisions of the Act and the Regulations which will have the effect of denying persons with disabilities of the protection of the provisions of the Act and the Regulations and place them in a position of inequality with others in the community with regard to their ability to access public buildings, public places and places where common services are available and use the facilities within these places. Next, there can be no dispute that when that failure on the part of the State and its agencies results in persons with disabilities being, in effect, debarred from accessing public buildings, public places and

places where common services are available or results in persons with disabilities having to publicly deal with inconvenience, difficulty and fear or even, at times, undergo public embarrassment or humiliation in the course of their attempts to access these places and use the facilities within these places, their human dignity is likely to be gravely impaired. This stark truth buttresses the determination reached earlier that there has been and continues to be a violation of the fundamental rights guaranteed by Article 12 (1) of the Constitution to the petitioner and others who are similarly circumstanced.

It is also relevant to draw attention to section 24 (1) of the Act which provides that:

"Where there has been a contravention of the provisions of section 23, any person affected by such contravention or the Council on behalf of such person may apply to the High Court established under Article 154P of the Constitution for the Province in which the person affected by such contravention resides, for relief or redress.".

Thereafter, Section 24 (3) enacts that:

"The High 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 application referred to in subsection (1).".

Further, we note that section 34 (*e*) of the Act stipulates:

"Any person who contravenes the provisions of this Act or any regulation or rule made thereunder, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding ten thousand rupees or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.".

Section 35 provides that: where such an offence is committed by a body corporate, the directors, secretary and officers of that body corporate shall be deemed guilty of the offence, and where the offence is committed by a firm, every partner of the firm shall be deemed guilty of the offence; unless such a person proves that the offence was committed without his knowledge and that he exercised due diligence to prevent to the commission of the offence.

There is no material before us which suggests that these specific provisions of the Act have been utilised. We think it appropriate to draw the attention of the National Council for Persons with Disabilities, the National Secretariat for Persons with Disabilities and the other respondents to the aforesaid provisions of the Act so that they could, in appropriate circumstances, consider resorting to these provisions in their efforts to ensure compliance with the provisions of the Act and the Regulations.

To conclude, we declare that the fundamental rights guaranteed by Article 12 (1) of the Constitution to the petitioner and other persons with disabilities who are similarly circumstanced, have been violated by the State and its agencies, including those coming under the purview or control of the 1st to 8th respondents.

In this connection, it should be mentioned here that the 1st to 8th respondents have not furnished material to us which would suggest that, apart from issuing some instructions and providing for compliance in the case of projects which have been recently completed or are still in the pipe-line, the requirements of the Act and the Regulations have been complied with in all the existing premises and facilities which are under the purview or control of 1st to 8th respondents or which are under the purview or control of local authorities, government departments, boards, statutory institutions and State agencies under 1st to 8th respondents.

With regard to the relief referred to in prayer (b) of the amended petition:

(i) We hereby issue a Direction to the 1st to 8th respondents and the Secretaries to the Ministries of the 1st to 6th respondents, to take or cause to be taken, effective measures to ensure the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006, as amended, are forthwith implemented and complied with in the case of and/or in respect of public buildings, public places and places where common services are available [as defined in clause 10 of the Disabled Persons (Accessibility) Regulations No. 1 of 2006] which come under purview or control of the 1st to 8th respondents and/or under the purview or control of local authorities, government departments, boards, statutory institutions, State agencies and public officers under the 1st to 8th respondents,.

However, if valid practical and/or budgetary considerations necessitate that such implementation and compliance in an existing public building, public place and place where common services are available [as defined in clause 10 of the Disabled Persons (Accessibility) Regulations No. 1 of 2006], be temporarily deferred, that may be done, provided that, in such instances, implementation and compliance is achieved at the earliest possible opportunity;

(ii) We hereby issue a further Direction to the 1st to 8th respondents and the Secretaries to the Ministries of the 1st to 6th respondents, to forthwith issue or cause to be issued, circulars or directions to all local authorities, government

departments, boards, statutory institutions, State agencies and public officers under the purview or control of the 1st to 8th respondents, specifying that:

(a) Approvals for the construction or renovation of public buildings, public places and places where common services are available [as defined in clause 10 of the Disabled Persons (Accessibility) Regulations No. 1 of 2006] shall not be granted unless the building plans, designs and drawing relating to such construction or renovation, comply with the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006;

(b) Certificates of conformity in respect of public buildings, public places and places where common services are available [as defined in clause 10 of the Disabled Persons (Accessibility) Regulations No. 1 of 2006] shall not be issued unless it has been established, after inspection, that such buildings and places, comply with the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006, as amended;

(iii) We hereby issue a further Direction to the 1st to 8th respondents and the Secretaries to the Ministries of the 1st to 6th respondents, to take or cause to be taken, appropriate follow-up action, on a continuing and regular basis, to monitor compliance with the subject matter of Direction (i) and Direction (ii) (a) and (ii) (b) above, by local authorities, government departments, boards, statutory institutions, State agencies and public officers under the purview or control of the 1st to 8th respondents;

(iv) We hereby issue a further Direction to the 1st to 8th respondents and the Secretaries to the Ministries of the 1st to 6th respondents, to instruct local authorities, government departments, boards, statutory institutions and State agencies and public officers under the purview or control of the 1st to 8th respondents, to take or cause to be taken, where reasonably considered appropriate, disciplinary proceedings against public officers who are found to have granted approvals or issued certificates of conformity in breach of and/or in violation of and/or in disregard of the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006;

(v) We hereby issue a further Direction to the 1st to 8th respondents and the Secretaries to the Ministries of the 1st to 6th respondents to direct local authorities, government departments, boards, statutory institutions, State agencies and public officers under the purview or control of the 1st to 8th respondents, to institute or cause the institution of prosecutions in the Magistrate's Court under the provisions of 34 of the Protection of the Rights of

Persons with Disabilities Act No. 28 of 1996, as amended, in instances where they detect that there has been a breach and/or violation and/or failure to comply with the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006 in the case of and/or with regard to a public building, public place and/or place where common services are available *and* they reasonably consider it appropriate to institute such a prosecution or cause such a prosecution to be instituted.

With regard to the relief referred to in prayers (c) and (d) of the amended petition:

(i) We hereby issue a Direction to the National Council for Persons with Disabilities acting together with the National Secretariat for Persons with Disabilities, to place appropriate, effective and prominent notices in the national newspapers in all three languages, on three separate occasions which are each one month apart, drawing the attention of the public:

(a) To the requirement that all public buildings, public places and places where common services are available [as defined in clause 10 of the Disabled Persons (Accessibility) Regulations No. 1 of 2006] must comply with the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006, as amended; and

(b) That a failure to comply could entail the liability to be prosecuted in the Magistrate's Court for the commission of an offence under the Act and, if found guilty, to be liable to punishment, as set out in the Act.

(ii) We hereby issue a further Direction to the National Council for Persons with Disabilities acting together with the National Secretariat for Persons with Disabilities, to, in addition to the above, carry out an appropriate and effective public awareness programme designed to increase public awareness of the relevant provisions of the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 Act, as amended and the mandatory requirements of the Disabled Persons (Accessibility) Regulations No. 1 of 2006, as amended. In this connection we drawn attention to section 13 (r) of the said Act which specifies that one of the functions of the Council is *"to make the public aware of the condition and needs of persons with disabilities through publications and programmes."*.

(iii) We hereby issue a further Direction to the National Council for Persons with Disabilities acting together with the National Secretariat for Persons with Disabilities:

(a) To take measures to provide facilities to assist, by way of legal advice and assistance, persons with disabilities and others who wish to enforce their rights under the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996, as amended, and the Disabled Persons (Accessibility) Regulations No. 1 of 2006, as amended, by recourse to the High Court or the Magistrate's Court, as the case may be; and

(b) In instances where there has been a breach and/or violation and/or failure to comply with the provisions of the Disabled Persons (Accessibility) Regulations No. 1 of 2006, as amended, to institute or cause the institution of proceedings in the High Court under the provisions of section 24 of the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996, as amended, and/or prosecutions in the Magistrate's Court under the provisions of 34 of the said Act, as amended, in instances where they reasonably consider it appropriate to do so.

The State will pay the petitioner a sum of Rs. 50,000/- on account of costs.

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 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (F/R) Application No. 275/2013.

Rubasin Gamage Indika Athula Priyantha,
No.19/9, Wewalwala Road,
Bataganvilla,
Galle.

Petitioner.

Vs.

1. The Inspector General of Police.
   Police Headquarters,
   Colombo 1.

2. Mr. K.E.L. Perera,
   Deputy Inspector General,
   Personnel Division,
   Police Headquarters,
   Colombo 1.

3. W.K. Jayalath,
   Senior Superintendent of Police,
   Director Recruitment,

Sri Lanka Police,
No.375, Sri Sambuddajayanthi Mawatha,
Colombo 8.

4. Dr. Dayasiri Fernando,
(Chairman),
Public Service Commission.

4(A). Rtd Hon Justice Sathya Hettige.
(Chairman),
Public Service Commission.

4(B). Mr. S.C. Mannapperuma,
Member,
Public Service Commission.

4(C). Mr. Ananda Seneviratne,
Member,
Public Service Commission.

4(D). Mr. N.H. Pathirana,
Member,
Public Service Commission.

4(E). Mr. S. Thillianadarajah,
Member,
Public Service Commission.

4(F). Mr. A. Mohamed Nahiya,

Member,

Public Service Commission.

4(G). Mrs. Kanthi Wijethunge,

Member,

Public Service Commission.

4(H). Mr. Sunil S. Sirisena,

Member,

Public Service Commission.

4(I). I.M. De Soysa Gunasekera.

Member,

Public Service Commission.

4(A)(A). Prof. Siri Hettige.

Chairman,

National Police Commission.

4(A)(B). Mr. P.H. Manathunga.

Member,

National Police Commission.

4(A)(C). Mrs. Savithree Wijesekara,

Member,

National Police Commission.

4(A)(D). Mr. Y.L.M. Zawahir,

Member,

National Police Commission.

4(A)(E). Mr. Anton Jeyanadan,
Member,
National Police Commission.

4(A)(F). Mr. Tilak Collure,
Member,
National Police Commission.

4(A)(G). Mr. Frande Silva,
Member,
National Police Commission.

4(A)(H). Mr. N. Ariyadasa,
Secretary,
National Police Commission.

All C/O The National Police Commission,
Block No.3, B.M.I.C.H. Premises,
Bauddhaloka Mawatha,
Colombo 7.

5. Mr. Palitha M. Kumarasinghe P.C.,
Member,
Public Service Commission.

6. Mrs. Sirimavo A. Wijeratne,
Member,
Public Service Commission.

7. Mr. S.C. Mannapperuma,
   Member,
   Public Service Commission.

8. Mr. Ananda Seneviratne,
   Member,
   Public Service Commission.

9. Mr. N.H. Pathirana,
   Member,
   Public Service Commission.

10. Mr. S. Thillanadarajah,
    Member,
    Public Service Commission.

11. Mr. M.D.W. Ariyawansa,
    Member,
    Public Service Commission.

12. Mr. A. Mohamed Nahiya,
    Member,
    Public Service Commission.

All C/O the Public Service
Commission,
No.177, Nawala Road,
Narahenpita,
Colombo 5.

13. The Secretary,
The Public Service Commission,
No.177, Nawala Road,
Narahenpita,
Colombo 5.

13A. Major General (Rtd)
Nanda Mallawarachchi,
Secretary to the Ministry of Law and Order,
Ministry of Law and Order,
Chatham Street,
Colombo 1.

13B. Dr. Mahinda Balasuriya,
The Secretary,
Ministry of Law and Order,
Floor 13, Sethsiripaya[Stage II],
Battaramulla.

13C. Mr. Jagath Wijeweera.
The Secretary,
Ministry of Law and Order,
Floor 13, Sethsiripaya[Stage II],
Battaramulla.

14. The Secretary,
Ministry of Defence and Urban Development,

No. 15/5, Baladaksha Mawatha,
Colombo 02.

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

Respondents

BEFORE : **L.T.B. DEHIDENIYA, J.,**
S. THURAIRAJA, PC, J. AND
E.A.G.R. AMARASEKARA, J.

COUNSEL : Rajeev Amarasuriya with Ms. Anne Devananda for Petitioner.
Rajiv Goonetilleke, SSC for the Respondents.

ARGUED ON : 6th February 2019.

WRITTEN SUBMISSIONS : Petitioner- 14th January 2019.
Respondents- 13th March 2019.

DECIDED ON : 7th June 2019.

S. THURAIRAJA, PC, J.

This is a Fundamental Rights application filed by the Petitioner above named, complaining that he has been discriminated for the appointment of Assistant Superintendent of Police (ASP) on the basis of his marriage under Article 12(1) of the Constitution.

As per the available material before this Court, the Appellant had applied for the post of ASP (Ordinary Police Office category). He was successful in the 1st written test and

the 2nd interview. Before the final interview and the appointment, he had contracted his marriage. The appointing authority had disqualified him on the basis of married persons are not eligible to be appointed as ASP (Ordinary Police Service Category).

The petitioner had submitted two principal matters to be determined by the Court.

(a) Whether discriminating the Petitioner because he "married" at the age of 34 years and therefore denying him appointment to the rank of ASP (which he was duly selected for)(on this basis alone), is unconstitutional and in violation of inter-alia the equality and equal protection provision of the Constitution.

(b) In any event, whether there was a prohibition at all, for married persons to be denied appointment.

The Petitioner advances his argument on the basis of International Covenant for Civil and Political Rights (ICCPR), Universal Declaration of Human Rights (UDHR), our Constitution and General Marriages Ordinance. Further the Petitioner is relying on judgments of other jurisdictions namely USA and Nigeria.

Cases cited by the Petitioner are not directly relevant to the issue before us. Further it is observed that, said judgments are in jurisdictions which are completely different from the social, economical, welfare and disciplinary services in Sri Lanka. Here, we basically followed the discipline in the military services from British with more specialization in domestic values. Hence, the order of discipline in uniformed services cannot be easily compared with other jurisdictions.

Respondents, represented by the Attorney General, submit that, the classification is based on rational and disciplinary matters of uniformed service. Further they submit that, the classification is warranted for the better training and service of the Police Officers.

Article 14 (1) (g) of the Constitution assures to all citizens, Freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.

The Petitioner had applied for the post of ASP under the Ordinary Police Service category and he had for the 1st interview obtained required marks to call for the 2nd interview. He attended the 2nd interview and he was successful. He was listed in the final selection list. Before the appointment is given, the Petitioner had contracted his marriage. When he submitted his marriage certificate for authorities, had found him disqualified for selection.

Now the Petitioner complains that marriage is his fundamental right and disqualifying him is amount to be a discrimination which tantamount to violation of fundamental rights enshrined under Article 12(1) of the Constitution of Sri Lanka. The Respondents submits that, the Petitioner had applied on an advertisement published in Gazette No. 1664 dated 23/07/2010. According to the said gazette, the Open Competitive Examination for the Selections of Assistant Superintendent of Police was called under several categories.

2.1 describe the Ordinary Police Service. Among many, one of the requirements is be an unmarried person. In the meantime 2.2 ASP (Medical Officer) which says may be married or unmarried. Similarly 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10 which are for ASP (Information Technology), ASP (Civil Engineer), ASP (Architecture), ASP (Electrical Engineer), ASP (Mechanical Engineer), ASP (Electronic Engineer), ASP (Veterinary Medicine), ASP (Western Music) respectively. Except the Ordinary Police Service Category at 2.1 other positions are more technical and specialised in certain field of work. Further it is observed that, those are open to female candidates too.

State Counsel submits that, this classification is for a specific purpose which is permitted under the Constitution. As submitted by the State, Assistant Superintendent of Police who is selected under the 'Ordinary Police Service category' is in-charge of the law and order, which obviously needs strenuous physical and weapon training. That is the reason why the appointing authorities had specified that, these candidates should be unmarried with less or no family commitment for the purpose of training.

In **Perera vs Jayawickrema [1985 1 Sri LR 285]**, Sharvananda CJ, delivered the majority opinion of the Court. The Hon. Chief Justice stated that a person claiming to be discriminated against must show that there was at least one other person similarly situate or equally circumstanced; that he had been treated differently from others and that there was no reasonable basis for such differential treatment.

The Petitioner brings an argument that, the word "candidate" will not be applicable for the Petitioner, because he is already been selected, hence he can marry. The requirement of unmarried is for the purpose of training after the appointment. Therefore this requirement is applicable until the conclusion of selection, training and the probation period or until the period specified by the appointing authority.

The State refers to **AIR India v. Meerza [1981 Vol 1 pp 438-503** also reported as **1981 AIR SC 1829]** held that,

> *"Based on reasonable classification that requiring air hostesses to be unmarried for period of four years after getting employment was not a violation of the equality provision, however that requiring them to leave employment after having children was against the equality provision."*

It is noteworthy that the Article 14 of the Indian Constitution which grants the right to equality is similar to Article 12(1) of the Sri Lankan Constitution. Article 14 of the

Indian Constitution reads; "*the State shall not deny to any person equality before the law or the equal protection of the law in the territory of India..*"

It is also to be noted that, based on this similarity between Article 14 of the Constitution, the Supreme Court of Sri Lanka had referred to Indian case law to elicit the meaning of equality as it did in **Perera vs. UGC [1978-80 1 SLR 103, Seneviratne vs. UGC [1978-80 1 SLR 182, Ramupillai vs. Festus Perera [1991 1 SLR 11]** and many other cases over the years.

Considering all, we find that the classification is reasonable in the given circumstances. Hence, we find that, there is no violation of the fundamental rights of the Petitioner.

Accordingly, we dismiss the Application.

Application dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.,
I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.
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 Democratic Socialist Republic of Sri Lanka.

SC (F/R) Application No. 276/2016.

1. Palipana Walawwe Udaya Bandara,
Palipana, 37/34, Eragoda,
Gampola.

2. Kuruppu Arachchilage Champa Nalinie Senevirathne.
22, Vijirarama Mawatha, Primrose Garden, Kandy.

3. Nadeeka Prashanthi Thenna Gunawardena,
348/1, Kumbure Gedara Road,
Haloluwa.

4. Ahangama Gamage Sunil,
082 B1,
Sirimavo Bandaranayake Mawatha,
Peradeniya.

5. Merangnage Gayani Fonseka,
126B, Yapa Mawatha,
Gannoruwa,
Peradeniya.

6. Herath Mudiyanselage Indrani Herath,
237, Meddegoda,
Yatiwawala,
Katugastota.

7. Marappulige Uthpalawanna Ranasinghe,
Ihalagama,
Tholangamuwa.

8. Anusha Nishanthi Nanayakkara,
214/8, Colombo Road,
Gampaha.

9. Rajamuni Devage Donil Kularathne,
Dikwatte Gedara,
Sevanagama,
Mahaulpotha,
Bandarawela.

10. Ekanayake Mudiyanselage Sumith Ekanayake,
5/12, Gamunu Mawatha,
Hanthana Pedesa,
Kandy.

11. Halpawaththage Madhuri Padmakumari Pieris.
"Iresha", Rohal Patumaga,
Tangalle Road,
Weeraketiya.

12. Rankette Gedara Sagara Priyantha Piyasena.
108, Doolwala,
Halloluwa, Kandy.

Petitioners.

Vs.

1. K.N. Yapa.
   Director General, Department of National Botanic Gardens,
   P.O. Box 14,
   Peradeniya.

2. R.M.D.B. Meegasmulla,
   Secretary,
   Ministry of Sustainable Development and Wildlife,
   9th Floor,
   "Sethsiripaya", Stage 1,
   Battaramulla.

3. Gamini Jayawickrema Perera,
   Minister,
   Ministry of Sustainable Development and Wildlife,
   9th Floor,
   "Sethsiripaya", Stage 1,
   Battaramulla.

4. R.M.N.E.K. Ranasinghe,
   Director,
   Sri Lanka Scientific Service Board,
   C/O, Ministry of Public Administration and Management,
   Independence Square,
   Colombo 07.

5. Ms. M.F.R. Safra,
   Assistant Director,
   Sri Lanka Scientific Service Board,
   C/O, Ministry of Public Administration and Management,
   Independence Square,
   Colombo 07.

6. Mr. Dharmasena Dissanayake,
   Chairman

7. Justice A. Salam Abdul Waid,
   Member

8. Mr. D.S. Wijayatilaka, Member

9. Dr. Prathap Ramanujan, Member

10. Mrs. V. Jegarasasingam, Member

11. Mr. S.N. Seneviratne, Member

12. Mr. S. Ranugge, Member

13. Mr. D.L. Mendis, Member

14. Mr. Sarath Jayathilaka, Member

    The 6th to 14th Respondents all of,
    Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita,
    Colombo 05.

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

16. E.J.S. De Soysa,
    No. 105/A, Mariyawatta, Gampola.

17. J.K.P.T.P. Jayaweera,
    Anoma, Diviyagahawela,
    Karandeniya.

18. H.K.K.D. Pathirana,
    Weragama,
    Ude Niriella,

Ratnapura.

19. H.S. Wijethunge,
    No.69/C, Giridara,
    Kapugoda.

20. B.H.D.S. Sampath, Sri
    Bodhiramaya, Samanalagama,
    Pathakada,
    Pelmadulla.

21. P.A.A.P.K. Senanayake,
    No. 1/21, Kehelgolla,
    Uduwa,
    Kandy.

22. M.C.L. Aththanayake,
    'Sandun Sewana',
    Ambalakanda Road,
    Pondape,
    Aranayake.

23. H.S. Punchihewa,
    No.144, Stage IV,
    Tissa Mawatha,
    Uyandana,
    Kurunegala.

24. M.M.L.I.W. Bandara,
    Indipitiya Wattha,
    Sumangala Mawatha,
    Wariyapola.

25. K.M.S. Deshaprema,
    No.17, Circular Road,
    Makuluwala,
    Galle.

26. H.M.I.N.K. Haluwana,

No. 15/A/A, Kulugammana,
Kandy.

Respondents

BEFORE : **SISIRA J. DE ABREW, J.**
VIJITH K. MALALGODA, PC, J.
S. THURAIRAJA, PC, J.

COUNSEL : J.C. Weliamuna, PC with Pulasthi Hewamanna for the Petitioners.
Yuresha de Silva, SSC for the 1st-15th Respondents.
Rajeev Amarasuriya with Chanaka Weerasekera and Anne Devananda for the 16th- 26th Respondents.

ARGUED ON : 07th February 2019.

WRITTEN SUBMISSIONS : Petitioners on 22nd February 2019.
1st – 15th Respondents on 20th February 2019.
16th-26th Respondents on 26th February 2019.

DECIDED ON : 05th April 2019.

S. THURAIRAJA, PC, J.

The petitioners above named filed a Fundamental Rights Application and leave was granted under Article 12(1) of the Constitution. Thereafter 16th to 26th Respondents intervened with the permission of the Court, those who are qualified to apply for the post of 'Assistant Director' in the Scientific Service in respect of the Department of National Botanical Gardens in terms of the Scheme of Recruitment (SOR). All parties filed written submissions and made their respective oral submissions.

Petitioners were originally joined as Graduate Development Programme and absorbed into the Department of Agriculture as Agricultural Programme Officers.

Subsequently, they were assigned to Department of National Botanical Gardens. The complaint of the petitioners is that, they were not absorbed in to Grade III-in the Sri Lanka Scientific Service, as per the Scheme of Recruitment marked as P4 dated 11th June 2015 by the petitioners.

Senior State Counsel had submitted all relevant documents regarding these positions. She submits that, the government had taken a policy decision in consultation with necessary State agencies to make the Department of National Botanical Gardens efficient, and several positions were categorized under Sri Lanka Scientific Services. Service Minutes of the Sri Lanka Scientific Services was approved and gazetted by the Secretary to the Public Service Commission on 28th August 2014 under Reference No.1877/27 (which is marked as 1R4). Accordingly, an internal circular- 1R5 (Scheme of Recruitment- SOR) was issued by the Director General of Department of National Botanical Gardens dated 11th June 2015 marked as 1R5.

According to the internal circular marked as 1R5, it clearly described the mode of recruitment. As far as the Department of National Botanical Gardens is concerned, 70% of candidates will be selected under the open category and 30% of the vacancies to be filled from the officers serving in the Department under the closed category. It is observed that, if the officers serving in the Government Department of National Botanical Gardens, posses relevant qualifications, they can compete either under the open category or closed category. However other candidates who are not currently serving in the government departments comes under the Scientific Service, can contest under the closed category.

As was evidenced by the communication between the petitioners and other relevant authorities, it clearly reveals that, they were aware of 1R4 (Service Minute) and 1R5 (SOR) at least by May 2016 (as per the amended petition). As per the letter dated 9th of June 2016, sent by the Secretary to Agriculture and Science Graduates Association

of Department of National Botanical Gardens addressed to the Director General of Department of National Botanical Gardens marked as P5 (b), they had made representation to the Director General and complained of the allocation of 30% and they wanted the limit to be increased from 30% to 90% for the closed category.

The complaint before this Court is regarding the Service of Recruitment (SOR). Therefore, it can be comfortably presumed that the Petitioners were well aware of the said SOR at least by May 2016, i.e. well before the Gazette (P6) calling for applications for the Sri Lanka Scientific Service.

The first approval for the said SOR has been received in 2011, and followed by consecutive approval process for the same in 2012, 2013 and 2014. All this time, the Petitioners were employed at the Department of National Botanical Gardens.

In **K.H.G. Kithsiri vs. Hon. Faizer Musthapha and Five Others (SC/FR Application No.362/2017),** it was held that,

> *"If the facts and circumstances of an application make it clear that a petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from the date on which he should have become aware of the alleged 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."*

The Senior State Counsel who appeared for 1st-15th Respondents and the Counsel for the 16th- 26th Respondents takes up a preliminary objection that, the fundamental rights application of the Petitioners is time barred. Hence, the Respondents moved this Court not to entertain this Fundamental Rights Application.

With respect to this, under Article 126 (2) of the Constitution requires any person alleging the violation of any Fundamental Right or Language Right or of the imminent violation of such rights by executive or administrative action, to prefer an application to the Supreme Court within a period of one month thereof.

In **Illangaratne vs. Kandy Municipal Council [1995 BALJ Vol. VI Part1page10]**, Hon. Kulatunge J. explained that,

> *"the result of the express stipulation of 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."*

In this connection, Fernando J. commented in **Gamaethige vs. Siriwardena [1988 1 SLR 384 at page 401]** stated that, "*... there is a heavy burden on a petitioner who seeks that indulgence.*."

The 2nd, 3rd, 4th, 5th, 6th, 10th and 11th Petitioners filed their respective complaints before the Human Rights Commission on 7th July 2016. The petitioners relying on the Section 13 of the Human Rights Commission Act No.31 of 1996 to overcome the time bar of one month.

As per paragraph 13 of the Amended Petition of the Petitioners, they became aware of the SOR in or about May 2016. As per the paragraph 14 of the Amended Petition, Petitioners further contended that immediately thereafter, they had obtained a copy

of the said SOR. Petitioners relied upon to bridge further time gap between their contentions of the knowledge of SOR in May 2016 and Petitioners filed their original Petition on 16th August 2016, which is more than one month after by May 2016.

In **Alagaratnam Manorajan vs. Hon. G.A. Chandrasiri, Governer, Northern Provoince [SC Application No. 261/2013 (F/R)]** decided on 11th September 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..."*

Petitioners have not filed any further documents with regard to the applications to Human Rights Commission other than the documents marked as P-7(a) to P-7(m), to establish that the Human Rights Commission were inquired into and/or the inquiry is pending before the Human Rights Commission to overcome the time bar of one month.

As held by this Court, both in the Case of **Subasinghe vs. The Inspector General of Police** [SC Special 16/99 SC Minutes of 11.09.2000] and the case of **Divalage Upalika Ranaweera and others vs. Sub Inspector Vinisias and others** [SC Application 654/2003 SC Minutes 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."

This application being a Fundamental Right Application, prior to considering the objections taken by the Counsels for the Respondents, it is appropriate to consider the merits of this application. In the present circumstances, Petitioners were recruited under the Graduate Development Programmes and placed at the Agricultural Department. When, the National Botanical Garden Department was created and these Petitioners were absorbed in to the said Department with additional perks and privileges. Subsequent to consultation with all necessary parties, the government had decided to convert certain positions as scientific services and to attach them to Sri Lanka Scientific Service.

We perused the available documents and find various departments were considered for this conversion and the recruitment ratio was decided after the due process. Under this recruitment to Scientific Services, some departments recruited 100% of their officers from the open category and very few departments called for applications for the recruitment of their officers from closed category. In this respect, following examples of Departments can identified falling within the Sri Lanka Scientific Service, offered lesser percentages for Limited Category.

As per 16R-14(a)- Export Agriculture SOR- Open 75: Limited 25.
As per 16R-14(b)- Metereology SOR- Open 75: Limited 25.
As per 16R- 14(c)- Zoological Gardens SOR- Open 75: Limited 25.
As per 16R-14 (d)- Government Analyst SOR- Open 100%.
As per 16R-14 (e)- Museums SOR- Open 100%.

In the Petitioners' Department, 30% of officers were allocated under the closed category, which is higher than the allocation given to other Departments to recruit to their department from the closed category. Clearly, therefore the Petitioners have been provided with an allocation of 30%, is higher than all of the above.

The Petitioners emphasized the fact that, the open category has a higher requirement and age limit for the selection processes; thereby the Petitioners' complaint is that the Petitioners wanted to be increased to 90% from 30% of their allocation.

Considering the required qualifications for the post advertised and the qualifications of the candidates from open and closed category reveals that, this process bring betterment to the public at large.

However, since this matter is dealing with a government Policy of the State, Courts are reluctant to intervene with the said policy, unless it is seriously warranted.

In **Wasantha Disanayake and others vs. Secretary, Ministry of Public Administration** (**SC/FR/ 611/2012)** decided on 10th September 2015, it was observed that,

> *"What is meant here is that equals should be treated equally and similar laws and regulations should be applicable to persons who are similarly circumstanced. In reference to Article 12(1) of the Constitution, it would be necessary to show that there had been unequal treatment and therefore there exist discriminatory action against the Petitioners."*

The other institutions which were considered under this scheme have concluded their recruitment well ahead and those departments are up and running in their work.

Unfortunately, due to the undertaking obtained by the Respondents, recruitment for the positions in their Department is still pending which adversely affects the day-to-day running of the said Department.

Considering the preliminary objections taken by the Respondents, we find that the Petitioners failed to file their petition within the stipulated time period. Hence, we hold with the Respondents and accept the preliminary objections. Accordingly, we find that, the Petitioners are not entitled to maintain this application.

Application Dismissed with cost.

Application dismissed.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, 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 Democratic Socialist Republic of Sri Lanka.

SC FR Application: 292/2018

1. Shahul Majeed Mohomed Rizwan,
   No. 46/1, Humes Road,
   Osanagoda,
   Galle.

2. Mohomed Aaqif,
   No. 46/1, Humes Road,
   Osanagoda,
   Galle.

Petitioners

-Vs-

1. Sampath Weragoda.
   The Principal,
   Richmond Coolege,
   Galle.

2. K.T.Chandrawathie,
   The Zonal Director of Education, Galle,
   Zonal Education Office,
   Kalegana, Galle.

3. W.M. Jayantha Wickramanayake.
   The Director,
   National Schools,
   'Isurupaya', Pelawatta,
   Battaramulla.

4. The Secretary,
   Ministry of Education,
   'Isurupaya', Pelawatta,
   Battaramulla.

5. Lanka Senanayake
6. Chandana Kumara
7. Akila Rathnayake
8. Renuka Narangoda
   (5th to 8th including the 1st Respondent, members of the Interview Board)
9. Kesara Wettamuny
10. Priyal De Silva
11. K.A.T. Kumari
12. Nilantha Haalpandeniya
13. Chinthaka Sanath
    (9th to 13th above, members of the Appeal Board)
14. The Attorney General,
    Attorney General's Department,
    Hultsdorp,
    Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC, J.
Prasanna Jayawardena, PC. J, and
Murdu N.B.Fernando, PC. J.

Counsel: M.U.M. Ali Sabry, PC, with Samhan Munzir and
Hassan Hameed for the Petitioners.
Suren Gnanaraj, SSC, for the Respondents.

Argued on: 27/02/2019

Decided on: 09/10/2019

Murdu N.B. Fernando, PC. J.

The 1st and 2nd Petitioners ("Petitioner") have filed this application seeking a Declaration that the 1st and 2nd Petitioner's Fundamental Rights guaranteed under Article 12(1) of the Constitution have been violated by one or more of the Respondents and for a Direction to the Respondents to admit the 2nd Petitioner to Grade One of Richmond College, Galle.

This Court granted Leave to Proceed on 26-11-2018 for the alleged violation of Article 12(1) of the Constitution against all the Respondents.

The facts of this case, as submitted by the Petitioners are as follows.

The 1st Petitioner, the father of the 2nd Petitioner submitted an application dated 08-06-2017 to Richmond College, Galle for the admission of 2nd Petitioner to Grade One in the year 2018, under the core category "Children residing in close proximity to the School", based on Clause 7.2 of the Admission Circular dated 30-05-2017 (P1).

At the interview held on 24-08-2017 the 2nd Petitioner was granted 84 marks. 15 marks were deducted under Sub-Clause 7.2.3 for 3 schools situated in closer proximity to the Petitioner's residence than the preferred school, Richmond College, Galle.

On 30-10-2017 the school published the 'Provisional List' of the students selected for admission to Grade One for the year 2018. The 2nd Petitioner's name was not in the selected list. He was No. 1 in the 'waiting list'. The 1st Petitioner submitted an appeal stating inter-alia that the Interview Panel had deducted 10 marks under Sub-Clause 7.2.3 contrary to the provisions of the Admission Circular P1.

An Inquiry with regard to the appeal was held on 27-11-2017. The contention of the Petitioner was that the deduction of 10 marks by the Interview Panel under Sub-Clause 7.2.3 for CWW Kannangara Vidyalaya, Galle and Paramananda Vidyalaya, Galle was contrary to the provisions of the Circular P1, since the said two schools admit only a restricted number of children (viz. 1%) belonging to the Islamic faith. To buttress the said position, the Petitioner relied on a document marked P13. The Petitioner had obtained the said P13 from the Zonal Education Office, Galle, under the Right to Information Act on a request made by him, for a list of schools which admit less than 10% of children belonging to the Islamic faith.

The school published the 'Final List' of students selected for admission to Grade One in the year 2018 on 11-01-2018 and the 2nd Petitioner's name was not included in the list. The Petitioner thereafter, on 16-01-2018 lodged a complaint with the Human Rights Commission. Upon the Human Right Commission informing the Petitioner on 14-09-2018 that a violation

of a Fundamental Right had not taken place, the Petitioner came before this Court on 20-09-2018.

The Petitioner's contention before this Court was that the deduction of 10 marks for CWW Kannangara Vidyalaya, and Paramananda Vidyalaya, Galle, was contrary to the provisions of the Circular P1. The Petitioners further submitted that if the said 10 marks (5 marks each for the said two schools) were not deducted, the 1st Petitioner would have obtained 94 marks and would have been on top of the list to gain admission to Richmond College, Galle over and above the four children selected under the quota for children belonging to the Islamic faith in the core proximity category. Thus, the Petitioner alleged, that Respondents actions were violative of his fundamental Rights guaranteed by the Constitution.

The Respondents represented before this Court namely, 1st,3rd,4th and 14th Respondents (Respondents) took up the position that the Interview Panel correctly deducted 15 marks from the Petitioner on the premise that St. Aloysius College, Galle, CWW Kannangara Vidyalaya and Paramananda Vidyalaya, Galle, were in closer proximity to the Petitioner's residence than Richmond College, Galle and that the Petitioner who is of the Islamic faith was eligible to seek admission to the said three schools without any hindrance because the said three schools admit children of the Islamic faith without any restriction and/or maintain a minimum or maximum percentage for children of Islamic faith of the total admissions.

The 1st Respondent, the Principal of Richmond College, Galle, in his affidavit filed before this Court further submitted that Richmond College, Galle being an Assisted School vested in the Government in or about 1960, had to maintain quotas for students of different religions, similar to those maintained at the time of vesting of the school in the Government vide Clause 4.2 of the Admission Circular and was required to maintain a quota of 3.1% for children of the Islamic faith. Thus, out of the total student intake of 266 students for Grade One in the year 2018, 8 student had to be children belonging to the Islamic faith.

Further, the 1st Respondent submitted, in terms of the applicable Circular, 50% of the Islamic student quota had to be selected from those applying under the proximity of residence category and the balance 50% from the other categories mentioned in the Circular and the said percentages and numbers were maintained by Richmond College by admitting 4 students out of the 8 students mentioned above, from the proximity category. The Respondent also averred that the cut-off mark for admitting applicants of the Islamic faith under the proximity of residence category was 87 marks and admittedly the Petitioner obtained only 84 marks and therefore was placed in the waiting list, at the number one position.

The 1st Respondent further averred that by virtue of Sub-Clause 7.2.3. of the Admission Circular P1, from the maximum 50 marks that could be awarded, 5 marks had to be deducted for each school on the basis of proximity to other eligible schools. With regard to the Petitioner, three schools, namely, St. Aloysius College, Galle, CWW Kannangara Vidyalaya, and Paramananda Vidyalaya were in closer proximity to Petitioner's residence, than Richmond College and 15 marks had to be deducted. Further, the said three schools admitted children of Islamic faith without any hindrance, restriction or limitation, and without maintaining a minimum or maximum percentage unlike Richmond College, Galle which was an Assisted School and vide Clause 4.2 had to maintain a particular quota and therefore the deduction of 15 marks (5 marks each for the said 3 schools) was in terms of the Circular. The Respondents also submitted that the Petitioner failed to secure sufficient marks over and above the four students selected under the quota for students of the Islamic faith seeking admission to Grade One of Richmond College, Galle, under the core proximity of residence category and therefore was not eligible to gain admission to Richmond College, Galle.

Upon perusal of the Brief before us, we observe that the Petitioner had not filed a Counter Affidavit contravening the position of the Respondents. The Petitioner's submission before this Court was based upon the document issued by the Information Officer of the Zonal Education office, Galle, marked P13, dated 19-09-2017, obtained after the interviews were held for admissions to Richmond College, Galle, and tendered by the Petitioner to the Appeal Board. P13 referred to a few schools that admit less than 10% of children belonging to the Islamic faith. P13, did not refer to St. Aloysius College, Galle. But it refered to Paramananda Maha Vidyalaya and CWW Kannangara Vidyalaya. Against the said two schools, one percent (1%) was recorded. We also observe that the Zonal Director of Education the 2nd Respondent, from whose office P13 was issued, was not represented before this Court by the State Counsel or by any other Counsel.

The 1st Respondent in his objections took up the position that since he had doubts about the accuracy of the percentages referred to in P13, he requested the 2nd Respondent to call for statistics directly from the Principals of the said two schools. The 1st Respondent further submitted, that CWW Kannangara Vidyalaya and Paramananda Maha Vidyalaya in fact, had not received sufficient number of applications to fill even one class and therefore, during the last few years, all applicants to Grade One of the said two schools, were admitted without any restriction, or limitation whatsoever. As observed earlier, the Petitioner had not challenged the said position before this Court by way of a Counter Affidavit or in the submissions made before this Court.

Thus, the main issue that this Court has to consider is whether the deduction of 10 marks for CWW Kannangara Vidyalaya and Paramananda Maha Vidyalaya is in violation of Sub-Clause 7.2.3 of the Admission Circular marked P1.

Sub-Clause 7.2.3. of the Admission Circular reads as follows: -

"Proximity to the School from the place of residence.

> Maximum marks will be given only if the applicant's place of residency is proved and if there are no other Government Schools with Primary Sections located closer to the place of residence than the School applied for. In the event of having other Government Schools with Primary Sections for the admission of the child which are closer to the place of residence than the School applied for marks will be deducted at the rate of 05 marks from the maximum marks for each such closer School.
>
> (Other Government Primary Schools that the child could be admitted mean, if the Government School concerned has the learning medium the child has applied for, if a girls or boys School or a mixed School appropriate for the child and *if a Government School which can admit 10% or more children of the religion to which the child belongs.)*
>
> (Maximum 50 marks)"

Thus, if an applicant has proved his residence, the computation of marks begins for this Sub-Clause from a maximum of 50 marks and scales down depending on the number of schools that are located between the residence and the preferred school applied for by the applicant. 5 marks is deducted for each school without a limitation on the number of schools. Thus, the greater the number of schools, more marks are deducted and an applicant could even loose all 50 marks if there are 10 Schools in between. The applicant is required to name the said schools which are in closer proximity to the preferred school in the Application Form. The Application Form (P2) tendered to Court by the Petitioner does not indicate a single school under the particular column. The mark list (P11) buttresses this position. The column where the parents had to self-assess marks for schools in closer proximity to preferred school was left blank.

The application tendered by the Petitioner (P2) further revealed that the Petitioner applied only to two schools namely, Richmond College, Galle and Paramananda Vidyalaya for admission to Grade One in the year 2018 though the Admission Circular requires a parent to apply to at least six schools including three Provincial Schools (vide Clause 5.6)

The Respondent's position before this Court was that for Grade One admissions to Richmond College for the year 2018, based upon Sub-Clause 7.2.3 of the Admission Circular, as was the practice in earlier years, across the board for all applicants, marks were deducted for St. Aloysius College, Galle, Paramananda Maha Vidyalaya and CWW Kannangara Vidyalaya respectively. With regard to the Petitioner, since all three Schools were located between the Petitioner's residence and Richmond College, 15 marks were deducted from the maximum 50 marks, awarding only 35 marks (i.e 50-15=35 marks) under this particular Sub-Clause.

The Petitioner, although in his Application Form under the proximity Sub-Clause did not reveal or refer or name any school, it is observed that the Petitioner before this Court is not challenging the reduction of 5 marks for St. Aloysius College, Galle. The Petitioner's grievance, based on P13, (the accuracy of which is in dispute by the Respondents) is only in respect of deduction of 10 marks for Paramananda Maha Vidyalaya and CWW Kannangara Vidyalaya. The Petitioner's contention is that the Petitioner being of Islamic faith is entitled to the said 10 marks.

The Sub-Clause clearly states that 5 marks should be deducted, for all school situated between the preferred school and the place of residence, provided it fulfills three conditions, namely, the school should have the learning medium of the child, a girls or a boys school appropriate for the child and a school which can admit 10% or more children of the religion to which the child belongs. The rationale for this provision is very clear. If there is a school in close proximity to which the child can gain admission, but admission is sought to a school further away, then marks should be deducted for such school for which admission was not sought, provided it is a Government school, it has the medium of learning, it admits children of the gender of the child and it has no quota restriction below 10% with regard to the religion to which the child belongs.

Thus, the Petitioner's case before this Court is that Paramananda Maha Vidyalaya and CWW Kannangara Vidyalaya are not schools that "can admit 10% or more children of the Islamic faith" and therefore, deduction of marks under Sub-Clause 7.2.3 for the said two schools, violates his Fundamental Rights guaranteed by Article 12(1) of the Constitution.

The only material placed before this Court to substantiate that the said two schools cannot admit more than 10% of children of Islamic faith is P13, which refers to one percent (1%) against the name of the said two Schools. P13 is disputed by the Respondents. In fact, the Respondent's contention before this Court is that there are no restrictions or limitations pertaining to admission of children of Islamic faith to the said two schools.

We observe that the key word in the said Sub-Clause is "can". Thus, the question that needs to be answered is how many children of Islamic faith "can" be admitted or what is the percentage of children of Islamic faith that "can" be admitted. The number of children or the percentage of the children of Islamic faith actually admitted during the last few years is not material and is not the issue. What the Petitioner should establish before this Court, is that there is a regulation or a rule that the school, being a Government School "can" admit only less than 10% of children belonging to the Islamic faith or that there are restrictions placed on the said school with regard to admissions or the said school "can" admit only a particular number of children of a particular faith or a particular percentage of children belonging to a particular faith. For instance like the situation referred to in Clause 4.2 of the Admission Circular (P1) pertaining to schools vested with 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 Petitioner has failed to adduce any evidence before this Court to substantiate that the said two Schools "can" admit only 1% of children belonging to the Islamic faith. The Petitioner only relies on P13, the percentages of which are disputed by the Respondents. The Petitioner has not placed material before this Court to even suggest that the said two schools were vested with the State and/or maintain quotas for different religions as encapsulated in Clause 4.2 of the Admission Circular P1.

In any event, the provisions of the said Clause 4.2 is in respect of filling of vacancies where consideration should be given to the proportion of children belonging to different religions at the time of vesting of the School with the Government. It does not speak of a minimum or maximum percentage.

Thus, the Petitioner has failed to adduce any material before this Court to indicate that the said two schools cannot or will not or restrict admission of children belonging to the Islamic faith. The failure of the Petitioner to adduce evidence before this Court should be considered from the perspective of the 1st Respondent who affirms that in fact, all applicants without any limitation or restriction will be admitted to the said two schools and the said two schools do not receive sufficient number of applications to fill up even one class.

The Respondents further submitted that in the year 2018 alone, the percentage of children belonging to Islamic faith admitted to CWW Kannangara Vidyalaya was 12% whereas for Paramananda Maha Vidyalaya it was 22%. As observed earlier, the Petitioner had not challenged this position by way of a Counter Affidavit nor established before this Court, that the said two schools cannot admit more than 10% of children belonging to the Islamic faith and therefore, the deduction of marks for the said two schools from the Petitioner, contravenes Sub-Clause 7.2.3 of the Admission Circular P1. Hence, we see no merit in the assertion of the Petitioner, that his Fundamental Rights have been violated by the Respondents.

We also observe in the Application Form P2, tendered by the Petitioner to Richmond College, Galle the Petitioner sought admission to only one other School and it was Paramananda Maha Vidyalaya, Galle. The Petitioner had failed to inform this Court, whether he was able to gain admission to Paramananda Maha Vidyalaya, Galle or whether the 2nd Petitioner was deprived of admission to the said school, on the ground that the percentage referred to in P13 for children of Islamic faith i.e. 1% had been exausted.

In the above circumstance, we hold that the Petitioner's application filed before this Court is misconceived in law and devoid of merit.

In the written submission filed before this Court, the Petitioner relies on the dicta of Anil Gooneratne J. in a Court of Appeal case **Laksith and another Vs Chairman School Committee, Dharamashoka Vidyalaya, Ambalangoda and others [2009] 2 SLR 267**, pertaining to a writ application, where His Lordship held, that "Education is one of the most important aspects in any civilized society as such authorities concerned are under a public duty to ensure and grant the right to admit a child to a school (if possible of his choice) if the admission requirements are fulfilled."

Whilst agreeing with the observations of the learned judge, we observe that the said statement is a qualified statement. It says "if admission requirements are fulfilled", then the authorities are under a public duty to ensure and grant the right to admit a child to a school, preferably of his choice.

In the instant application before us, the Petitioner has failed to fulfill the admission requirements referred to in Clause 7.2 under the core category "Children of residents in close proximity to the school" and specifically the requirement stated in Sub-Clause 7.2.3 pertaining to 'Proximity to the School from the place of residence'. The Petitioner has failed to refer to a single school as being in close proximity to the preferred school in the Application Form tendered on 08.06.2017 (P2) and also in the Form submitted to the Interview Panel on 24-08-2017 (P11) and failed to self-assess marks for such Schools in the mark sheet P11. (vide Sub-Clause 7.2.3).

The Petitioner has also not given any justifiable reason or any reason as to why the Petitioner omitted to refer to St. Aloysius College, Galle, CWW Kannangara Vidyalaya and Paramananda Maha Vidyalaya in the Application Form and specifically St. Aloysius College, Galle, for which the deduction of marks is not challenged by the Petitioner before this Court. Therefore, the admission requirements as referred to in the above quoted statement have not

been fulfilled by the Petitioner in order to assert that the authorities have a public duty to admit the child to the school of his choice.

Further, the Petitioner has failed to establish before this Court, that Paramananda Maha Vidyalaya, Galle and CWW Kannangara Vidyalaya, Galle are two schools that restrict admission to children of Islamic faith and therefore, cannot admit 10% or more children of the Islamic faith which is the crux of the Petitioners challenge before this Court. Thus, we observe that the Petitioner, has not established before this Court, that the decision to deduct 10 marks for Paramananda Maha Vidyalaya and CWW Kannangara Vidyalaya under Sub-Clause 7.2.3 for admission to Grade One of Richmond College, Galle, in the year 2018 by the Respondents, specifically the Interview Panel and the Appeal Board is discriminatory in nature and infringes the Petitioner's Fundamental Rights.

In concluding, I wish to refer to the case of **Dayawathie Vs Principal Girl's High School Kandy and others, SC FR 459/2017-** decided on **05-11-2018** a recent Judgment of this Court pertaining to Grade One admissions to Girl's High School, Kandy, for the year 2018, based on the same Admission Circular which is referred to in the application before us as P1.

In the said Judgement, Aluwihare J. referred to the Judgement of **Wijesinghe Vs Attorney General [1978-79-80] 1 SLR 102** and relied on Stone CJ's off-quoted dictum in **Snowden Vs Hughes** and held, that it cannot be concluded that the Respondents in the said Fundamental Rights application acted with an insidious discretionary purpose when they refused to admit the Petitioner's daughter to Girl's High School, Kandy.

I wish to repeat the above mentioned dictum of Stone CJ, herein.

> "The judicial decision must of necessity depend on the facts and circumstance 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 case before this Court as enumerated above, the Petitioner has failed to establish a single element of intentional and purposeful discrimination or unequal application of the law particularly to the children of Islamic faith.

In the said circumstances, I hold that the 1st and 2nd Petitioners have failed to prove that the deductions of 10 marks by the Respondents, for the two schools Paramananda Vidyalaya, Galle and CWW Kannangara Vidyalaya, Galle being in closer proximity to the residence of the Petitioner than the preferred school Richmond College, Galle was done arbitrarily and in contravention of the Admission Circular P1. Therefore, I hold that the Respondents have not infringed or violated the Fundamental Rights of the 1st and 2nd Petitioners guaranteed under Article 12(1) of the Constitution.

Accordingly, this application is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.
I agree

Judge of the Supreme Court

Prasanna Jayawardena, PC. J.
I agree

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC /FR/ Application No 387/2013

1. Hewa Munumullage Ajith,
   No. 416/1,
   Desawalagodella,
   Koleidanda, Weligama.

2. Hewa Munumullage Akila,
   "Akila Iron Works"
   Koleidanda, Weligama.

Petitioners

Vs,

1. Kalinga de. Silva,
   Head Quarters Inspector,
   Police Station,
   Weligama

2. M.A.M. Faslan,
   No. 392/2,
   Arusiya Mawatha,
   Aluth Weediya,
   Weligama.

3. Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

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

Respondents

Before: Chief Justice H.N.J. Perera
Justice B.P. Aluwihare PC
Justice Vijith K. Malalgoda PC

Counsel: J.C. Weliamuna, PC with Pulasthi Hewamanna for the Petitioners
P.K. Prince Perera for the 1st Respondent
Ms. I. Punchihewa, SSC for the AG

Argued on: 18.01.2019

Judgment on: 25.03.2019

Vijith K. Malalgoda PC J

The two Petitioners, namely Hewa Munumullage Ajith and Hewa Munumullage Akila are two brothers who filed the instant application before this court alleging violations of their Fundamental Rights guaranteed under Articles 11, 12(1), 13(1) and 13 (2) of the Constitution. When this matter was supported before this court on 27.06.2014, the court after considering the material placed, granted leave to proceed on alleged violations under Articles 11 and 13 (1) of the Constitution.

Among the two Petitioners, the 1st is a welder by profession and the 2nd, owned a work shop by the name “Akila Iron Works”.

As submitted by the 2nd Petitioner, on 10th September 2013, several police officers had visited his work shop in the morning hours and informed him of a complaint made by the owner of one “Hotel Barakath" against his brother Ajith in connection with some damage caused to the property of the

said hotel. Since his brother was away at that time, the 2nd Petitioner under took to produce the 1st Petitioner before Weligama Police Station on his return.

In the meantime the 2nd Petitioner visited "Hotel Barakath" around 10.30 am to inquire about the damage caused by his brother, and promised the owner (the 2nd Respondent) to indemnify the damage caused by his brother.

The owner too had express his willingness to settle the matter as suggested by him, but before the 2nd Petitioner left the said premises, the 1st Respondent had visited the said "Hotel Barakath" in a police jeep.

When the 2nd Respondent introduced the 2nd Petitioner to the 1st Respondent and informed him that the 2nd Petitioner had agreed to pay damages on behalf of his brother and therefore the matter would be resolved amicably, the 1st Respondent saying "How can a person who cannot correct his brother build the Hotel" and pushed him into the jeep after putting handcuffs on him.

When the 2nd Petitioner questioned the 1st Respondent the reason for him being taken into custody, the 1st Respondent, took him out of the jeep, assaulted him with a stick pulled from a nearby fence, in the presence of several outsiders and had taken him back to the jeep. Thereafter the 2nd Petitioner was taken to the house of the 1st Petitioner. In the absence of the 1st Petitioner at his house, the mother-in-law of the 1st Petitioner was informed by the 1st Respondent that he would detained the 2nd Petitioner until the 1st Petitioner turns up at the police station.

Having been informed of the arrest of his elder brother, the 1st Petitioner surrendered to the police station Weligama in the same afternoon.

Having seen the 1st Petitioner at the police station, the 1st Respondent had ordered his men to take him to the place where the alleged incident had occurred.

At "Hotel Barakath" the 1st Petitioner was severely assaulted by the 1st Respondent in presence of several others until two Broomsticks were broken. When the 1st Respondent had started to hit the 1st Petitioner with a cinnamon stick, the other police officers had prevented him being assaulted with the cinnamon stick.

At the police station the 1st Respondent had once again assaulted the 1st Petitioner and whilst being assaulted, he kicked the neck of the 1st Petitioner and as a result he had vomited blood.

The relatives of the two Petitioners including the wife of the 1st Petitioner had visited the SSP's Office, Matara during the same afternoon and had informed the SSP, of the brutal attack that took place at Weligama Police Station on the 1st Petitioner.

In the presence of the wife of the 1st Petitioner, SSP had directed the 1st Respondent (via telephone) to admit the 1st Petitioner to the hospital immediately.

When the relatives met the 1st Respondent and requested 1st Respondent to release both the 1st and 2nd Petitioners, the 1st Respondent informed them that he could only release the 2nd Petitioner but he had to admit the 1st Petitioner to the hospital. Immediately thereafter the 2nd Petitioner was released and the 1st Petitioner was taken to the hospital.

However according to the affidavit tendered by the 1st Petitioner before this court, he was not admitted to the hospital by the 1st Respondent even though the doctor who examined him at Matara hospital had directed that he be admitted to the hospital, and had returned to the police station. On their way back the 1st Respondent went inside the pharmacy of the Asiri Private Hospital

Matara and returned with some pills and had given them to the 1st petitioner asking him to take them. As submitted by the 1st Petitioner, he was kept at the police station on 10th night and the following day around 12.30 pm, he was once again taken to the Matara Hospital. On their way to Matara, the 1st Respondent threatened the 1st Petitioner with death unless he informs the Judicial Medical Officer that the injuries on the body of the Petitioner were due to a fall and not by any assault whilst in police custody. When the 1st Petitioner was taken before the Judicial Medical Officer by the 1st Respondent, in fear he told the Judicial Medical Officer that the injuries concerned were caused due to a fall. After the medical examination by the Judicial Medical Officer the 1st Petitioner was brought back to the police station and released on police bail after the wife of the 1st Petitioner agreeing to withdraw the complaint lodged at the Human Rights Commission. However before his release he was forced to sign several document at the police station.

Soon after the release, the 1st Petitioner was admitted to the Matara Hospital and received treatment until 14.09.2013. As a result of constant headaches and pains, the 1st Petitioner was again admitted to Karapitiya Teaching Hospital by his family members on 16.09.2013 and received treatment at the said hospital until 19.09.2013.

When the present application was filed, the Petitioners have sought interim orders as prayed in prayer [e] (i), (ii) and (iii) to the petition dated 30th October 2013 and this court on two occasions, i.e. on 03.12.2013 and 29.01.2014 made orders directing the relevant authorities to submit to this court the medical reports referred to in the prayer referred to above. Accordingly this court received documents both from District General Hospital Matara and Teaching Hospital Karapitiya and I will now proceed to analyze the medical reports submitted before this court.

On behalf of the Petitioners it was prayed under paragraph (e) that,

(e) Make order

i. Directing the Medical Officer (Administration) or Director of the Matara Base Hospital to submit your Lordships' Court the Bed Head Ticket, treatment sheets, all notes and medical reports pertaining to the 1st Petitioner who was treated at ward 5 therein from 11.09.2013 to 14.09.2013;

ii. Directing the Judicial Medical Officer of Matara or any other appropriate official to submit to Your Lordships' Court the Medico Legal Report, all notes and other medical reports pertaining to the 1st Petitioner who was examined by him on 11.09.2013;

iii. Directing the Director or any other appropriate official of the Karapitiya Teaching Hospital to submit Your Lordships' Court the Bed Head Ticket, treatment sheets, all notes and medical reports pertaining to the 1st Petitioner who was treated at ward 19 therein from 16.09.2013 to 19.09.2013;

As observed by this court the Director of the District General Hospital Matara had submitted the Admission Form of H.M. Ajith along with the Bed Head Ticket maintained at the said hospital with regard to him.

The said Admission Form refers to two dates, i.e. 10th September and 11th September and from the said document it is clear that the patient was first examined on 10th September but admitted to the ward only on 11th September at 4.30 pm.

The above two entries confirms the position taken by the 1st Petitioner before this court. According to the Admission Form, the doctor who examined the 1st Petitioner on 10th September had recorded that, "Assaulted by known person to L/S of the neck, back and L forearm"

The doctor who recorded the history in the Bed Head Ticket on 11th September had recorded the History as "Assault by police, beaten to neck L side back……." When going through the said Bed Head Ticket it appears that, the 1st Petitioner was subjected to several tests during this period and was on medication.

The Judicial Medical Officer Matara, had also submitted his report before this court and the said report refers to two examinations done by him with regard to one Hewa Mummulage Ajith, the 1st Petitioner before this court.

The 1st examination with regard to the said person was carried out on 11.09.2013 at 1.40 pm in the presence of Police Sargent Kularathne of Weligama Police Station. There is no reference to the presence of the 1st Respondent in this report.

The history given by the 1st Petitioner limits to an incident occurred on the 10th night at "Hotel Barakath" where he received some injuries due to a fall when he tried to escape from a group of persons who chased behind him after he damaged some properties at the said hotel, but strangely the Judicial Medical Officer had not observed any injuries on the body of the examinee.

In contrary, to the observations referred to above, the same Judicial Medical Officer had observed a fracture on the left forearm ulna bone, when he examined the 1st Petitioner on 14.09.2013 around 10.00 am at ward 5 of the General Hospital Matara.

As observed by me, the 1st Petitioner was first examined by the Judicial Medical Officer on 11th around 1.40 pm and found no injuries on his body. The Admission Form confirms that the 1st Petitioner was admitted to the General Hospital Matara on the same day (i.e. on 11th) around 4.30 pm. Under the 2nd examination, the Judicial Medical Officer too had recorded that the person by the name Hewa Mummulage Ajith got admitted to ward 05 on 11.09.2013.

According to the Judicial Medical Officer, the examinee had given additional information with regard to an assault whilst in the police custody during the 2nd examination. The said information had been recorded by the Judicial Medical Officer as follows;

4) There, I told the doctors that I have been assaulted by the police

5) Then doctors admitted me to the ward. After examination in the ward I was referred to orthopedic treatment unit

6) I did not mentioned about the History of assault by the Police with Judicial Medical Officer during the previous examination due to the fear.

Even though the Judicial Medical Officer had recorded the new information provided by the 1st Petitioner, he had failed to carry out a thorough external examination and record whether there are any visible injuries found on the body of the examinee compatible with an assault by police. Even on the 11th, when the 1st Petitioner was examined by the Judicial Medical Officer for the 1st time, the examinee had informed him that he had a fall when he was chased by a group of people, but the Judicial Medical Officer who said to have examined the 1st Petitioner on 11th afternoon had not observed any injury on his body.

However when the same person (i.e. the 1st Petitioner) was taken to Matara Hospital on 10th evening, the Medical Officer too had directed him to be admitted to the hospital considering the condition of the person brought before him.

Even after 11th, when the Judicial Medical Officer was informed by the 1st Petitioner, that he did not come out with truth due to fear, it was the duty of the Judicial Medical Officer to conduct a full examination on the 1st Petitioner, but he had failed to do such examination.

In the said circumstances this court cannot rely on the report submitted by the Judicial Medical Officer- Matara since his conduct is highly suspicious. The said conduct of the Judicial Medical Officer- Matara needs to be investigated by the relevant authorities.

As revealed from the Admission Form and the Bedhead Ticket before this court. The 1st Petitioner who surrendered to Weligama police on 10th afternoon was hospitalized immediately after his release from the police custody on 11th evening and was taking treatment from Matara hospital until 14th and thereafter from 16th to 19th from Karapitiya Teaching Hospital due to an assault that took place on 10th whilst in police custody.

The arrest notes with regard to the 1st petitioner was produced marked R1, R2 and R3 by the 1st Respondent and according to the said notes, the arresting officer, the 1st Respondent had not made any observation with regard to any injuries on the body of the 1st Petitioner at the time of his arrest and when the said Petitioner was handed over to the reserve, the reserve officer had made the following entry on the relevant Information Book.

> "මු.පොා.ප. තුමා විසින් භාරදෙන ලද සැකකරුවන් වන එච්.එම්. අපිත් සහ එච්.එම්.අකිල යන අය භාරගෙන මු.පොා.ප.තුමා ගේ උපදෙස් ලැබෙන තෙක් සිරමැදිරියේ රඳවමි. පරීක්ෂා කලා ඔවුන් සතු දේපල හෝ තුවාල නැත. ලේඛනය ලකුණු කලා..... x අත්සන "

When considering the material discussed above I have no doubt that the 1st Petitioner had sustained injuries while he was in police custody and the 1st Respondent being the arresting officer and the investigating officer is responsible for causing the said injuries to the 1st Petitioner.

However when considering the investigation notes produced marked R1 and the affidavits tendered by the two Petitioners before this court, it appears that there was an incident that took place on 9th night at "Hotel Barakath" where the 1st Petitioner had assaulted some employees and damaged

property at the hotel. A complaint had been made at Weligama Police Station by the owner of the said hotel one, Mohamad Azwer Mohomad Paslam at 00.40 hours on 10th. In the said complaint the Complainant had identified the suspect who committed the said offence as "Rathu, who is the brother of Akila" and in the said circumstances there appears to be sufficient material before police to arrest the person who is responsible for the said offence.

However with regard to the arrest of the 2nd Petitioner H.M. Akila, question arises whether the arrest was made in accordance with the procedure established by law. In order to arrest a person under section 32 (1) of the Code of Criminal Procedure Act No 15 of 1979, there should be a reasonable complain, credible information or reasonable suspicion.

In the case of ***Munidasa Vs. Senevirathne SC FR 115/91*** Supreme Court minutes 03.04.1992 this court held that "an arrest without lawful reason and justification or legal cause for such arrest in terms of material to the contrary is arbitrary arrest which would not be according to the procedure established by law."

In ***Corea Vs. Queen 55 NLR 457*** it was held that, "the arrest must be made upon reasonable ground of suspicion. There must be circumstances objectively regarded the subjective satisfaction of the officer making the arrest…."

In the arrest notes submitted before this court marked, R-3, the 1st Petitioner Ajith was arrested by the 1st Respondent at 12. 30 pm and on the same day at 12.40 pm arrested the 2nd Petitioner Akila for allowing his brother to escape in order to avoid him being arrested by the 1st Respondent.

When compared with the two affidavits submitted by the 1st and the 2nd Petitioners before this court it appears that place and the method of the arrest of the said Petitioners' were contradictory with R-3, the arrest notes submitted by the 1st Respondent. Even if I reject the version given by the

two Petitioners, still it is difficult for me to consider R-3 as an accurate note made by the 1st Respondent for the reason that there is no necessity for the 1st Respondent to arrest the 2nd Petitioner at 12.40 pm after the 1st Petitioner being arrested at 12.30 pm. As submitted by the 2nd Petitioner, when he inquired from the 1st Respondent as to the reasons for his arrest, he was taken out of the jeep and assaulted with a stick pulled out from a nearby fence, but no reasons were given for his arrest.

When considering the material already discussed, I am satisfied that there was no valid reason for the 1st Respondent to arrest the 2nd Petitioner on 10th September 2013.

The 2nd Petitioner had referred to an assault by the 1st Respondent immediately after his arrest at "Hotel Barakath" but the 2nd Petitioner has failed to submit additional material in support of his version. In the case of ***Nandasena Vs. Chandradasa Officer-in-Charge Police Station Hiniduma and Others (2206) I Sri LR 207*** this court observed the high degree of proof required when an allegation of torture is made as follows;

> "…… it would be necessary for the Petitioner to prove his petition by way of medical evidence and/or by way of affidavits and for such purpose, it would be essential for the Petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden."

In the said circumstance I am not inclined to make any conclusion with regard to the said allegation against the 1st Respondent.

As already observed by me, this court had granted the two Petitioners leave for allege violations under Article 11 and 13 (1) of the Constitution which reads as follows;

Article 11; No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Article 13; 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 ascertaining whether the conduct of the 1st Respondent is in contravention of Article 11, this court is mindful of the degree of proof observed by *Amerasinghe J* in the case of ***Channa Peris and Others V. Attorney General (1994) 1 Sri LR 1*** to the effect that;

> "In regard to violations of Artic le 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 endeavoring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."

When considering the matters already discussed in this judgment, I hold that the 1st Petitioner was subjected to torture, cruel, inhuman and degrading treatment by the 1st Respondent and therefore the 1st Respondent has violated Fundamental Rights of the 1st Petitioner guaranteed under Article 11 of the Constitution.

I further conclude that 1st Respondent has violated the fundamental rights of the 2nd Petitioner guaranteed under Article 13 (1) of the Constitution.

In the said circumstances the 1st and the 2nd Petitioners are entitled to receive as compensation Rs. 150000/- and 50, 000/- respectively from the 1st Respondent. The 1st Respondent is directed to pay the above compensation to the 1st and the 2nd Petitioner respectively within 3 months from today.

I further direct the State to pay Rs. 25,000/- to each of the Petitioner as cost incurred by them.

Judge of the Supreme Court

Justice Nalin Perera

I agree,

Chief Justice

Justice B.P. Aluwihare 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 11, 12, 13 and 17 of the Constitution read together with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/ FR Application 411/2012

Herath Mudiyanselage Indika Kanchana Hemantha.

Unagaswewa,

Nagollagama.

PETITIONER.

Vs.

1. Karunaratne Mudiyanselage Abeysinghe.
   Police Officer, Maho Police Station,
   Maho.

2. H.R. Samansiri Dharmapala.
   Police Officer, Maho Police Station,
   Maho.

3. Channa Abeyratne.
   Officer-in-Charge,
   Maho Police Station,
   Maho.

4. I. Ratnayake,
   Crime Branch Officer-in-Charge,
   Maho Police Station,

Maho.

5. N.K. Illangakoon,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

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

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.,**
P. PADMAN SURASENA, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Senaka De Saram for the Petitioner.

Saliya Pieris, PC with Anjana Rathnasiri for the 1st and 2nd Respondents.

Chrisanga Fernando, SC for the 3rd, 4th, 5th and 6th Respondents.

ARGUED ON : 22nd May 2019.

WRITTEN SUBMISSIONS : Petitioner- 31st May 2019.
1st and 2nd Respondents- 31st May 2019.

DECIDED ON : 13th November 2019.

S. THURAIRAJA, PC, J.

The Petitioner had filed this petition stating that his fundamental rights have been infringed by the Respondents. On the 27th of August 2012, the matter was supported before this Court and the Court granted leave to proceed against the 1st and 2nd Respondents for the alleged violation of Articles 11, 12(1), 13(1) and 13(2) of

the Constitution. Further, the Court granted leave to proceed against the 3rd, 4th and 5th Respondents for the alleged violation of Articles 12(1), 13(1) and 13(2) of the Constitution.

Both parties filed objections and counter objections and produced several documents. The Counsel for the Petitioner and the Counsel for the Respondents made their oral submissions and filed additional written submissions.

According to the Petitioner, on the 26th of June 2012, he was arrested by a four member team which included the 1st and 2nd Respondents, who are both police officers attached to the police station of Maho. The Petitioner claims that he was initially taken to the rear part of the Maho police station and was later moved to another room, where he was questioned about the theft of two ladies' bags containing Rs. 300,000/- and Rs. 120,000/ from female passengers in a train, which was bound to Trincomalee.

The Petitioner submits that his hands were tied behind his back with a T-shirt and he was hung by his hands with a large rope to the roof of the said room, following which he was assaulted excessively with a wooden pole by the 1st and 2nd Respondents while they questioned him about the whereabouts of the two bags. He states that at one point, he was made to lie down on the floor and two police officers stood on the petitioner's knees for about 30 minutes while the 1st Respondent began beating the soles of the petitioner. He submits that he was unable to identify two of the other police officers who were involved in the assault but that he could clearly identify the 1st and 2nd Respondents.

The Petitioner states that the officers continued to assault him on the day following his arrest, as well. The petitioner claims that, he had visible bruises and that he was suffering from pain but was not provided any medical attention.

The Petitioner states that on the night of the 27th of June 2012, a police constable had provided him a mobile phone through which the petitioner had managed to call his mother and informed her that he had been detained in a room

on the rear end of the police station of Maho. Thereafter, it is claimed that the Petitioner's wife and father had come to the police station to make a complaint but the police had denied any such arrest.

The Petitioner states that on the 28th of June 2012, while he was at the canteen of the said police station, the 1st Respondent had brought in a woman, whom the Petitioner identified to be a Muslim. The Petitioner stated that the 1st Respondent questioned the woman whilst pointing towards the Petitioner and she had nodded her head in the negative. The Petitioner claims that, he was then taken back to the room allotted to him and was hand-cuffed to the bed, following which he was informed by the 1st and 2nd Respondents that they were considering his release, but he was instead placed in the police cell of the Maho police station.

The Petitioner recalls that, on the 29th of June 2012, he was produced before the Magistrate of Maho by the 4th Respondent. He also claims that, he had been forced to sign a statement, which he was not allowed to read.

The Petitioner claims that the Magistrate of Maho had ordered for a medical examination of the Petitioner and had instructed that the Petitioner be present for an identification parade.

The Petitioner submits that on the 3rd of July 2012, he was produced before the Judicial Medical Officer (JMO) of Kurunegala Hospital for a medical examination. He had reported the incident to the JMO who had affirmed that his injuries were compatible with the history given by him. The report has been produced in this Court (document marked as 'P6'). The identification parade was held on the 4th of July, 2012 and the Petitioner was not identified by any of the witnesses.

On the 11th of July 2012, he was granted bail by the Magistrate of Maho, following which, the Petitioner states he was re-admitted to the Kurunegala Hospital where he underwent treatment from the 12th of July 2012 to the 15th of July 2012. The particulars of the complaint recorded by the Hospital have been produced before this Court (document marked as 'P9').

The Counsel for the 1st and 2nd Respondents submits that, the Petitioner was arrested on the 28th of June 2012 by Police Sergeant 24771 Dharmadasa, an officer attached to the Maho Police Station.

The Counsel for the 1st and 2nd Respondents had produced the Medico-Legal Examination Form (MLEF) dated 29th June 2012 (document marked as 'R-2E') given by the Medical Officer of the District Hospital at Maho. According to the report, the patient was examined at 9.50 am at the Maho Hospital. Apart from ticking all boxes, no observations were made in the Report. As per the contents of R-2E, there is no injury observed by the doctor. However, P6 reveals 6 injuries, which are consistent with the complaints made by the Petitioner. Therefore, R-2E contradicts P6.

1st and 2nd Respondents had denied the involvement of the said Respondents in the arrest and assault of the Petitioner.

On careful perusal of the materials before this Court, I have come to the conclusion that, the Respondents have not properly responded to the allegations made against them.

The Petitioner states that, there were four people involved in his arrest and that he can clearly identify two of them as the 1st and 2nd Respondents. On the other hand, the 1st and 2nd Respondents state that the Petitioner was arrested by Police Sergeant Dharmadasa. Other than the mere suspicion that the Petitioner was responsible for the theft of the bags, 1st and 2nd Respondents were unable to submit any evidence of a genuine reason to carry out the arrest. Moreover, the Petitioner was not identified at the Identification Parade, which was held on the 4th of July 2012.

The Petitioner states that the date of arrest was the 26th of June 2012 while the Respondents claim that, as per the Police entry, he was arrested on the 28th of June 2012. The Medico-Legal Report (MLR) shows that, the petitioner had informed the JMO (while he was in fiscal custody) that, he was arrested on the 26th of June 2012 and had described the mode of torture and shown his injuries to the JMO, an independent Government medical officer who had examined and confirmed that the

injuries are compatible with the history given. This includes the nature of the injury, pattern of the injury and the duration of injuries.

It is noted that the MLR obtained from the Medical Officer of the District Hospital of Maho on 29th of June 2012 was not produced to the Magistrate at the time of producing the Petitioner before the Magistrate.

It has been brought to the notice of the court that, the said Medical Examination was done by 9.50 am on the 29th of June 2012. At the same time, according to R-2D, an entry made by Police Officers in the information book maintained at the Police Station shows that, at 8.29 am, the Petitioner was taken to the Doctor of Maho hospital for a Medical Examination and another entry made with the MLR reveals that he was brought back at 10.00 am. The Counsel for the Petitioner had stated that it is peculiar to observe that a person who was subjected to examination at 9.50 am had been examined and brought back along with the report to the Police Station within 10 minutes. The Counsel argued that the report cannot be accepted. I have also observed the said infirmities in the available documents.

In the written submissions made on behalf of the 1st and 2nd Respondents, the Counsel has repeatedly relied on authorities to state that the allegations on torture must be strictly proved. In pursuance of this argument, the Counsel for the 1st and 2nd Respondents, in their written submissions had cited the case of ***Edward Sivalingam v. Sub Inspector Jayasekara and Others*** S.C. (F/R) No. 326/2008 Decided on: 10.11.2010:

> *"The standard required …. must be of a higher threshold than mere satisfaction."*

However, in the same case, as quoted in Page 11 of the said written submissions, the Court had observed that the presence of documents would mitigate against the presumption in favor of the validity of the official acts and help the Court reach a verdict in favor of the Petitioner on the cumulative value.

In the present case, the MLR dated 04.07.2012, (document marked as 'P6') as produced by the Counsel for the Petitioner discloses injuries consistent with the alleged assault and torture suffered by him during his unlawful detainment. Considering the materials before the court, I find that, the claim of the Petitioner is amply corroborated, especially by the said MLR. Moreover, as previously stated and elaborated, there exists infirmities observed in the documents of the Respondents.

Therefore, on analysis of the documents produced by the Petitioner and the infirmities that arise out of the documents submitted by the 1st and 2nd Respondents, I find that, the 1st and 2nd Respondents have violated the Petitioner's fundamental rights stipulated under Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

With regard to the liability of an Officer-in-charge, Fernando J, in the case of **K.D.S. Silva v. Chanaka Iddamalgoda**, SC No. 471/200 (FR) – Minutes of 8th August, 2003, while discussing the liability of the Respondent who was an Officer-in-Charge, stated that:

> *"As the officer-in-charge, he was under a duty to take all reasonable steps to ensure that persons held in custody (like the deceased) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates. He did not claim to have taken any steps to ensure that the petitioner was being treated as the law required. Such action would not only have prevented further ill-treatment, but would have ensured a speedy investigation of any misconduct as well as medical treatment for the petitioner. The 1st respondent is, therefore, in any event liable for his culpable inaction."*

In the present case, the 3rd Respondent is the Officer-in-Charge of Maho Police Station while the 4th Respondent is the Officer-in-Charge of Crimes Division, Maho Police Station. Any Officer-in-charge of a police station, as part of his duty as superior officer is expected to monitor and be aware of the activities of his delegates

or subordinates. Merely being present for duty does not amount to fulfilment of the responsibility attached to the designation.

I find that the omission of duty on the part of the 3rd and 4th Respondents arising out of their negligence has caused considerable harm to the Petitioner and I therefore, find that the 3rd and 4th Respondents have violated the Petitioner's fundamental rights guaranteed under Articles 12(1), 13(1) and 13(2) of the Constitution.

The nature of the violation is serious and therefore, I find that the 1st to 4th Respondents are liable to pay compensation.

In conclusion, I hold that, the 1st and 2nd Respondents have violated Articles 11, 12(1), 13(1) and 13(2) while the 3rd and 4th Respondents have violated Articles 12(1), 13(1) and 13(2). Therefore, I order the 1st and 2nd Respondents to pay to the Petitioner, a compensation of Rs. 50,000/- each from their personal funds. I order the 3rd and 4th Respondents to pay to the Petitioner, a compensation of Rs. 25,000/- each from their personal funds. In addition to this, I direct the State to pay compensation of Rs. 100,000/- to the Petitioner.

Application allowed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.
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.

SC.FR.NO.413/2017

B.A. Nulara Nethumi
5 ½ , Gomes Path,
De Fonseka Road,
Colombo 05.

Appearing by,
B.A. J. Indrathilaka
5 ½ , Gomes Path,
De Fonseka Road,
Colombo 05.

Petitioner

Vs.

1. S.S.K. Awiruppola
The Principal,
Vishaka Vidyalaya,
Vajira Road,
Colombo 05.

2. Sunil Hettiarachchi
Secretary to the Ministry of Education,
Isurupaya, Pelawatte,
Battaramulla.

3. Attorney General
Attorney General's Department,
Colombo 12.
Respondents

BEFORE : **SISIRA J. DE ABREW, ACTING CJ.**
L.T.B. DEHIDENIYA, J. &
P. PADMAN SURASENA, J.

COUNSEL : Manohara de Silva PC for the Petitioner.
Yuresha de Silva SSC for the Attorney-General.

ARGUED &

DECIDED ON : 24.01.2019.

SISIRA J. DE ABREW, ACTING CJ.

The Petitioner by his petition dated 15.11.2017 has complained to this Court that his fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the 1st Respondent. This Court by its order dated 28.03.2018 granted Leave to Proceed for the alleged violation of Article 12(1) of the Constitution. Petitioner complains that his child was not admitted to Grade I in Vishaka Vidyalaya, Colombo in the year 2014. We note that the 2nd Respondent the Secretary to the Ministry of Education has made a direction to

the Principal, Vishaka Vidyalaya (the 1st Respondent) by letter dated 22.06.2014 to admit the Petitioner's child to Vishaka Vidyalaya. This document has been produced as P7. However, the Principal of Vishaka Vidyalaya(the 1st Respondent) did not admit the Petitioner's child as directed by the 2nd Respondent. The 1st Respondent has made an endorsement on the letter marked P7 as a suggestion to the 2nd Respondent that she would admit the Petitioner's child to Grade II in Vishaka Vidyalaya in the year 2015, as the child has, at that time, been admitted to Musaeus College. We note that the 1st Respondent has failed to comply with the direction given by the 2nd Respondent who is the Secretary to the Ministry of Education. Although, the 1st Respondent has made an endorsement which is reflected in P7 that she would take the petitioner's child to Grade II in Vishaka Vidyalaya in the year 2015, she has failed to comply with the said endorsement. Although, the 1st Respondent failed to admit the petitioner's child to Grade II in Vishaka Vidyalaya in the year 2015, she has admitted a child named Samaratunga to Grade II in Vishaka Vidyalaya in the year 2015. This is evident by document marked P16a which is a letter addressed to the 1st Respondent by the 2nd Respondent. The date of P16a is 23.04.2015. The date of P7 is 22.06.2014. If the 1st Respondent complied with her own endorsement made on P7, she would have admitted the Petitioner's child in January 2015 itself. But she did not do so. For the above reasons we hold that the 1st Respondent has violated the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

For the above reasons, we direct the 1st Respondent to admit the Petitioner's child to Grade VI in Vishaka Vidyalaya, Colombo in the year 2019. The 1st Respondent is directed to comply with this direction within one month from the date of this judgment.

Learned Senior State Counsel who appears for the 1st Respondent undertakes to inform the judgment of this Court to the 1st Respondent.

ACTING CHIEF JUSTICE

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

P.PADMAN SURASENA, 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 under and in terms of Article 17 and 126 of the Constitution.

SC.FR.NO.414/2017

Binudi Yehansa Manage
No.141/3B, Vajira Road,
Colombo 05.

Appearing by,
Kumarasiri Manage
No.141/3B, Vajira Road,
Colombo 05.

Petitioner

Vs.

1. S.S.K. Awiruppola
   The Principal,
   Vishaka Vidyalaya,
   Vajira Road,
   Colombo 05.

2. Sunil Hettiarachchi
   Secretary to the Ministry of Education,
   Isurupaya, Pelawatte,
   Battaramulla.

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

Respondents

BEFORE : **SISIRA J. DE ABREW, ACTING CJ.**
L.T.B. DEHIDENIYA, J. &
P. PADMAN SURASENA, J.

COUNSEL : Manohara de Silva PC for the Petitioner.
Yuresha de Silva SSC for the Attorney-General.

ARGUED &

DECIDED ON : 24.01.2019.

SISIRA J. DE ABREW, ACTING CJ.

The Petitioner by his petition dated 15.11.2017 has complained to this Court that his fundamental rights guaranteed by Article 12(1) have been infringed by the 1st Respondent when she (the 1st Respondent) refused to admit the Petitioner's child to Vishaka Vidyalaya, Colombo. This Court by its order dated 28.03.2018 granted Leave to Proceed for the alleged violation of Article 12(1) of the Constitution.

Petitioner made an application to Vishaka Vidyalaya, Colombo to admit his child to Grade I. However, the Principal of Vishaka Vidyalaya (the 1st Respondent) refused the admission of the said child to the Vishaka Vidyalaya. Thereafter, on an appeal made by the Petitioner to the Secretary to the Ministry of Education (the 2nd Respondent) in terms of circular marked P1, the said Secretary made an order that the petitioner's child should be admitted to Grade I in Vishaka Vidyalaya in the year 2014. This document has been marked as P7 by the Petitioner. However, the 1st Respondent made an endorsement on the said letter marked P7 as a suggestion to the 2nd

Respondent that she would admit the Petitioner's child to Grade II in Vishaka Vidyalaya in the year 2015 as the petitioner's child has, at that time, been admitted to Musaeus College.

Surprisingly even in the year of 2015, the Petitioner's child was not admitted to Vishaka Vidyalaya by the Principal of Vishaka Vidyalaya. Although, the 1st Respondent did not admit the Petitioner's child to Grade I in Vishaka Vidyalaya in the year 2014, the 1st Respondent on the direction given by the Secretary to the Ministry of Education on the same letter marked P7, has admitted a child of one Kasturiarachchi to Grade I in Vishaka Vidyalaya in the year 2014. This is reflected in the document marked P15a. The admission of Kasturiarachchi's child to Grade I in Vishaka Vidyalaya in the year 2014 on the direction made by the Secretary to the Ministry of Education (the 2nd Respondent) was not denied by the 1st Respondent in his affidavit filed in this Court. We note that P7 and P15a which are the same documents had been signed by the 2nd Respondent. Thus it appears that on the same direction given by the 2nd Respondent the 1st Respondent decided to admit Kasturiarachchi's child to Grade I in Vishaka Vidyalaya in the year 2014, but she (the 1st Respondent) did not admit the child of the Petitioner to Grade I in Vishaka Vidyalaya in the year 2014. Thus it appears that the document marked P7 was applicable to the child of Kasturiarachchi but not to the child of the Petitioner. On this point itself we hold that the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the 1st Respondent. Further, we note that although the 1st Respondent refused to admit the Petitioner's child on the direction given by the 2nd Respondent to Grade I in Vishaka Vidyalaya in the year 2014, the same 1st Respondent has, on directions given by the 2nd Respondent, admitted seven children to Grade I in Vishaka Vidyalaya in the year 2014 on 29.05.2014 and 02.06.2014. The above mentioned admissions are proved by documents marked P15c and P15d. P15c and P15d have been signed by the 2nd Respondent respectively on 02.06.2014 and 29.05.2014. P7 was signed by the 2nd Respondent on 26.05.2014. We note that even the

admission numbers are found on the said documents marked P15c and P15d. Therefore, we note that although the 1st Respondent refused to admit the Petitioner's child on a direction given by the 2nd Respondent (P7), the 1st Respondent has, on subsequent directions given by the 2nd Respondent admitted children to Grade I in Vishaka Vidyalaya in the year 2014. This is evident by document marked P15d and P15c. We therefore hold that the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the Constitution.

For the above reasons, we hold that the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the Constitution. We therefore direct the 1st Respondent to admit the Petitioner's child to Grade VI in Vishaka Vidyalaya, Colombo in the year 2019. The 1st Respondent is directed to comply with this direction within one month from the date of this judgment.

Learned Senior State Counsel who appears for the 1st Respondent undertakes to inform the judgment of this Court to the 1st Respondent.

ACTING CHIEF JUSTICE

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

P.PADMAN SURASENA, 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 under and in terms of Article 17 and Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 422/2017

Jothirathna Nanayakkarage Oshem Shelumiyal Nanayakkara (Minor)
Apearing by his Next friend Guardian ad litem
Jothirathna Nanayakkara Lathik Suranga,
Both of No. 470/11 B, Colombo Road,
Gintota, Kosgahawatta,
Galle.

Petitioner

Vs.

1. Mr.Sampath Weragoda,
   The Principal,
   Richmond College,
   Galle.

2. Director National Schools,
   Ministry of Education, Isurupaya,
   Battaramulla.
3. The Secretary,
   Ministry of Education, Isurupaya,

Battaramulla.

4. L.B.B. Theekshana,
   Guardian and Father LBN Enuka
   No.14, 1st lane, Madapathala, Eliot Road,
   Galle.
5. The Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

Before : Buwaneka Aluwihare PC J

Sisira J de Abrew J

L.T.B. Dehideniya J

Counsel : Gnaneshwaran for the Petitioner

Yuresha de Silva SSC for the Attorney General

Argued on : 11.1.2019

Decided on : 6.3.2019

Sisira J de Abrew J

The Petitioner by this petition alleges that his fundamental rights guaranteed by Article 12(1) and 14(1)(e) of the Constitution have been violated by the Respondents. This court by its order dated 4.4.2018, granted leave to proceed for alleged violation of Article 12(1) of the Constitution.

The Petitioner submitted an application to Richmond College Galle to admit his son to Grade I in Richmond College Galle under the category of Non-Roman Catholic Christian quota and Proximity category. The Petitioner's son was not selected as he did not receive sufficient amount of marks. According to 1R9(c), **seventeen** students were selected to be admitted to Grade I in Richmond College Galle under the category of Non-Roman Catholic Christian quota and Proximity category and the Petitioner's son was able to secure 2nd place in the waiting list. Later, the son of the 4th Respondent was disqualified from the list of seventeen students and as a result the Petitioner son was moved to the 1st place in the waiting list. It is to be noted here that seventeen students were admitted to Grade I in Richmond College Galle under the category of Non-Roman Catholic Christian quota and Proximity category. According to 1R9A and paragraph 17 of the affidavit of the 1st Respondent **three** Non-Roman Catholic Christian students were admitted to Grade I in Richmond College Galle under the brother category (brothers who are already in the school). According to 1R9B and paragraph 17 of the affidavit of the 1st Respondent, **one** Non-Roman Catholic Christian student was admitted under the old boys' category. It is therefore seen that twenty one Non-Roman Catholic Christian students were admitted to Grade I in Richmond College Galle. Learned Counsel for both parties at the hearing before us admitted that in terms of circular bearing No.22/2017 dated 30.5.2017 pertaining to admission of children to Grade I marked 1R1, only twenty one Non-Roman Catholic Christian students could be admitted to Grade I in Richmond College Galle. It is therefore seen, that **seventeen** students were admitted to Grade I in Richmond College Galle under the category of Non-Roman Catholic Christian quota and Proximity category (1R9C); that **three** Non-Roman Catholic Christian students were admitted to Grade I in Richmond College Galle under the brother category (1R9A); and that

one Non-Roman Catholic Christian student was admitted under the old boys' category (1R9B). Learned counsel for the Petitioner contended that above mentioned four students referred to in documents marked 1R9A and 1R9B could not have been admitted under the Non-Roman Catholic Christian quota as the said students do not belong to the category of Non-Roman Catholic Christian students. Learned counsel for the Petitioner further contended that if the four students referred to in documents marked 1R9A and 1R9B were not admitted, son of the Petitioner would have been admitted to Grade I in Richmond College Galle. This was the only ground urged by learned counsel for the Petitioner. He did not dispute thirty eight (38) marks given to the Petitioner under the Proximity Category. I now advert to this contention. Where is the evidence to support the contention that the aforementioned four students referred to in documents marked 1R9A and 1R9B do not belong to the category of Non-Roman Catholic Christian students? When the court invited learned counsel for the Petitioner to produce evidence on this matter, he failed to do so. He drew our attention to document marked P5K which document was issued by Methodist Church Sri Lanka. This document only speaks about the Petitioner's son. It is noted that there is no evidence to support the above contention of learned counsel. Further the Petitioner has failed to name the parents of the above four students as respondents to this petition. This court cannot make any adverse declaration regarding them without giving a hearing to them.

When I consider all the above matters, the above contention of learned counsel for the Petitioner cannot be accepted and has to be rejected.

For the above reasons, I hold that the Petitioner has failed to prove the allegation levelled by him in his petition. I further hold that the Petitioner's fundamental

rights have not been violated by the Respondents. For the aforementioned reasons, I dismiss the petition of the Petitioner.

Parties in case No. SC FR 430/2017 agreed to abide by the judgment that may be delivered in this case. Since I have dismissed this case (SC FR 422/2017), the Petition in case No. SC FR 430/2017 too stands dismissed.

Petition dismissed.

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 17 and Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 430/2017

Halgamuwa Gamage Ashan Kaveesha
(Minor)
Apearing by his Next friend Guardian ad litem
Halgamuwa Gamage Saman Kumara,
Both of No. 11/A/01, Gallamulla,
Akuressa Road,
Yakkalamulla.

Petitioner

Vs.

1. Mr.Sampath Weragoda,
   The Principal,
   Richmond College,
   Galle.

2. Director National Schools,
   Ministry of Education, Isurupaya,
   Battaramulla.
3. The Secretary,
   Ministry of Education, Isurupaya,

Battaramulla.

4. L.B.B. Theekshana,
   Guardian and Father LBN Enuka
   No.14, 1st lane, Madapathala,
   Eliot Road,
   Galle.
5. The Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

Before : Buwaneka Aluwihare PC J

Sisira J de Abrew J

L.T.B. Dehideniya J

Counsel : Gnaneshwaran for the Petitioner

Yuresha de Silva SSC for the Attorney General

Argued on : 11.1.2019

Decided on : 6.3.2019

Sisira J de Abrew J

Parties in this case, agreed to abide by the judgment that may be delivered in case No. SC FR 422/2017. The judgment in SC FR 422/2017 was delivered

today dismissing the petition of the petitioner. Therefore the Petition in this case (SC FR 430/2017) too stands dismissed.

Petition dismissed.

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 17 and Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 495/2011

U.G. Chandima Priyadeva
No.64, Kandy Road
Kiribathgoda,
Kelaniya

Petitioner

Vs.

1A. Director General,
Director General's Office of
Merchant Shipping,
Ministry of Ports & Highways,
1st Floor, Bristol Building
No. 43-89, York Street
Colombo1.

1. Shantha Weerakoon,
Former Director General,
Director General's Office of
Merchant Shipping,
Ministry of Ports & Highways,
1st Floor, Bristol Building
No. 43-89, York Street
Colombo1

2. Rathna Bharathi,
Acting Shipping Officer,
Director General's Office of

Merchant Shipping,
Ministry of Ports & Highways,
1st Floor, Bristol Building
No. 43-89, York Street
Colombo1

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

Respondents

Before : Sisira J de Abrew J

Murdu Fernando PC J

S. Thurairaja PC J

Counsel : Uditha Egalahewa PC with Ranga Dayananda for the Petitioner

Rajiv Goonathilake SSC for the Attorney General

Argued on : 13.5.2019
Decided on : 6.6.2019

Sisira J de Abrew J

The Petitioner filed this action in this court alleging that his fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the Constitution were violated by the Respondents. This court by its order dated 3.11.2011 granted leave to proceed for the alleged violation of fundamental rights of the Petitioner guaranteed by Article 12(1) and 14(1)(g) of the Constitution.

The Petitioner who is a seaman left for Japan in 2004 on a tourist visa and returned to Sri Lanka in 2007. In March 2011, the Petitioner, in order to obtain his Certificate of Watch Keeping, which is a necessary certificate to continue in his

profession of seaman, submitted his Continuous Discharge Certificate (hereinafter referred to as the CDC) to the 2nd Respondent. The 2nd Respondent did not return the said CDC to the Petitioner. The 2nd Respondent after an inquiry suspended the said CDC for a period of six years. The Petitioner therefore contends that his fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the Constitution have been violated by the 2nd Respondent.

The 2nd Respondent who is the Acting Shipping Officer in his affidavit filed in this court has submitted the following facts. Learned SSC who appeared for the Respondents too submitted the same facts.

1. In order to consider the application of the Petitioner regarding his Certificate of Watch Keeping, the 2nd Respondent held an inquiry.
2. At the said inquiry the Petitioner admitted that he went to Japan on a tourist visa and overstayed in Japan for a period of three years and that the Petitioner was deported by the Immigration officials of Japan.
3. The 2nd Respondent being satisfied of the material submitted at the inquiry acting under Regulation 8 of the Merchant Shipping Regulations 1980 (R1), suspended the CDC of the Petitioner for a period of six (6) years.

When I consider the above matters, the most important question that must be considered is whether the 2nd Respondent has the power to suspend the CDC of the Petitioner under the said Regulations. Regulation 8(a) of the Merchant Shipping Regulations 1980(R1) published in Government Gazette No.99/6 dated 29.7.1980 reads as follows.

> *"Notwithstanding anything contained in these regulations, the Shipping Officer may suspend, cancel or confiscate the Continuous Discharge Certificate of any seaman who is shown to the satisfaction of the Shipping*

Officer to have deserted his ship or is found guilty of smuggling, theft, misbehavior or such other offence, as may, in the opinion of the Shipping Officer, makes him unsuitable for employment on board a ship."

Learned President's Counsel for the Petitioner tried to contend that the decision of the 2nd Respondent to suspend the CDC of the Petitioner was a malicious decision since the Petitioner has a family dispute with the 1st Respondent. I am unable to agree with this contention since it is the 2nd Respondent who has taken the said decision. The following facts are undisputed.

1. The Petitioner illegally overstayed in Japan for a period of three years.

2. The Petitioner was, due to his illegal overstay in Japan, deported.

Learned Senior State Counsel (SSC) who appeared for the Respondents contended that such a person has a tendency to desert his ship during his employment in the ship. I think there is merit in this argument. Learned President's Counsel for the Petitioner contended that for the 2nd Respondent to act under the Regulation 8(a) of the Merchant Shipping Regulations 1980, there must be a conviction of the Petitioner by a court of law under the said section. But the Regulation 8(a) of the said Regulations does not speak about a conviction by a court of law. Therefore, I am unable to agree with the said contention of learned President's Counsel for the Petitioner. When I consider Regulation 8(a) of the Merchant Shipping Regulations 1980 (R1), I hold the view that under the said Regulation, if a seaman, in the opinion of the Shipping Officer, is guilty of an offence which renders him (the seaman) unsuitable for employment in a ship, the Shipping Officer can suspend or cancel the CDC of the seaman. It has to be noted here that the 2nd Respondent (the Shipping Officer) has taken the decision to suspend the CDC of the Petitioner after

an inquiry conducted him. The Petitioner who illegally overstayed in Japan for a period of three years was deported by the Immigration Officials of Japan. When the Petitioner enjoys such a reputation, can the Shipping Officer decide that the Petitioner is suitable for employment in a ship? In my view such a person is not suitable to be employed in a ship. For the above reasons, I hold that the Shipping Officer, the 2nd Respondent was correct when he, acting in terms of Regulation 8(a) of the Merchant and Shipping Regulations 1980, decided to suspend the CDC of the Petitioner for a period of six years. In my view, the Petitioner has failed to prove that his fundamental rights had been violated as alleged by him. For the above reasons, I dismiss the petition of the Petitioner with costs.

Judge of the Supreme Court

Murdu Fernando PC J

I agree.

Judge of the Supreme Court

S. Thurairaja 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.

SC (FR) Application No.502/2010

1. P.S.R. Premalal
   No.2, First Lane, Vidyala Mawatha,
   Anuradhapura.

2. W.G. Karunaratne,
   Neelavila, Suruwirugama,
   Sooriyawewa.

3. W.M.A.C. Dissanayake,
   'Jeewana', Kamburupitiya.

4. R.S.K. Mallawaarachchi,
   61d, Feeldvive Terrace, Kandy Road,
   Wewaldeniya.

5. K.L.Mahinda
   No. 34, Mawarala Watta,
   Mawarala, Matara.

6. S.P. Mallawaarachchi,
   No.83, Anuradhapura Road,
   Kahatagasdiliya.

7. P.K.W.Kalutota,
   Palugaswala, Lunama,
   Ambalantota.

8. R.W.G.D.P. Munasinghe,
   No.42, Jana Udana House Scheme,
   Talawa.

9. J.K.D.S.Samadara,
‘Manjula’, Kalahe, Mandawala, Galle.

10. W.D.S.Fernando,
No.32, East Moratumulla,
Moratuwa.

11. G.G.G. Rejikumara,
Palugampala Road, Sannasgama,
Lellopitiya.

12. V.A.N. Premarathna,
Gurugewatta Road, Wendesiwatta,
Ballapana, Galigamuwa.

13. W.G.N. Pathmini,
256/5, Flower Gardens, Weligama,
Matara.

14. E.A. Anushka Kumari,
No.20, Andagala Road, Matugama.

15. S.K. Samarasinghe,
H 11, Nila Niwasa, Penideniya,
Peradeniya.

16. P.H.Walpita,
‘Dahampaya’, Talagala, Gonapola Junction.

17. H.I.M.Kulathunga,
No.52,’Nawakala’,Kiwldeniya,
Kulugammana.

18. K.C. Dasanayake,
Meewewa, Sub Post Office,

Narammala.

19. G.P.A.L.Pathirana,
No.193/1, Ibigala Road,
Katugastota.

20. I.M.S.K.M.Idisooriya,
No.163/3, M.C. Nilaniwasa, Hatton House Mawatha, Hatton.

21. Y.S.P.P. Gunarathna.
No 401/ A/2, Dagonna, Negambo.

22. H.K.G Niroshana,
No. 671, Perakum Pedesa, Kaduruwela, Polannaruwa.

23. A.M.Anura Thissa,
No.2/2, 3rd Lane, Kanupelella,
Badulla.

24. U.P. Dahanayake,
No.206/B/2, Halgala Road, Alapaladeniya.

25. H.J. Piyasena,
'Jayanthi', uthuru uduwa, Kuda Uduwa, Horana.

26. R.A.T.C.Weerasekara,
No.71,Railwayquarters,
Moratuwa.

27. Y.M. Soma Kumuduni,
No.223, Badabedda Watta, Pannala.

28. S.P. Kusumawathie,

No.44/16, Sri Bodigaya Road,
Gampaha.

29. P.B. Wickremasinghe,
No.156, Dikkanda, Waturugama.

30. P.H.C. Pushpakumara,
No.601/66, Thammennakulama.
Anuradhapura.

31. W.M.U.S. Weerakoon,
No128, 'Banadara', Puliyankulama,
Anuradhapura.

32. D. Deepani Perera.
No.208, Aluthgama, Bogamuwa,
Yakkala

PETITIONERS

Vs.

1. (A) Wasala Mudiyanselage Nimal Jayantha Pushpakumara
Commissioner of Examinations,
Pelawatte, Battaramulla.

2. (B) Jawigodage Jayadeva Ratnasiri
Secretary, Ministry of Public Administration and Local Government and Democratic Governance, Independence Square, Colombo 7.

3. M.W. Jagath Kumara
4. M.G.I.Mhawatta

5. L.U.J.Perera
6. H.K.M.D.K.Kavisekara
7. B.D.Y.S.Wimalarathna.
8. N.P. Samarawickrema.
9. N.Y.Kohowala.
10. H.M.V.S.Jayawardena
11. S.P.Sirimanna
12. J.H.P.Samarasena
13. K.H. Somalatha
14. L.P.M.S.Pathirana
15. W.T.N.Silva
16. D.R. Jaysinghe
17. R.A.Wijayawickrema
18. T.K.J.T.Kumari
19. J.M. Chandralatha
20. P.N.P.K Karunarathna
21. H.I.R.Hathurusinghe
22. N.M.Y.Thushari
23. W.R.R.P.Wije Rupa
24. K.P.Chaminda
25. M. Wanigasekara
26. H.D.Satharasinghe
27. Vaantha Kumari
28. R.P.M.S.Rajapaksha
29. K.H. Pushpa Jennet
30. S.D.S.A. Rupasinghe
31. N.K.U.Kumari
32. H. Thilakawardena.
33. M.M.N.S.Kumara
34. K.D.S.Sanjeewana
35. W.D.N.Sirimanna
36. U.K.B.L. Priyadarshana

The 3rd to 36th Respondents C/O Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7.

37 (A). Wasantha Deshapriya,
Acting Director, 28/10, Sri Lanka Institute of Development Administration, Malalasekara Mawatha, Colombo 7.

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

RESPONDENTS

39. (B)Dharmasena Dissanayake, Chairman
40. (B)A.Salam Abdul Waid, Member.
41. (B).Ms.D.ShiranthiWijethilake, Member
42. (A) Dr. Prathap Ramanujam, Member
43. (A)Mrs. V. Jegarasasingham, Member
44. (A) Santhi Nihal Seneviratne, Member
45. (A) S. Rannuge,Member
46. (A) D.C.Mendis, Member
47. (A)Sarath Jayathilake, Member.

The 39(B) to the 47th Respondents: of the Public Service Commission, No.177, Nawala Road, Narahenpita.

ADDED RESPONDENTS

Before: Buwaneka Aluwihare PC, J

H.N.J.Perera, J

L.T.B.Dehideniya, J

Counsel: J.C.Weliamuna, PC with Pulasthi Hewamanne for the Petitioners.

Nerin Pulle, DSG for the 1A, 2B, 39B, 45A and the AG.

Uditha Egalahewa PC, with Vishwa Vimukthi for the 3rd -36th Respondents.

Argued on: 06-02-2018

Decided on: 05-03-2019

L.T.B.Dehideniya, J.

The Petitioners being the public servants, and the candidates for the vacancies in Class III of the Sri Lanka Administrative Service invoke the fundamental rights jurisdiction of this court to challenge the legality and the correctness of the Limited Competitive Examination- 2007 for the recruitment to class III of the Sri Lanka Administrative Service, the recruitment process that followed the said examination, the selection of 3rd to 36th Respondents to class III in the SLAS, the failure of the 1st and 2nd Respondents or other authorities to conduct a proper and comprehensive investigation into the alleged fraudulent acts.

The Limited Competitive Examination-2007, which the Petitioners sat, had consisted of three question papers, namely General Administration, Financial Regulations and Case Study. The examination was to be conducted on 30-05-2009 and 31-05-2009. The Petitioners state that, on 28-05-2009, they discovered with credible evidence that the question paper on 'case study' had been leaked out to many candidates and they believed that the other two question papers were also leaked out. The contention of the Petitioners is that, the leakage of the question paper is a serious matter that vitiated the legitimacy and propriety of the Limited Competitive Examination-2007.The Petitioners state that the said

'malpractice' was brought to the notice of the 1st Respondent by the General Secretary of Sri Lanka Government, combined Management Assistants' Services Union, by its letter dated 08-06-2009. A fresh examination was conducted on 14-11-2009, in respect of the question paper on case study. The Petitioners emphasize that, they had an agitation to have a fresh examination for other two question papers, and amidst their continuous demands for a fresh examination in respect of the other two subjects (General Administration and Financial Regulations), the authorities have taken no steps to redress their grievance.

According to the Petitioners, a list of interviewees was issued by the Department of Examinations, on or about 22-04-2010. The list contained the names of 77 candidates including the Petitioners, who were eligible to be interviewed. The Petitioners state, that the specific list contained the names of the several candidates who have been connected with the fraudulent act of leakage of the question paper pertaining to the 'Case Study'. The Petitioners further complain that the marks obtained by specific candidates have not been included into the list. The Petitioners state that, they received letters by the 2nd Respondent for an interview to be held on 05-06-2010, for which they attended. The Petitioners state that, on or about 05-08-2010, the 2nd Respondent issued a list of candidates who have been selected for the recruitment to the Class III of SLAS and as per their contention, the list has failed to disclose either the total marks of each candidate or the breakdown of their marks for each subject. The Petitioners further accentuates, the fact that, it has been the practise, when releasing names of selectees, to give the marks of such selectees in order of merit. The Petitioners state that, they made a request to the 2nd Respondent, to release the said list with marks but the 2nd Respondent issued the list dated 11-08-2010, including the names of the candidates (3rd to 36th Respondents) instead. The Petitioners state that some candidates had obtained unrealistically higher marks for the question

paper on General Administration, and there was a rumour that the 13th Respondent involved in the type setting of the paper and simultaneously, 3rd ,4th ,5th 6th ,7th ,9th ,11th ,12th ,16th and 20th Respondents had access to the content of the question papers. The Petitioners further state, that an inquiry relating to the fraud has been pending against the 3rd and 8th Respondents, who had been selected and majority of the Respondents have been included in the list through political affiliations, eliminating the Petitioners.

The Petitioners state that, the decisions, actions and inactions of the 1st and 2nd Respondents, including other authorities are illegal and amount to an infringement of the Fundamental Rights of the Petitioners guaranteed under Article 12(1) of the Constitution.

The 1st Respondent admits the fact that the Petitioners sat for the Limited Competitive Examination 2007 for SLAS. The 1st Respondent has received a compliant on 08-06-2009, about the leaking out of a question paper relevant to the 'Case Study', which was scheduled to be held on 31-05-2009 prior to the examination. The 1st Respondent states that an inquiry was launched upon the receipt of the compliant by the Department of Examination in terms of Public Examinations Act No: 25 of 1968 and further a complaint was made to the Criminal Investigation Department of Sri Lanka Police (CID).

The CID was successful in discovering the premature release of the question paper relevant to 'case study'. As the 1st Respondent states, the Examination pertaining to 'Case Study' held on 31-05-2009 was cancelled and the fresh examination was held on 14-11-2009. Meanwhile, several other similarly circumstanced candidates filed the writ application no.772/2009 to call for fresh

examinations in respect of all three question papers and the Court of Appeal dismissed the writ application. The 1st Respondent states that, the Department of Examinations issued a list containing 77 candidates who were eligible to attend the interview in order of their merit.

Meanwhile, The CID and Department of Examination were both conducting investigations in relation to the premature release of the question paper. The Department of Examinations was capable in identifying three candidates involved in the fraud and according to the 1st Respondent, the candidates who were involved in the fraud, were disqualified and removed from the selected list of candidates. Subsequently, the CID initiated criminal proceedings against the identified perpetrators, at the Kaduwela Magistrate Court.

The 3rd to 36th Respondents reiterate the contention of the 1st and 2nd Respondents. As the 3rd to 36th Respondents state, they were appointed to class III of the SLAS by letter dated 06-10-2010 of the 2nd Respondent.

The Respondents' Contention is that, the Petitioners have not complied with the Article 126(2) of the Constitution. The Article 126 (2) of the Constitution, describes the 'one month rule', which applies to the Fundamental Rights cases. What the Respondents' insist is that, the Petitioners have not complied with the 'one month rule' to institute this application.

Article 126 (2) of the Constitution states;

> *'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.'

What the Respondents argue on this matter is that, the Respondents filed the Petition after 91 days, since the date their fundamental rights were alleged to have been violated and the application is time barred. The Respondents cite **Mahendran v. Attorney General (S.C. Application No.68/80)** and highlight the contention of Justice Wanasundera P.C stating,

'Article 126 requires that the application to the Supreme Court must be made within month of the date of the alleged infringement of the fundamental right. The Petition is clearly out of time.'

It is further argued in the case **Gamaethige v. Siriwardena and Other (1988) 1S.L.R. 384**; which states that, '*the pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit.'*

Further, the Respondents uphold the contention of Sathya Hettige P.C.J, in the case **Liyanage and Another Vs. Ratnasiri Divisional Secretary,**

Gampaha and others(2013) 1.S.L.R.06, which in essence holds the view that, *the time limit within which an application for relief for any fundamental right or language right violation may be filed is mandatory and complied with.*

The case further asserts the fact, that the 'month rule' is a constitutional mandate.

In this case, the original examinations were scheduled to be held on 30-05-2009 and 31- 05-2009. After being discovered, that the paper on 'case study' was leaked out, a fresh examination was held on 14-11-2009. They faced the interview on 05-06-2010. It is apparent, that the Petitioners were silent until the interview was over and after getting to know that, they were disqualified from the interview for the selection, they took steps to file this application. The law cannot excuse on their delay in applying to the court. It has been held by Justice Gamini Amaratunga, in **Ranaweera and others v. Sub-Inspector Wilson Siriwardena and Others (2008) 1.S.L.R.260,**

> *'..... the court would entertain an application made outside the time limit of one month provided an adequate excuse for the delay could be adduced. For instance of a petitioner had been held incommunicado.....'*

It is evident from the statements of the Petitioners that, they were informed about the alleged leakage of the question paper on the dates which the examinations were scheduled to be held. They were silent for a period of

time and upon the non-selection, they became enthusiastic to file this application. The Petitioners are unable to provide with an adequate excuse for the delay in filing the application. It is axiomatic that, when it comes to the law courts, the litigants must not sleep over their right to invoke the jurisdiction. The Petitioners have not complied with the 'one month rule' in filing this application.

The Respondents illustrate the mistakes in the Petitioners' application. What they insist is the futility of the application and the failure on the part of the Petitioners to name the necessary parties as Respondents. The futility of the application is explained by referring to the time which has lapsed, between the date on which the application was filed and the present. It is clear that, the Petitioners have not prayed for a relief to quash the appointments of the 3rd to 36th Respondents and the court has not granted interim reliefs to the Petitioners to restrict the 3rd to 36th Respondents being appointed to Class III of SLAS where they were appointed to the relevant positions by the 2nd Respondents' letter dated 06-10-2010, with effect from 08-10-2010. The 3rd to 36th Respondents have been appointed to the relevant stations on or about 13-01-2011 after they underwent a training session conducted by Sri Lanka Institute of Development Administration. It is clear to this court that, the purpose of the examination and interviews was already fulfilled and the Petitioners purpose of application to this court is apparently of no avail. The 3rd to 36th Respondents were rendering their service as government servants, to the country for last 8 years and their services were not interrupted. The Respondents quote the contention of Justice Shirani Bandaranayake in **Don Shelton Hettiarachchi v. Sri Lanka Ports Authority and Others (2007)2S.L.R.307,**

'Learned President's Counsel for the Respondents brought to our notice at the time of the hearing, which was admitted by the Petitioner, that both the Petitioner and the 5th Respondent had retired from the 1st Respondent authority during the pendency of this application and there it was futile for the Petitioner to proceed with this application.'

Justice Bandaranayke quoted the contention pronounced by Abrahams C.J, *'this is a court of justice and not an Academy of Law'*.

As far as the current situation is concerned, the futility of the application is clear, owing to the fact that the 3rd to 36th Respondents have been appointed to the specific positions of SLAS and it would amount to a futility to proceed with the application.

The Respondents' further illustrate the failure of the Petitioners to name the necessary parties as Respondents. As the Petitioners specify, their compliant on the infringement of Fundamental Rights, guaranteed by the Constitution is directed towards the 1st and the 2nd Respondents and other authorities to investigate and /or cause such investigation to be conducted into the said incident of leakage of the three question papers. The Respondents state, the failure of the Petitioners to name Inspector General of Police / Director of the CID of the police as necessary parties to their application.

The law has focussed on many purposes of naming officials. In **Samanthilake V. Earnest Perera and others (1990) 1 Sri.L.R 318,** Justice Amarasinghe has elaborated on the purposes. His Lordship has predominantly emphasized on the fact that naming officials has a supportive function towards the court. Such an act supports the court in the identification of those who could help the court in the exercise of its inquisitorial functions in clarifying the disputed facts. Another purpose which his lordship has stated is that the act of naming officials facilitate proof as to the question whether the specific act in question is executive or administrative. His contention was further extended to the extent the giving a title or a description of a state officer, supports in reducing the burden which falls on the Petitioners of adducing evidence to establish that the act in question was executive or administrative action. (Jayampathi Wickremarathne P.C, Fundamental Rights in Sri Lanka, pg.466).

It is evident, that the Petitioners failure in naming the Inspector General of Police/ Director of the CID of the Police, up to a certain extent influenced the inquisitorial functions of this court, especially in regard to the clarification of certain facts on the investigations conducted as to the question paper on 'Case study'.

The Respondents further state that 08 candidates have not been included in the application as Respondents. The situation of these 08 candidates is, they sat for the three examinations and have been shortlisted on the marks obtained for the three question papers. The Petitioners prayed for an interim relief to cancel the question papers on General Administration and

Financial Regulations and if this court granted the interim relief, the interests of these 08 candidates would have been adversely affected.

'He who seeks equity must do equity' is the maxim which specifies that, when a litigation is involved, the claimant must act fairly towards his opponent, if he wants to claim relief. In the simplest sense, persons seeking equitable relief must accord to the other parties concerned all the equitable rights, in the subject matter to which they are entitled. The Petitioners are obliged to name the candidates as Respondents to the application, if they foresaw the fact that the rights of the 08 candidates are at a stake.

The Respondents uphold the contention of Justice Shirani Bandaranayke in **Don Shelton Hettiarachchi v. Sri Lanka Ports Authority and others (2007) 2S.L.R.307,**

> *'This need for having necessary parties before court was considered by this court in Farook v. Siriwardena, Election Officer and Others, where it was clearly stated that the failure to make a party to an application of persons, whose rights could be in the proceedings is fatal to the validity of the application.'*

A further doubt has arisen in relation to the honesty and the disclosure by the Petitioners. The Petitioners in their Petitions and affidavits complained that the 1st Respondent, has not conducted an investigation as to the leakage of question papers but prima facie evidence is there in proof of the fact that the 1st Respondent has conducted an inquiry in terms of Public Examinations

Act No.25 of 1968. These are contradictions in the statements of the Petitioners. Further the Petitioners state a misleading fact in relation to the B-Report. The Petitioners allege, that the B-Report consists about a leakage of 03 question papers but when concerning prima facie evidence, it depicts leaking out of the question paper relevant to 'Case Study'.

It is in general perception of law, that a party seeking an equitable remedy must not himself be guilty of unconscionable conduct. **In Dering v. Earl of Winchelsea (1787) 1Cox 318,**

> *'.....such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward come into this Court under these circumstances..... A man must come into a Court of Equity with clean hands, but when this is said, it does not mean a general depravity: it must have an immediate and necessary relation to the equity sued for, it must be a depravity in legal as well as a moral sense.*'

The Respondents quote the contention of Justice Hector Yapa, in **Jayasinghe v. The National Institute of Fisheries (2002)1 S LR 277,** where his lordship held that,

> *'The Petitioner's conduct lacked uberima fides. The application has to be rejected in limine on this ground as well.'*

The Petitioners' contradictions as to the 1st Respondent and the contents of the B-Report causes a doubt in regard to the uberima fides of the Petitioners' conduct which disentitles them to obtain relief.

The Petitioners, not complying with the 'one month rule' of the Article 126(2), failure in naming the parties, and the falsity in petitions and affidavits as to the material facts, rendered the application defective.

The court upholds the contention that, no violation of the Fundamental Right guaranteed to the Petitioners under Article 12 (1) of the constitution has taken place.

Petition dismissed.

Judge of the Supreme Court

H.N.J Perera, J.

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 Application under and in terms of Articles 11, 13(1) and 17 of the Constitution read together with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/ FR Application 577/2010

Rathnayake Tharanga Lakmali
272/ A, Yapa 05, Moraketiya,
Embilipitiya.
(In respect of the infringement of the fundamental rights of her husband Ranamukage Ajith Prasanna who is now deceased)

PETITIONER

Vs.

1. Niroshan Abeykoon
   Inspector of Police
   Officer-in-Charge
   Crime Branch
   Embilipitiya Police Station
   Embilipitiya.

2. Suraweera Arachchige Wasantha Suraweera, Police Sergeant 32215
   Embilipitiya Police Station
   Embilipitiya.

3. Police Constable 41953 Hewa Sangappulige Chaminda
   Embilipitiya Police Station
   Embilipitiya.

4. Police Constable 20527 Pushpakumara
   Embilipitiya Police Station
   Embilipitiya.

5. Inspector of Police Peter
   Embilipitiya Police Station
   Embilipitiya.

6. Vijitha Kumara, Chief Inspector of Police, Embilipitiya Headquaters Police Station, Embilipitiya.

7. Ananda Samarasekera
   Assistant Superintendent of Police
   ASP's Office, Embilipitiya

8. Mahinda Balasooriya
   Inspector General of Police
   Police Headquaters, Colombo 01.

8A. Mr. Pujitha Jayasundara,
   Inspector General of Police
   Police Headquaters, Colombo 01

9. Dr. Uthpala Attygalle
   Judicial Medical Officer
   Embilipitiya (Discharged from the proceedings)

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

RESPONDENTS

BEFORE : **L. T. B. DEHIDENIYA, J.,**
MURDU N.B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Saliya Pieris, PC, with Lisitha Sachindra for the Petitioner
Dharmasiri Karunaratne for the 1st and 2nd Respondents
Ranjan Nayakaaratne with Kumar Gunatilaka for the 3rd and 4th Respondents
Chrisanga Fernando, SC for the 5th, 6th, 7th, 8th and 10th Respondents.

ARGUED ON : 28th August 2019 and
30th September 2019

WRITTEN SUBMISSIONS : Petitioner - 7th October 2019
1st and 2nd Respondents - 7th October 2019
3rd and 4th Respondents - 7th October 2019

DECIDED ON : 17th December 2019.

S. THURAIRAJA, PC, J.

This fundamental rights application was filed by the wife of the deceased, Rathnayake Tharanga Lakmali, on behalf of her husband Ranamukage Ajith Prasanna who died on the 18th of September 2010 in the custody of the Police. The Petitioner pleads that one or more or all of the Respondents and the State have infringed the Fundamental Rights of her husband guaranteed to him under **Article 11** and **13 (1)** of the Constitution.

When this matter was supported on the 25th of October 2010, this Court, upon an application made by the Petitioner, ordered that the body of the deceased be exhumed and be sent to the Judicial Medical Officer (JMO) of the Karapitiya Teaching Hospital to conduct a fresh Post Mortem Examination. On the 5th of May 2011, Court granted leave to proceed for alleged violation of fundamental rights guaranteed under **Articles 11** and **13 (1)** of the Constitution. On the same day, the learned Counsel for the petitioner moved to amend the caption excluding the 9th Respondent from the case. Of consent, the 9th Respondent was discharged from the proceedings. On the 22nd of September 2011, the Attorney General informed that he will only be appearing for the 5th, 6th, 7th, 8th and 10th Respondents and that he will not be appearing for the 1st to the 4th Respondents. The 1st, 2nd, 3rd and 4th Respondents were represented by their own Counsels.

According to the Petitioner, on the 16th of September 2010, when she was at home with her husband and children, a team of police officers including the 1st

Respondent, Inspector of Police (IP) Niroshan Abeykoon - Officer-in-Charge of the Crime Branch of the Embilipitiya Police Station had come to their house. They had searched the house and nothing was found. Subsequently, they had arrested the deceased and taken him away in a vehicle. When the Petitioner pleaded for the reason, the 1st Respondent had told her that they were taking him to record a statement.

On the following day, i.e. the 17th of September 2010, the Petitioner had gone to the Police Station of Embilipitiya to visit the deceased. However, she had not been permitted to see him. On the 18th September 2010, the Petitioner had once again gone to the Police Station. There she was informed that the deceased had been taken to her house. When the Petitioner returned home, she had been informed by her mother that a police team including the 1st Respondent had brought the deceased and shown him to them. When the child had cried, the deceased had said, "*Don't come to see your father. You won't be allowed to see your father*." ("අප්පච්චිව බලන්න එන්න එපා, අප්පච්චිව බලන්න දෙන්නේ නැහැ.")

The Petitioner's aunt – Hewavithiranage Neetha Samanthika had also been present when the deceased was brought home at around 12 noon on the 18th September 2010. The aunt claims that the police officers had not allowed the deceased to speak to them. At one point, the 1st Respondent had stated "*Are you making lunch? You can have your last meal today*." ("හා උඹලා උයනවා නේද? අද උඹට අන්තිම කෑම කාලා යන්න පුළුවන්.") The deceased had been allowed to have his meal. The aunt of the Petitioner had fed the deceased while he was handcuffed. At the time, the deceased had said

> "*Aunt I cannot eat. Food is not going below the throat. Aunt, they have assaulted me a lot. It's very painful, they will kill me. Save me.*" ("අනේ නැන්දේ මට කන්න බෑ. කෑම උගුරෙන් පල්ලෙහට යන්නේ නෑ, නැන්දේ මට ගොඩක් ගහල තියෙන්නේ. මට හොඳටම අමාරුයි, මාව මරයි, මාව බේරගන්න. ")

The Petitioner further submits that the Police Officers who accompanied the deceased had searched the house but had found nothing.

On the 19th of September 2010, the Petitioner had been informed by the elder brother of the deceased that the deceased was shot and taken to the Embilipitiya Hospital. The Petitioner together with her mother and aunt had gone to the police station but they had been chased away by the Police Officers who had told them "*Don't try to come and cry here. Go away from here*." (මෙතන ඇවිල්ල කෑගහන්න ලෑස්ති වෙන්න එපා. මෙතනින් පලයල්ලා.) At the Embilipitiya Hospital, she had been informed that the 3rd Respondent had shot her husband.

The Petitioner had identified the body at the morgue in the presence of the learned Magistrate. Initially, the Petitioner and her family had refused to accept the body because the deceased had died while he was in police custody. An inquest was held on the 20th of September 2010. The Post-Mortem Examination (PME) was held on the 21st of September. The Petitioner claims that her statements were recorded prior to the PME and that she had not been allowed to be present at the time of the PME.

Briefly, the Petitioner claims that her husband was arrested, taken away from her house illegally and killed by the police officers which violated his Fundamental Rights enshrined by the Constitution under Articles 11 and 13 (1).

The Respondents have raised a preliminary objection based on non-compliance by the Petitioner of **45 (3)** of the Supreme Court Rules. The Petitioner explains that they have tendered several due notices to the Attorney-General who appeared initially and the delay in tendering notices on the second time arose from the confusion that resulted from the change in counsels for the 1st to the 4th Respondents. I find that the reason for the delay has been adequately explained. In any event, no prejudice has been caused to the Respondents by the same. Hence, the Preliminary Objection is overruled.

The Petitioner averred that

(a) the deceased has been arrested on false charges without any credible material and without reasons being given for the arrest,
(b) the deceased has been detained in custody without adherence to procedure established by law and without any justification,
(c) the deceased has been subject to torture, cruel, inhuman degrading treatment and punishment by being assaulted,
(d) the deceased has been killed by the police whilst he was in the custody of the 1st to 4th Respondents who have thereafter fabricated a version to justify the killing.

The Respondents submit that the deceased was arrested on the 17th of September 2010 based on credible evidence that he was involved in the unsolved murder of Kanakanamge Ananda Sunil Shantha committed in the Embilipitiya area. Respondents claim that live ammunitions were recovered at the house of the deceased at the time of the arrest. Property receipts and the police information book entry regarding the seized goods have been submitted to this Court. However, a perusal of the entry reveals that the goods which were seized have not been properly sealed. The Respondents submit further that facts were reported to the Magistrate of Embilipitiya through the Assistant Superintendent of Police (ASP) i.e. the 7th Respondent and a detention order was obtained (marked 6R1). Hence, they claim that the deceased was arrested and detained properly.

Both parties relied on the inquest proceedings submitted to this Court which has been marked as **P5**.

Hewavithiranage Neetha Samanthika, the Petitioner's aunt gave evidence at the inquest. She related the incident and informed the Magistrate "මෙම මරණය පොලිසිය විසින් හිතාමතාම සැලසුම් සහගතව කරන ලද මරණයක් බවට කියලා මට සැක හිතෙනවා." (I suspect that this was a planned killing by the police). She further stated that when he was brought home on the previous day, he was pale and his face was

swollen. The mother of the deceased, Balagamage Pemawathie gave evidence at the inquest on the 28th of September 2010 and informed the learned Magistrate that the deceased was brought handcuffed on the 18th at around 12.30 pm by a team of police officers containing 12 personnel. She submitted that the deceased had told her that he would be killed, "අම්මේ මාව මරනවා කියලා කිව්වා". Hewayaddehiyage Priyantha Kumara, nephew of the deceased at the inquest, stated that the deceased was brought home on the 18th around noon and that he was handcuffed. Rathnayake Tharanga Lakmali, wife of the deceased (i.e. the Petitioner) also gave evidence and submitted to the magistrate that her husband was killed by the Police.

Upon the conclusion of the inquest proceedings, before the Order was made, the Petitioner made an application before the learned Magistrate requesting that a JMO other than the JMO in Embilipitiya be directed to conduct the Post-Mortem Examination as she could not expect an accurate report from the latter. However, the learned Magistrate disallowed the application. Further the learned Magistrate made order and found that the deceased's death was caused by the discharge of a bullet from a firearm and referred the matter to the Attorney-General.

When this application was supported for interim relief, the Petitioner made an application to direct the learned Magistrate of Embilipitiya to exhume the body of the deceased and to conduct a fresh Post-Mortem Examination by a competent JMO of Colombo or Karapitiya Teaching Hospital, Galle. This Court, after hearing submissions of both parties directed the JMO of the Karapitiya Teaching Hospital, Galle to conduct a second Post-Mortem Report and the Post-Mortem Report is available on record.

The Respondents claim that the deceased was not subject to any torture, cruel, inhuman or degrading treatment. In support of this claim, the Respondents relied on the second PMR dated 7th July 2011 issued by the JMO of the Karapitiya Teaching Hospital, Galle. The Respondents have not submitted the initial PMR issued

by the JMO of Embilipitiya. The statement of the JMO (Embilipitiya) which was recorded in the Grave Crimes Information Book is the only document available before us. The JMO of Embilipitiya has stated that no injuries could be seen on the body of the deceased. However, the subsequent PMR reveals that the middle and distal phalanxes of the left 2nd to 4th fingers were contused and hemorrhagic. The report indicates that the injuries in the left hand are of ante-mortem nature and due to application of blunt force, approximately 1 – 2 days old. Hence, it seems that the injuries to the left hand were retained when the deceased was in the Respondent's custody. The Respondents have failed to adequately explain how the ante-mortem injuries occurred on the deceased while he was under custody.

The Petitioner submits that the deceased was shot and killed while he was in police custody. The 1st, 2nd, 3rd and 4th Respondents claim that it was an accidental death and justified by law. Respondents submit that on the 18thof September 2010, the deceased was taken out of the police station at night to recover a weapon hidden in the deceased's plantain grove. They claim that on the way, the deceased had struggled with the 3rd Respondent to snatch his rifle and he was killed as a result of a single shot that went off during the struggle. It is noted that the deceased was taken out several times on the 17th and 18th of September. However, apart from the entry note that was entered on the day of the arrest, the Respondents have not submitted any notes entered in the Police information books pertaining to the deceased being taken out of the detention cell and police station.

It is a fact that the deceased was in the custody of the Police at the time of his death. According to the second PMR, the death of the deceased was caused by necessarily fatal injuries to the neck and head due to the discharge of a rifled firearm at a contact range. It is an admitted fact that the bullet was discharged from a T56 rifle in the possession of the 3rd Respondent.

The 3rd Respondent claims that the he was injured during the struggle with the deceased. The Medico-Legal Examination Form (MLEF) submitted to Court

consists of a small signature initialing on three checkboxes, namely abrasion, blunt and non-grievous, with the reason for examination being "පහර දීමෙන් තුවාල" and the conclusive remark being 'assault'. The MLEF was issued on the 18th of September 2010 and submitted to this Court on the 6th of January 2012. No detailed Medico-legal report has been tendered before this Court up to date. Further, there is no patient history recorded in the said MLEF.

According to the material submitted to the Court, it is evident that the Respondents had information to the effect that the deceased was a person from the underworld and was involved in contract killings. It is revealed that he was so dangerous and was kept under special custody. Moreover, on the 17th and 18th noon, the deceased was transported under heavy guard. In light of the aforesaid circumstances, the 1st Respondent has failed to satisfactorily explain why the deceased was taken out at night without handcuffs with only 3 officers and the driver, in a faulty van without a door. **Section 8 (b) of the Police Department Standing Order A20 (Rules with regard to Persons in Custody of the Police)** requires police officers to provide sufficient security where there is a possibility that the suspect might escape or become hostile. **Section 8(I)** stipulates that

> '*A person in Police custody will not be sent out for further inquiry from the Station except for some very good reason and then only under an escort sufficient to ensure his safe custody*.'

It is evident that the 1st to the 4th Respondents have acted in complete disregard of the said standing orders.

The 1st to the 4th Respondents in their affidavits submit that the deceased had been providing overwhelming information regarding persons involved in underworld activities. 1st to the 4th Respondents indicated that therefore, the death of the deceased had caused loss of a person who could have given important information which would have led to the arrest of other culprits residing in the area. The Respondents relied on the inquest proceedings submitted to this Court. In the said

proceedings, on the 20th of September at page number 12, the 1st Respondent states as evidence, "මෙම සැකකරු මිය යාම නිසා අපරාද රැසක් විසඳ ගැනීමට හැකි උනා" (Many crimes were resolved as a result of the death of the suspect). The statement has not been corrected by either party. Therefore, this also receives our attention.

As described by the Police, the deceased would have been a person involved in grave crimes. If so, the Respondents should have been more careful in handling him. The Respondents have not explained why they allowed a person allegedly involved in criminal activities with the knowledge of handling of firearms, to be without handcuffs close to a police officer with a readily loaded and unprotected (unlocked) weapon. In these circumstances, I find the Respondents' submissions to be highly untenable.

The 5th Respondent, the Inspector of Police of the Embilipitiya Police Station, submits that he was on special duty at the Rathnapura Saman Devalaya on the 18th of September 2010 (i.e. the day of the deceased's death). He submits further that he filed a B Report under the case bearing number BR 1233/10 on the instructions of the Headquarters Inspector (i.e. the 6th Respondent) on the 19th of September 2010. The 6th Respondent in his affidavit affirms that a B report under his hand was filed on the 19th of September 2010.

No submissions have been made by the 7th and 8A Respondents, i.e. the Assistant Superintendent of Police, Ananda Samarasekara and the Inspector General of Police, Pujitha Jayasundera. However, a detention order (marked **6R1)** obtained by the 7th Respondent is available on record. It is evident from the detention order that although the Police had physical custody, the deceased was under the custody of the judiciary. Hence, the 7th Respondent is responsible and answerable to Courts. In the absence of any material regarding the steps taken by the 7th Respondent, I find that he has failed to fulfil his responsibility.

The Respondents have relied on Justice Weeraratne's observation in ***Jeganathan v. Attorney General*** [1982 1 Sri LR 294]

"The petitioners' allegations against the 4th and 5th respondents if proved will carry with them serious consequences for these respondents. Furthermore, the allegations are of a very serious nature. They must therefore be strictly proved. This degree of cogency is seriously lacking in these proceedings which must fail"

To support the proposition that allegations of torture and extra-judicial killing which are of a very serious nature, must be strictly proved. In ***Jeganathan v. Attorney General***, the petitioner, a detainee at the Panagoda Army Cantonment under the Prevention of Terrorism (Temporary Provisions) Act, had failed to refer to any witnesses in his petition and affidavit to support the allegation that he was tortured. Moreover, in ***Jeganathan***, although a motion was initially filed in the Court of Appeal to get the petitioner examined by a JMO, the said application had not been supported even though five lawyers had had access to the petitioner on the day of the alleged torture. However, in the instant case, to substantiate her claim, the Petitioner has submitted affidavit evidence and the PMR issued by the JMO Karapitiya which states that "*The injuries in the left hand are of ante-mortem nature and due to application of the blunt force, approximately and 1 – 2 days old*." Hence, the Respondents cannot rely on ***Jeganathan v. Attorney General***.

Our legal system provides for investigation, inquiry, trial and punishment by proper authorities which is the base of democracy and the Rule of Law. As per **Article 13 (4)** of the Constitution, *no person shall be punished with death or imprisonment except by order of a competent court*. Hence, even a convicted criminal has a right not to be arbitrarily deprived of his life except in accordance with procedure established by law. As was observed by Justice White for the U.S. Supreme Court in ***Wolff v. McDonnell [418 US 539, 555-6 (1974)]***

"[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. ***There is no iron curtain drawn between the Constitution and the prisons****..."* (Emphasis Added)

The Fundamental Rights Chapter in our Constitution does not expressly refer to a right to life. However, the Constitution, as a living document, should not be construed in a narrow and pedantic sense. I am of the view that constitutional interpretation should be informed by the values embodied in it. The preamble/ svasti of the Constitution recognises **Dignity and Well-being of the People** as a fundamental value that should be furthered by *assuring to all People FREEDOM, EQUALITY, JUSTICE , FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY*. In my view, recognition of a right to life is in furtherance of this fundamental value.

The conclusion that the right to life is implicitly recognised in Chapter III of the Constitution is reinforced by International Conventions ratified by Sri Lanka. **Article 27 (2) (15)** of the Directive Principles of State Policy mandates the State *to foster respect for international law and treaty obligations in dealings among nations*. Interpretation of fundamental rights enshrined in our Constitution in light of Sri Lanka's treaty obligations would thus be in furtherance of the aforesaid objective spelt out in the Chapter on Directive State Policies. Thus, Chapter III, particularly **Articles 11 and 13 (4),** when read in light of Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, Article 11 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and Article 10 of the Convention on the Rights of Persons with Disabilities affirm the Right to Life.

I am in agreement with the sentiments expressed by Justice Mark Fernando with Yapa J and J. A. N. De Silva J agreeing in ***Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others*** (**[2003] 2 Sri LR 6 at page 76 - 77).** An extract of the case is reproduced below.

> *Although the right to life is not expressly recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter III of the*

Constitution. In particular, Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court. That is to say, a person has a right not to be put to death because of wrongdoing on his part, except upon a court order. (There are other exceptions as well, such as the exercise of the right of private defence.) Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise. Thus Article 13(4), by necessary implication, recognises that a person has a right to life – at least in the sense of mere existence, as distinct from the quality of life - which he can be deprived of only under a court order. If, therefore, without his consent or against his will, a person is put to death, unlawfully and otherwise than under a court order, clearly his right under Article 13(4) has been infringed.

Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Unlawfully to deprive a person of life, without his consent or against his will, would certainly be inhumane treatment, for life is an essential pre-condition for being human.

I hold that Article 11 (read with Article 13(4)), recognises a right not to deprive life whether by way of punishment or otherwise and by necessary implication, recognises a right to life. *That right must be interpreted broadly, and the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to protect those rights effectively (cf. Article 118(b)).*

(Emphasis added)

Considering all material available before us, I am of the view that the Fundamental Rights enshrined in the Constitution, particularly **Articles 11** and **13** have been violated by the Respondents. I specifically find the 1st, 2nd 3rd and 4th

Respondents individually liable for the violation and I direct them to pay Rs. 250,000/- each individually from their personal resources to the Petitioner.

The available material does not reveal that the 5th, 6th and 7th Respondents have fulfilled their responsibilities. Hence, I find them responsible for the violation and order them to pay Rs. 25,000 each from their personal funds to the Petitioner.

It is the State's responsibility to protect every citizen of this country. In the instant case, I find that the State has failed its responsibility and has violated the Fundamental Rights of the deceased. Hence, I order the State to pay Rs. 1 million as compensation to the petitioner, i.e. wife of the deceased, Rathnayake Tharanga Lakmali.

Application allowed.

JUDGE OF THE SUPREME COURT

L. T. B. DEHIDENIYA, 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 under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 584/2008

Munugoa Hewage Muditha Sagarie
Methsiri Lane, Weraniyawela
Baddegama.

Petitioner

Vs.

1. Secretary
   Ministry of Public Administration and
   Internal Affairs,
   Independence Square, Colombo7.

2. Mrs.Indika Samarasinghe
   Additional Secretary,
   Ministry of Public Administration and
   Internal Affairs,
   Independence Square, Colombo7.

3. G.D.Anura Piyabandu,
   Senior Additional Secretary,
   Ministry of Public Administration and
   Internal Affairs,

Independence Square, Colombo7.

4. P.B.K Guruge
   Hammaliwala Watte
   Akuratiya, Baddegama

5. S.P.Weerasekara
   "Manel",Weraniyawala,
   Ampegama
6. H.H.B.Chandani Bemmula Watta,
   Gurusinghegoda.
7. K.H.D.R. de Silva
   "Asiri", Nabara Atta,
   Athkandura.
8. N.M.B. Kariyawasam,
   "Gamini", Nugethota, Athkandura.
9. T.G.D.A. Kariyawasam
   "Hishan" Waduwelipitiya North,
   Kahaduwa.
10. Commissioner General of Examinations
    Department of Examinations, Isurupaya,
    Paleewatta.
11. Justice Priyantha Perera
    Chairman, Public Service Commission,
    No.356/B, Karlwil Place, Galle Road,
    Colombo 3.
12. Professor Dayasiri Fernando
    Member, Public Service Commission.
13. Professor M.Rohanadeera,
    Member, Public Service Commission.
14. Palitha Kumarasinghe

Member, Public Service Commission.

15. W.P.S. Jayawardena
Member, Public Service Commission.

16. Gunapala Wickramaratne,
Member, Public Service Commission.

17. S.A.Wijeratne.
Member, Public Service Commission.

18. Prof.Bernad Soyza.
Member, Public Service Commission.

19. Secretary,Public Service Commission.

11A. Justice Sathyaa Hettige PC
Chairman,
Member, Public Service Commission.

12A. S.C.Mannapperuma
Member,Public Service Commission.

13A. Ananda Seneviratne
Member, Public Service Commission.

14A. N.H.Pathirana
Member, Public Service Commission.

15A. S.Thillanadarajah
Member, Public Service Commission.

16A. A. Mohamed Nahiya
Member, Public Service Commission.

17A. Mrs. Kanthi Wijetunga
Member, Public Service Commission.

18A. Sunil S. Sirisena
Member, Public Service Commission.

19A. Secretary, Public Service Commission
All of No.177,Nawala Road,Narahenpita
Colombo 5.

20. Hon. Attorney General,
Department of Attorney General,
Colombo 12.

Respondents

Before : Sisira J de Abrew J
Murdu Fernando PC, J
S. Thurairaja PC, J

Counsel : Saliya Pieris PC with Lisitha Sachindra for the Petitioner

Rajiv Goonatilake SSC for the Attorney General

Argued on : 25.3.2019

Decided on : 3.4.2019

Sisira J de Abrew J

The Petitioner has filed a petition dated 8.1.2009 in this court alleging that her fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the Respondents. This court by its order dated 13.1.2009 granted leave to proceed for alleged violation of the fundamental rights of the Petitioner. The Petitioner in her petition states that she made an application to the post of Grama Niladhari in Welivitiya, Divithura Divisional Secretariat Division; that she obtained 132 marks from the competitive examination; that she and four (4) others were called for an interview on 28.1.2008; that she obtained seven (7) marks from the interview; that 5th and 6th Respondents who were not called for the interview on 29.1.2008 were appointed as Grama Niladharis but she was not appointed; that 5th and 6th Respondents were interviewed by a board of interview which is different

from the board of interview which interviewed the Petitioner; and that her fundamental rights had been violated by the Respondents.

The main point urged by learned President's Counsel (PC) for the Petitioner was that the 5th and 6th Respondents were not called for the interview on the same day that the Petitioner was called for the interview and that different boards of interview could give different marks. I now advert to the above contention. The Petitioner was interviewed on 28.1.2008 and the 5th and 6th Respondents were interviewed on 23.9.2008. Although the Petitioner and the 5th and 6th Respondents were interviewed by different boards of interview, the chairman of both boards was the same person. It is undisputed that there were three vacancies for the post of Grama Niladhari in Welivitiya, Divithura Divisional Secretariat Division; and that six (6) candidates should be interviewed to fill the said vacancies. Although six candidates were selected for the interview, the 1st board of interview could not interview one person from the above six candidates since one candidate is not from Welivitiya, Divithura Divisional Secretariat Division. It is a requirement according to the Gazette (P1) which advertised the post that the candidate should, within the period of last three years from the closing date of acceptance of applications, permanently reside in the relevant Secretariat Division. Therefore the Respondents had to select another person for the interview who had obtained maximum marks at

the competitive examination. The Petitioner had obtained 132 marks at the competitive examination and each of the 5th and 6th Respondents had obtained 131 marks at the said examination. The above information was sent by the Department of Examination which conducted the competitive examination. Since both 5th and 6th Respondents had obtained equal marks both had to be called for the interview. Under these circumstances the relevant officers attached to the Ministry of Public Administration and Internal Affairs had to call both 5th and 6th Respondents for the interview. Although learned PC for the Petitioner contended that different boards of interview could give different marks to candidates, it appears that there is no material to support this contention. The Petitioner had got four (4) marks for the performance at the interview. The 5th and 6th Respondents too have got four (4) marks for the performance at the interview. At the interview marks had been given under various categories. At the interview the Petitioner had obtained seven (7) marks, the 5th Respondent had obtained thirteen (13) marks and the 6th Respondent had obtained eleven (11) marks. The above information is found in the document marked 1R5. Thus the total marks that the Petitioner, 5th Respondent and 6th Respondent had obtained were 139, 144 and 142 respectively. The above information is found in the document marked 1R3. When I consider all the aforementioned matters, I hold that the appointments of the 5th and 6th Respondents

had been correctly done. Therefore the Petitioner cannot complain that her fundamental rights were violated when the 5th and 6th Respondents were selected for the post of Grama Niladhari over and above her.

For the above reasons, I hold that the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution have not been violated as alleged by the Petitioner. For the aforementioned reasons, I dismiss the petition of the Petitioner with costs.

Petition dismissed.

Judge of the Supreme Court

Murdu Fernando PC, J

I agree.

Judge of the Supreme Court

S. Thurairaja 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 and read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Samaraweera Arachchige Wasantha Niroshan,
Tharuna Seva Mawatha,
Moronthuduwa,
Milleniya.

S.C. (FR) Application No. 598/2011

PETITIONER

-Vs-

1. Police Constable, 82255,
   Police Station,
   Moronthuduwa.

2. Police Constable, 82306,
   Police Station,
   Moronthuduwa.

3. Police Constable, 83934,
   Police Station,
   Moronthuduwa.

4. Nandana, Police Sergeant,
   Police Station,
   Moronthuduwa.

5. Liyanarachchi,
   Officer in Charge,
   Police Station,
   Moronthuduwa.

6. Abeyratne Dissanayake,
   Assistant Superintendent of Police II,
   Office of the Assistant Superintendent of Police,
   Panadura.
7. Sumith Edirisinghe,
   Senior Superintendent of Police,
   Office of the Senior Superintendent of Police,
   Panadura.
8. N. K. Illangakoon,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.
9. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.

RESPONDENTS

BEFORE:	Buwaneka Aluwihare PC, J. Vijith K. Malalgoda PC, J. Murdu N. B Fernando PC, J.
COUNSEL:	Viran Corea for the Petitioner Malik Azeez SC, for the 6th to the 9th Respondents
ARGUED ON:	12.12.2018
DECIDED ON:	07.03.2019

Aluwihare PC, J.

The Petitioner was a printing technician employed at Screen Printing Division of Lanka Brush Exports (Pvt) Limited since 2005. On 1st January 2011, as he was celebrating the New Year at his workplace, around 9 a.m the 1st Respondent in civvies had visited his workplace and ordered the Petitioner to come with him to the Police Station to record a statement. Even though the Petitioner queried as to the reasons for the sudden turn of events, the 1st Respondent has disregarded the same and ordered the Petitioner to come to the Police station. At this point, the Petitioner's supervising officer Mr. Lal Ratnayake had intervened to inquire as to which Police station the Petitioner would be taken. He was informed that the Petitioner would be taken to the Panadura Police Station.

However, as it later transpired the Petitioner was taken to the Moronthuduwa Police Station. Inside the three-wheeler which took him to the said police station

were 2nd and the 3rd Respondents. The Petitioner further states that on the way the 2nd Respondent took into custody the Petitioner's mobile phone.

Upon arriving at the Police Station, the Petitioner was produced before the 5th Respondent who threatened the Petitioner to confess about an alleged Cannabis trade he was involved in. Furthermore, the 5th Respondent had taken out from the drawer four parcels and asked the Petitioner in the presence of the 1st to the 4th Respondents "isn't it you who traffic these?" (මේවා උඹ නේද ගෙනියන්නේ?)

When the Petitioner denied the allegations and attempted to offer an explanation, the 5th Respondent had motioned a blow threatening him to remain silent. Thereafter, the Petitioner had been taken to a house in the Millagashandiya area with a view to further interrogate the Petitioner. However, as the house was unattended at that point, the Petitioner had been taken back to the Police Station.

No sooner than he was brought back, the Petitioner's father and the supervising officer Lal Ratnayake arrived at the Police Station to see the Petitioner being detained in the cell. At that point the 5th Respondent had not been present. Later, on the following day, *i.e.* on the 2nd January 2011, when the Petitioner's father again came to the Police Station to meet the 5th Respondent, the 5th Respondent has informed the father that the Petitioner was arrested with the aforesaid 4 parcels; ("මේවත් එක්ක තමයි ගත්තේ"). The Affidavit by the Petitioner's father affirming to the veracity of these facts is produced marked "P1".

On 3rd January 2011, at about 3 pm, the Petitioner was forced to place his fingerprint on a parcel and on an envelope. When he resisted, the 4th Respondent threatened to assault him. Thereafter, he was further questioned to divulge the names of those who were involved in the alleged drug peddling. Even though he honestly responded that he knew of no such business let alone the names of any such persons, it was to no avail. He was informed by the 4th Respondent that a case

has been filed against him and that it would be taken up at the Magistrate's Court of Panadura the following day.

On 4th January, as informed, the Petitioner was produced before the Magistrate's Court of Panadura in a case bearing No. 96749. In Court, the Petitioner learnt that he was charged for possessing 500 grams of Cannabis (Ganja). The 5th Respondent produced a B report containing false information wherein it was stated that the Petitioner was arrested near a bridge in the vicinity of Kalapugama on the 3rd of January while transporting the said quantity of Ganja in a motorcycle.

A true copy of the case record bearing no. 96749 in Magistrate's Court Panadura is produced in these proceedings marked "P2".

The Magistrate's Court ordered him to be placed in protective custody till the 14th of January. On the next calling date, Petitioner's counsel presented to the Court an affidavit of Lal Ratnayake, who affirmed that the arrest took place on the 1st of January 2011 at the workplace. In view of the discrepancies between the B-report and the affidavit, the Magistrate ordered the Superintendent of Police Panadura to conduct an investigation and to report to Court the exact circumstances surrounding the arrest. The Petitioner's term of protective custody was further extended till 28th January 2011. On 28th January, as there was no report by the 6th and/or 7th Respondents before the Court, the Magistrate re-issued the same order and further extended the remand period upto 11th February 2011. The same state of inaction by the 6th and 7th Respondent prevailed on 11th February 2011 as well and on account of their failure to report to the Court the circumstances as to the arrest, the Magistrate was compelled to confine the Petitioner to remand custody till 25th February 2011. On 25th February 2011, the 7th Respondent finally confirmed to the Court the veracity of the Petitioner's position. Thereafter the learned Magistrate ordered the 7th Respondent to report on 11th March 2011 whether there were sufficient grounds to proceed with the case against the Petitioner, and on the said day, being apprised of the absence of any circumstance

warranting further custody, the learned Magistrate discharged the Petitioner from the proceedings. The Petitioner had been on remand custody for a period of 2 months and 7 days.

This is an offence where an accused could be charged either under Section 78(5) or under Section 54A of the Poisons and Dangerous Drugs Ordinance. In terms of section 83 of the said Act, the jurisdiction to grant bail in respect of an offence coming under Section 54 A is vested with the High Court thus the magistrate was helpless with regard to considering bail and in fairness to the learned magistrate, he directed the Senior Superintendent of Police to inquire and report with regard to the discrepancy that had arisen as to the date of arrest of the petitioner, even that the respondents were dragging their feet.

8 days after the discharge, the Petitioner lodged a complaint at the Human Rights Commission against the Moronthuduwa police station over the arrest, detention and filing of false charges. The matter was called for inquiry on or about 27th June 2011 at which point the 5th Respondent informed the Commission that steps were being taken to institute fresh action against the Petitioner. In view of this, the Commission decided to postpone the inquiry and the Petitioner states that even up to the point of filing the present application (22nd December 2011), no steps have been taken to institute fresh action against the Petitioner.

The Petitioner has come before this Court alleging that his fundamental rights under Article 12 (1), 13 (1),13 (2) and 14 (1) (h) were violated by the 1st to the 8th Respondents. The Court has granted leave to proceed on all counts except on Article 14 (1)(h).

On 14. 06. 2012 the learned Senior State Counsel informed Court, that the Hon. Attorney General will not be appearing for the 1st to the 5th Respondents.

In the objections filed on behalf of the 1st to the 5th Respondents, they have taken up the position that they arrested the Petitioner in a raid conducted on the 3rd

January 2011. According to extracts (marked "4R1" and "5R2") from the information book of Moronthuduwa Police Station, the 1st to the 5th Respondents have arrested the Petitioner and taken into custody his black motorcycle near Pelpola bridge and his mobile phone bearing number 072 *****86, after they found Cannabis weighing 500 grams in his possession. The Respondents have further attached investigation notes, in-and-out entries made during the course of the day and the B reports produced to the Magistrate.

However, the gamut of evidence before us does not attach even the slightest degree of truth to their version. A cursory glance at the Magistrate's Court case record marked "P2" exposes the blatant falsehood and *mala fide* demonstrated by the 1st to the 5th Respondents. The said proceedings also place in great jeopardy the veracity of the Information Book (IB) extracts, the content therein and the other documents produced by the 1st to the 5th Respondents. I need only quote the proceedings before the Magistrate's Court on 3rd March 2011 to cut across the entire version presented by the 1st to the 5th Respondents.

"මෙම නඩුවේ 11. 2. 25 දින සහකාර පොලිස් අධිකාරීවරයා විසින් ගොනු කර ඇති වාර්තාවේ ඇත්තේ මෙම නඩුව සැ /කරු පොලිසිය මගින් අත්අඩංගුවට ගෙන ඇත්තේ 11.01.01 දින බව තහවුරු වේ. ***ඒ අනුව, මෙම නඩුව පොලිසිය විසින් ගොනු කර ඇති වාර්තාවේ නඩුවේ සියලුම කරුණු අසත්‍ය බව පැහැදිලිව පෙනී යයි.*** ඒ අනුව මෙම නඩුවේ සැ/කරු රි/භාරයට පත් කිරීමට කරුණු නොමැති බව පෙනී යයි. එසේම සැ /කරුට එරෙහිව මෙම නඩුව තවදුරටත් පවත්වාගෙන යාම නොහැකි බව ද පෙනී යයි. ඒ අනුව, අ. න. වී. ස. 115 (2) වග. ප්‍රකාරව චූ/නිදහස් කරමි.

අ./කලේ.
මහේස්ත්‍රාත්/පානදුර
."

Thus, there could be no doubt as to the illegality of the arrest and detention of the Petitioner. Even if this Court were to disregard the said order of the Magistrate's Court, the affidavits produced by the Petitioner's father ("P1"), his friends ("P3 (a), P3 (b), P3 (c), P3 (d), and P3 (e)") and manager of the Petitioner's company ("P4") unequivocally establish that the 1st to the 5th Respondent arrested the Petitioner at their whim. Thereafter, they planted evidence on him, forcibly obtained his fingerprints on the productions which had nothing to do with him and caused the Petitioner to remain in custody for over 2 months for an alleged act which he was completely innocent of. The Petitioner's motorcycle which the 1st to the 5th Respondents claim they seized at the point of arrest had been later released to its original owner by the Magistrate's Court itself in August that year (order marked "P5").

In those circumstances, I am firmly of the view that the Petitioner has established his innocence and I have no hesitation in declaring that the 1st to the 5th Respondents violated the Petitioner's rights under Article 12 (1), 13 (1) and 13 (2) of the Constitution.

In addition to the malicious conduct of 1st to the 5th Respondents, the Petitioner also claims that the 6th Respondent's delay in promptly inquiring and reporting true facts to the Magistrate's Court resulted in extending the term of protective custody. The Petitioner claims that the delay amounts to culpable inaction and that the 6th to the 8th Respondents are therefore liable for violating the Petitioner's right to equality under Article 12 (1) of the Constitution.

He further alleges that the 6th Respondent has failed to conduct an 'adequate' and 'impartial' inquiry into the matters, and that he has failed to take any disciplinary action against the 1st to the 5th Respondents for their *mala fide* exercise of powers. Furthermore, he contends that the 6th Respondent has not issued a charge sheet against the 3rd and 4th Respondents despite clear evidence of misfeasance.

In his objections the 6th Respondents has admitted to the delay caused in conducting the investigation and has stated that the delay was caused on account of the need to conduct a complete inquiry. He has produced to this Court copies of three charge sheets issued against the 1st, 2nd and 5th Respondents. He has further attached "6R1" a letter forwarded to the Director Legal of Police apprising him of the veracity of the Petitioner's version of the incident.

However, the said "6R1" has been sent on 03rd May 2012, after almost a year's lapse since the illegal arrest and detention of the Petitioner. Although the 6th Respondent states in paragraph 7 (e) in his objections dated 16th July 2014 that he recommended to the 7th Respondent (Senior Superintendent of Police, Panadura) disciplinary actions against the 1st to the 5th Respondents, I fail to see any such recommendation on the face of the document. No evidence has been produced before this Court to indicate that any disciplinary action has been taken against the 1st to the 5th Respondents.

The Petitioner has drawn this Court's attention to the dicta in **Deshapriya v. Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship "Gemunu" And Others [2003] 2 SLR 99** where Justice Mark Fernando attached liability to the Commanding Officer for, *inter alia*, want of care and failure to take prompt action against his subordinates for committing illegal acts.

> "*I turn now to the question of the 1st respondent's liability. Learned Counsel on his behalf urged that there was no evidence that he had participated in, authorized, or had knowledge of any act of torture or cruelty, and stressed that no one had complained to him about any such act. He contended that the 1st respondent would not be liable for whatever his subordinates might have done unless it was proved that he had knowledge thereof and neverthe-less refrained from taking remedial action.*
>
> *The 1st respondent's responsibility and liability is not restricted to participation, authorization, complicity and/or knowledge. His duties and responsibilities as the Commanding Officer were much more*

onerous. In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody (like the petitioner) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contact with detainees. The fact that the petitioner was being held in custody under his specific orders made his responsibility somewhat greater.

In his affidavit the 1st respondent merely denied participation, authorization and complaints. He did not claim that he had taken any steps, either personally or through responsible subordinates, to ensure that the petitioner was being treated as the law required. Such action would not only have prevented further ill-treatment, but would have ensured a speedy investigation of any misconduct as well as medical treatment for the petitioner. It is not clear whether the petitioner did receive medical treatment. But that makes little difference to the liability of the 1st respondent. If the petitioner did receive medical treatment, then the 1st respondent ought to have known that he had been ill-treated. If the petitioner did not receive medical treatment for his injuries, the denial of medical treatment was itself inhuman treatment violative of Article 11, for which the 1 st respondent shares responsibility.

If indeed the 1st respondent really did not know how the petitioner was being treated, that was willful ignorance due to want of care, and not a genuine lack of knowledge."

This Court adopted a similar line of thinking in **Sriyani Silva v Iddamalgoda, OIC Payagala [2003] 2 SLR 63**.

While taking due cognizance of these judgments, it is my considered view that the circumstances of the present case do not meet the high threshold established in the aforesaid cases. There is evidence that the 6th Respondent in the present application did conduct an inquiry and inform the Magistrate's Court which paved way the Petitioner's discharge. Nevertheless, I note with disapproval, the marked failure by the 6th Respondent to pursue these actions to any meaningful conclusion. As

pointed earlier, there is no indication that any disciplinary action has been taken against the 1st to the 5th Respondents despite clear evidence of illegal conduct.

Having regard to the facts and circumstances of the case, which do not meet the same gravity elucidated in the previous cases, I desist from issuing a declaration that the 6th to the 8th Respondents' conduct amounts to an infringement of Article 12 (1). However, I place on record my strong disapproval of the delay and lethargy demonstrated by the 6th and the 7th Respondents in inquiring into the matter. It has been brought to the attention of the Court that the 6th Respondent has retired from service during the pendency of this Application. In view of this, I direct the 7th and 8th Respondents or the present incumbents of the office of Senior Superintendent of Police Panadura and Inspector General of Police to promptly inquire and report to this Court the actions against the 1st to the 5th Respondents for their illegal exercise of powers not later than three months from the date of the delivery of this judgement.

No doubt, the enthusiasm to combat crime on the part of the police is to be appreciated, however, what the Respondents have done in the instant case is quite serious in that; not only they foisted a trumped up charge against the Petitioner, the Respondents physically introduced Cannabis and produced it with a report containing a false statement before the learned magistrate thereby misleading the court. The Respondents in fact had practiced a deception on the court. Police are vested with wide powers for the purpose of conducting investigations into crime, and it's needless to say that those powers are vested to be used with utmost honesty and integrity for the betterment of the society in order to protect the society from criminal elements and certainly not to their detriment. This court cannot condone the callous disregard the Respondent displayed towards the applicable legislative provisions and the conduct of the Respondents amounts to an offence under section 193 of the Penal Code.

The mental trauma the Respondents by their conduct, had subjected the petitioner and his family, would have been immeasurable.

The Petitioner is entitled to a declaration that rights guaranteed to him by Article 12 (1), 13 (1) and 13 (2) of the Constitution have been violated by the 1st to the 5th Respondents. I partially allow the Petitioner's application and direct the State to pay a sum of Rs 40,000/- to the Petitioner and direct 1st, 2nd, 3rd and the 4th Respondents to pay Rs. 35, 000/- each as compensation to the Petitioner and the 5th Respondent to pay Rs. 50,000/- as compensation to the Petitioner.

Application partly allowed.

Judge of the Supreme Court

Justice Vijith K. Malalgoda PC.

I agree

Judge of the Supreme Court

Justice Murdu N. B. 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 Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Daya Chandrasiri Jayanetti
2. Dandeniyage Nandalal Gamini de Silva
3. Ranasinghe Arachchige Anuruddha Roshana Silva
4. Piyadasa Madarasinghe
5. Ananda Deepthi Edussuriya
6. Pullipu Widana Cyril Dayaratne
7. Ananda de Silva
8. Rohana Ranaweera
9. Ravi Roshan Madarasinghe
10. Cyril Gunasekara
11. Marina Hiranthi Seneviratne
12. Rajasinghe Pathirage Anusha Shyamali
13. Kottage Osman Perera
14. Chandani Edussuriya
15. Lintan Nalawansa
16. Dandeniya Chandralal Amarasiri de Silva

Petitioners

SC/FR 621/2010

Vs

1. Urban Development Authority
2. Municipal Council Sri Jayawardenapura Kotte
3. RM Swarna Silva The Mayor Municipal Council Sri Jayawardenapura Kotte
4. Director General, Urban Development Authority
5. Shantha P Liyanage, The Municipal Commissioner

Sri Jayawardenapura Kotte

6. MR Siriwardene, Director Enforcement
   Urban Development Authority
7. Lalithasiri Gunawansa
   Secretary, No.1 D.R.Wijewardene Mawatha
   Colombo 10.

8. Mahinda Balasuriya
   The Inspector General of Police
9. Royal Institute, No.10, Chapel Lane, Nugegoda
10. GT Bandara No.191 Havelock Road, Colombo 5
11. General Manager Railways
12. Hon.Attorney General.
13. R.A.D. Janaka Ranawaka
    The Mayor, Municipal Council,
    Sri Jayawardenapura Kotte,
    Rajagiriya
14. Pujith Jayasundara.
    The Inspector General of Police
    Police Head Quarters, Colombo 1
15. Wasanthi Ratnapala
    (for 5th Respondent)
    The Municipal Commissioner
    Sri Jayawardenapura Kotte,
    Rajagiriya.
16. M.P. Ranathunga
    (for 6th Respondent)
    Director Enforcement
    Urban Development Authority
    Sethsiripaya, Battaramulla.
17. G.S. Withanage
    (for 7th Respondent)
    Secretary, Ministry of Transport
    Secretary, No.1 D.R.Wijewardene Mawatha
    Colombo 10.
18. Wasanthi Ratnapala.
    (for 13th Respondent)
    Municipal Commissioner,

Municipal Council,
Sri Jayawardenapura Kotte,
Rajagiriya
Respondents

Before : Sisira J de Abrew J
Priyantha Jayawardena PC,J
L.T.B. Dehideniya J

Counsel : Gamini Marapana PC with Navin Marapana,
Mahinda Nanayakkara and U Wickramasinghe
for the Petitioner
Indika Demuni de Silva DSG for the 1st,7th,8th,11th and 12th Respondens.
Neville Abeyratne with Kaushalya Abeyratne for the 2nd,3rd and 5th Respondents
Faiz Musthapa PC with Manohara de Silva PC for the 9th and 10th Respondents

Argued on : 6.7.2018, 11.7.2018, 16.7.2018

Written Submission
tendered on : 26.9.2018 by the Petitioners
10.10.2018 by the 1st,4th,11th,12th,13th, and 17th Respondents
20.8.2018 by the 2nd,3rd, and 5th Respondents
19.9.2018 by the 9th and 10th Respondents
Decided on : 3.4.2019

Sisira J de Abrew J.

The Petitioners, by this petition, seeks a declaration that their fundamental rights guaranteed by Article 12(1) and 14(1)(h) of the Constitution have been violated by the 1st to 8th and 11th Respondents.

This Court by its order dated 13.12.2010, granted leave to proceed for the alleged violations of fundamental rights guaranteed by Article 12(1) of the Constitution of the Republic. This Court also granted an interim order as prayed for in paragraph (g) of the prayer to the petition preventing the 9th (Royal Institute) from constructing illegal and unauthorized buildings. The petitioners, inter alia, complain the following matters.

1. The petitioners reside and/or in close proximity to Chapal Lane Nugegoda where the 9th Respondent is presently illegally and/or wrongfully carrying on a business of an international School in contravention of the Development Plan-Sri Jayawardenepura Kotte Municipal Council Area (Zoning Regulations) 2008-2020 marked as P1.

2. The Royal Institute International School is now housed in two buildings on premises bearing assessment Nos.10,17 and 19/1 Chapal Lane. Apart from the said school, the 9th respondent is illegally constructing a fourteen storied building on approximately 25 perches of land bearing assessment No.12 Chapal Lane abutting a twenty feet road. The 10th Respondent who is the Managing Director of Royal Institute (9th Respondent) in paragraph 5(jj) of his objection admits that he has got approval to construct a building which consists of Basement, Ground and Mezzanine Floor plus ten upper floors. Thus it is clear that the 9th Respondent is getting ready to construct or constructing the said building.

3. According to the Development Plan-Sri Jayawardenepura Kotte Municipal Council Area (Zoning Regulations) 2008-2020 marked P1(page 3 of P1) the said Chapal Lane is situated in a Mixed

Development Zone and educational institutes are not permitted to be established.

4. The 9th Respondent has established an International School in Chapal Lane which has resulted in severe inconvenience being caused to the Petitioners and other residents of Chapal Lane. The school has a student population of 2000 students. The 10th Respondent in paragraph 12 of his affidavit admits that there is a school at Chapal Lane and the student population of this school is 1900. The 10th Respondent in paragraph 5(c) and (d) of his affidavit also admits that in the four schools of the 9th Respondent (Havelock Road, Maya Avenue, Chapal Lane Nugegoda and Maharagama) students are being trained for Cambridge GCE advanced Level Examination. The 4th Respondent in paragraph 10 of his affidavit too admits that the 9th Respondent is running an International School at Chapal Lane Nugegoda. Thus it is established that 9th Respondent is running a private International School at Chapal Lane Nugegoda and the student population of the said school is 1900.

5. As a result of the aforementioned actions of the 9th Respondent, the residents are being greatly inconvenienced especially due to traffic congestion which has hampered daily activities of the residents. The noise caused by the said school of the 9th Respondent and the traffic congestion have made residing and travelling along the said Chapal Lane a near impossibility and have violated the petitioner's and the other resident's rights including the right of movement [paragraph 8(vi) and 8(vii) of the petition].

6. The 9th Respondent is in the process of constructing a high rise building on a twenty five (25) perch block abutting 20 feet road at Chapal Lane, Nugegoda. As per Planning & Building Regulations of UDA 2005 marked as P4, it is prohibited to construct high rise building in excess of five (5) stories including the ground floor unless the plot of the land is forty (40) perches. Further according to the said regulations, it is prohibited to construct an aforementioned high rise building unless the site abuts a street which is no less than twelve meters in width. The above facts have been stated in paragraph 10(i), (iv) and (v) of the petition. [The 10th Respondent however in his affidavit admits that the building at No.10 and 12 Chapal Lane Nugegoda will consist of Basement, Ground Floor, Mezzanine Floor plus ten upper floors.]

The Petitioners state that the site upon which the said high rise building is being constructed abuts a street (Chapal Lane) of twenty (20) feet wide (approximately 6.1 meters) which is less than what is permitted by P4 [paragraph 10(vi) of the petition]. The 4th respondent too, in his affidavit, admits that the width of the said road is six meters.

The Petitioners further complain that running of a private school or International School at Chapal Lane is illegal and constructing the aforementioned high rise building is also illegal. The Petitioners inter alia moves this court to grant the following reliefs.

1. A declaration declaring that the Petitioners fundamental rights guaranteed by Article 12(1) and 14(1)(h) of the Constitution have been violated by the 1st to 8th and 11th Respondents .

2. A direction to the 1st to 8th and 11th Respondents to demolish all illegal constructions pertaining to the buildings on premises bearing assessment Nos.10 and 12 Chapal Lane Nugegoda.

3. An order directing the 2nd and/or 3rd Respondents to cancel all the permits (if any) granted to Royal Institute to carry on business of International School Chapal Lane, Nugegoda.

4. An order directing the 2nd Respondents and/or 3rd Respondents to take steps to evict Royal Institute from premises situated at Chapal Lane, Nugegoda.

I will now consider whether Chapal Lane Nugegoda falls within a Mixed Development Zone or not. The 4th Respondent (Director General, Urban Development Authority) in his affidavit filed in this court admits that Chapal Lane Nugegoda falls within a Mixed Development Zone in Sri Jayawardenapura Kotte Municipal Area. The document marked 9R17 was produced by the 10th Respondent with his affidavit. This document (9R17) is a letter dated 22.6.2017 issued by the UDA to the 10th Respondent. The Director (Enforcement) UDA in the said letter admits that the Chapal Lane Nugegoda falls within the Mixed Development Zone in Sri Jayawardenapura Kotte Municipal Area. Considering all the above matters, I hold that the Chapal Lane Nugegoda falls within a Mixed Development Zone in Sri Jayawardenapura Kotte Municipal Area.

Learned President's Counsel for the 9th and 10th Respondents contended that the applicable Regulations are 9R4, 9R5,9R11 and 9R12. But when the above documents are examined, it is clear that the said Regulations are applicable to the Colombo Municipal Area. I have earlier held that Chapal Lane Nugegoda

falls within the Mixed Development Zone in Sri Jayawardenapura Kotte Municipal Area. For the above reasons I hold that above regulations (9R4,9R5,9R11 and 9R12) are not applicable to Chapal Lane Nugegoda. The 10th Respondent who is the Managing Director of the Royal Institute (9th Respondent) states, in his affidavit filed in this court, that the 9th Respondent became the owner of the property at No.10, Chapal Lane, Nugegoda in April 1999. On an application dated 5.4.1999, Sri Jayawardenepura Kotte Municipal Council issued a development permit marked 9R9 dated 4.6.99 to construct a building (Teaching Block) consisting of ground floor plus **four (4)** upper floors. What is the applicable regulation, in the year 1999, to issue the Development Permit marked 9R9? The Regulations published in Government Gazette No.392/9 dated 10.3.1986 marked P4 were in operation in the year 1999. These Regulations were in operation in Sri Jayawardenepura Kotte Municipal Council area until Regulations marked P1 and P3 came into operation on **21.4.2008**. Therefore when Sri Jayawardenepura Kotte Municipal Council issued the said development permit marked 9R9 to the 10th Respondent, the applicable regulations were the regulations marked P4. The 10th Respondent constructed a building at No.10, Chapal Lane, Nugegoda and he is now running a school in this building. Therefore the building permitted by the development permit marked 9R9 has now been completed. The 10th Respondent later made another application to build a building consisting of ground floor plus **ten upper floors** at No.12 Chapal Lane Nugegoda. Learned President's Counsel appearing for 9th and 10thRespondents contended that Section 6(3)(c) of the Interpretation Ordinance should apply to all applications made by the 9th and 10th Respondents

to construct buildings. Section 6(3)(c) of the Interpretation Ordinance reads as follows.

"Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-

(a) omitted

(b) omitted

(c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

The building consisting of ground floor plus four (4) upper floors has now been completed. Construction of an additional building at No.10 Chapal Lane, Nugegoda has been admitted by the 9th and 10th Respondents in their written submissions dated 19.9.2018. The inspection report marked 4R11 establishes the fact that two buildings (Ground floor + three floors and Ground floor + four floors) already exist at No 10 and 12 Chapal Lane Nugegoda. Thus if this building too is also completed there will be three buildings at No.10 and 12 Chapal Lane, Nugegoda. When I consider all the above matters, I am of the opinion that Section 6(3)(c) of the Interpretation Ordinance does not apply to this building. I have earlier pointed out that when 9th Respondent purchased the premises at No.10, Chapal Lane Nugegoda and when the development permit marked 9R9 was issued to the 10th Respondent, the applicable regulations were

the regulations marked P4. The 9th Respondent made an application to construct a building consisting of ground floor plus **four (4)** upper floors at No.10, Chapal Lane Nugegoda and the development permit marked 9R9 was also issued. According to Section 27(1) of the Regulations marked P4, to construct a building consisting of ground floor plus **four (4)** upper floors, the minimum plot size (the extent of the land) should be 40 perches. But the extent of the land at No.10, Chapal Lane is only 38.6 perches. The 10th Respondent in his affidavit [paragraph 5(m)] too admits that the extent of this land is only38.6 perches. Therefore according Section 27(1) of the Regulations marked P4, this building consisting of ground floor plus **four (4)** upper floors cannot be permitted to be built. Further when 10th Respondent started constructing this building ground floor plus **four (4)** upper floors, there was already a building consisting of ground floor plus three (3) upper floors at No.10, Chapal Lane Nugegoda and a certificate of conformity [COC] marked 9R8 had already been issued to this building. This position has been admitted by the 10th Respondent in his affidavit [paragraphs 5(n) and 5(o) of the affidavit of 10th Respondent]. Thus building had taken a certain extent of the land of 38.6 perches. Then how did the UDA issue a permit to construct another building at No.10, Chapal Lane Nugegoda? How can there be two buildings [one is ground floor plus three (3) upper floors and the other one is ground floor plus **four (4)** upper floors] on a land extent of which is only 38.6 perches? On this ground alone the 2nd building [ground floor plus **four (4)** upper floors] at No.10, Chapal Lane Nugegoda for which development permit marked 9R9 had been issued can be declared an illegal building. Learned President's Counsel appearing for 9th and 10th Respondents tried to advance an argument that both these buildings could be permitted since the two blocks of

land at No.10 and 12 Chapal Lane have been amalgamated. I now advert to this contention. After the amalgamation what is the extent of the entire land? It is (38.6+26) 64.6 perches. To permit two buildings on this amalgamated land, there must be eighty (80) perches according to Section 27 of the Regulations marked P4. When I consider the above matters, I feel that both buildings cannot be permitted. For the above reasons, I reject the above contention of learned President's Counsel for the 9th and 10th Respondents.

Learned President's Counsel for the 9th and 10th Respondents tried to contend that the 2nd building [building consisting ground floor plus **four (4)** upper floors] at No.10, Chapal Lane Nugegoda had been regularized. He relied on a document marked 4R11 which is said to be an inspection report. This is a document which has been issued by UDA. When I examine the date on which it has been signed, the said date has been interpolated. It appears that 1/3/08 had been interpolated to read as 1/3/11. At this stage it is interesting to point out a letter signed by the Chairman of UDA marked 9R26 directing the 10th Respondent to demolish both buildings [ground floor+ 3 upper floors and ground floor + 4 upper floors] at No.10, Chapal Lane. The date of this latter is 8th Nov 2010. The date of the inspection report marked 9R11 had been interpolated to read as 1/3/2011 when the original date appears to be 1/3/2008. I would like to point out again that the Chairman of the UDA by the said letter marked 9R26 directed the 10th Respondent to demolish both buildings at No.10 and 12 Chapal Lane, Nugegoda. It has to be noted here that Sri Jayawardenepura Kotte Municipal Council issued Development Permit marked 9R9 to construct a building consisting of ground floor + 4 upper floors at No.10 Chapal Lane, Nugegoda. But when the building was completed surprisingly the building was having

ground floor + **5 upper** floors. Learned President's Counsel who appeared for the 9th and 10th Respondents admitted before us that the 2nd building, as at present, was having ground floor + **5 upper** floors. Therefore it has to be noted here that one additional upper floor in this building has come up violating the building permit marked 9R9. Thus 9th and 10th Respondents have intentionally violated the building Permit marked 9R9. When I consider all the above matters, I hold that the 2nd building [before construction, ground floor + four upper floors but after the construction, ground floor + 5 upper floors] is an illegal building and cannot be permitted to stand.

I would like to point out another illegality with regard to the 2nd building [before construction, ground floor + four upper floors but after the construction ground floor + 5 upper floors] No.10 Chapal Lane, Nugegoda. Regulation No. 27(2) of P4 reads as follows.

"No plan of the sight shall be approved for the construction of a highrise building unless:-

(1) omitted

(2) the site abuts on a street which is not less than 12 meters in width."

Thus according to the said Regulation No.27(2) in order to construct a building consisting of ground floor + 4 upper floors the width of the access road cannot be less than 12 meters. The access road is the Chapal Lane. What is the width of the access road? It is only 6 meters wide. The Petitioners state width of the Chapal Lane is only 6 meters. The 4th Respondent too in his affidavit admits this position. Therefore the 2nd building [before construction, ground floor + four

upper floors but after the construction, ground floor + 5 upper floors] at No.10 Chapal Lane, Nugegoda cannot be permitted to stand on the ground. When I consider all the above matters, I hold that the 2nd building even if it has only ground floor + four upper floors would be an illegal building and therefore cannot be permitted to stand on the ground.

I would like to point out another matter. Learned counsel for the 2nd Respondent (Sri Jayawardenepura Kotte Municipal Council) very honourably admitted before us that no COC (Cetificate of Confirmation) had been issued by the said Municipal Council for the 2nd building [before construction, ground floor + four upper floors but after the construction ground floor + 5 upper floors] at No.10 Chapal Lane, Nugegoda. Then can anybody occupy this building? The present regulations applicable to construction in Sri Jayawardenepura Kotte Municipal Council area are marked as P1 and P3 which came into operation on 21.4.2008 by Government Gazette No.1546/3. According to Section 28(1) of the said Regulations, no person is permitted to occupy a building if COC is not issued to the building. The 10th Respondent in his affidavit admits that he is running a school at Chapal Lane, Nugegoda and that the student population is around 1900. The running of the said school in the 2nd building at No.10 Chapal Lane, Nugegoda is illegal since COC had not been issued to the said building.

I will now consider whether the 9th and the 10th Respondents have got permission to run a school at Chapal Lane, Nugegoda. The 10th Respondent has produced a certificate marked 9R3A which states that Royal Institute at No.191, Havelock Road, Colombo 05 is registered as an Institute to conduct Courses and Examination in Computer Programming, Secretarial Practice and English Language. But the 9th and the 10th Respondents have not produced any

certificate or a document which gives permission to run a school at Chapal Lane Nugegoda. The regulations relating to construction, business and etc. are found in documents marked P1 and P3 which came into operation on 21.4.2008 by Government Gazette No.1546/3. Since the 9th and the 10th Respondents have not got any approval to run a Private School at Chapal Lane, Nugegoda, whether they can run a Private School at Chapal Lane, Nugegoda has to be considered under the new regulations marked P1 and P3. I have earlier pointed out that Chapal Lane, Nugegoda comes under Mixed Development Zone in Sri Jayawardenepura Kotte Municipal Council Area. According to page 9 of P1, schools and/or International Schools are not permitted in Mixed Development Zone. Therefore no person is permitted to run schools and/or International Schools at Chapal Lane, Nugegoda. For the above reasons, I hold that running of Private Schools and/or International Schools at Chapal Lane, Nugegoda is illegal and that the 9th and/or the 10th Respondents cannot run any Private Schools and/or International Schools at Chapal Lane, Nugegoda. Since the 10th Respondent has in his affidavit admitted that he runs a school in the name of Royal Institute in both buildings at No.10 Chapal Lane, Nugegoda, he must stop running of schools at Chapal Lane, Nugegoda.

The10th Respondent has made an application to Sri Jayawardenepura Kotte Municipal Council to construct a building consisting of Basement, Mezzanine floor plus ten upper floors at No. 10 and12 Chapal Lane, Nugegoda. The extent of this land is only 64.6 perches. The plan for this building has been submitted to Sri Jayawardenepura Kotte Municipal Council on **27.2.2008** (vide endorsement on 9R23, the proposed plan). Thus the applicable regulations are the regulations found at document marked P4. The width of the Chapal Lane is

only 6 meters. Thus according to Section 27(2) of the said regulations which I have referred to earlier, this building cannot be permitted to be built and if the said building has already been constructed it has to be demolished. When I consider the aforementioned matters, I hold that the development permit issued to construct the above mentioned building marked 9R22 extended by 9R24 has violated the above regulations and that therefore it becomes an illegal document. However learned President's Counsel (PC) appearing for the 9th and the 10th Respondents admitted at the hearing before us that there is no any building at No.12, Chapal Lane Nugegoda and that the development permit issued to construct the above mentioned building marked 9R22 extended by 9R24 has now lapsed. However if the building shown in 9R23 has been constructed or part of the said building has been constructed at No.12, Chapal Lane Nugegoda, the 1st and the 2nd Respondents should take all steps to demolish the said building. I have earlier held that the 2nd building (before construction, ground floor + four upper floors but after construction, the building was having ground floor + **five** upper floors) at No.10, Chapal Lane, Nugegoda is an illegal building; that running of any Private School and/or International School at Chapal lane is illegal; and that the Development Permit marked 9R22 extended by 9R24 is illegal. The 1st and the 2nd Respondents have permitted the aforementioned actions. For the above reasons, I hold that the1st and the 2nd Respondents have violated the fundamental rights of the Petitioners guaranteed by Article 12(1) and 14(1)(h) of the Constitution.

For the aforementioned reasons, I make the following orders.

1. The 1st and the 2nd Respondents are directed to demolish all illegal constructions pertaining to the buildings on premises bearing assessment Nos.10 and 12, Chapal Lane, Nugegoda.

2. The 2nd Respondent is also directed to cancel all permits (if any) granted to royal Institute, the 9th Respondent to carry on business of an International School at Chapal Lane Nugegoda.

The 1st and 2nd Respondents are given three months time from the date of this judgment to comply with the directions given in this judgment.

Judge of the Supreme Court.

Priyantha 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 under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (F/R) Application No. 642/2012.

1. D.C.P. Kaluarachchi,
No. 442/3, Neelammahara Road,
Maharagama.

2. J.D.D.L. Gunasekera,
No.10A, Thalgaspe,
Elpitiya..

3. K.A. Sugath,
No.1/155, Halathota,
Kalutara.

4. S. Ranjan,
No.28, Futimagiri Mawatha,
Batticaloa.

5. K.D.S. Chandra Kumara,
No.45/17, Chandraloka Mawatha,
Thalapathpitiya,
Nugegoda.

6. T.H.M. Sumith Sisira Herath,
No. 47/53, Sir Kuda Rathwatte
Mawatha,
Kandy.

7. A.A. Roshan Perera,
No.836/5, Kurusawala,
Thumpeliya,
Ja-Ela.

8. M.B. Wijeratne,
No.584/2, Halmillaketiya,
Thunkama,
Embilipitiya.

9. I.J.A. Perera,
No. 843/1, Daham Mawatha,
Thalangama North,
Malabe.

10. A.L.A. Herbert Priyantha
Liyanage,
No. 7/G, Station Road, Khahalla,
Katugastota.

PETITIONERS.

-VS-

1. Prof. Dayasiri Fernando.
   Former Chairman,

2. Srima Wijeratne,
   Former Member,

3. Palitha Kumarasinghe,
   Former member,

4. S.C. Mannapperuma,
   Former Member,

5. Ananda Seneviratne,
   Former Member,

6. N.H. Pathirana,
   Former Member,

7. S. Thillanadarajah,
   Former Member,

8. M.D.W. Ariyawansa,
   Former Member,

9. A. Mohamed Nahiya,
   Former Member,

All of the Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5.

10. D.G.M.V. Hapuarachchi,
Former Commissioner General of Excise,
Excise Department of Sri Lanka, No.34,
W.A.D. Ramanayaka Mawatha,
Colombo 2.

10 A. L.K.G. Gunawardena,
Former Commissioner General of Excise,
Excise Department of Sri Lanka, No.34,
W.A.D. Ramanayaka Mawatha,
Colombo 2.

10B. K.H.A. Meegasmulla,
Commissioner General of Excise,
Excise Department of Sri Lanka, No.34,
W.A.D. Ramanayaka Mawatha,
Colombo 2.

11. P.B. Jayasundara,
Former the Secretary,

Ministry of Finance and Planning,
The Secretariat,
Colombo 1.

11A. R.H.S. Samarathunga,
The Secretary,
Ministry of Finance and Planning,
The Secretariat,
Colombo 1.

W.M.N.J. Pushpakumara,
Commissioner General of Examinations,
Department of Examinations,
P.O. Box 1503,
Colombo.

12. S.M.J. Ariyakumara,
Excise Inspector,

13. K.S.M.G.M. Bandara,
Excise Inspector,

14. C.P.J. Otupitarachchi,
Excise Inspector,

15. B.P.A.M. Asela Fernando,
Excise Inspector,

16. A.A. Sunil Gunathunga,
    Excise Inspector,

17. I.N.R.W. Ilangakone,
    Excise Inspector,

18. E.B.B.H. Kumara,
    Excise Inspector,

19. G.N. Kumarage,
    Excise Inspector,

20. T.L.D. Mendis,
    Excise Inspector,

21. S.S.B. Perera,
    Excise Inspector,

22. K.L.D.T.A. Regies,
    Excise Inspector,

23. G. Vineetha Rathnapala,
    Excise Inspector,

24. R.A.D.P.K. Senaratne,
    Excise Inspector,

25. M. Jayantha Silva,
    Excise Inspector,

26. C.H. Sirimanna,
    Excise Inspector,

27. T.C. Wijewardena,
    Excise Inspector,

28. H.K. Meththasinghe,
    Excise Inspector,

29. Y.A.S.P. Yapa,
    Excise Inspector,

30. T.D.J. Dissanayaka,
    Excise Inspector,

31. Kalarasike Wijesinghe,
    Excise Inspector,

32. Dileep Nirosha Jayakody,
    Excise Inspector,

33. A.W.M. Majeed,
    Excise Inspector,

34. U.B. Marasinghe,
    Excise Inspector,

35. D.M.C.P. Jayawardena,
    Excise Inspector,

36. M.D. Welagedara,
    Excise Inspector,

37. D.H.K. Aruna,
    Excise Inspector,

38. M.A. Nimal Shantha,
    Excise Inspector,

39. Ravindra Panveriya.
    Excise Inspector,

40. W.T.R. Samantha,
    Excise Inspector,

41. H.G.P. Ranaweera,
    Excise Inspector,

42. I.M.D. Tennakoon,
    Excise Inspector,

43. D.J.P. Udayakumara,
    Excise Inspector,

All c/o Excise Department of Sri Lanka, No.34,
W.A.D. Ramanayaka Mawatha,
Colombo 2.

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

45. Sathya Hettige,
    Former Chairman,
    Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita.

46. Kanthi Wijetunga,
    Former Member,

47. Sunil A. Sirisena,
    Former Member,

48. I.N. Soyza,
    Former Member,

    All of the Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita,
    Colombo.

49. Dharmasena Dissanayaka,
    Chairman,

50. A. Salam,
    Member,

51. V.Jagarajasingham,
    Member,

52. Nihal Seneviratne,
    Member,

53. Dr. Prathap Ramanujam,
    Member,

54. S. Ranugge,
    Member,

55. D.L. Mendis,
    Member,

56. Sarath Jayathilaka,
    Member,

57. Dhara Wijethilaka,
    Member,

    All of the Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita
    Respondents

BEFORE : **PRASANNA JAYAWARDENA, PC, J.**
MURDU FERNANDO, PC, J.
S. THURAIRAJA, PC, J.

COUNSEL : Pubuduni Wickramaratne for the Petitioners.

S. Rajaratnam PC, ASG for 10B, 11A, 44th, 49th, 51st-57th Respondents.

Uditha Egalahewa PC with Ranga Dayananda for the 15th- 18th , 21st , 25th-28th, 30th , 32nd , 34th , 36th – 38th and 41st Respondents.

ARGUED ON : 11th February 2019.

WRITTEN SUBMISSIONS : Petitioners on 08th October 2018.
10B, 11A, 44th, 49th, 51st-57th Respondents on 14th March 2019.

DECIDED ON : 7th June 2019.

S. THURAIRAJA, PC, J.

The Petitioners are officials attached to the Excise Department as Chief Excise Inspectors. They have filed a Petition before this Court complaining of a violation of their fundamental rights. It is alleged that the said department has taken steps to fill 22 posts of Superintendent of Excise on the 28th August 2008. They relied on the Scheme of Recruitment as advertised in the Government Gazette No. 1156/31 dated 01st November 2000. According to the said Gazette, 50% of the said positions will be filled by seniority and merit basis and the balance 50% of the 22 vacancies by Limited Competitive Examination.

It is observed that, 11 positions were under the category of seniority and merits were challenged before this Court and was settled subsequently.

The Excise Department took steps to fill the remaining 11 vacancies (Under the Limited Competitive Examination category) for the post of Superintendents of Excise by letter dated 5th July 2012 under the Reference No. EB/102/02/VI under the signature of Excise Commissioner General and called for applications. The Chief Excise Inspectors Union, being agitated with the said letter commenced making representatives to various authorities including the Excise Commissioner General. This is observed by "P 13" a letter dated 17th July 2012 addressed to Excise Commissioner General. This factor proves that, the Petitioners are in receipt of the said letter on or about 5th July 2012 (marked as "P9").

The Petitioners' grievance is that, the vacancies which arose in 2008 were to be filled in 2012 from among officers including those who are qualified as at 2012, hence, a serious prejudice will be caused to the officers who were qualified in 2008. The Limited Competitive examination was held as scheduled on 11th November 2012 and according to the exam results indicate 27 candidates have passed, which includes only 3rd , 4th , 5th and 7th Petitioners. Other Petitioners were not successful in the said exam.

Initially this Court granted leave to proceed under Article 12(1) and stayed the promotions.

The Respondents have submitted a proper explanation for the delay, in holding the exam, which includes pending cases before the Supreme Court, delay in constitution of Public Service Commission, formulating a new recruitment policy for the Excise Department and many other reasons.

Counsels for the Respondents raised a preliminary objection from the inception that, the Petition is time barred; hence, the Petitioners cannot maintain this application.

This matter was fully argued before this bench and all Counsel were given an opportunity to file further written submissions. Senior Additional Solicitor General who appeared for 10th, 44th, 49th, 51st, 52nd, 53rd, 54th, 55th, 56th and 57th Respondents filed written submissions, emphasizing his preliminary objection.

When we perused the brief, we find that, the Scheme of Recruitment was advertised on 1st November 2000 (marked as "P3"). The first recruitment to the post of Superintendent of Excise under the Seniority and Merit Category had commenced in August 2008.

The present process of calling for applications were commenced by the Commissioner General of Excise by letter dated 5th July 2012 (marked as "P9"), indicating the closing date as 2nd August 2012. As discussed earlier, it can be well presumed that, all these Petitioners have received "P9" on or before the 17th of July 2012.

It is submitted that, they have made an application to the Human Rights Commission on 3rd September 2012 (marked as "P 17") and the present petition is submitted before this Court on 1st November 2012 which are after the due period stipulated in the Constitution.

We are of the view that, petitioners have failed to challenge the "P 9" within the prescribed period stated in the Constitution.

In **Alagaratnam Manorajan v. Hon G.A. Chandrasiri and others [SC 261/2013 (F/R)]**, SC Miunutes of 11.09.2014, her Ladyship Justice Eva Wanasundera observed that,

""I am of the opinion that, Section 13 of the Human Rights Commission Act No.31 of 1996 should not be interpreted and/or used as a rule to suspend the one month's time limit contemplated by Article 126(2) of the Constitution, particularly when the person alleging the violation of his fundamental rights has not made his complaint to the HRC within one month of the alleged violation. The provisions of an ordinary Act of Parliament should not be allowed to be used to circumvent the provisions in the Constitution..."

As held by this Court, both in the Case of **Subasinghe vs. The Inspector General of Police** [SC Special 16/99 SC Minutes of 11.09.2000] and the case of **Divalage Upalika Ranaweera and others vs. Sub Inspector Vinisias and others** [SC Application 654/2003 SC Minutes 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."

In **Gamaethige vs. Siriwardana [1998 1SLR 384]** Fernando J held that,

"three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge 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 infringement and knowledge exist. The pursuit of other, remedies judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in

exceptional cases on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.."

In **Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake [SC 206/2008 (F/R)]** SC Minutes of 09.12.2016, his Lordship Justice Prasanna Jayawardena observed that,

"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 and this Court has recognized that it would fail to fulfil its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier."

In **K.H.G. Kithsiri vs. Hon. Faizer Musthapha and Five Others (SC/FR Application No.362/2017),** SC Minutes 10.01.2018, His Lordship Aluwihare observed that,

"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."

Considering the series of decisions made by this Court and the submissions made by parties with regard to Article 126(2) of the Constitution as well as sections 13 and 14 of the Human Rights Commission Act, we find that, the Petitioners have failed in complying with the requirement of the Article 126 of the Constitution hence, we uphold the preliminary objection raised by the Counsels for the Respondents.

For the purpose of clarity and completeness, we perused all materials before this Court and find that, there is no violation of fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution.

Considering all, we hold that, there is no merit in this application. Hence, we dismiss the application. We order no cost.

Application dismissed.

JUDGE OF THE SUPREME COURT

PRASANNA 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

SC (FR) Application No. 677/2012

In the matter of an Application under and in terms of Article 126 (2) of the Constitution of the Republic of Sri Lanka

1. Landage Ishara Anjali (Minor)
   Prosecutes this Application through her Next Friend,

2. Wijesinghe Chulangani,

   Both of,
   Nilmenikgama,
   Deegala, Marambha,
   Akuressa

PETITIONERS

Vs.

1. Waruni Bogahawatte,
   Matara Police Station,
   Matara

2. Officer-in-charge,
   Matara Police Station,
   Matara.

3. Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

RESPONDENTS

Before:	Buwaneka Aluwihare PC. J Priyantha Jayawardena PC. J Vijith K. Malalgoda PC. J
Counsel:	J.C Weliamuna PC with Pulasthi Hewamanne for the Petitioners Warunika Hettige De Silva, DSG for the Respondents
Argued on:	01.02.2018
Written submissions :	14.02.2018
Decided on:	12.06.2019

Aluwihare PC. J,

This is a fundamental rights application by Landage Ishara Anjali a minor (hereinafter Anjali) presented through her next friend (her mother Chulangani, hereinafter the 2nd Petitioner). In the present application the Petitioners contend that the conduct of the 1st Respondent, in taking the 1st Petitioner into custody and detaining her violated her fundamental rights guaranteed under Article 11, 12 (1), 13 (1) and 13 (2). Leave to proceed was granted for all of the above mentioned Articles. Before addressing the legal questions, it is apposite to present the facts of the case.

Anjali was a grade 10 student of the Rajakeeya Maha Vidyalaya, Telijjiwila at the time of the alleged incident. She was known among the villagers for her talent for producing instant rhythmic verses ("හිටිවන කවි"). The alleged incident took place in the midst of the school term test. On or about 17 – 07 – 2012, Anjali had returned home after sitting for two question papers and was preparing herself for the question papers of the following day. Around 3.30 pm the 1st Respondent, along with 6 other officers of the Matara Police station had come to her residence on the pretext of introducing Anjali to a local media station. It is disclosed that she was alone at home at that point. The 1st Respondent had first shown interest in her ability to produce instant rhythmic verses. One officer also requested Anjali to sing a verse about the 1st Respondent with which request she complied. Anjali claims in her petition that several people in the area gathered around her house at this point, partly due to the curiosity of seeing a Police Jeep in the vicinity and partly, hearing her rhythmic verse.

Thereafter, in the presence of the said crowd, the 1st Respondent had questioned Anjali as to whether she was sexually molested by the Chairman of the Akuressa Pradeshiya Sabha. To this question, she had emphatically answered in the negative.

However, the 1st Respondent persisted in her questioning stating that they have received information that she was subjected to an alleged sexual abuse. Anjali had continued to deny being subject to any such treatment. Around this time, her grandmother and her parents (2nd Petitioner and Landage Priyantha) had arrived at the scene. After receiving the same negative answer from Anjali to the alleged sexual abuse, the 1st Respondent stated that they need to take Anjali to the Police Station for further questioning. The parents of the 1st Petitioner objected to sending their daughter alone and sought to accompany her. However, the 1st Respondent objected, stating that it was not necessary. After several pleadings and requests, the 1st Respondent agreed to allow only the girl's grandmother to accompany her to the Matara Police station.

At the police station, the 1st Respondent had taken Anjali inside her office to question her alone. She claims that she was shouted at and threatened to divulge the truth about her relationship with the said chairman of the Akuressa Pradeshiya Sabha. Anjali had repeatedly asserted that she had no relationship with the Chairman. She also alleges that the 1st Respondent showed inappropriate photos to her during the questioning.

The 1st Respondent thereafter locked Anjali in a cell where she spent the night along with another female detainee. She had not been provided with any food or water during her overnight detention. The following morning her parents visited her and her father (Landage Priyantha) upon finding out that his daughter had not eaten from the previous night, brought her some snacks. Around 9. 30 am, Anjali had been taken to the 1st Respondent's office and she was told that serious consequences would follow if she fails to reveal the truth. She once again denied having any relationship with the Chairman. Thereafter, Anjali alleges that she was forced to sign a statement the content of which was not made known to her.

Around 10 am, Anjali had been taken to the Matara General Hospital for a medical examination. She would remain there for another 8 days, presumably on the orders

of the Respondent. Anjali's parents remained at the police station with a view to taking their daughter home once she was brought from the hospital. However, it is stated that they were asked to leave as soon as their statements were recorded.

On 19-07-2012 Anjali was subjected to a judicial medical examination. The medico-legal report dated 19- 07- 2012 of the said examination shows that there were no signs of any sexual abuse or other ailment. Despite this, Anjali had been subjected to another medical examination about 4 days later and for a third time, 2 days thereafter. At this second referral, a medical staff member informed the Police that the girl had already been examined and that she could be discharged. Nevertheless, Anjali had been kept in the hospital for 8 continuous days. Throughout this period, 2 male Police officers and 1 female police officer remained stationed in her ward.

On 22- 07 -2012, Anjali's mother, the 2nd Petitioner lodged a complaint at the Human Rights Commission (HRC) that her daughter was detained unlawfully by the 1st Respondent. The HRC promptly intervened and secured the discharge of Anjali from the hospital on 25 - 07 - 2012. Even after the discharge the girl was first taken to the Matara Police Station and was made to wait till later that day to go home.

In her statement of objections, the 1st Respondent takes up the position that she visited the 1st Petitioner's house around 7. 30 pm on 17- 02-2012 when the parents and the grandmother were in the house. She states that she visited the house after receiving a communication from the Inspector General of Police to inquire into an alleged case of sexual abuse by the Chairman of the Akuressa Pradeshiya Sabha, where, Anjali, the 1st Petitioner was the alleged victim. She states that during the inquiry, a separate incident of sexual abuse involving one Kusumsiri was revealed to her and that she considered it fit to further inquire into the said incident. She decided to take Anjali to the Police station that night as they could not finish recording the statement pertaining to the said incident allegedly

committed by one Kusumsiri. The 1st Respondent also alludes that Anjali's apparent unease at disclosing all relevant facts in front of her parents prompted her to take the 1st Petitioner to the Police Station. She denies disallowing the parents to accompany the girl and claims that it was she who suggested that someone should accompany the child when the 2nd Petitioner was reluctant to accompany Anjali as the son (brother of Anjali) was suffering from influenza. The 1st Respondent also denies that she ill-treated the girl; that she was keeping her in a cell; did not provide food; showed inappropriate photos and made Anjali sign a statement.

There are a number of discrepancies in the version presented by the 1st Respondent. Although the 1st Respondent claims that she arrived at the Petitioner's house around 7 pm when the parents were at home, affidavits produced by two neighbours of the Petitioners (marked "P5 (a), P5 (b)") disclose that they saw a Police jeep parked in front of the petitioner's house around 4 pm on the said day. These affidavits also affirm that the parents arrived at the house some time later and that they were not at first allowed to enter. The allegation that the 1st Respondent objected to parents accompanying Anjali to the Police station is also corroborated by these affidavits. Secondly, the affidavit produced by Anjali's grandmother (marked "P3") -who accompanied the girl to the police station and was physically present at the Police station the night the detention took place— discloses that Anjali was in fact kept in the cell overnight. Her affidavit also lends credence to the affidavits produced by the neighbours (P5 (a) and (b)) and to the contents in the Petition, *i.e.* that the 1st Respondent objected to allowing anyone accompanying Anjali, the 1st Petitioner. Their statements refute the claims made by the 1st Respondent in her objections and places the veracity of the Respondent's version at peril. Although the 1st Respondent had ample opportunity to discredit the content of the affidavits, she had failed to present before this Court the "In and Out" entries made on that day or the record containing details of the detainees kept in the cell as maintained by the Reserve. Furthermore, it is to be noted that the Respondent has not denied that the Human Rights Commission initiated an

investigation against her for violating the fundamental rights of the 1st Petitioner. Her responses in the statement of objections only seek to explain the failure to appear before the HRC.

Apart from these, there are a number of infirmities in the Respondent's version. Of particular interest are the reasons adduced by the 1st Respondent that prompted her to take the 1st Petitioner to the Matara Police Station. The 1st Respondent claims that she took the girl child to the Matara Police to record the statement as she seemed uneasy to speak the truth before the parents. It is difficult to believe that the 1st Petitioner who apparently showed signs of unease of speaking in front of her parents, in her own house, in a familiar background, would behave any differently, and particularly more forthcoming about the information in a completely unfamiliar background as a Police station. The 1st Respondent has further stated that it was necessary to take the girl child to the Police station as they did not have sufficient time to finish recording the statement at the 1st Petitioner's house. I fail to understand how a change of location would better facilitate recording the statement if the 1st Respondent's concern was with regards to the lack of time. In my opinion, taking Anjali to the Matara Police station, which was approximately 30 kms away from her house, would have had precisely the opposite effect. The purported reasons therefore appear wholly counter-intuitive and unconvincing. The 1st respondent has only produced an extract of the notes taken during the investigation at 8.15 pm on 17 – 07 – 2012. In the said extract, it is stated that the 1st Respondent took her to the Batapola junction to inquire into the alleged sexual abuse by the three-wheeler driver. This investigation relating to the scene had taken place at 10 pm on the same day. The 1st Respondent has failed to explain why there was such an urgency to take all these steps during the remaining hours of the same day. In the absence of any such reasons, the urgency displayed by the 1st Respondent in taking the 1st petitioner away from her home to record a statement, and inspect the scene at such an hour appears rather unusual. Furthermore, the notes taken by the 1st Respondent do not disclose the events that

transpired at the police station. The failure to produce the statements recorded and the notes of investigation add to the infirmities in the Respondent's version.

Apart from Section 109 (6) of the Code of Criminal Procedure Act no 15 of 1979, there is no other provision under the Code that empowers a police officer making investigations, to order the attendance of a person acquainted with the circumstances of the case, before that officer. Even such a request has to be in writing, under the said provision. The provisions of the Code do not in any manner empower a police officer to restrict the liberties that are recognized and enjoyed by the public. In terms of Article 4 of the Constitution one manner in which Sovereignty is to be enjoyed by the people is through the fundamental rights which are by the Constitution declared and recognized.

Paragraph (d) of Article 4 of the constitution 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 to the extent hereinafter provided"* (Emphasis added).

Admission on the part of the 1st Respondent, that she decided to take Anjali to the Police station that night as they could not finish recording the statement pertaining to the said incident allegedly committed by one Kusumsiri and that it was necessary to take the girl child to the Police station as they did not have sufficient time to finish recording the statement at the 1st Petitioner's house are clear instances where the 1st Respondent had failed to respect the fundamental rights of Anjali. If there was no time to conclude recording her statement on that day, the 1st Respondent could easily have adjourned recording the statement for another day. These are steps taken by the police in the course of investigations day in and day out. Anjali was in the midst of sitting for her term test at the relevant time. She was not only removed from her home by the 1st Respondent but also made

her stay at the hospital for no ostensible reason, even after a medical examination clearing her from being subjected to a sexual assault.

On the other hand, this was not a complaint made by Anjali or her parents but by a third party ostensibly who had no connection to Anjali's family. The moment Anjali and her parents denied the occurrence of any such incident, I cannot understand the undue enthusiasm on the part of the 1st Respondent to pursue with the investigation. The only conclusion, this court can draw is that 1st Respondent was purely acting in order to satisfy the desires of her superiors or a third party. Thus, the conduct of the 1st Respondent cannot be condoned by any measure and must be frowned upon.

In contrast, I find that the version narrated by the 1st and 2nd Petitioner is consistent, supported by the affidavits of the others, and is intrinsically more probable. The Respondent's version when assessed against the Petitioners' version impress upon us that the 1st Respondent took the girl child away from her house not to finish recording the statement, but to coerce her to make a different statement to that made by her at her place.

With that in mind, it is pertinent to examine whether the conduct of the 1st Respondent amounts to a violation of Article 11, 12 (1), 13 (1) and (2).

Violation of Article 13 (1)

The 1st Petitioner claims in the Petition that the 1st Respondent subjected her to arbitrary arrest and detention and thereby violated Article 13 (1) of the Constitution.

Article 13 (1) of the Sri Lankan Constitution declares the rights relating to personal liberty and criminal procedure. It reads; "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The Article guarantees freedom from arbitrary arrest and mandates that any deprivation of liberty should strictly follow the procedure

established by law. These procedural safeguards are set in place to avoid rule by whim or caprice and to prevent the abuse of judicial process for individual gain and for political purposes.

Was there arrest:

In the present case, there is no evidence of formal arrest by the 1st Respondent. Facts disclose that the 1st Respondent took the 1st Petitioner to the Police station to record a statement, detained her overnight in the cell, and made her stay in the hospital for 8 days for a judicial medical examination. Prior to answering whether there was a violation of the procedure, it is appropriate to first determine whether the present circumstances amount to an 'arrest' within the meaning of the Article.

The procedure for Arrest is provided in section 23 (1) of the Code of Criminal Procedure Code No. 15 of 1979. "In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested." The explanation to this provision reads;

"Explanation. -

Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person"

What is needed therefore is not a strictly formal legal procedure of arrest. Restraining or subjugating somebody in a way that impedes freedom of movement falls well within the meaning of arrest in the Code. There is no question that when the 1st Respondent took the 1st Petitioner to the Police Station and kept her inside the cell overnight, she arrested the 1st petitioner. Even during the period of 8 days the 1st Petitioner spent at the hospital, she was under the custody of the 1st

Respondent. The apprehension of arrest is irresistible when there are 3 police officers stationed throughout.

The question whether a deprivation of liberty would amount to an 'arrest' within the meaning of Article 13 (1) only if such deprivation is for the purpose of being dealt with under the law was raised in ***Namasivayam v Gunawardena (1989) 1 SLR 394.*** In that case, the Petitioner alleged that he was arrested by the third respondent while he was travelling in a bus and that he was not informed of the reason for his arrest. The 3rd Respondent denied the arrest and stated that he was investigating into a case of robbery and had reasons to believe that the petitioner was acquainted with the facts and circumstances relating to the robbery. He therefore required the petitioner to accompany him to the Police Station for questioning and released him after recording his statement at the Police station. Sharvanada CJ, with Athukorale and H.A.G. de Silva JJ agreeing stated;

"*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, in my view the 3rd Respondent's action of arresting the Petitioner and not informing him the reasons for his arrest violated the Petitioner's fundamental rights warranted by Article 13 (1) of the Constitution.*" (p. 401)

Similarly, in the present case the 1st Petitioner did not go to the police station on her own volition. She was taken to the police station by the 1st Respondent against her and her parents' will. If the parents did not keep agitating to accompany her, the 1st Respondent would have taken the 1st Petitioner alone to the Police station.

She was detained in a cell in the police station that night and on the following day was referred to the hospital where she would stay for 8 days. From the time she was taken away from the custody of her parents up to the point where she was able to return home, she was at all times under the authority of the 1st Respondent. Accordingly, I have no hesitation in holding that the conduct of the 1st Respondent in taking the 1st Petitioner to the Police station for the ostensible reason of completing the statement and compelling her to stay in the hospital for 8 days amount to an arrest.

Was the arrest carried out according to the procedure established by law?

Article 13 (1) contains a prohibition on deprivation of liberty that no person shall be arrested. However, there is an exception, that such deprivation of liberty may be effected "according to the procedure established by law". In ***Kapugeekiyanage v Hettiarachchi and two others (1984) 2 SLR 153***, it was held that the "*procedure established by law cannot mean any other than the procedure established by the Code of Criminal Procedure Code Act No. 15 of 1979*". Section 32 (1) the Code of Criminal Procedure Act No. 15 of 1979 lays down the instances in which a peace officer may without an order from a Magistrate and without a warrant arrest any person. The section prescribes, *inter alia*, that a peace officer could arrest a person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

As disclosed in the statement of objections, the 1st respondent arrived at Anjali's house upon receiving a communication (marked "1R1") by the IGP that the Chairman of the Akuressa Pradeshiya Sabha allegedly has sexually abused her. The complaint therefore was made against the said Chairman and not against the 1st petitioner. By the 1st Respondent's own admission, the 1st Petitioner was only the 'alleged victim.' Therefore, there could not have been any circumstance that permitted the 1st Respondent to arrest her let alone detain her in the cell overnight.

The Constitutional jurisprudence of this country has always placed a high premium on personal liberty. It has been our judicial opinion throughout that "*This liberty should not be interfered with, whatever the status of that individual be, arbitrarily or without legal justification"* (Justice Sharvananda in the case of **Namasivayam** supra). Children, who are vulnerable to exploitation and abuse of power, must in particular be guaranteed these safeguards. Under Article 27 (13) of the Constitution, the State has an obligation to promote with special care the interest of children and youth and to protect them from exploitation and discrimination. **Article 9** of the **UN Convention on the Rights of the Child (CRC),** which Sri Lanka ratified in 1991, states that "*a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with the applicable law and procedures, that such separation is necessary for the best interest of the child*". This is reinforced by **Rule 2** of the **UN Rules for the Protection of Juveniles Deprived of their Liberty** (General Assembly Resolution 45/113, 14 December 1990) which states that "*Deprivation of the liberty of a juvenile should be a disposition of last resort and to the minimum necessary period and should be limited to the exceptional cases.*" Officials charged with the duty of preserving and promoting these interests should not flout these safeguards as they please. Arrest is legal only if it is clearly permitted by law. There is no provision in our law which allows a police officer to arrest or take into custody a victim of an alleged offence. The 1st Respondent took the 1st Petitioner into custody to interrogate her. Whatever her reasons for the action may have been, the 1st Respondent was not empowered by law to detain the 1st Petitioner in a cell overnight when she was only the 'alleged victim' of an offence. There was no information or grounds warranting her detention. She was further detained in the hospital for 8 days, despite the initial medical reports clearly indicating that there were no signs of abuse. The young girl child was prevented from attending school, and returning to her normal life and there is no material placed before us explaining why such deprivation of liberty

was necessary. Accordingly, I hold that the 1st Respondent's actions amount to a violation of Article 13 (1) of the Constitution.

Violation of Article 13 (2)

Article 13 (1) prohibits not only the taking into custody, but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law. Where a person is deprived of personal liberty without being brought before the judge of the nearest competent court according to the procedure established by law, there is a violation of Article 13 (2) of the Constitution.

The obligation to produce every person held in custody or otherwise deprived of personal liberty before the judge of the nearest competent court is one that should be carried out according to procedure established by law. The said procedure is found in Sections 36 and 37 of the Code of Criminal Procedure Act which deal with persons arrested without a warrant.

> *"36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case.*
>
> *37. Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate"*

As these statutory provisions clearly indicate, any person arrested under the regular procedure cannot be detained for longer than 24 hours. Adhering to this time frame is primordial as it is linked to the detainee's corollary right to challenge the legality of the deprivation of liberty. Article 13 (2) does not draw any distinction between types of people held in custody. It applies with equal force to

everyone held in custody, detained or otherwise deprived of liberty, whether the same person be a suspect, victim or otherwise. It is a human right that has found expression in core international human rights instruments to which Sri Lanka is a party; such as Article 9 (4) of the International Covenant on Civil and Political Rights and article 37 (d) of the Convention on the Rights of the Child. Every person, including a child whose liberty is deprived, must be allowed to claim the benefit of the said right.

Regrettably, the 1st Petitioner to the present application was not guaranteed the protection accorded by the said provisions of law. There is not an iota of evidence present before us to suggest that the 1st Respondent took measures to bring the 1st Petitioner before a Magistrate within 24 hours of the arresting. Neither has any reasons been adduced to justify the delay in this regard. It is also a matter of high concern that the 2nd Respondent subjected the 1st Petitioner to a medical examination without producing her before the Magistrate. Under section 122 (2) and 137 of the Code of Criminal Procedure Act No. 15 of 1979 it is the Magistrate who can make an order authorizing a medical examination. There is no evidence that the Respondents sought an order prior to subjecting the 1st Petitioner to a medical examination, nor have they consulted the parents or the guardian to obtain their consent. On the contrary, I find that the 1st Respondent continued to detain her in the hospital for 8 more days without allowing any judicial intervention to determine the legality of such detention. In these circumstances, I have no hesitation in holding that the 1st Respondent and the 2nd Respondent patently violated the law by failing to produce the 1st Petitioner before a Magistrate. The failure amounts to a violation of Article 13 (2) of the Constitution.

Violation of Article 11

The next issue that requires the consideration of this Court is, whether there was a violation of the fundamental right guaranteed to the Petitioner by Article 11 of the Constitution. Article 11 reads as follows; "*No person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment."* Apart from the Constitution, **The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 Of 1994** prohibits inflicting torture or subjecting persons to cruel, inhumane and degrading treatment or punishment. **Article 37 (a) of the UN Child Rights Convention** also obliges the state parties to ensure that "*a child shall not be subjected to torture or cruel, inhuman or degrading treatment*". Apart from these, all notable international declarations of human rights prohibit torture as well as cruel, inhuman or degrading treatment or punishment. **Article 5 of the Universal Declaration of Human Rights**, **Article 7 of the International Covenant on Civil and Political Rights** and **Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** are in similar terms.

In analysing the contours of Article 11 of the Constitution, Dr. Amerasinghe J in his separate judgment in ***Silva v. Chairman, Fertilizer Corporation (1989) 2 SLR 393*** observed that; "*The treatment contemplated by Article 11 wasn't confined to the realm of physical violence. It would rather embrace the sphere of the soul or mind as well.*" Thus, this Court has given a broad definition of the right not to be subjected to inhumane treatment, extending beyond physical violence into emotional harm as well.

In the present case, the 1st Petitioner alleges that the 1st Respondent's conduct during the entire investigation, *i.e.* the act of questioning her in the presence of neighbours about an alleged sexual relationship between the chairman of the

Akuressa Pradeshiya Sabha, arresting her, and keeping her in custody overnight, amounts to a violation of Article 11.

In ascertaining whether this behaviour is in contravention of Article 11, this Court must consider the degree of proof necessary. In ***Vivienne Gunawardena v. Perera (1983) 1 SLR 305***, where violations of Articles 11 and 13 (1) were alleged, Soza J. held that a high degree of probability is required where it is alleged that the petitioner had been subjected to cruel, inhuman or degrading treatment. In ***Channa Peris and Other v. Attorney General and Others (1994) 1 SLR 01***, Amerasinghe J held that in considering whether Article 11 has been violated, three general observations apply:

I. "The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.
II. Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.
III. Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."

Further, in ***W. Nandasena v. U. G. Chandradasa, OIC police Station, Hiniduma & 2 others*** reported in 2005 [B.L.R] 104, Shirani Bandaranayake, J held that when there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution, it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden.

Along with the high degree of certainty, a very high degree of maltreatment is also required to make a finding on cruel, inhumane, degrading treatment under Article 11. As Jameel J. enunciated in ***Silva v. Chairman, Fertilizer Corporation (1989) 2 SLR 393*** "*ill-treatment per se, whether physical or mental, is not enough; a very high degree of maltreatment is required*".

Nevertheless, this Court recognizes that what amounts to a 'high degree of maltreatment' in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child. In ***Bandara v. Wickremasinghe (1995) 2 SLR 167*** where the petitioner who was a Minor and a student of Sri Subhuthi Vidyalaya alleged that he was assaulted during school hours by the Principal, Deputy Principal, Vice Principal and a teacher, Kulatunga J. holding that the Respondent's conduct was violative of the Petitioner's rights under Article 11 stated that; ***"****This Court has hitherto been deciding cases of torture by police officers. However, the victims of such torture generally belong to a different class. Here it is a student with an unblemished record. This Court must by granting appropriate relief reassure the petitioner that the humiliation inflicted on him has been removed, and his dignity is restored. That would in some way guarantee his future mental health, which is vital to his advancement in life.*"

In the present application Anjali, the 1st petitioner was 14 years of age at the time of the incident. Being a young girl who was well known among the villagers, it is very likely that she suffered humiliation when the 1st Respondent questioned her whether she was the victim of an alleged sexual abuse in front of the villagers. Affidavits marked P5 (a) to (c) clearly indicate that there were several villagers gathered around the 1st Petitioner's house when the said questioning took place.

Though the 1st Petitioner emphatically denied being subjected to any abuse, it was to no avail. In the end, despite being the 'alleged victim', she was taken to the Police station in front of the said crowd. The stigma attached to cases of this nature is a concern which the 1st Respondent ought to have factored in before deciding her course of action. Where a school child living in a close-knit community is concerned, an even greater sensitivity must be displayed. Regrettably, the 1st Respondent, when she initiated the investigation in public, failed to appreciate the effect her actions may have on the dignity of the child. She also treated the 1st Petitioner in a degrading manner in the Police station. As corroborated by the affidavit of the 1st Petitioner's grandmother (marked P3), the 1st Petitioner was made to spend the night in the cell along with another female detainee. Not only was this act degrading, it also constitutes a violation of **section 13 of the Children and Young Persons Ordinance,** which obligates the authorities to make arrangements to prevent a child or young person from associating with an adult (not being a relative) who is charged with any offence while detained in a police station. The same section also requires to ensure that a girl (being a child or young person) while so detained be under the care of a woman. The right to humane treatment also finds expression in Article 37 (c) of the Convention on the Rights of the Child. Article 37 (c) of the Convention provides "*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age*". The positive right to humane treatment is in general also expressly guaranteed by Article 10 (1) of the International Covenant on Civil and Political Rights to which Sri Lanka is a party.

It is understood that the civil rights of detained persons are also applicable to children. However, the arrested, detained or imprisoned children have additional rights on account of their age. **Article 3 (2)** of **Sri Lanka's Charter on the Rights on the Child** states that "*the best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether*

undertaken by any social welfare institution, court of law, administrative authority or any legislative body". I am of the view that the treatment meted out to the young petitioner of this case did not conform to these standards. The 1st Respondent does not appear to have regarded the circumstances particular to the child, her age or her educational and social concerns when she questioned her, arrested her and detained her for over a week. In those circumstances, this Court while stressing the importance of treating children with dignity, finds that the treatment meted out to the 1st Petitioner amounts to degrading treatment within the meaning of Article 11 of the Constitution.

The Court further observes that the conduct of the 1st Respondent in arresting and detaining the 1st Petitioner in violation of the procedure established by law also deprived the 1st Petitioner of her right to equal protection of the law under Article 12 (1) of the Constitution.

Liability of the Respondents

While the State is responsible for all violations of Fundamental Rights, this Court has observed that an individual officer could be held personally liable where there is clear evidence to this effect. To quote Sharvananda CJ. In ***Mariadas v Attorney General (1983) 2 SLR 461***, 469: "*The relief granted is principally against the state, although the delinquent official may also be directed to make amends and/or suffer punishments*".

In the present case, the 1st Respondent was responsible for the 1st petitioner's unlawful arrest and deprivation of liberty; her unjustified detention without production before a Magistrate and subjecting her to degrading treatment.

I hold that the 1st Respondent infringed the petitioner's fundamental rights under Articles 11, 12 (1), 13 (1) and 13 (2). The 1st Respondent being the inquiring officer of the alleged case of sexual abuse, had a mandatory duty in terms of section 113 of the Code of Criminal Procedure Act to report the result of the

investigation to the Officer-in-Charge of the police station, the 2nd Respondent and in the ordinary course of events, this court, in the absence of any contrary material, can presume that the 2nd Respondent had the knowledge of the steps taken by the 1st Respondent in relation to the impugned investigation. As such, I hold that the 2nd Respondent acquiesced in and condoned the 1st Respondent's actions and I therefore further hold that the 2nd Respondent infringed the Petitioner Anjali's fundamental right under Article 12 (1) of the Constitution. The 1st Respondent's conduct not only infringed the fundamental rights of the Petitioner but displayed a callous disregard for the law.

The circumstances do not warrant her being excused or exempted from personal liability. Accordingly, I order the State to pay a sum of Rs, 50,000 (Fifty Thousand) as compensation to the 1st Petitioner. I further order the 1st Respondent personally to pay the 1st Petitioner a sum of Rs.100, 000 (one hundred thousand) in instalments of Rs 25,000 within 12 months, commencing from the date of the delivery of this judgement.

This Court also takes an opportunity to note with concern the increasing number of incidents of abuse of power by law enforcement authorities. There is no doubt that what is brought before Courts is a fragment of the totality of incidents taking place across the country. In view of the pervasive practice, the Court considers this to be an opportune moment to direct the 3rd Respondent the Inspector General of Police to lay down guidelines to be followed by law enforcement authorities if such guidelines are already not in place. Guidelines that are thus formulated must reflect the legal safeguards in our law, international instruments and global best practices. The objective is to reinforce the content of the law, clarify any obscure areas and shed light on the rights and obligations of concerned parties. This Court stresses that law enforcement authorities must adhere to those guidelines in addition to the law and take every possible measure to end the abuse of power.

Guidelines should broadly cover the following aspects and may include any other area which the Inspector General of Police, the 3rd Respondent deems necessary, in furtherance of securing and advancing the rights of the public that are recognized under the Constitution and under the law.

- Law Enforcement Officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
- Law enforcement officials shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity.
- Law enforcement officials shall at all times protect and promote, without discrimination, equal protection of law. All persons are equal before the law, and are entitled, without discrimination, to equal protection of the law.
- They shall not unlawfully discriminate on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth or other status.
- It shall not be considered unlawful or discriminatory to enforce certain special measures designed to address the special status and needs of women (including pregnant women and new mothers), juveniles, the sick, the elderly, and others requiring special treatment in accordance with international human rights standards.
- Children are to benefit from all the human rights guarantees available to adults. In addition, children shall be treated in a manner which promotes their sense of dignity and worth; which facilitates their reintegration into society; which reflects the best interests of the child; and which takes into account the needs of a person of that age.
- Detention or imprisonment of children shall be an extreme measure of last resort, and detention shall be for the shortest possible time.
- Children shall be detained separately from adult detainees.

- Detained children shall receive visits and correspondence from family members.
- Law Enforcement Officials shall exercise due diligence to prevent, investigate and make arrests for all acts of violence against women and children, whether perpetrated by public officials or private persons, in the home, in the community, or in official institutions.
- Law Enforcement Officials shall take rigorous official action to prevent the victimization of women, and shall ensure that revictimization does not occur as a result of the omissions of police or gender-insensitive enforcement practices.
- Arrested or detained women shall not suffer discrimination and shall be protected from all forms of violence or exploitation.
- Law Enforcement Officials shall not under any circumstance use Torture and other cruel, inhuman or degrading treatment.
- No one shall be subjected to unlawful attacks on his or her honour or reputation.
- Law Enforcement Officials shall at all times treat victims and witnesses with compassion and consideration.
- Law Enforcement Officials shall at all times promptly inform anyone who is arrested of reasons for the arrest.
- Law Enforcement Officials shall maintain a proper record of every arrest made. This record shall include: the reason for the arrest; the time of the arrest; the time the arrested person is transferred to a place of custody; the time of appearance before a judicial authority; the identity of involved officers; precise information on the place of custody; and details of the interrogation.

- Anyone who is arrested has the right to appear before a judicial authority for the purpose of having the legality of his or her arrest or detention reviewed without delay.
- Law Enforcement Officials as far as possible shall take every possible measure to separate juveniles from adults; women from men; and non-convicted persons from convicted persons.
- Law Enforcement Officials shall at all times ensure to obey and uphold the law and these rules.

Application allowed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH 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 and in terms of Articles 17 and 126 of the Constitution

SC /FR/ Application No 188/2010

1. P.D.W.K Chandrarathne,
   G/16, Field Force,
   Head Quarters,
   Colombo 05.

2. N.A. Amarasena,
   Welfare Division,
   Colombo 01.

3. U.J. Dangalle,
   11/A, Bogodawaththe,
   Palugama, Dompe.

4. K.W.M. Chandrasiri,
   18.1, Uruwala,
   Nedungamuwa.

5. A.M. Ranita Fernando,
   521/28, Hibe Garden,
   Artigala Road, Meegoda.

6. N.G.G. Nikathanne,
   Crime Division,
   Police Headquarters, Colombo 01.

7. K.R.M. Menike,
   Children and Women Bureau,
   Colombo 01.

8. D.M. Gunarathne,
   5/32, Sarammudali Mawatha,
   Weliweriya, Matara.

9. K.H.R. Kariyawasam,
   "Senasuma"Edandawila Watta,
   Wanala, Kananke.

10. L.K. Dharmasena,
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    Walpola Matara.

11. A.A.L. De. Alwis,
    2B, Police Headquarters,
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12. M.W. Upali Ranjith,
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13. N.P. Jayarathne,
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14. M.E.M. Keerthirathne,
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15. H.D.C.S. Satharasinghe,
    232, Pallegama,
    Pepiliwala.

16. M.A.Laxman,
    Batuwita Watte, Batuwita,
    Thihagoda, Matara.

17. P.L.A.J. Gunawardena,
    P18, Police Quarters,
    Ampara.

18. N.D. Darmasiri,
    N1/10, Anderson Flats,
    Narahenpita.

19. S. Anura Lalith,
    237/39, Moratwahena Road,
    Athurugiriya.

20. M. Ranathunga,
    71, Sri Gnanarathana Mawatha,
    Peliyagoda

21. M. Karunathilake,
    67, Lak Sewana, Kirigam Pamunuwa,
    Polgasovita.

22. W.G.Rupasinghe,
    49/5B, Amunugoda,
    Imbulgoda.

23. K. A. Karunathilaka,
    162, Raddalgoda,
    Kelaniya.

24. S.A.J.Suraweera,
    120/1, Simbiragemulla,
    Nadungamuwa.

25. D.A.K. Jagathsiri,
    309/1, Gammanawaththa,
    Raigama, Bandaragama.

26. G.J. Gunawadena,
    Thimbiriya, Kalapugama,
    Moronthuduwa.

27. W.P.L. Senevirathne,
    No. 1, Police Quarters,
    SLPC, Kaluthara.

28. B.G.R. Perera,
    25, Welithuduwa,
    Waththala, Gamagoda Road,
    Kaluthara South.

29. R. Ariyarathne,
    G 4, Police Quarters,
    Maradana.

30. S.P. Thilakarathna,
    No. 13, Police Quarters,
    SLPC, Kaluthara.

31. P.K.C.R. Bodinagoda,
    Bodinagoda Awththa,
    Yalegama, Induruwa.

32. D.M.P.S. Bandaranayake,
    555/3/2, Police Quarters,
    Negombo Road, Wattala

33. K.G.A. Gunawardena,
    SLPC, Kaluthara.

34. L.G. Sarath,
    H8, Police Quarters,
    Colombo 5.

35. H.P.S. Nanayakkara,
    Police Quarters,
    Kegalla.

36. A. Upali Jayathissa,
    G 15A, Galkotuwa Waththa,
    Amunugama, Kiriwadunna.

37. R.M. Dayapala,
    513, Anwarama,
    Mawanella.

38. H.M.N. Herath,
    Ambasewana, Alkegama,
    Makemelwala, Mawanella.

39. K.P. Lal Thilakasiri,
    E 24, Kondagala,
    Nelundeniya.

40. J.C. Weerathunga,
    120/2/A, Pinnawala Road,
    Madapatha, Piliyandala.

41. Piyaseeli Yahangoda,
    267, Godagama Road,
    Athurugiriya.

42. K.W.Wijewardena,
    Ihalagama,
    Kannanthota.

43. D.G. Badugamahewa,
    “Sampatha” Berilwaththa,
    Halpathota, Baddegama.

44. E.M.S. Kumarasena,
    16/2, Pahalaweediya waththa,
    Yakkala.

45. M.G. Thilaknanda,
    2/1, Wekanda Road,
    Homagama.

46. A. Jayawardena,
    N 2/6 Anderson Flats,
    Narahenpita.

47. B.M.N. Hemachandra,
    13, Police Quarters,
    Mihindu Mawatha, Colombo 12.

48. C.R.K.Deheragoda,
    202D, Aluthgama,
    Bogamuwa, Yakkala.

49. S.M. Punchibanda,
    510/C, Makola North,
    Makola.

50. U.L.S.N. Perera,
    15/40, Weediyawatta,
    Udugampola.

51. L.U. Lakshmi,
    56-1/4, Police Quarters,
    Modara, Colombo 15.

52. K.A.C. Damayanthi,
    Rerukana Road, Weedagama,
    Bandaragama.

53. R.K. Sisira,
    RP-966, Rajapaksa Pura,
    Seeduwa.

54. Y.R.J.C. Kumarasena,
    16/3, Wijayaba Mawatha,
    Nawala Road, Nugegoda.

55. P.P. Yasawathi,
    2/5, 2/1 Police Quarters,
    Cinnamon Gardens.

56. M.G. Pemasiri, C/O,
    A/OIC, Wijewardena Hall,
    University of Peradeniya.

57. R.P. Jayalath,
    “Amara” Maramba,
    Akuressa.

58. S.K.S. Wijewardena,
    B 34/8, Henepola, Pathampitiya,
    Rambukkana.

59. D.L. Lal Ranjith,
    “Chandra Niwasa”
    Radawana.

60. K.U. Dharmadasa,
    “Pushpa” Dambaliyadda,
    Bamunakotuwa.

61. J. Randenigala,
    In front of Temple, Kurundugasmanana,
    Kamburawela, Badureliya.

62. K.M. Premasundara,
    11/6, Puranavihara Road,
    Colombo 06.

63. S.M. Justin,
    Criminal Record Division,
    Colombo 07.

64. W.A.W.P.I. Wickramasinghe,
    Criminal Record Division,
    Colombo 07.

65. S.M.D. Padmini,
    Criminal Record Division,
    Colombo 07.

66. S. Wannigama,
    Criminal Record Division,
    Colombo 07.

67. A.H.N. Nazeera,
    Criminal Record Division,
    Colombo 07.

68. C.M.W. Chandrasekara,
    Criminal Record Division,
    Colombo 07.

69. H.A. Ramani Lalani Dias,
    Criminal Record Division,
    Colombo 07.

70. M.H.Sunil,
    Criminal Record Division,
    Colombo 07.

71. J.D. Samarawickrama,
    Criminal Record Division,
    Colombo 07.

72. H.K. Menike,
    Criminal Record Division,
    Colombo 07.

73. D.M.L. Senanayaka,
    Criminal Record Division,
    Colombo 07.

74. A.E.A.P Sunil Jayarathne,
    13, Police Quarters,
    Mathara.

75. M. Jayasinghe,
    43A, Gemunupura,
    Ampara.

76. R.A.K.M.S. Ruwanwella,
    170/25, Dharmasena Mawatha,
    Lewlla, Kandy.

77. S.P. Piyasena,
    40K, Galoluwa,
    Nedungamuwa.

78. P.K. Sumanasena,
    2, Police Quarters,
    Beach Road, Matara.

79. V.L. Gunapala,
"Thilina" Dikdenipotha,
Makandura, Mawarala.

80. K.W. Perera,
112/A/12, Samaranayaka Mawatha,
Alubomulla.

81. R.A. Jayantha Malani,
104/188A, Hikgahalanda,
Kalagedihena.

82. M.C. Sunanda Wijerathna,
571,3, Gangarama Road,
Werahera, Boralesgamuwa.

83. M.M.K. Bandara,
"Chandrawasa" Kudamaduwa Junction,
Kottawa Road, Siddhamulla.

84. K.P.W. Renuka De. Silva,
386F, Koshinna,
Ganemulla.

85. A.P.D. Kalyani,
H 11/11, Police Quarters,
Borella.

86. I.S. Karunanayaka,
681/3, Kongahagedara,
Kuliyapitiya.

87. M.G. Kirihamine,
C4, Police Quarters,
Slave Island.

88. M.C.A. Saleem,
22/B, Nagoor Lane,
Saibu Road, Kalmunai.

89. C. Thasim,
    56-2/1, Police Quarters,
    Modara.

90. B.W.A.R. Ramyasiri,
    Morenna, Yakkala.

91. S.D.N.A.M. Weerasinghe,
    “Madusewana” Pepiliyawala Watta,
    Kuda Galgamuwa.

92. T.M.N. Bandara,
    151/4, Galle Road,
    Colombo 03.

93. Upali Hapuarachchi,
    65/4, Mulgampola,
    Kandy.

94. N.P. Upali De. Silva,
    34, Samagi Pedesa,
    Bandiwewa, Polonnaruwa.

95. S. Serasinghe,
    1/13, Dematagolla,
    Katugasthota.

96. T.R. Cunchir,
    50/1, De Zoyza Road,
    Idama, Moratuwa.

97. W.M.R.L.S. Halangoda,
    132/A, Sri Sumangala Mawatha,
    Aluviharaya, Matale.

98. A.G. Wekadapola,
    Seed Store Road,
    Katugasthota.

99. Y. Somasiri,
2/2, Police Quarters,
Baron Jayathilaka Mawatha, Maligawatta.

100. W.M. Abeyrathne,
106, 20th Lane, 2nd Step, Dikhenapura,
Horana.

101. U.A. Wanaguru,
40, Akkarapaha, Samagi Mawatha,
Wethara, Polgasovita.

102. V. Raveendran,
57/1-3/4, Mawila Lane,
Colombo 09.

103. W.A.N. Wikramasinhe,
23/24, Makulugahawatta,
Ambalangoda, Polgasovita.

104. P.C. Pathirana,
259/A, Kanatta Road,
Pore, Athurugiriya.

105. M.A. Ranjith,
Gepalllawa Road,
Amunugama, Pothuhera.

106. C.J. Alahakoon,
103/13, Kuda Aduwa,
Honnanthara South, Piliyandala.

107. M.H.S. Mohomad,
555/3/2, Negombo Road,
Wattala.

108. K.D.P. Peiris,
53-E, Midellamulahena,
Munagama, Horana.

109. M.A. Somarathna,
Munella Watta, Hiththetiya West,
Matara.

Petitioners

Vs,

1. Mahinda Balasuriya,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

1A. N.K. Illangakoon,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

1B. Pujith Jayasundara,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

2. Gotabaya Rajapakse,
Secretary, Minister of Defence,
Public Security, Law and Order,
No.15/5, Baladaksha Mawatha,
Colombo 03.

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

4. J.A.S.K. Jayakody,
Crimes Division,
Police Head Quarters,
Colombo 01.

5. D.S.K. Hettiarachchi,
Crimes Division,
Police Head Quarters,
Colombo 01.

6. Osman Perera,
   Welfare Division,
   Police Head Quarters,
   Colombo 01.

7. K.A.P. Chandrathilake,
   Welfare Division,
   Police Head Quarters,
   Colombo 01.

8. P.M.P. Kumara,
   Welfare Division,
   Police Head Quarters,
   Colombo 01.

9. M.D. Karunasena,
   Welfare Division,
   Police Head Quarters,
   Colombo 01.

10. K.G.P. Mallika,
    Welfare Division,
    Police Head Quarters,
    Colombo 01.

11. S.A.S. Senadheera,
    Legal Division,
    Police Head Quarters,
    Colombo 01.

12. M.P.M. Dias,
    Welfare Division,
    Police Head Quarters,
    Colombo 01.

13. Gangani Wijesekera,
    Welfare Division,
    Police Head Quarters,
    Colombo 01.

14. G.H.S. De. Silva,
    Police Station,
    Kantale.

15. S.H. Dharmasiri,
    Police Station,
    Kantale.

16. U.M. Gunaratne,
    Police Station,
    Kantale.

17. N.P. Galagedara,
    Police Station,
    Kantale.

18. Dayasiri Fernando,
    Chairman,

19. Palitha M. Kumarasinghe,
    Member,

20. Sirimavo A. Wijeratne,
    Member,

21. S.C. Mannapperuma,
    Member,

22. Ananda Seneviratne,
    Member,

23. N.H. Pathirana,
    Member,

24. S. Thillanadarajah,
    Member,

25. M.D.W. Ariyawansa
    Member,

26. A. Mohomed Nahiya,
    Member,

    18th to 26th Respondents all at:

    No.177, Nawala Road,
    Narahenpita.

27. Siri Hettige,
    Chairman,
    National Police Commission,
    Block No.09, BMICH Premises,
    Bauddhaloka Mawatha,
    Colombo 07.

28. P.H, Manatunga,
    Member

29. Savithree Wijesekara,
    Member

30. Y.L.M. Zawahir,
    Member

31. Anton Jeyanadan,
    Member

32. Tilak Clooure,
    Member

33. Frande Silva
    Member

    28th 33rd Respondents:

    National Police Commission,
    Block No.09, BMICH Premises,
    Bauddhaloka Mawatha,
    Colombo 07.

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Murdu N.B. Fernando PC
Justice S. Thurairaja PC

Counsel: Manohara de. Silva, PC with Hirosha Munasinghe for the Petitioners
Rajiv Goonetillake, SSC for the Attorney General

Argued on: 04.06.2019

Judgment on: 04.09.2019.

Vijith K. Malalgoda PC J

Petitioners to the present application were Sub-Inspectors of Police at the time the application was filed before the Supreme Court. When filing the application before the Supreme Court, the Petitioners alleged that their Fundamental Rights guaranteed under Article 12 (1) of the Constitution had been violated by the 1st and the 2nd Respondents, by appointing the 4th to the 17th Respondents as Inspectors of Police who do not have the 08 years of service in the rank of Sub-Inspector as required by circular RTM 252 dated 08.02.2010.

As submitted by the Petitioners, all 109 Petitioners had joined the regular force of the Police Department as Police Constables at various points and were promoted in their ranks and finally promoted to the rank of Sub-Inspector of Police between 23.02.2002 and 28.02.2006.

Out of the 109 Petitioners before the court, except for 8th,14th,20th, 23rd and 29th Petitioners, all the other Petitioners had received their promotions to the rank of Sub-Inspector by way of a "Time promotion scheme" dated 23.02.2006.

By circular dated 24.02.2006 a scheme was introduced for the absorption of Reserve Police Officers into the regular cadre with effect from 24.02.2006.

With regard to the calculation of seniority of the reservists who had been absorbed into the Regular Service, the Petitioners, relied on two documents which were produced marked D and F to the petition, and submitted that,

according to paragraph 5 of document D (IG's circular 24.02.2006)

> "The Reservists who are absorbed will be placed in their seniority just below their counterparts of the Regular Cadre in the respective years in which they have been enlisted and also as per the date on which they have been promoted to the respective ranks"

and also according to sub paragraph (i) of National Police Commission letter dated 2nd August 2007 addressed to IGP produced marked F,

> "Seniority of officers in their respective ranks shall be determined from the date of absorption; and they will placed junior to all officers of the Regular Police Service on that date"

Whilst relying on the above provisions in the absorption circular and the NPC decision, the Petitioners argued before this court that the Reserve Sub-Inspectors who were absorbed in to the Regular Service based on the above circular will be placed junior to all officers in the Regular Force as at 24.02.2006. The Petitioners further relied on a telephone message send on 02.08.2007 from the Inspector General of Police (TP-100), where both these appointments namely the time promotions given to the Petitioners and absorption of the 4th -17th Respondents had been back dated as follows;

a) Absorption of reserve officers to the permanent cadre on 24.02.2006 to be backdated with effect from 01.02.2006 and

b) Time promotions given with effect from 23.02.2006 to be back dated from 01.01.2006

and further submitted that the reason behind the said message was to keep the seniority of those who received time promotions, above those who were absorbed from the reserve cadre.

During the argument before this court the Petitioners brought to our notice of the Supreme Court decision in ***SC FR 650/2003 Mannethhiyalage Pradeep Priyadarshana and 20 others Vs. Ranjith Abeysuriya Chairman National Police Commission and 8 others*** SC minute dated 05.07.2006 and heavily relied on the following passage of her Ladyship Shirani Bandarayake's judgment in the said case,

> "On a careful comparison of the characters of the Reserve Police Force and the Regular Police Force, on the basis of the aforementioned analysis, it is evident that they belong to two different categories without any rational nexus to link the two groups for the purpose of putting them together.
>
> In such circumstances, it is abundantly clear that the officers of the Regular Force and the Reserve Force belong to two different categories and therefore the decision of the Respondents to include clause 2.I.III in the undated circular P-1 cannot be regarded as unequal, unfair, arbitrary or violative of the Petitioners fundamental rights guaranteed in terms of Article 12 (1) of the Constitution"

As observed by this court, the crux of the argument raised on behalf of the Petitioners were that, there was a difference between the officers of the Regular Force and Reserve Force of the

Police Department which is acknowledged by the department itself and the fact that telephone message 100 was sent from the Inspector General's Office was a clear indication of this difference.

Whilst challenging the above position taken by the Petitioners, the 1st and 2nd Respondents explained the difference between the Reserve Service referred to in the Supreme Court decision in ***Mannetthiyalage Pradeep Priyadarshana and 20 others Vs. Ranjith Abeysuriya Chairman National Police Commission and 8 others*** and the reserve officers referred to in circular RTM 252 dated 08.02.2006.

The attention of this court was drown to a Cabinet Memorandum submitted by the then President, as the Minister of Defence and Law and Order where it was recommended to the Cabinet that,

"වර්තමානයෙහි පොලිස් දෙපර්තුමේන්තුවට බඳවා ගනු ලබන සියළු උප සේවා නිලධාරීන් පොලිස් නිලධාරීන් නිත්‍ය සේවයට බඳවා ගැනීමේ සුදුසුකම් වලට සමාන අධ්‍යාපනික හා කායික සුදුසුකම් අනුව බඳවා ගනු ලැබේ.

තවද නිත්‍ය සේවා නිලධාරීන්ගේ තනතුරට නියමිත වැටුප හා සමානව වැටුපක් උප සේවා නිලධාරීන්ටද හිමිවේ.

ඉහත කරුණු සලකා බැලීමේදී, පොලිස් සේවයේ නිත්‍ය සේවය හා උප සේවය වශයෙන් කාණ්ඩ දෙකකින් නිලධාරීන් බඳවා ගැනීම වෙනුවට, සුදුසුකම් ලත් සියළුම උප සේවා පොලිස් නිලධාරීන් නිත්‍ය සේවයට අන්තර්ග්‍රහණය කිරීම සුදුසු බවට නිරීක්ෂණය වී ඇත. තවද මෙම නිලධාරීන්ට වැටුප් ගෙවීමේදී හා අනෙකුත් වියදම් දැරීමේදී අමතර වැය බරක් පොලිස් දෙපර්තුමේන්තුවට දැරීමට සිදු නොවනු ඇත. මේ සමඟම ඉදිරියෙහිදී උප සේවය අහෝසි කිරීමට කටයුතු කෙරෙනු ඇත.

ඒ අනුව:

පොලිස් නිත්‍ය සේවයට බඳවා ගැනීමේ දී සැපිරිය යුතු සියළු සුදුසුකම් සපුරා ඇති සියළුම නිලයන්හි උප සේවා පොලිස් නිලධාරීන්, නිත්‍ය සේවයට අන්තර්ග්‍රහණය කිරීම සඳහා අමාත්‍ය මණ්ඩලයේ අනුමැතිය අපේක්ෂා කරමි."

The Petitioners have submitted the corresponding Cabinet decision marked F before this court.

Whilst submitting the above Cabinet Memorandum the 1st and 2nd Respondents have taken up the position that, those who will be absorb to the permanent cadre under the said Cabinet decision have to satisfy that they possess all the requirements necessary to join the Regular cadre, if they are to be absorbed to the Regular cadre on their qualifications. Those who does not possess the basic academic qualifications need to serve 8 years in the Reserve cadre to become eligible to be absorbed into the Regular cadre (R-2, and D)

In the circumstances it is clear from the documents produced before this court marked R-2 and R-3 by the Respondents that, the absorption of the Reserve officers to the Regular cadre were based on two criterias' namely,

a) Those with required educational qualifications
b) Those with 8 years' service

And therefore it is not correct to say that the rational identified by her Ladyship Justice Shirani Bandaranayake in the case of ***Mannethhiyalage Pradeep Priyadarshana and twenty others Vs. Ranjith Abeysuriya Chairman National Police Commission and 8 others*** had been violated by the 1st and the 2nd Respondents in the present case. As observed by this court, those who did not possess the required educational qualifications were clearly identified as a different category without putting them together with those who had the required educational qualifications to be absorbed into the permanent cadre.

As further revealed before this court, the 4th to the 17th Respondents had joined the Reserve cadre of the Police Department as Sub-Inspectors with the required qualifications to become a Sub-Inspector of Police in the regular cadre and had fulfilled the required qualifications to be

promoted to the rank of Inspector based on RTM 252 but the 109 Petitioners before this court had joined the Regular cadre of the Police Department as Police Constables and were promoted to the rank of Sub-Inspector in the Regular cadre between 23.02.2002 and 01.02.2006, and had not completed the 8 years' of service as required by RTM 252.

In the case of ***C.W. Mackie Vs. Hugh Molagoda Commissioner General Inland Revenue and others 1986 1 Sri LR 300*** Sharvananda CJ concluding that "Illegality and equity are not on speaking terms" had observed,

> "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."

The 109 Petitioners who had not completed 8 years in the rank of Sub-Inspector as required by RTM 252 are not entitled to be promoted to the rank of Inspector of Police and thereby they have failed to establish violation under Article 12 (1) of the Constitution.

The Petitioners' application fails and is dismissed.

I make no order with regard to costs.

Judge of the Supreme Court

Justice Murdu N.B. Fernando PC

I agree,

Judge of the Supreme Court

Justice S. Thurairaja 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 and in terms of Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5c of the High Court of Provinces (Special Provision) Act No. 54 of 2006.

W. L. M. N. De Alwis,
No 2A, Abeywickrema Avenue,
Mount Lavinia.

Plaintiff

WP/HCCA/COL/38/2010 (F)

DC Colombo Case No. 39717/MR

SC/HCCA/LA No. 47/16

Vs

1. Malwatte Valley Plantations Limited,
   No. 280. Dam Street, Colombo 12.

2. L. R. Anthony Perera,
   Royal Gardens,
   No. 288/12, Sri Jayawardenapura
   Mawatha, Kotte.

Defendants

And

W. L. M. N. De Alwis,
No 2A, Abeywickrema Avenue,
Mount Lavinia.

Plaintiff-Appellant

Vs

1. Malwatte Valley Plantations Limited,
   No. 280, Dam Street, Colombo 12.

2. L. R. Anthony Perera,
   Royal Gardens,
   No. 288/12, Sri Jayawardenapura
   Mawatha, Kotte.

Defendant-Respondents

Now (By and between)

W. L. M. N. De Alwis,
No 2A, Abeywickrema Avenue,
Mount Lavinia.

Plaintiff-Appellant-Petitioner

Vs

1. Malwatte Valley Plantations Limited,
   No. 280. Dam Street, Colombo 12.

2. L. R. Anthony Perera,
   Royal Gardens,
   No. 288/12, Sri Jayawardenapura
   Mawatha, Kotte.

Defendant-Respondent-Respondents

And Now Between

In the matter of an Application for substitution of the heirs of

W. L. M. N. De Alwis (Deceased),

No 2A, Abeywickrema Avenue,

Mount Lavinia.

Plaintiff-Appellant-Petitioner

a. Usha Amala De Alwis

b. W. Ravini Padmangi De Alwis Karunaratne

c. W. Sanjaya Ruwan De Alwis

All of No.2B, Abeywickrama Avenue
Mt-Lavinia

Petitioners

Vs

1. Malwatte Valley Plantations Limited,
   No. 280. Dam Street, Colombo 12.

2. L. R. Anthony Perera,
   Royal Gardens,
   No. 288/12, Sri Jayawardenapura
   Mawatha, Kotte.

Defendant-Respondent-Respondent-Respondents

Before:	Buwaneka Aluwihare PC. J L.T.B. Dehideniya J S. Thurairaja PC J
Counsel:	Suren De Silva for the Plaintiff-Appellant-Petitioner. Palitha Kumarasinghe PC with Asanka Ranawake for the 1st Defendant-Respondent. Kushan De Alwis PC with Prasanna de Silva and Hiran Jayasuriya for the 2nd Defendant-Respondent-Respondent.
Written Submissions:	By the Petitioners on 06. 12. 2016 By the 2nd Respondent on 17. 10. 2016
Order reserved on:	28.02.2019
Decided on:	21.06.2019

Aluwihare PC J.

This order pertains to the issue as to whether the cause of action for malicious prosecution, following the death of the Plaintiff abates or whether it is permissible for the Plaintiff's heirs to be substituted in his room and place.

The Plaintiff-Appellant-Petitioner (hereinafter referred to as the 'Plaintiff'), filed action against the 1st and 2nd Defendant-Respondent-Respondent-Respondents (hereinafter referred to as the 'Respondents') seeking damages for pain of mind,

loss of reputation and harassment caused by malicious prosecution, before the District Court. The case was dismissed by the learned Additional District Judge by his judgment dated 25th January 2010.

Being aggrieved by the said decision the Plaintiff filed an appeal in the High Court of Civil Appeal. The said appeal to the High Court was also dismissed. Thereafter, seeking to set aside the said judgement, the Plaintiff filed the present Leave to Appeal Application in the Supreme Court.

On 02nd March 2016, while the said Application was pending before this Court, the Plaintiff passed away. The heirs of the Plaintiff, the Petitioners abovenamed, filed a Petition seeking permission to substitute themselves in room and place of the Plaintiff, in order to prosecute the Leave to Appeal Application. The learned President's Counsel for the 2nd Respondent objected to the substitution and raised a preliminary objection on the basis that the cause of action, being an action based on personal nature, cannot survive after the death of the Plaintiff.

Counsel representing all parties agreed that the order on the preliminary objections could be decided on the written submissions filed by the respective parties.

Positions taken by the respective parties:

It is common ground that no judgment ***in favour*** of the Plaintiff has been entered at any point and it has not been disputed that the Petitioners are the lawful heirs of the deceased Plaintiff.

It is the position of the 2nd Respondent that, the Petitioners would have been bestowed with the right to be substituted in place of the deceased Plaintiff as his legal representatives, **only** had there been a judgement in favour of the Plaintiff at the time of his death, since the action of the Plaintiff is an action *in personam* i.e. a personal action.

On the other hand, the Counsel for the Petitioners has submitted that the action- even though of a personal nature- survives as the stage of *litis contestatio* has been reached. In support of this contention, the decision in **Malalage v Weerakoon, Inspector of Police, Anuradhapura Police Station (SC FR Application No. 278/2008)** which followed the precedent set in **Atapattu v People's Bank (1997 1 SLR 208, 218, 219)** has been cited. In **Atapattu v People's Bank** it has been held that the ***rule against*** substitution in personal actions is subject to the qualification that there has not been *litis contestatio* before the death. In the said judgment Fernando J. cited 'Law of Delict' by McKerron where it is stated that *"for the effect of litis contestatio, which in modern law is deemed to take place at the moment the pleadings are closed, is to freeze the Plaintiff's rights as at that moment, and thus, in the event of his dying before the action is heard, to confer upon his executor all the rights which he himself would have had if he had lived. "* (Mc Kerron, law of Delict, 6th Edition pg.132)

It has also been pointed out on behalf of the Petitioners that, the stage at which *litis contestatio* is achieved is at the closure of pleadings rather than at the time of entering a judgment. The decision in **Muheeth v Nadarajapillai (19 NLR 461 at 462)** lucidly draws the distinction; the point at which *litis contestatio* is reached in action in *rem* vis a vis action in *personam.* The court held;

> *"An action became litigious, if it was in rem, as soon as the summons containing the cause of action was served on the defendants, if it was in personam, on litis contestatio, which appears to synchronize with the joinder of issue or the close of the pleadings"*

The above rational was also followed in the **Malalage** judgment (supra).

On the strength of this position, the Counsel for the Petitioners contended that the absence of a judgment in favor of the deceased is immaterial for the question of 'substitution' as the pleadings have already been concluded at the trial stage in the District Court. The case having reached *litis contestatio*, there is no ambiguity with

regard to the parties' respective rights and therefore there is no bar against the Petitioners from claiming those rights.

The 2nd Respondent, however, contests this position relying on the decision of **Stella Perera and Others v Margaret Silva (2002 1 Sri LR 169).** In the said case the Plaintiff who had been gifted the property in suit by her husband, gifted the same to two of her nephews. Then she sought to evict her husband, (the 1st Defendant) and her adopted daughter and the daughter's husband, (the 2nd and 3rd Defendants respectively), from the said premises by an action filed in the District Court. The 1st Defendant in turn sought the revocation of his gift of the property to the Plaintiff on the ground of ingratitude and a declaration that the gift made to the nephews were null and void. The learned District Judge dismissed the Plaintiff's action and allowed the revocation of the deed of gift by the 1st Defendant to the Plaintiff. The Court of Appeal however, set aside the orders of the District Judge. While the case was before the Court of Appeal, the 1st Defendant passed away. Their Lordships of the Supreme Court held that, *"However, by that time he had a judgment in his favour in respect of his claim to have the donation to his wife revoked and for possession. The stage of litis contestatio having been reached, the first defendant's action did not die with him."* and that the maxim *actio personalis moritur cum persona* or 'personal right of action dies with the person' was not applicable to the case and that the action was not extinguished by the death of the 1st Defendant for the reason that the stage of *litis contestatio* had been reached. However, in the particular case 'litis contestatio' was taken to be the point at which the Judgment was given in favor of the 1st Defendant at the time of his death.

Consequently, the 2nd Respondent has argued that as "*very many actions* in personam *like defamation, medical negligence (subject to certain limitations), slander, libel… would be determined by death"* **(Ariyaratne v Ariyaratne in SC Appeal No. 28/2013)**, the Plaintiff's action too would not survive beyond his death

given that an action for malicious prosecution is an action *in personam* and that in the present case it has not reached the point of *litis contestatio*.

The survival of an Action for Malicious Prosecution

In terms of Section 392 of the Code of Civil Procedure, *"the death of the plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives."* In order to decide whether the Petitioners can be substituted in the room and place of the Plaintiff it has to be first determined whether or not the action in question is extinguished by the death of the original Plaintiff. Substitution can take place only if the action survives the death of the Plaintiff.

For this purpose, it is pertinent to advert to the law relating to the survival of an action for malicious prosecution.

"*Injuria*, is used in the sense of *contumelia*, that is, damage to reputation, honour and good name and the appropriate action for an *injuria* is *actio injuriarum*" **(A Modern Treatise on The Law of Delict, U. L. Abdul Majeed, p 65).** It is trite law that the action for malicious prosecution is based on *actio injuriarum.*

An action for malicious prosecution is a personal action or an action *in personam*. A personal action can be defined as "*an action in which the cause of action or complain or injury is one affecting solely a person and the cause of action, which is personal in nature, dies with the death of the person… the right to sue and the liability to be sued is personal to the deceased and is not transmitted to or against his estate after his death*" **(A Modern Treatise on The Law of Delict, Abdul Majeed, p 331).**

Under the Roman Dutch Law, Aquilian actions do not lapse by the death of either party. In contrast, however, in cases of *actio injuriarum* the action, being personal,

does not survive the death of the Plaintiff or the Defendant. In the common law, by the application of the maxim *actio personalis moritur cum persona*, a personal action does not survive the death of the person whom it is attached to.

However, an exception is made to this rule if the action has reached the stage of *litis contestatio* prior to the death. This position has been illustrated in the South African case of **Gillespie vs Toplis (1951 (1) SA 290 at 293)** where *inter alia* the Plaintiff, filed an action for personal satisfaction (for the hurt to his feelings and dignity) against the Defendant, for violating a grave by removing the tombstone over the grave with the railing around it, situated on a land. The Defendant passed away before summons was issued and the plaintiff issued summons against the Defendant's estate. Since *actio injuriarum* encompassed actions for personal satisfaction, it was considered non-transmissible against the estate of the wrongdoer nor in favour of the estate of the person wronged, unless *litis contestatio* had been reached. The court held that;

> *"the unlawful conduct alleged grounded no action in law against the deceased P's (the defendant) estate and that on P's death* ***before litis contestatio****, the claim against P had become extinguished."*

The Sri Lankan appellate courts have accepted and followed this *litis contestatio* exception. (**Atapattu v People's Bank, Muheeth v Nadarajapillai** as well as in **Associated Newspapers of Ceylon v Felicia Kariyakarawana 2006 2 Sri LR 361, John Fernando and Attorney General v Satarasinghe 2002 (2) SLR 113.)** It is worthy of mention that the *litis contestatio* exception applies to situations of insult, libel and slander which are focused on seeking reparation for sentimental hurt, rather than the recovery of patrimonial losses.

The **Stella Perera and Others v Margaret Silva (Supra)** case which has been cited by the 2nd Respondent to support the position that *litis contestatio* can be considered to have been reached only if there is a judgment in favour of the Plaintiff, intrinsically fortifies the view that where *litis contestatio* has been

reached, even an action of a personal nature may survive the death of the parties. Furthermore, perusal of the said **Stella Perera** case reveals that their Lordships of the Supreme Court **have not** stated that *litis contestatio* can **only** be reached when there is a judgment in favour of the Plaintiff. Therefore, it is an overtly narrow interpretation of the said judgment to assume that a personal action can survive only if there is a previous judgment entered in favour of the Plaintiff.

In this backdrop, the submissions made by the respective parties must be appreciated. The crux of the submission of the Petitioners was that, a personal action in respect of which *litis contestatio* has taken place is not barred from being substituted in favour of the original litigant's representative, and that *litis contestatio* takes place upon the conclusion of pleadings. The 2nd Respondent's argument was that the substitution is not permissible due to the lack of a judgment in favour of the plaintiff.

The development of jurisprudence over the years has been to the effect that *litis contestatio* is considered to take place at the moment when pleadings are closed. **(Milne v Shield Insurance Co. Ltd 1969 (3) SA (AD)352 at 358-359)** This view has been followed locally as well in cases such as **Muheeth v Nadarajapillai (19 NLR 79)** and **Atapattu v People's Bank (supra)** which have been referred to in the submissions of the Petitioners. In **Banda et al. v Cader (16 NLR 79)** pleadings were deemed to conclude after filing of the defendant's answer.

The law as it stands today and the rationale of the judgements referred to above, clearly points to the proposition that the exceptional circumstances under which substitution in a personal action, after the death of the Plaintiff takes place, can be permitted at the conclusion of pleadings rather than at the delivery of a judgment. The reason for the point of conclusion of pleadings to be considered as the point at which *litis contestatio* is reached is to ensure that the positions of the respective parties have been set out by them at this point and there can be no further amendments. The practical considerations behind the point of *litis contestatio*

being the conclusion of pleadings, were illustrated in the Court of Appeal's decision in **Ariyadasa v Weerasinghe, (Western) Provincial Housing Commissioner** by **His Lordship Justice U. De Z. Gunawardena** as follows*;*

> *"It is evident that the very ratio leges or the rationale of the rule that rights of parties are frozen or fixed, at the latest, as at the point of time of litis contestatio, is to prevent the parties from shifting or moving from one position to another."*

Therefore, if the rationale behind this rule is to be maintained, the conclusion of the pleadings that should be considered in the present case for the purpose of ascertaining whether *litis contestatio* has in fact been reached, would be the pleadings that were concluded at the District Court. If I were to quote further from Justice Gunawardena's decision in **Ariyadasa v Weerasinghe (Supra)** *"…the rights of parties, in particular those of the Plaintiff, must be examined usually with reference to the point of time at which the action was commenced, if not, at the point of time that the stage of* ***litis contestatio*** *was reached which stage was marked by the filing of the Defendant's answer as had been held in* ***Banda v Cader*** *16 NLR 79 as well."*

The Petitioners' contention that *litis contestatio* regarding the present action for malicious prosecution took place at the conclusion of the pleadings more than ten years ago is the correct position to be upheld. As far as the proceedings before the Supreme Court is concerned, at the time of the Plaintiff's death, apart from the issuing of notices to the Respondents, no further pleadings had taken place in the present Leave to Appeal Application. Therefore, the pleadings that have to be considered for the present purposes, are those that took place at the District Court. There is no repugnance in such construction as it is common ground that an Appeal is not an independent action severed from the original action. As clearly set out by Chief Justice Sharvananda in **Sudharman De Silva v Attorney General (1986) 1 Sri LR 9**, at Page 13 *"An appeal is not a fresh suit but is only a*

continuation of the original proceedings and a stage in that suit itself." Accordingly, the pleadings that are relevant are the original proceedings that took place at the District Court.

As the exceptional circumstance of *litis contestatio* has been reached by the conclusion of the pleadings at the District Court, there is no impediment to the survival of the action. Therefore, the right to sue on the cause of action survives, and as such I hold that the substitution of the deceased Plaintiff Appellant-Petitioner is permissible.

The preliminary objection is overruled.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Nagananda Kodituwakku, Attorney-at-Law

SC/Rule/01/2016

Justice Vijith Malalgoda
Judge in the Supreme Court

Complainant

Nagananda Kodituwakku
Attorney-at-Law
99,Subadrarama Road,
Nugegoda

Respondent

Before : Hon. H.N.J. Perera, CJ

Hon. Sisira J. De Abrew, J

Hon. Prasanna Jayawardena, PC, J

Counsel : Rohan Sahabandu PC with Chamath Fernando for the BASL.

Nagananda Kodituwakku, Attorney-at-Law the Respondent is present in person.

Dappula de Livera , PC, SG with Ms. Viveka Siriwardena, DSG for the Hon. AG.

Argued on : 14.05.2018, 15.05.2018, 06.06.2018, 04.07.2018

28.11.2018, 13.12.2018, 12.03.2019, 13,03.2019

Decided on : 18.03.2019

H.N.J. Perera, CJ

The Rule issued to the Respondent states, *inter alia*, that on, 21st May 2015, the Respondent appeared in the Court of Appeal and:

"(a) by the contemptuous submissions you had made without any basis whatsoever brought the Court into ridicule and caused the erosion of public trust and confidence reposed in the judicial system and the overall damaging effect of your submissions could be considered an instance of contempt of court which makes you ex-facie liable to be dealt with according to the law,

(b) By reason of the aforesaid conduct which cannot be countenanced you have conducted yourself in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys-at-law of good repute and competency and have thus committed a breach of Rule No. 60 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 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 is inexcusable and such as to be regarded as deplorable by your fellows in the profession 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 unworthy of an Attorney-at-Law and have thus committed a breach of Rule No. 61 of the said rule.".

The respondent initially pleaded not guilty to the Rule issued to him and the matter proceeded to inquiry during the course of which evidence was led. However, at the stage of making oral submissions, the Respondent made the following statement in open Court on 13th March 2019:

> *"I do hereby tender my regret and unqualified and unreserved apology to the President of the Court of Appeal, to the then President of the Court of Appeal Hon Justice V.K.Malalgoda, PC in open Court and the other Hon. Judges of the Court of Appeal for my statement made and my conduct on 21st May 2015.*
>
> *Further, I do hereby state I wish to make the same apology to Hon Justice V.K.Malalgoda, PC in open Court and also in writing to the present President of the Court of Appeal."*.

Accordingly, this matter was again taken up today and the Respondent stated the aforesaid apology and expression of regret in open Court. At the same time, the Respondent apologised and expressed his regret to Hon. Justice V.K.Malalgoda,PC, who was present in Court today upon being informed that the Respondent wishes to tender an apology. The Respondent also expressly and unconditionally withdrew the allegations he had made against that Honourable Judge and the Court of Appeal.

In our view, the aforesaid apology and expression of regret which the Respondent has voiced in open Court on two separate occasions, amounts to an unqualified admission by the Respondent that he committed the misconduct he is charged with. The fact that the Respondent has withdrawn the allegations he made in the course of committing the said acts of misconduct, establishes that the Respondent admits the said allegations were unfounded and baseless.

In these circumstances, we find the Respondent guilty of committing the breaches of Rules 60 and Rule 61 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka, as set out in the Rule issued to the Respondent.

We are now required to consider the punishment which should be imposed.

We note that the misconduct the Respondent is charged with and has been found guilty of, arise from acting in a manner which is contemptuous of the Court of Appeal. This is a grave offence which calls for appropriate punishment. This Court must keep in mind its duty to protect the dignity of the Courts when determining the appropriate punishment which is to be imposed.

At the same time, we should take into account the fact that the Respondent has made the aforesaid apology, expressed his regret for his misconduct and withdrawn the false allegations which he had made. However, the fact remains that the Respondent did so only at the very end of these proceedings.

Taking these factors into account, we hereby suspend the Respondent from practice in terms of section 42 (2) of the Judicature Act No.2 of 1978, as amended, for a period of 03 years from today.

A copy of this Order is to be forwarded to the Hon. President of the Court of Appeal. Further, the Registrar of this Court is directed to take the required steps for the notification of this Order as required.

Chief Justice

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 REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal under and in term of Article 128 of the Constitution against the Judgment of the Court of Appeal

Democratic Socialist Republic of Sri Lanka

Complainant

SC/SPL/LA 290/2008

SC/SPL/LA 293/2008

CA 184,184A-187/1996

HC Colombo Case No.6763/94

Vs,

1. Wasantha Basnayake
2. John Cyril Nimal Fernando
3. Veerappan Murugan Kandiah
4. Arthur Patrick St' John Jackson
5. Thangeshwary Sundaramoorthy

Accused

And

1. Wasantha Basnayake
2. John Cyril Nimal Fernando
3. Veerappan Murugan Kandiah
4. Arthur Patrick St' John Jackson
5. Thangeshwary Sundaramoorthy

Accused-Appellants

Vs,

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

Complainant –Respondent

And now between

4. Arthur Patrick St' John Jackson
5. Thangeshwary Sundaramoorthy

4th and 5th Accused-Appellant-Appellant

Vs,

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

Respondent- Respondent

Before: **Hon. Justice Vijith K. Malalgoda PC**

Hon. Justice L.T.B. Dehideniya

Hon. Justice S. Thurairaja PC

Counsel: Dr. Ranjith Fernando for the 4th Accused- Appellant-Appellant

Razik Zarook, PC with Rohana Deshapriya. Chanukya Liyanage and Thilak Wijesinghe for the 5th Accused- Appellant-Appellant

Priyantha Nawana PC, ASG for the Hon. Attorney General

Argued on: 22.03.2019
Decided on: 25.07.2019

Vijith K. Malalgoda PC J

Five Accused including the Accused-Appellant-Petitioner in SC/SPL/LA Application 290/2008 namely Thangeshwary Sundaramoorthy and the Accused-Appellant-Petitioner in SC/SPL/LA 293/2008 namely Arthur Patrick St' John Jackson were indicted before the High Court of Colombo by the

Attorney General on several charges for committing the offence of conspiracy to commit the offence of Criminal Breach of Trust, for committing the offence of Criminal Breach of Trust and for committing the offence of aiding and abetting to the said offence of Criminal Breach of Trust.

At the conclusion of the trial before the High Court, the learned High Court Judge had convicted all 5 accused and sentenced them accordingly. Being aggrieved by the said conviction and sentence, all 5 accused had appealed to the Court of Appeal.

The Court of Appeal by its order dated 08.10.2008 dismissed the said appeal and affirmed, both the conviction and the sentence.

All five accused have filed papers for Special Leave before the Supreme Court against the said order but delayed supporting the said applications until today.

As observed by me these applications are before the Supreme Court for over 10 years.

Whilst these appeals were pending for support before the Supreme Court, three Petitioners namely Wasantha Basnayake, John Cyril Nimal Fernando and Veerappan Murugan Kandiah had passed away.

As observed by me the five accused referred to above had faced the following charges before the High Court.

Charge 1- Conspiracy to commit the offence of Criminal Breach of Trust of monies belonging to Union Trust Investment Private Limited (UTI) - against all 5 accused

Charge 2- Committing the offence of Criminal Breach of Trust of Rs. 6150000/- the monies belonging to the said UTI by the 4th accused (Arthur Patrick St John Jackson - the Petitioner before this court in SC SPL LA 290/2008)

Charge 3- Committing the offence of abetment to the above 2nd charge by the 1st accused (Wasantha Basnayake who is now dead)

Charge 4- Committing the offence of abetment to the above 2nd charge by the 2nd accused (John Cyril Nimal Fernando who is now dead)

Charge 5- Committing the offence of abetment to the above 2nd charge by the 3rd accused (Veerappan Murugan Kandiah who is now dead)

Charge 6- Committing the offence of abetment to the above 2nd charge by the 5th accused (Thangeshwary Sundaramoorthy the Petitioner before this court in SC SPL LA 293/2008)

Charge 7- Committing the offence of Criminal Breach of Trust of Rs. 3000000/- the monies belonging to the said UTI by the 4th accused

Charge 8- Committing the offence of abetment to the above 7th charge by the 1st accused

Charge 9- Committing the offence of abetment to the above 7th charge by the 2nd accused

Charge 10- Committing the offence of abetment to the above 7th charge by the 3rd accused

Charge 11- Committing the offence of abetment to the above 7th charge by the 5th accused

The offences referred to the Indictment had taken place between the 1st February 1985 and 30th June 1985, 33 years ago and the accused referred to above were holding responsible high positions at the said Union Trust Investment Private Limited (UTI)

The same five accused had faced another Indictment before the same High Court on similar charges and the said trial was pending before the High Court of Colombo at the time the Special Leave to Appeal application was filed before this court in the year 2008.

When looking at the sequence of events that took place from the time of the alleged offence, i.e. in the year 1985, after the collapse of the UTI, due to the financial frauds that took place in the

management of the said company, an investigation was commenced by the Criminal Investigations Department. The Hon. Attorney General forwarded two Indictments before the High Court of Colombo in the year 1994. The two Indictments were allocated Number HC 6763/1994 and HC 6764/1994 by the High Court of Colombo.

The trial in 6763/94 was commenced before the High Court of Colombo in March 1995.

It is important to observe at this stage that the 1st accused in the said Indictment namely Wasantha Basnayake was not present before the High Court at that stage but was represented by a counsel. When the said case was called before the High Court of Colombo in October 1994, in order to serve the Indictment, it was revealed that the said 1st accused was never arrested even during the investigations, since he had left for England by that time and an officer from the Criminal Investigation Department had gone to England to record his statement. Based on the above material the court had issued a warrant against him, but subsequently at trial even though he did not participate, he was represented by a counsel.

At the conclusion of a protracted trial, the learned High Court Judge convicted all the accused of the charges against them except counts 4 and 5 against the 2nd and 3rd accused on 16.09.1996. The 4th and the 5th accused, who are the accused-appellant-appellants before this court, were convicted of all the charges against them and imposed the following sentence on them.

4th accused- Convicted of 1st, 2nd and 7th charges against him and sentenced,

1st count 2 years Rigorous Imprisonment

2nd count 2 years Rigorous Imprisonment and fine of Rs. 500,000/-

7th count 2 years Rigorous Imprisonment and fine of Rs. 500,000/-

5th accused- Convicted of 1st, 6th and 11th charges against her and sentenced,

1st count 2 years Rigorous Imprisonment

6th count 2 years Rigorous Imprisonment and a fine of Rs. 500,000/-

11th count 2 years Rigorous Imprisonment and fine of Rs. 500,000/-

The sentences imposed on counts 2 and 7 on the 4th accused and counts 6 and 11 on the 5th accused were to run concurrent.

Total Imprisonment ordered on each accused is 4 years and a fine Rs. 1,000,000/- with a default term of 7 months Rigorous Imprisonment.

The appeals logged by all five accused before the Court of Appeal in the year 1996, were finally disposed by the Court of Appeal in the year 2008, affirming the conviction. All five accused including the 1st accused who was tried in absentia filed papers for Special Leave before the Supreme Court in 2008 but no steps were taken to support the said applications until March 2019, for 11years. In between this matter had come up on numerous occasions and had gone down for numerous reasons.

However it is observed that, the petitioners before the Supreme Court, even though they had not insisted to support the applications, negotiated settlements to avoid serving sentences in jail. This fact was recorded in journal entries on several days. As observed by me, on 02.08.2012 it was recorded that,

> "Learned President's Counsel who appear for the petitioner in the respective cases, which are all connected, state that they are in a position to have this matter resolved and that his

clients are ready to pay the principle amounts involved if interest component can be waived."

again on 01.11.2013 it was recorded that,

"All learned Counsel who appear for the Petitioners who are respectively the 1st -5th accused in the High Court of Colombo cases bearing Nos 6763/94 and 6764/94 which are in the process of settling the amounts that are due under the relevant Indictments in the case and the interest accrued thereon. They state that in view of the fact that the case that is pending in the High Court namely 6764/94 is to be taken up in the afternoon in the High Court today. They state that they will go before the High Court and resolve all matters in order that this court can expeditiously deal with the application before this court for seeking Special Leave to Appeal"

As submitted by the counsel who represented the appellants in SC SPL LA 290/08 and SC SPL LA 293/08 their clients i.e. the 4th and the 5th accused in the Indictment along with the other accused who are now dead had settled the defrauded amounts along with interest and deposited them with the liquidator at the Central Bank. As submitted by the counsel the defrauded amount in each trial, i.e. HC 6763/ 94 and 6764/94 was Rs. 9 Million each and the appellants in all 5 Special Leave to appeal applications, had deposited Rs. 14 Million in each case with 5 Million interest. The total amount they deposited with the liquidator is Rs. 28 Million. In addition to that, the 2nd, 3rd and 5th accused have pleaded guilty before the High Court in HC 6764 whilst the present leave to appeal applications are pending before the Supreme Court and they were imposed non-custodial sentences by the High Court on 22.11.2013. However there is no record of 1st and 4th accused in the said case pleading guilty before the High Court.

Whilst referring to the fact that all the accused referred to above along with the two appellants before this Court had now compensated "the victims" of the defrauded finance company, and the long delay in finalizing the case against them and specially the health condition of the appellant in SC SPL LA 293/2008, namely Arthur Patrick St. John Jackson, the 4th accused in the Indictment, the learned counsel took up the position that they would not challenge the conviction which was affirmed by the Court of Appeal but would only be canvassing the sentence before this court.

This court after considering the lengthy submission made by the learned President's Counsel and the learned Counsel in both these matters and the learned Additional Solicitor General who did not object to the above application of the learned Counsel, decided to grant leave on the following question of law,

> "Did the sentence imposed by the High Court on the accused appellant is excessive"

When making submissions, the learned Counsel for the appellants relied on the decision in ***Priyanka Perera Vs. Attorney General SC Appeal 99/2006 Unreported Judgments of SC 2007 Vol I-II page 10*** where the Supreme Court had considered the delay in disposing a case in the following terms;

> "The charge has been hanging over the appellants' head over a period of 8 years and the disorganization that essentially would have followed due to the undue delay in conformation of his sentence, in my view are circumstances, although not obligatory, that should be taken into consideration in suspending the sentence of imprisonment"

Following the same line of argument to canvass for a non-custodial sentence to be imposed on the appellants the parties further relied on the Court of Appeal decision in ***Kumara Vs. Attorney General 2003 (1) Sri LR 139*** where the court held;

i. A suspended sentence is a means of re-educating and rehabilitating the offender, rather than alienating or isolating the offender

ii. No offender should be confined to in prison unless there is no alternative available for the protection of the community and to reform the individual

iii. Imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during the imprisonment of one of the family members

iv. Suspended sentence with its connotations of punishment and pardon is supposed to have integrative powers. The offender is shown that he has violated the tenets of society and provoked its wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behavior again

v. The accused does not have previous convictions; **he surrenders to the police; he pleaded guilty on the first date of trial; he offered compensation to the aggrieved party**; these amply demonstrate the mitigatory factors."

This court is mindful of another Court of Appeal decision in ***The Attorney General Vs. Mendis (1995) 1 Sri LR 138*** on the question of sentencing. In the said case the court held,

……. "once an accused is found guilty on his own plea or after trial the judge is deciding on sentence, should consider the point of view of the accused on the one hand and the interest of society on the other. The nature of the offence committed, the machinations and manipulations resorted to by the accused to commit the offence, **the effect of committing such a crime in so far as the institution or organization in respect of which it has been committed, is concerned, the person who are affected by such crime,** the ingenuity with

which it has been committed and the involvement of others in committing the crime are matters which the judge should consider."

In the said case *Gunasekara J* had further observed,

"The trial judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not surrender this sacred right and duty to any other person, be it counsel or accused or any other person." ……..

"**White collar crimes or economic crimes have been committed with impunity in the past. Hence the sentence passed should be in keeping with the nature and magnitude of the offence to which the accused pleaded guilty**."

(Emphasis added)

Even though this court is not bound to follow the above decisions I observe that their Lordships were mindful of several important areas a trial judge should consider in imposing a sentence.

In the present case there is no question of the learned trial judge imposing a lenient or sevior sentence. Their Lordships of the Court of Appeal had gone into the said judgment in full and affirmed the said judgment. That has not been challenged before us.

As observed by this court the only issue before the court is "in the present circumstances" the sentence imposed on the accused are "excessive or not." The learned President's Counsel who appeared for the appellant in SC/SPL/LA 290/08 in addition to the common mitigatory factors they submitted above, submitted that his client who underwent immense pressure due to this case for over 30 years is prepared to pay doubled the fine and urge this court to act under section 303 (1) of the

Code of Criminal Procedure Act No 15 of 1979. The learned Counsel who appeared for the appellant in SC/SPL/LA 293/08 has taken up his present health condition and total blindness of the right eye and critical diabetic condition as the main mitigatory factor and further submitted that, even though his client had previously contributed some money to pay back the defrauded money, today he is not in a position to make any payment as a fine and request the court to be in mindful of these facts when considering their appeals.

As observed by this court, even though the trial before the High Court was concluded within 3 years the two appeals had taken 23 years. The first appeal before the Court of Appeal had taken 12 years but at the conclusion of the said appeal, none of the accused before Court of Appeal mitigated the sentence imposed on them but challenged the conviction and sentence. However their Lordships of the Court of Appeal affirmed the conviction and sentence both.

The present Special Leave to Appeal applications were filed before the Supreme Court in the year 2008 by all 5 accused, whose sentence was affirmed by the Court of Appeal but as pointed out in this judgment they did not take any interest in challenging the conviction affirmed by the Court of Appeal. Instead they engaged in a discussion with the Attorney General's Department "for a settlement." If the appellants (all 5 appellants were among the living at that time) were genuinely interested in compensating the victims, there is no reason for the 2nd trial, before the High Court of Colombo to drag on until this time. It is our view that the accused had made use this opportunity to commence a dialog between them and the Attorney General and to impress both the Attorney General's Department and this court, by settling the defrauded amounts with an interest by depositing Rs. 28 Million with the liquidator at the Central Bank in the year 2013 (between 10.10.2013 and 19.11.2014) 30 years after the money belonging to the depositors were defrauded by them.

As observed from the journal entries before us, (I have referred to some in this judgment) this court as well as the officers of the Attorney General's Department had allowed the accused to "obtain time" with a view to settle the matter before the Supreme Court. When going through the journal entries, I further observe, that since 2008 this matter was not marked ready "for support" on a single day.

Whilst this process was in operation three appellants have passed away and their applications were accordingly abetted. As further observed by me, those applicants have succeeded in their "operation" and did not serve a single day in prison for the offence they were convicted and sentenced.

When considering the matters already discussed in this judgment it is not possible for me to conclude that the sentence imposed on the two remaining suspects are excessive. This court cannot approve any application made by a counsel allowing his client to buy freedom by making a double payment. At the same time the court cannot be so sympathetic and allow an accused person to go scot-free considering his sickness alone, when he is found to be the "main offender" in the Indictment. Both these appellants have worked together with the other accused who are not among the living today to "delay justice" in this case.

In the said circumstances we are not inclined to interfere with the sentence imposed by the learned Trial Judge, but considering all the circumstances of the present case, decided to make order to run the sentences imposed on the 1st count and the other counts on which the appellants were convicted to run concurrent. In the said circumstance the total imprisonment imposed on the each appellant will be 2 years.

We further make order under section 303 (1) of the Code of Criminal Procedure Act No 15 of 1979 suspending the said term of 2 years Rigorous Imprisonment for a period 10 years.

Subject to the above variation of the sentence, both appeals before this court, i.e. SC/SPL/LA 290/2008 and SC/SPL/LA 293/2008 are dismissed.

Both appeals are dismissed subject to above variation/ No costs.

Judge of the Supreme Court

Hon. Justice L.T.B. Dehideniya

I agree,

Judge of the Supreme Court

Hon. Justice S. Thurairaja 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

SC TAB 01/2016
SC. Appeal No. 19/2003 (TAB)
HC Colombo 1092/2002

Rathnayake Mudiyanselage Sunil Ratnayake.
(Presently at Welikada Prison)

1st Accused-Appellant

Vs.

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

Respondent

BEFORE: Buwaneka Aluwihare, PCJ,
Sisira J. De Abrew, J,
Priyantha Jayawardena, PC, J,
H. N. J. Perera, J &
Murdu N. B. Fernando, PC, J.

COUNSEL: Anil Silva, PC with Sahan Kulatunga, G. Gunaratne, Dhanaraj Samarakoon and Asela Serasinghe for the1st Accused-Appellant

Thusith Mudalige, DSG with Viraj Weerasooriya, SC for Attorney General

ARGUED ON: 04.09.2018, 05.09.2018, 19.09.2018
20.09.2018 and 08.10.2018

DECIDED ON: 25.04.2019

Aluwihare, PC, J:

Mirusavil, a northern Sri Lankan village in the Jaffna peninsula had faced the ferocity of the civil war that had engulfed the country, at the dawn of the millennium.

In the early part of the year 2000, the fighting has intensified and in April 2000, the combatants of the Liberation Tigers of Tamil Eelam (LTTE) had overrun one of the key and strategic Army bases at Elephant Pass. With this debacle, the army had had to reposition their defence lines, and a forward defence line was established at Ellathumadduwal. Straddled by the areas of Ellathumadduwal and Kodikamam, stray shells fell on Mirusavil, which forced the villagers of Mirusavil to abandon the village and to seek refuge at locations some distance away from their village. They, however, kept a tab on their abandoned houses and had developed the habit of visiting their houses once in a while to clean up the places and to collect whatever produce that they could make use of. The visits, however, were done during the day time and they ensured that they left before dusk.

On the 18th December, 2000 a military unit of the Gajaba Regiment was airlifted and deployed in the general area of Mirusavil. This military unit consisted of a reconnaissance unit as well. On the day following, i.e. on the 19th December, 2000, eight villagers cycled to Mirusavil from the places where they had taken temporary residence, in order to visit their respective houses. One of them happened to be a toddler of 5 years who accompanied his father on his cycle.

Having attended to the chores and having collected whatever produce they could lay their hands on, by 4.00 in the afternoon, they were getting ready to cycle back to their temporary residences. The toddler Prasad, having noticed Guava fruits on a nearby tree, pestered his father Wilvarasa to get him some fruits. Probably not having the heart to disappoint the child, they had walked towards the vicinity of the Guava tree lugging along the bicycles on which they had stacked whatever they had collected from their compounds. They, however, could not proceed the full distance, because they were stopped by some soldiers. It would, at this point, be pertinent to identify the villagers who visited their houses on this day. The group comprised of Raviwarman, Thaivakulasingham, Wilvarasa, and his two sons; the toddler Prasad, who was 5 and his 13-year-old other son Pradeepan Jayachandran, Gnanachandran and his 15-year-old son Shanthan and finally Maheshwaran who happened to be the brother-in-law of Gnanachandran and the solitary survivor of this ordeal who lived to relate the tale.

Maheswaran's story:

By the year 2000, Ponnadurai Maheshwaran was a youth of 21 years. Maheswaran in his testimony had said that they abandoned their house as their houses were hit by artillery and as such had to move to the village of Karaweddi. Maheswaran had testified to the effect that on the day in question, he along with the group referred to earlier, came to Mirusavil and engaged in cleaning their houses and others who accompanied him also had cleaned their respective houses. Of this crowd, Raviwarman alone was slightly conversant in Sinhala. Raviwarman, however, had a disability, in that when he was a child of seven, while playing in his surroundings, he had come across a live shell which is said to have been ammunition used by the Indian Peace Keeping force (The IPKF). He had dashed it on the floor, causing it to explode. Due to the explosion, he had lost his left arm below the elbow. The significance of this injury, I shall advert to, later in this judgement.

When they approached the Guava tree, they were confronted by two military personnel-one armed with a firearm and the other with a knife. The group of civilians was ordered to kneel and were questioned by the soldiers. Raviwarman with his limited knowledge of Sinhala had explained the reason for their presence in the area. At this point, one soldier had left the place leaving behind the other to guard them. A short while later the soldier who had left had returned in the company of four other military men. The soldiers had then assaulted Maheshwaran and the other villagers who were with him. Maheshwaran according to him, had been blindfolded with his sarong. Even at this point, the other villagers who came with him had been present. Thereafter he had been assaulted and had lost consciousness. After a while, however, he had regained his senses. At that point, two military men had carried him by his arms and had tossed him over a fence. In the process his blindfold had got entangled with the barbed wire of the fence and had come off. At this point, Maheshwaran had not seen any of the other villagers who was with him just before he was assaulted. He had then been taken to a location where there was a cesspit. According to Maheshwaran he had noticed patches of blood on the cesspit slab and also sensed some movements emanating from inside the cesspit. Fearing that the others who came with him had been harmed and that he too would face the same fate, he had pushed the two soldiers who approached to blindfold him again and had run for his life through the thicket. He had reached the home of Sinnaiah Wilvarasa who is one of the deceased in this case. He was clad only an underwear as his sarong had been used to blindfold him. Having borrowed a sarong from the wife of Wilvarasa, he had spent the night at a house of one of his aunts, about a quarter of a mile away from Wilvarasa's house. The following morning, on his way home, he had met his father and had returned to their temporary residence at Karaweddi. Maheshwaran had related the events he encountered to his father. The same evening his mother had complained about the incident to the office run by the political party –Eelam Peoples Democratic Party, which is commonly referred to by its acronym, EPDP. Some of the party officials had visited Maheshwaran in the evening and had

subsequently admitted him to Chandiger hospital. On the 22st December he had left the hospital and had come home. On the following day he had been visited by military personnel who had questioned him about the events he encountered, in the company of the villagers a few days prior. On the following day (24th December) officers of the military police had visited him again. On the same day Maheshwaran accompanied by his parents, members of the EPDP, the Gramasevaka of the area along with the Military Police officers had visited the location of the cesspit. What they found inside the pit were parts of the carcass of a goat and a reptile.

While the group of people, including Maheshwaran were near the cesspit, a few military personnel had approached the crowd. Significant as it would seem, Maheswaran spontaneously had pointed out two persons as two of the soldiers that who had been involved in the incident where they were asked to kneel, blindfolded and assaulted, when he and the other villagers who accompanied him, were approaching the Guava tree.

Kandaiah Ponnadurai, father of Maheshwaran had left his home in search of his son as he had not returned after he went with a group of people to visit their homes at Mirusavil the previous day. He had met him on the way and had related the escapade. He, however, had also stated that the other eight people were still in the Army custody, presumably as Maheswaran did not know as to the fate others had faced at that point. Ponnadurai also had accompanied the group of persons who visited the location of the cesspit on the 24th. He had said in his evidence that when his son saw the army personnel who came to the scene after they reached the location, he had shouted saying that they were the people who assaulted them.

Major Sydney de Soyza was in charge of the supervision of the military police, based in the Jaffna region, and he had received orders from Brigadier Thoradeniya on 23rd December, 2000 to inquire into the killing of eight persons. He had gone to the house of Maheshwaran and had had his statement recorded. Then he had proceeded to the location where Maheshwaran alleged the incident had happened.

On Maheshwaran's directions, they had gone through shrub jungle and had first reached the abandoned home of Maheshwaran at Mirusavil. Thereafter they had proceeded to the location of the Guava tree and then to the location of the cesspit. Major Soyza had observed blood like stains on the concrete slab covering the cesspit. When the slab was removed, they had seen parts of an animal. On making inquiries he had come to know about 20 army soldiers of the Special Operations Unit of the 6th Gajaba Regiment were occupying the building that Major Soyza had observed in the vicinity. The Chief Officer of that Unit Sergeant Ranasinghe accompanied by several other officers had approached the location of the cesspit and witness Maheshwaran had suddenly shouted. What Maheshwaran had said was that two of the soldiers who came with the Sergeant Ranasinghe were the soldiers who restrained and assaulted him. Inquiries made by Major Soyza had revealed that the two officers identified by Maheshwaran were Lance Corporal Rathnayake (the Accused-Appellant) and Private Mahinda Kumarasinghe. Major Soyza having identified the Accused-Appellant in court, however, had stated that his recollection is faint with regard to Private Kumarasinghe.

Major Soyza had placed in custody, five soldiers inclusive of Lance Corporal Rathnayake (The Accused-Appellant) and Private Kumarasinghe.

On the 24th December, 2000, on being pointed out by the Accused-Appellant, the Military Police had searched the terrain around the area of the cesspit and had come across an area with loose soil which had been covered with twigs and small branches. The witness, through the Superintendent of Police had produced the Accused-Appellant along with other military personnel taken into his custody before the Magistrate.

On the orders of the Magistrate the area had been searched and eight bodies were unearthed. It was established that those bodies were of the persons who accompanied Maheshwaran on the 19th December to visit Mirusavil.

Steps thereafter had been taken to have identification parades held where a number of military personnel who were suspected of committing the crime, were

produced (13 in all) as suspects and five of them had been identified by Maheshwaran. In the context of this case, I do not see much significance of the evidence relating to the identification parade, as such I do not perceive any necessity to engage with that evidence at length here.

It was based on the above material that the Attorney General indicted five persons inclusive of the present accused-appellant on the following counts:

Count 1: Committing an offence punishable under Section 140 of the Penal Code being a member of an unlawful assembly with the common object of causing intimidation to Raviwarman.

Count 2: Committing the murder of Raviwarman, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 3: Committing the murder of Thaivakulasingham, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 4: Committing the murder of Wilvarasa Pradeepan, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 5: Committing the murder of Sinnaiah Wilvarasa, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 6: Committing the murder of Nadesu Jayachandran an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 7: Committing the murder of Kadeeran Gnanachandran an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 8: Committing the murder of Gnanachandran Shanthan an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 9: Committing the murder of Wilvarasa Prasad, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 10: Causing hurt to Maheshwaran, an offence punishable under Section 314 of the Penal Code read with Section 146 of the Penal Code.

Counts11 to 18 are again counts of murder in respect of the persons referred to in counts 2 to 9, however the basis of liability under the said counts is Common Intention articulated in Section 32 of the Penal Code and Count 19 again is the corresponding charge of causing hurt, referred to in Count 10, based on Common Intention.

The Trial-at-Bar before which the trial was held, however, acquitted the 2nd to the 5th accused, but convicted the 1st Accused (the present Accused-Appellant) on all counts referred to above, and proceeded to impose sentences in respect of each count on which the convictions were entered. I shall advert to in detail, the sentences imposed later in this judgment. At this point, however, I wish to consider whether the Trial-at-Bar had erred in finding the Accused-Appellant (hereinafter referred to as the 1st Accused) guilty of the offences on which he was indicted.

Pivotal to the conviction is Maheshwaran's credibility, for the entire prosecution case hinges on Maheshwaran's testimony. Before I deal with the issue of Maheshwaran's credibility it would be pertinent at this juncture to consider the other circumstantial evidence. It is only then, one could decide whether the other circumstances are compatible with and are supportive of Maheshwaran's testimony. This will have a decisive bearing on the acceptability or otherwise of Maheshwaran's testimony.

There is no dispute that Maheshwaran along with the other eight persons who died came to their houses at Mirusavil on the 19th of December.

According to the father of Maheshwaran, Ponnadorai, his son had gone to Mirusavil on 19th December and as he had not returned, in the early morning of the 20th December he had left for Mirusavil, in search of Maheshwaran and on the way had met him. It was then that Maheshwaran had related the story as to what he and the other eight persons faced on the previous day evening. This was confirmed by witness Letchchimi who happened to be Maheshwaran's mother.

The testimonies of both Ponnadorai and Letchchimi had been led by the prosecution to establish the consistency of Maheshwaran's version as to the incident and this is permitted in terms of Section 157 of the Evidence Ordinance, for the reason that the narration of events to these two witnesses by Maheshwaran had taken place contemporaneously or in or about the time the incident took place.

Evidence of Major Sydney de Soyza

By the year 2000, Major de Soyza had been serving in the capacity of a Major attached to the Military Police as the officer in charge of the Military Police in the Jaffna Peninsula. According to Major de Soyza it had been the 55th Army division, which was entrusted with the security, covering a large swath of land to which Mirusavil was central, under the command of Major General Sunil Tennekoon. According to Major de Soyza, consequent to the attack on the Elephant Pass in April, 2000, the Army had retreated to Mirusavil area and the forward defence lines were positioned about 700 – 800 meters in front of the location in question which was under Army control. He also has said that due to firing of shells, the people in Mirusavil had abandoned their houses and had moved out.

On the 23rd of December, 2000, around 9.00 a.m. Brigadier Thoradeniya had phoned him and had said that the Army had taken 9 civilians into custody and 8 of them were alleged to have been murdered and for him to take necessary action to trace the civilian who had survived and to inquire into the incident.

Consequently, Major de Soyza and his team had gone to Maheswaran's house at Nelliadi.

They had met Maheswaran's parents and who had taken the Major to the room where Maheswaran was seated on the floor. Major de Soyza had observed bandages on his body.

Upon being questioned, Maheswaran had come out with the same version, he gave in Court. He had also said that he could point out the location of the cesspit where Maheswaran believed the bodies of the other villagers might be. However, he had refused to accompany the army, unless officials of the EPDP and the Gramasevaka came along with them. The group had travelled in two vehicles up to a point and then had walked a distance of about 1 ½ kilometers to reach the location. First, they had been shown Maheswaran's house. In addition, Maheswaran also had shown the spot where they had, on the 19th, left their bicycles in order to approach the Guava tree. The bicycles, however had not been there. Maheswaran also had taken the witness to the location where they were confronted by the army near the Guava tree. At that point Maheswaran had said that he and the others were assaulted after being blindfolded and heard the wailing of the others who had come along with him.

From that point, Maheswaran had taken them to the location of the cesspit where he had suspected the bodies of the other 8 villagers might be. Maheswaran had shown signs of fear when they came up to the cesspit which was covered with a concrete slab.

When asked what Maheswaran had to say with regard to the incident, he had responded by saying, that it was the spot where his blindfold had come off and he had seen stains like blood. Fearing that he would be killed, he had run for his life. When Major de Soyza got the slab covering the cesspit removed, they had seen parts of a dead animal. Witness also had said that Maheswaran expressed his suspicions that the bodies of the other 8 persons could be in the pit.

Having observed a building which was of a distance about 50 meters, Major Soyza had approached the building and had found about 20 army officers of the Special Operations of the 6th Gajaba Regiment, occupying the building.

According to Major de Soyza, he had confronted Sergeant Ranasinghe who was in charge of the unit and had questioned him about the blood stains, the wire in the shape of a noose and the parts of the dead animal (goat). Sergeant Ranasinghe was told to summon the officers who were responsible for the slaughter of the goat. Consequently, 2 soldiers had come forward.

As they came up to the cesspit, all of a sudden, the witness had heard a groan accompanied by a loud shout. When he turned in the direction where the sound came from, he had seen Maheswaran clinging on to his father, and shouting. The two army men who had come forward also had become restless and had shown signs of fear.

The witness had walked up to Maheswaran with the interpreter and had questioned him as to why he shouted. Maheswaran had said that the two soldiers who came there were the two people who detained and assaulted them on the 19th December. Major de Soyza had then directed Major Premalal to question the two soldiers and even at this point the two soldiers have been very restless, so much so that Major Premalal had to tell them that there was no reason for them to be so disturbed. Major de Soyza had referred to the two soldiers as Corporal Rathnayake the Accused-Appellant and Private Mahinda Kumarasinghe and the witness had identified the Accused Appellant in court. Altogether at this point 5 soldiers had been taken into custody, including the Accused-Appellant and Private Kumarasinghe.

This witness had said that after the 5 soldiers were handed over to the military Police, again on the 24th of December of the same year he was involved in the investigation pertaining to the accused-appellant and the other soldiers who were taken into custody. Based on the statement made by the accused appellant, this witness along with a team of Military Police officers had visited the area where the

incident was alleged to have taken place. Upon reaching the location with the directions given by the 1st Accused-appellant, they had walked through a shrub jungle and the Accused- Appellant had pointed out a location. Witness had observed an area with loose soil covered with small branches. Witness had taken steps to secure the area and had placed Military Police personnel to guard the location. Then steps had been taken to inform the Police. Accordingly, Police had arrived at the scene headed by Senior Superintendent of Police Kankesanthurai followed by the Magistrate who ordered the police to dig the area pointed out by the Accused-appellant. In the process 8 bodies had been recovered and relations had identified them as those of the deceased referred in the murder charges on the indictment.

The District Judge of Chavakachcheri Mr. Premashankar, in his evidence had said that it was the Accused-Appellant and Major Soyza who pointed out the location from where the bodies were unearthed.

Reference also must be made to the evidence of Dr. Sinnathurai Kadiravelu, the District Medical Officer who had examined the main witness Maheswaran on the 20th December, 2000 at the Point Pedro Hospital. The history given by Maheswaran according to the doctor was that he was assaulted by army personnel on 19th December, 2000 around 4.00 p.m. According to Dr. Kadiravelu, he had observed a number of contusions on Maheswaran's body, in the area around the eye, on the back of the chest and on both legs. The Doctor's evidence was that all the injuries were compatible with blunt trauma and Maheswaran had sustained them within a day or two prior to the examination. When one considers the testimony of Maheswaran, in the backdrop of the medical history, the vintage of the injuries and the nature of the injuries, all are compatible with his story. The doctor had also noted that Maheswaran appeared to be frightened and restless. According to Dr. Kadiravelu he had been the only Medical Officer in that area.

Dr. Kadiravelu also had been present when the ground was dug to search for the bodies and had been present when the bodies were taken out. The bodies had been

placed in body bags and transported to the hospital morgue. He had performed the postmortem examinations on the 26th December, 2000. The witness had commented that he was 69 years of age at the time and was fatigued on the day the post mortems were conducted.

The doctor had observed a solitary cut injury on the front of the neck about 2 inches deep, on each of the deceased and had opined that death had resulted due to shock and hemorrhage resulting from the cut injury on the neck. The doctor had also said the cut injury had severed the main two arteries on either side of the neck and which was necessarily fatal. In the course of the hearing it was contended by the learned Deputy Solicitor General that the person or persons who were responsible for the killings had been cautious in tactically resorting to a silent mode of killing quite unlike the use firearms which would have caused alarm to the warring factions, given the volatility in the area at the relevant time. Thus, the learned DSG submitted that it is a factor indicating that the persons responsible for the killings were well aware of the war situation and had taken precautions to avoid making any noise.

Credibility of witness Maheswaran

It would be pertinent at the outset, to consider whether Maheswaran can be treated as a credible witness in view of the submissions made by the learned President's Counsel on behalf of the accused-appellant.

It is correct to say that none of the learned judges of the Trial-at-Bar who delivered the judgement had the benefit of observing Maheshwaran's demeanour and deportment, as they were not members of the Trial-at-Bar when Maheswaran testified. The learned judges, however, had not relied on the demeanour and the deportment of the witness and on the other hand, no application had been made on behalf of the accused-appellant to have the witness Maheswaran recalled. The defence had the right to do so and could have done.

The Trial-at-bar, had considered the credibility of witness Maheswaran (Pages 381 to 415 of the proceedings or pages 19 to 52 of the judgment) at length and had considered the contradictions 1V1 to 1V12 and the omissions 1 to 12; and after evaluating his testimony, the Trial-at-Bar had decided that it is safe to act on Maheswaran's evidence.

I have carefully considered the contradictions and the omissions referred to above and am of the view that in the context of the incident and Maheswaran's state of mind at the time, that the contradictions and omissions are insignificant. One needs to bear in mind that Maheswaran spoke Tamil and not Sinhala. Thus, it appears that what he said in Tamil, had been straight away translated into Sinhala and thereafter reduced to writing. It is not difficult to fathom his disturbed state of mind when he made the statement. He even refused to go with the army without the EPDP officials or the ICRC. Such was the fear Maheswaran entertained on this occasion.

This is a case where the court has to decide, mainly on circumstantial evidence. The court is required to consider the cumulative effect of the entirety of the evidence which I shall advert to now.

The fact that Maheshwaran went along with the deceased persons to Mirusavil on the 19th of December; the fact that he did not return home on that day, which was the usual practice of the villagers; that he had sustained blunt trauma injuries compatible with the history of assault; that Maheshwaran obtained treatment for the said injuries on the 20th, December the day following the alleged incident; that he gave a history of assault by Army personnel to the doctor; that he narrated the very incident to his father and mother at or about the time the incident took place of which he gave evidence years later in court are matters on which independent evidence is available to test both the veracity and the credibility of Maheshwaran's evidence. On the other hand, there is not even a hint that Maheshwaran had any reason to implicate the Accused-Appellant or other accused falsely.

What stands out is the conduct of Maheshwaran, by his spontaneous reaction, when in a raised voice he pointed out the Accused-Appellant and Private Kumarasinghe, who had not been indicted, as two of the persons who assaulted them on the 19th December, out of a number of Army personnel that were present when they visited the scene of the incident on the 24th of December. This evidence, I am of the view is an item of positive evidence to establish the presence of the Accused-Appellant at the scene. I see no reason to doubt the identification of the Accused-Appellant by Maheshwaran at this point. It would also be significant to consider the Dock Statement of the Accused-Appellant at this point. In his dock Statement, he admits his presence in the area of Ellathumadduwal on the 18th of December and further, as they did not have a place to stay his Company split into small groups and occupied abandoned houses in the area is also admitted. He also admits that they were not assigned any duties on the 19th of December and on that day, they were engaged in cleaning the surroundings of the places they had come to occupy the previous day. The Accused-Appellant's own admission, establishes his presence in the area of the incident and the fact that he was not assigned any duty on that day, are relevant in terms of Section 7 of the Evidence Ordinance, as facts which afforded an opportunity for their occurrence.

The learned judges of the Trial-at-Bar had carefully analysed the Dock Statement of the Accused-Appellant (pages 229-232 of the judgement) and had rejected his general denial as to any complicity of the crimes alleged. I have considered this aspect and I am of the view that the rejection of the Dock Statement cannot be faulted.

The learned President's Counsel on behalf of the Accused-Appellant referred to certain aspects of Maheshwaran's testimony and submitted that in view of those alleged infirmities, the Trial-at-Bar ought not to have placed reliance on Maheswaran's testimony.

It was submitted that after Maheshwaran escaped from his captors, the first person he met was Selvarani, the wife of the deceased Pradeepan Wilvarasa. Maheswaran

had borrowed a sarong from her but had not told her what the group had encountered. Under the circumstances, Maheswaran's immediate reaction would have been to escape from danger and on the other hand, he may not have wanted to cause alarm to Selvarani under the circumstances. In my view, this factor cannot be considered as an infirmity of Maheswaran's testimony.

The learned President's Counsel also pointed out that according to Maheswaran's father (Ponnadurai), his son had told him that "some of them were cut by the Army". This, it was pointed out, is contradictory to Maheswaran's evidence as he did not say that he saw any one being cut by the Army. Witness Ponnadurai gave evidence years after the incident and it is very probable that events may have overtaken the witness for the reason that at the time Ponnadurai gave evidence he knew all the deceased had died of cut injuries. As such, I hold that this discrepancy is insignificant.

The learned President's Counsel also highlighted purported discrepancies in the evidence of Maheswaran and contended that there was a great possibility that Maheshwaran were initially captured and assaulted close to the Guava tree, he escaped and ran away while the others were taken for questioning by the army personnel, suggesting that there is no direct evidence implicating the accused-appellant and that Maheswaran exaggerated and fabricated a story against the accused who were indicted. If that were the case, then Maheswaran could easily have said he saw the accused attacking the deceased, directly implicating them, which was, however, not the case. I have given my mind to the inconsistencies alleged, both *inter se* and *per se* of the testimony of Maheshwaran and I cannot fault the Trial-at-Bar for holding that his evidence is credible and is safe to act upon.

For the reasons set out above, I conclude that the evidence of Maheshwaran is credible and is safe to act upon.

It was also argued on behalf of the Accused-Appellant that the extension of the principle, expounded in the case of **Ariyasinhe and Others V. The Attorney General**

2004 2 SLR 360 with regard to a discovery of a fact in consequence of information received from a person accused of any offence, in terms of Section 27 of the Evidence Ordinance, is not applicable to the instant case. It is trite law that, all what can be inferred from a "Section 27 discovery" is that the accused had the knowledge as to the whereabouts of the 'fact' discovered. I am in agreement with the decisions cited on behalf of the Accused-Appellant, namely, **Etin Singho v. Queen** 69 N.L.R 353, **Heen Banda v. Queen** 75 NLR 54, **Ranasinghe v. AG** 2007 (1) SLR 223 and **Wimalaratne Silva and another v. AG** CA 483/2001 decided on 11.11.2008.

In the course of the trial, the prosecution relied on two discoveries based on the statement given by the Accused-Appellant to the police, which were marked in evidence under Section 27 of the Evidence Ordinance (T 47). The discoveries were, the location where the bodies were buried and the location where the bicycles on which some of the deceased rode, were buried.

It was contended by the learned President's Counsel that the decision in **Ariyasinhe and others v. The Attorney General** *(supra)* which expanded the law relating to the evidentiary value of a Section 27 statement has no application to the instant case. It is to be noted that the accused- appellant had also shown the location where the bodied were buried, to Major Soyza, an item of evidence admissible under Section 8 of the Evidence Ordinance as subsequent conduct against him and which in turn gives additional credence to the Section 27 statement marked as T 47.

In the teeth of the overwhelming cogent evidence led against the accused-appellant in this case, even assuming the Trial-at-Bar had misdirected itself with regard to the evidentiary value of the Section 27 statement, in my view, such misdirection has not substantially prejudiced the rights of the Accused-Appellant and does not warrant a reversal of the decision of the Trial-at-Bar.

It was also contended on behalf of the Accused-Appellant that the judgement of the Trial-at-Bar was a compromised verdict, where the court acquitted 2nd to the 5th Accused and only convicted the Accused-Appellant, an exercise to please all

parties concerned and further if the acquittal of the 2nd to the 5th Accused resulted due the infirmities of Maheshwaran's evidence, then that benefit also must accrue to the Accused-Appellant as well. I have carefully considered the material placed before the court by the prosecution and the reasoning of the learned judges of the Trial-at-Bar. It is clear that the acquittal of the 2nd to the 5th Accused had resulted not due to disbelieving the evidence of Maheshwaran, but due to the failure on the part of the prosecution to establish the identities of the 2nd to the 5th Accused to the degree of proof required by law. The prosecution relied on the Identification Parade evidence to establish the identities of the accused and the Trial-at Bar, upon careful consideration of the evidence placed before it, quite rightly did not place any reliance on that evidence and consequently the acquittal of the 2nd to the 5th accused resulted. As far as the Accused-Appellant was concerned, however, the spontaneous identification of the Accused-Appellant by witness Maheshwaran at the scene remains unassailed. As such I do not see any merit in the argument of the learned President's Counsel that the verdict is a compromised one.

The other main issues raised on behalf of the Accused-Appellant in this case was; whether the evidence placed by the prosecution is sufficient to prove the counts 2 to 9, beyond reasonable doubt. It was contended by the learned President's Counsel on behalf of the Accused-Appellant that a charge of murder cannot be maintained as there was no direct evidence and the evidence available is also inconclusive, in particular, the prosecution evidence does not establish the common object of the unlawful assembly, namely, to commit assault on Raviwarman.

Thus, it is incumbent on this court to consider, as to whether the prosecution has established the charges on the Indictment beyond reasonable doubt. As referred to earlier, the 1st count is Unlawful Assembly (within the meaning of Section 139 of the Penal Code) the common object of the assembly being to commit "Assault" on Raviwarman.

Thus, it is incumbent on the prosecution to prove beyond reasonable doubt, two factors:

(1) That there was an assembly of five or more persons
and

(2) That the common object of the persons composing that assembly was to commit Assault on Raviwarman.

When one analyses the evidence, it is clear that, initially there had been only two persons, one of them happened to be the accused-Appellant, and later four others joined them, making the total number of persons present six. In that context the prosecution had established that there was an assembly of more than five persons. The next aspect the Court is required to consider is, whether those persons assembled, with the common object of committing Assault on Raviwarman. It must be said that the learned judges of the Trial-at-Bar had not considered this aspect in detail nor did the judgement carry any reasoning for the conclusion that Assault had been committed on Raviwarman.

Section 342 of the Penal Code defines "Assault" as follows:

"Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit "an assault".

Thus, it is necessary to consider whether the prosecution has established that any member or members of the Assembly "committed Assault" on Raviwarman. On this aspect the evidence of Maheshwaran was as follows; (proceedings of 13-02-2003). After four others had joined the initial two persons who were there, Maheshwaran and his group had been questioned by the Army personnel and it was conveyed to Maheshwaran through his uncle who had a limited understanding of Sinhala, that they were accused of being members of the LTTE. At that point Raviwarman had been separated from them and had been taken away to a distance of about 25 meters and about ten minutes later he had been brought back. As referred to earlier Raviwarman had a physical infirmity in that he had lost his left arm below the elbow. This injury probably may have given the

impression to the military personnel that Raviwarman had sustained it in battle. This also would have been the reason to separate Raviwarman from the rest of the group for questioning.

The moment Raviwarman was brought back, all of them had been assaulted by the Army personnel with fists and clubs. If, to go by the evidence of Maheshwaran, all that had happened was that Raviwarman had been taken away a distance of about 25 meters from the group of Maheshwaran's people, a distance easily visible to the naked eye, a little longer than a length of a cricket pitch for one to get an understanding of this distance. Unfortunately, the prosecutor had not asked a single question from Maheshwaran, as to whether he saw what happened between Raviwarman and the two Army personnel who took him away. Raviwarman, unfortunately, didn't live to tell the tale as to what transpired between him and the two men who took him away.

Hence the prosecution has starved the case of evidence as to whether those two who took Raviwarman made any gestures causing apprehension to Raviwarman that those two persons were about to use criminal force on him. With the paucity of evidence on this aspect, a doubt lingers as to whether the reason for taking Raviwarman away was with the object of questioning Raviwarman in order to ascertain the reasons for their presence in the locality or to commit Assault within the meaning of Section 342 of the Penal Code. In this context, I hold that the prosecution had failed to establish that there was an unlawful Assembly with the common object of committing Assault on Raviwarman within the meaning of Section 342 of the Penal Code. Thus, counts 1 to 10 of the Indictment must necessarily fail. Accordingly, I set aside the conviction of the Accused-Appellant on counts 1 to 10.

What remains to be considered are the counts 11 to 19 which are based on vicarious liability of common intention. Maheshwaran's evidence as to what transpired after Raviwarman was brought back is significant. His evidence was that, no sooner Raviwarman was brought back, the Army personnel started

assaulting Maheswaran and the other villagers who accompanied him with fists and sticks. Thereafter he had been blindfolded with his own sarong and the assault had continued. It was at this point that Maheswaran says he fainted. The rest of his evidence I have dealt with earlier in this judgement hence repeating it here would not be necessary. When one considers the participation of the Accused-Appellant coupled with the evidence with regard to the participation of the others, it is clear that the Accused-Appellant is not only liable for the acts committed by him, but also for the acts committed by others who were with him as well by virtue of Section 32 of the Penal Code.

There are significant features in this case that direct me to conclude that all persons involved had acted in furtherance of a common intention. As referred to earlier, no sooner Raviwarman was brought back, all of them had been assaulted by the group of army personnel gathered there, which included the Accused-Appellant. This assault appears to have commenced simultaneously indicating fusion of minds and a common intent, on the part of the military personnel involved. All the eight deceased persons had sustained the identical fatal injury, a cut on the neck inflicted from behind, as disclosed by the medical evidence. All bodies were buried in the same location which is proximate to the location where Maheswaran and the group were confronted by the Army personnel. In addition, four of the bicycles on which the group rode to Mirusavil on the 19th of December, were also recovered from a location close to the place where the bodies were. It is highly improbable if not impossible for a single person to commit all these acts. Thus, it is reasonable to infer that these acts have been committed by more than one person. Furthermore, the time of death is also compatible with the evidence of Maheshwaran. When the deceased were seen last, they were detained by the Accused-Appellant, and the other Army personnel who were present. When Maheswaran was carried by two men, none of the others were to be seen and even after he was tossed over the fence, he was assaulted by two men, and after that they had walked him to the location where the cesspit was. At that point he had seen another person near the cesspit armed with a Kris knife and he had also seen blood on the slab covering the

cesspit (which was confirmed by the evidence of the Government Analyst) and sensed movements emanating from the cesspit as similar to someone was shaking his limbs. At that point one of the men had collected his sarong that had got entangled in the fence and had approached Maheshwaran and made an attempt to blindfold him. It was at this juncture that Maheswaran had pushed the man who tried to blindfold him and had run away.

Considering the above the irresistible inference that could be drawn is that it was the accused-appellant and the group of men who had inflicted the fatal injuries to the deceased and from the nature of the injuries it can be concluded that the injuries were inflicted with the intention of causing their deaths. Thus, I conclude that the prosecution has established the counts of murder (11 to 18) and the count of causing hurt to Maheshwaran, count no. 19 of the indictment.

In the course of the hearing, as I have referred to earlier, it was contended on behalf of the Accused-Appellant, by the learned President's Counsel that the evidence of Maheshwaran is infirm and as such not safe to act upon. Both in the oral submissions as well as in the written submissions the attention of this court were drawn to many contradictions and omissions in the testimony of Maheswaran. I have carefully considered them and given my mind to the same. When one considers the context in which this incident happened, the security and the climate that prevailed in the geographical area in which the incident took place and the fear under which the people lived in those areas at the relevant time, the alleged infirmities are not of such significance as to shake the credibility of Maheshwaran's evidence.

I wish to quote Justice Thakkar with approval, who stated in the case of **Bhoginibhai Hirjibhai v. State of Gujarat** AIR1983 SC 753,

"We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. 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 recall the main purport of the conversation. It is unrealistic a witness to be a human tape recorder.

(5) In regard to the 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.

Thus, I am of the view that the Trial-at-Bar was justified in treating witness Maheswaran as a credible witness and acting on his testimony and I conclude that the learned judges of the Trial-at-Bar were correct in coming to the conclusion that the accused-Appellant was guilty on counts 11 to 19 (inclusive of both counts) on the Indictment. As such I affirm the conviction and the sentences imposed on the accused-Appellant on the said counts.

The appeal is partially allowed.

JUDGE OF THE SUPREME COURT

JUSTICE H.N. J. PERERA

I agree

CHIEF JUSTICE

JUSTICE SISIRA J. DE ABREW

I agree

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDHU N. B. 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 for mandates in the nature of Writs of Certiorari and Mandamus under Article 140 read with Article 104H of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. **KELEPOTHA VITHANAGE ARIYARATNE**
   368, Kiridola Road, Thalagaspe.
2. **DEHIWELA LIYANAGE THILAK OPATHA**
   308, Indipalagoda, Pitigala.
3. **ARIYAWANSHA DISSANAYAKE**
   Secretary, Democratic United National Front,
   47A, 1st Lane, Rawawathawatte,
   Moratuwa.

PETITIONERS

SC Writ Application No. 12/2018

VS.

1. **S.T.KODIKARA**
   Returning Officer,
   District Secretariat, Galle.
2. **MAHINDA DESHAPRIYA**
   Chairman,
3. **N.J.ABEYSEKERA,PC**
   Member,
4. **PROF. S.R.HOOLE**
   Member,
   2nd to 4th Respondents abovenamed are members of the Election Commission, Election Secretariat, P.O.Box 2,Sarana Mawatha, Rajagiriya.

5. **M.B.I.DE SILVA**
   Assistant Commissioner of Elections,
   Elections Office, Galle.
6. **MAHINDA SAMARAWEERA**
   Secretary,
   Eksath Janatha Nidahas Sandanaya,
   301, T.B.Jayah Mawatha,
   Boralesgamuwa.
7. **SAGARA KARIYAWASAM**
   Secretary,
   Sri Lanka Podujana Peramuna,
   8/11, Robert Alwis Mawatha,
   Boralesgamuwa.
8. **KABEER HASHIM**
   Secretary, United National Party,
   400, Kotte Road, Pitakotte.
9. **M.TILVIN SILVA**
   Secretary,
   Janatha Vimukthi Peramuna,
   464/20, Pannipitiya Road,
   Pelawatte, Battaramulla.
10. **HON. ATTORNEY GENERAL**
    Attorney General's Department,
    Colombo 12.

RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
L.T.B.Dehidenya, J.
E.A.G.R.Amarasekera, J.

COUNSEL: A.S.M.Perera, PC with Neville Ananda for the Petitioners.
Ms. Viveka Siriwardena,DSG with Rajitha Perera,SSC for the 1st to 5th and 10th Respondents
.

ARGUED ON: 29th April 2019.

DECIDED ON: 30th August 2019.

Prasanna Jayawardena PC, J.

An election to elect members of Local Authorities throughout the island was to be held on 10th February 2018. The Elpitiya Pradeshiya Sabhawa is one such Local Authority. Elpitiya is located within the District of Galle.

The provisions of law governing this election including the provisions of law governing the nomination of candidates for election as members of a Local Authority, are set out in the Local Authorities Elections Ordinance No.53 of 1946, as amended. ["the Ordinance"].

On 27th November 2017, the Elections Commission of Sri Lanka published a public notice calling for nominations of candidates for election as members of Local Authorities, including the Elpitiya Pradeshiya Sabhawa, at the aforesaid proposed election. The notice specified that the nomination period commenced on 18th December 2017 and ended on 21st December 2017.

The 1st, 2nd and 3rd petitioners are all members of the political party named "Prajathanthravadi Eksath Jathika Peramuna" ["Democratic United National Front"], which was a *"recognised political party"* for the purpose of election of members of Local Authorities under and in terms of the Ordinance. The 1st and 2nd petitioners, along with 29 others, were candidates nominated by the Democratic United National Front for election as members of the Elpitiya Pradeshiya Sabhawa at the aforesaid election. The 3rd petitioner is the Secretary of that political party.

On 04th December 2017, the 1st petitioner was also duly appointed, under and in terms of the provisions of the Ordinance, as the authorised agent of the Democratic United National Front for the purposes of the election of members of the Elpitiya Pradeshiya Sabhawa.

The 1st respondent was the Returning Officer for the electoral area of the Elpitiya Pradeshiya Sabhawa in terms of section 27(1) read with section 4(1) of the Ordinance. He also functioned as the Election Officer for the purposes of the aforesaid election.

The 2nd to 4th respondents are the Chairman and members of the Election Commission and the 5th respondent is the Additional Commissioner of Elections. The 6th to 9th respondents are the Secretaries of the other recognised political parties which submitted Nomination Papers in respect of the aforesaid election of members of the Elpitiya Pradeshiya Sabhawa. The 10th respondent is the Hon. Attorney General.

The Nomination Paper containing both the "First Nomination Paper" and the "Additional Nomination Paper" in respect of all Wards of the Elpitiya Pradeshiya Sabhawa was prepared by the Democratic United National Front for submission and delivery to the 1st respondent [the Returning Officer] in terms of the provisions of the Ordinance. The

Nomination Paper was duly and correctly prepared in compliance with the provisions of the Ordinance. Further, on 15th December 2017, the Democratic United National Front deposited the legal tender as required by section 29 of the Ordinance.

On 21st December 2017, the 1st respondent was present in the auditorium of the District Secretariat of Galle for the purpose of accepting Nomination Papers which were to be delivered to him in terms of section 28 of the Ordinance. As set out in the aforesaid notice dated 27th November 2017, the 1st respondent was obliged to accept Nomination Papers submitted to him up to 12 noon on 21st December 2017.

The Elections Department also provided a `Help Desk" staffed by an unit of officers who would check Nomination Papers and verify that they were in order prior to the Nomination Papers being delivered to the 1st respondent. The Help Desk was located within the auditorium.

On 21st December 2017, the 1st petitioner, accompanied by the 2nd petitioner entered the premises of the District Secretariat of Galle at 10.55 am. They proceeded to the auditorium. The 1st petitioner carried two file covers. The first file cover contained the supporting documents relating to the First Nomination Paper. The second file cover contained the supporting documents relating to the Additional Nomination Paper.

After entering the auditorium, the 1st petitioner, accompanied by the 2nd petitioner, tendered the two file covers with the Nomination Paper and supporting documents therein, to the officers at the Help Desk. These officers checked the Nomination Paper and supporting documents and confirmed that they were in order.

The 1st respondent [the Returning Officer] was seated behind a desk within the auditorium. The Assistant Returning Officer of the Galle District was seated at the same desk, by the side of the 1st respondent.

The facts narrated earlier are not in dispute. However, from this point onwards, the petitioners and the 1st respondent have two different versions of what took place.

The petitioners state that the 1st petitioner, accompanied by the 2nd petitioner, proceeded to the desk at which the 1st respondent was seated. They did so for the purpose of delivering the Nomination Paper and supporting documents to the 1st respondent in terms of section 28 (5) of the Ordinance. The 1st and 2nd petitioners seated themselves on two chairs which were placed on the other side of the desk behind which the 1st respondent and the Assistant Returning Officer were seated. The 1st petitioner then attempted to deliver the two file covers [containing the Nomination Paper and supporting documents] to the 1st respondent. However, the 1st respondent indicated that the file covers should be removed and only the Nomination Paper and supporting documents be delivered to him. The 1st petitioner then kept the file covers

with him and handed the Nomination Paper and supporting documents to the 2nd petitioner [who was seated beside him] and asked the 2nd petitioner to arrange the Nomination Paper and supporting documents so that they could be delivered to the 1st respondent. A few moments later, the 1st respondent made a sign with his hand indicating that the 2nd petitioner should hand the Nomination Paper and supporting documents to the 1st respondent. Thereupon, the 2nd petitioner handed the Nomination Paper and supporting documents to the 1st respondent *"with the consent and approval of the 1st petitioner"* and *"for and on behalf of the 1st petitioner and under his control"*. After taking the Nomination Paper and supporting documents into his custody, the 1st respondent asked the 2nd petitioner to hand over the 2nd petitioner's National Identity Card so that the name and National Identity Card Number of the 2nd petitioner could be entered on the Nomination Paper as the person who delivered the Nomination Paper and supporting documents to the 1st respondent. The petitioners objected and stated to the 1st respondent that the Nomination Paper and supporting documents had been delivered to the 1st respondent by the 1st petitioner who was the authorised agent. The 1st respondent nevertheless insisted that the 2nd petitioner hand over his National Identity Card and, upon being compelled to do so, the 2nd petitioner handed his National Identity Card to the 1st respondent *"under protest"*. The 1st respondent then entered the name and National Identity Card Number of the 2nd petitioner on the Nomination Paper as the person who delivered the Nomination Paper and supporting documents to the 1st respondent. The petitioners had to leave the aforesaid desk thereafter. There were CCTV cameras which recorded the aforesaid sequence of events.

On the other hand, although the 1st respondent acknowledges that the 2nd petitioner was accompanied by *"another person"* and that both men came before the 1st respondent for the purpose of handing over the Nomination Paper, the 1st respondent states he is *"not aware"* whether that other person was the 1st petitioner. The 1st respondent denies that two file covers were handed to him and denies that he indicated that the 2nd petitioner should hand over the Nomination Paper. The 1st respondent also denies that he *"threatened"* to reject the Nomination Paper if the 2nd petitioner did not hand over his National Identity Card and denies that the petitioners made any protest. The 1st respondent avers that the CCTV cameras had failed to record the proceedings.

It is common ground that, after the time period open for the acceptance of Nomination Papers ended at 12 noon on 21st December 2017, there was a span of one and a half hours ending at 1.30pm available for objections to be made to the Nomination Papers that had been submitted and that no objections were made to the Nomination Paper submitted by the Democratic United National Front.

It is also common ground that, after the period provided to make objections ended, the 1st respondent announced that the Nomination Paper submitted by the Democratic

United National Front had been rejected for the reason that it had been delivered by a person who was not the authorised agent of that political party. Subsequently, the petitioners received a written communication dated 26th December 2017 marked "P4" stating that the Nomination Paper submitted by the Democratic United National Front had been rejected under and in terms of section 31 (1) (a) of the Ordinance for the reason that the requirements of section 28 (5) of the Ordinance had not been complied with.

On 10th January 2018, the petitioners filed this application invoking the jurisdiction of this Court under Article 140 read with Article 104H of the Constitution and praying, *inter alia*, for writs of *certiorari* quashing the decision made on 21st December 2017 and set out in "P4" rejecting the Nomination Paper delivered to the 1st respondent by the 1st petitioner as the authorised agent of the Democratic United National Front. The petitioners also prayed for a writ of *mandamus* directing the 1st respondent to accept and/or receive as valid the Nominations Paper delivered to the 1st respondent by the 1st petitioner as the authorised agent of the Democratic United National Front and directing the 1st respondent to allot a symbol to the Democratic United National Front in terms of section 37 (1) of the Ordinance and to submit a report under section 37 (3) of the Ordinance in respect of the Electoral Area of the Elpitiya Pradeshiya Sabhawa. Further, the petitioners prayed for a writ of *mandamus* directing the 1st respondent to specify a fresh date of poll for the election of members of the Elpitiya Pradeshiya Sabhawa. The petitioners prayed for an interim order suspending and/or restraining the 1st respondent from holding the election of members of the Elpitiya Pradeshiya Sabhawa, until the final determination of this application.

After hearing submissions made by learned President's Counsel in support of this application and submissions made in opposition by learned Deputy Solicitor General on 30th January 2018 and after considering the material placed before the Court including the documents marked "A" to "E" produced together with the 10th respondent's Motion dated 26th January 2018, an interim order was issued in terms of prayer (h) of the petition restraining the respondents from holding an election of members of the Elpitiya Pradeshiya Sabhawa (only) until the final determination of this application. The Court specified that this interim order operates only in respect of holding an election of members of the Elpitiya Pradeshiya Sabhawa and would not affect the holding of elections to other Local Authorities on 10th February 2018.

Accordingly, the election of members of the Elpitiya Pradeshiya Sabhawa has not yet been held although the elections to other Local Authorities were held on 10th February 2018.

The 1st to 5th respondents have filed a Statement of Objections supported by an affidavit affirmed to by the 1st respondent. The 1st petitioner has filed a counter affidavit.

The position taken by the 1st respondent with regard to the manner of delivery of the Nomination Paper to him, has been described earlier. The 1st respondent states that the Nomination Paper submitted by the Democratic United National Front was rejected *"for the reason that it had not been handed over by the Secretary or the Authorized Agent as required by section 28 (5) of the Local Authorities Elections Ordinance as amended which is one of the grounds for rejection stipulated in Section 31 (5) of the Ordinance."*.

In this connection, the 1st respondent states that *"The nomination paper of the Democratic United National Front for the Elpitiya Pradeshiya Sabha was handed over to the 1st Respondent by a person by the name of Dehiwela Liyanage Thilak Opatha, holder of the NIC Number 612104140V. The NIC of the person who handed over the nomination paper to the 1st Respondent was requested and his details were entered in the nomination paper along with the date and time of handing over the said the nomination paper …. The person who handed over the nomination paper to the 1st Respondent willingly and without any hesitation whatsoever gave his NIC when requested to do so. The NIC No. i.e. 612104140V and the name stated in the said NIC i.e Dehiwela Liyanage Thilak Opatha was accordingly entered in the nomination paper. Another person accompanied the said Dehiwela Liyanage Thilak Opatha at the time the said Dehiwela Liyanage Thilak Opatha handed over the nomination paper to the 1st Respondent. The 1st Respondent is not aware whether the other person who accompanied Dehiwela Liyanage Thilak Opatha was the 1st Petitioner or not."*. It should be mentioned here that the aforesaid Dehiwela Liyanage Thilak Opatha referred to by the 1st respondent, is the 2nd petitioner. The copy of the Nomination Paper marked "1R2" confirms that the name and National Identity Card Number of the 2nd petitioner has been entered by the 1st respondent in the column which records the person who delivered the Nomination Paper.

The 1st respondent has produced a photograph marked "1R3". It depicts the 1st respondent seated behind a desk with the Assistant Returning Officer by his side. The 2nd petitioner is standing on the opposite side of the desk and is seen handing the Nomination Paper and supporting documents to the 1st respondent. Another man is seated beside the 2nd petitioner.

The 1st respondent also states that an appeal dated 21st December 2017 marked "1R5" was made by the 1st petitioner acknowledging that the Nomination Paper *"was handed over to the Returning Officer by the Deputy Leader Dehiwela Liyanage Thilak Opatha"* and *"appealing to accept the same as having been handed over by the Authorized Agent"*.

In his counter affidavit, the 1st petitioner has stated that he wrote and submitted "1R5" at the request of the 1st respondent and long before the 1st respondent announced that the Nomination Paper submitted by the Democratic United National Front was rejected. A perusal of "1R5" shows that the 1st petitioner has stated in "1R5" that he was accompanied by the 2nd petitioner and that the 1st petitioner delivered the Nomination Paper to the Returning Officer *"through"* [*මගින්*] the 2nd petitioner. The 1st petitioner has gone on to state that, as far as he sees, there was no defect in the manner in which the Nomination Paper was delivered to the 1st respondent and has requested the 1st respondent to acknowledge that the Nomination Paper was delivered by the 1st petitioner, who is the authorised agent of the Democratic United National Front.

When this application was taken up for Hearing before us, learned President's Counsel for the petitioners and learned Deputy Solicitor General for the respondents made extensive submissions.

As mentioned earlier, the 1st respondent has rejected the Nomination Paper submitted to him by the Democratic United National Front on the sole basis that it was delivered to him by the 2nd petitioner and not by the 1st petitioner who was the authorised agent of that political party for the purpose of the aforesaid election. The 1st respondent has taken up the position that the fact that the Nominations Paper was physically handed to him by the 2nd petitioner constituted non-compliance with the requirements of section 28 (5) of the Ordinance which justify the rejection of the Nomination Paper.

Section 28 (5) of the Ordinance states:

"Each nomination paper shall be signed by the secretary of a recognized political party and in the case of an independent group, by the candidate whose name appears in the nomination paper of that group and is designated therein as the group leader of that group (such candidate is hereinafter referred to as "the group leader") and shall be attested by a Justice of the Peace or by a Notary Public. Such nomination paper shall be delivered to the returning Officer within the nomination period by the secretary or the authorized agent, in the case of a recognized political party, or the group leader in the case of an independent group.

The documentary material before us establishes that both the 1st petitioner and the 2nd petitioner entered the premises of the District Secretariat of the Galle District at 10.55am on 21st December 2017 and proceeded to the auditorium for the purpose of delivering the Nomination Paper of the Democratic United National Front to the 1st respondent. It is common ground that the 2nd petitioner was seated in front on the 1st respondent's desk. The photograph marked "1R2" establishes that there was another man seated by the 2nd petitioner. The 1st petitioner and the 2nd petitioner both say that

this individual was the 1st petitioner. The 1st respondent has only claimed that he did not know the identity of that individual. However, the truth of that claim made by the 1st respondent is called into question by the established fact that the 1st and 2nd petitioners entered the District Secretariat together and 1st respondent's own statement that the 1st petitioner submitted the handwritten document marked "1R5" to the 1st respondent at the auditorium soon after the 1st respondent took the Nomination Paper into his custody.

Having carefully considered the material before us, I have no doubt that the 1st petitioner and 2nd petitioner were seated together in front of the 1st respondent's desk and that they came there for the specific purpose of delivering the Nomination Paper of their political party to the 1st respondent.

The 1st and 2nd petitioners have stated that the 1st petitioner - as the authorised agent of the Democratic United National Front - sought to deliver the Nomination Paper and supporting documents to the 1st respondent and that the only reason he handed the set of documents to the 2nd petitioner was because the 1st respondent indicated that the file covers should be removed. Thereafter, the petitioners unequivocally state that the only reason the 2nd petitioner physically handed the Nomination Paper and supporting documents to the 1st respondent was because the 1st respondent indicated that he should do so.

I am inclined to believe the version of the events narrated by both the 1st petitioner and the 2nd petitioner. I consider it unlikely that when the authorised agent of the political party was present at the Returning Officer's desk for the specific purpose of delivering the Nomination Paper, the 2nd petitioner would have delivered the documents to 1st respondent unless the 1st respondent indicated to him to hand over the Nomination Paper and supporting documents. The fact that the 2nd petitioner stood up to do so, was, in all probability, nothing more than a mark of courtesy and respect.

The fact that the 1st petitioner was, all along, seated by the side of the 2nd petitioner and was, thereby, participating in the act of handing over the Nomination Paper to the 1st respondent cannot be ignored. The 1st petitioner was very much an integral part of the act of *"delivering"* the Nomination Paper to the 1st respondent. Too much should not be read into the fact that it was the 2nd petitioner who physically handed the Nomination Paper to the 1st respondent since it is clear that the 1st petitioner was present at that very moment by the side of the 2nd petitioner and that the 2nd petitioner was acting on behalf of the 1st petitioner and under the direct control of the 1st petitioner. Further, I have no doubt that the 2nd petitioner handed the Nomination Paper to the 1st respondent only because the 1st respondent beckoned him to do so and that the 1st and 2nd petitioners rushed to obey. I also accept the petitioners' narration that, thereafter, the 2nd petitioner handed his National Identity Card to the 1st respondent only because the 1st respondent insisted that he did so.

In these circumstances, I have no hesitation in holding that there was compliance with the requirements of section 28 (5) of the Ordinance which require that the Nomination Paper and supporting documents be *"delivered"* to the 1st respondent by the authorised agent of the political party. In my view, the aforesaid circumstances in which the Nomination Paper and supporting documents were handed to the 1st respondent constitute *"delivery"* of the Nomination Paper by the 1st petitioner, who was the authorised agent of the political party since the 1st petitioner was physically present at the time and the Nomination Paper was handed to the 1st respondent by the 2nd petitioner who was acting under the 1st petitioner's direct control at that time and on behalf of the 1st petitioner. As observed earlier, the 1st petitioner was an integral part of the act of *"delivering"* the Nomination Paper to the 1st respondent.

Learned Deputy Solicitor General has relied on the decision of this Court in EDIRIWEERA vs. KAPUKOTUWA [2003 1 SLR 228]. In that case, Silva CJ upheld the rejection of a Nomination Paper which had not been signed by the Secretary of the recognised political party which submitted the Nomination Paper. In reaching this conclusion, the learned Chief Justice placed emphasis on the necessity of ensuring that the signature of the Secretary of the recognised political party is placed on the Nomination Paper and observed [at p.233-235] *"The question whether substantial compliance with a requirement in a statute is permitted as distinct from proper or what may be termed as strict compliance, should be examined on two basic premises. They are, firstly the significance of the requirement in the scheme of the relevant provisions in the statute and, secondly the sanction which attaches to a non-compliance of the requirement. In examining the significance of the mandatory provision in Section 28 (5) that the Secretary of the recognised political party or the group leader, shall sign each nomination paper delivered to the Returning Officer, it is necessary to consider albeit briefly, the electoral process in the light of what existed before ….. By Law No. 24 of 1977, this (the previous) system was done away with. The ward system which existed for decades was replaced by a system in which the entire local authority became one electoral area. Instead of nomination by a proposer and seconder within a ward, groups of candidates are nominated by recognised political parties or leaders of independent groups. Thus the link between a recognised political party and the candidate which was at a minimum in the system which existed in the past, was made, was entrenched and made firm. Candidates who were previously proposed and seconded by voters at the grass root level became groups nominated by political parties or leaders of independent groups. This pervasive link between a recognized political party and its groups of candidates is manifested by the signature of the Secretary of the party. It is for this reason that a specific place is provided in the nomination form for the signature of the Secretary, beneath the name of the candidates and with a preceding certification that the youth candidates are below the stipulated age. The significance of the requirement is brought to a zenith by the provision in Section 28 (5) that the signature should be*

attested by a Justice of the Peace or by a Notary Public. Therefore in relation to the first premise to be examined as to the significance of the requirement, it has to be concluded that ***it is necessary for the Secretary of the recognised political party or group leader to sign each nomination paper in order to establish the vital and pervasive link between the recognized political party and the candidates*** *or the group leader and the candidates, as the case may be.* ***This requirement is unquestionably of the highest significance in the scheme of the relevant provisions in the statute****. Moving to the second premise which relates to the sanction attaching to the non compliance of the requirement for the Secretary of the recognized political party or the group leader to sign the nomination paper, it is seen that Section 31 (1) (e), places a firm sanction by mandating a rejection of the nomination in the event of non compliance. Thus the significance of the requirement is matched by the severity of the sanction which attaches to non compliance. When examined in the scheme of the relevant provisions of the statute, I have to conclude that the requirement in Section 28 (5) is mandatory and calls for proper compliance.".* [emphasis added].

Thus, the *ratio* applied in EDIRIWEERA vs. KAPUKOTUWA is based on the vital importance of ensuring that a Nomination Paper is signed by the Secretary of a recognised political party so as to conclusively manifest the fact that the candidates named thereon had been nominated by that political party.

Learned Deputy Solicitor General has also cited the decision of this Court in PUNCHINILAME vs. PREMARATNE [SC SPL LA 78/2002 decided on 30th April 2002]. In that case, the rejection of the Nomination Paper was upheld by this Court because the authorised agent was not present at the time the Nomination Paper were handed over to the Returning Officer and since no evidence was submitted to suggest that an explanation was given to the Returning Officer for the absence of the authorised agent. The decision in CA Writ Application No. 424/2006 [decided on 10th March 2006] cited by learned Deputy Solicitor General is a case where the rejection of the Nomination Paper was upheld by the Court of Appeal because it had been tendered after the time period available to do so had ended.

Thus, the aforesaid decisions cited by learned Deputy Solicitor General do not help the respondents since the facts in those cases are entirely different to the facts and circumstances of the case before us in which the Nomination Paper was duly signed by the Secretary of the recognised political party and was delivered to the 1st respondent, within the stipulated period of time, in the manner described earlier in the presence of and under the control of the 1st petitioner, who was the authorised agent.

Learned Deputy Solicitor General has also cited the decision of the Court of Appeal in NEHATAMULLAH vs. DISSANAYAKE [CA 88/2011 decided on 12th May 2011] where

the facts before the Court of Appeal were similar to the facts in the present case. In that case, Hettige J, then in the Court of Appeal, observed *"….. the 1st petitioner* [the authorised agent] *along with one A.M.Zafrullah went to the 2nd respondent's office on 27/01/2011 and handed over the nomination paper to the 2nd respondent [*the Returning Officer] *along with the required documents in terms of the law to the 2nd respondent at the District Secretariat in Matale. It is stated however, that the nomination paper was given back to the 1st petitioner to remove the file cover and submit only the nomination paper and in the rush thereafter his companion one Zafrullah who was the 1st petitioner had had submitted the nomination paper to the 2nd respondent."*. Hettige J upheld the rejection of the Nomination Paper stating *"….. the fact that the authorized agent was present at the time of handing over the nomination paper is not a ground under section 28 (5) of the Ordinance that should be taken into consideration by the returning officer not to reject the nomination paper and that fact cannot be taken into account to prove that the there is substantial compliance of the law ….."*. [*verbatim*].

I am unable to agree with the decision of the Court of Appeal in NEHATAMULLAH vs. DISSANAYAKE since, on the basis of the reasoning set out above with regard to the present case, the Nomination Paper in that case too appears to have been delivered by the authorised agent in compliance with the requirements of section 28 (5) of the Ordinance

For the reasons set out earlier, the petitioners' application is allowed and the writs of *certiorari* prayed for in prayers (b) and (c) of the petitioners' petition dated 10th January 2018 and the writs of *mandamus* prayed for in prayers (d), (e) and (f) of that petition are hereby issued. The parties will bear their own costs.

Judge of the Supreme Court

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

Judge of the Supreme Court

E.A.G.R.Amarasekera J.
I agree.

Judge of the Supreme Court

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

SC Appeal No. 55/2012
SC Spl. LA No. 232/2010
CA Writ No. 533/2007

In the matter of an Appeal with Special Leave to Appeal obtained from this Court.

JAYAKODI KURUNDUPATABENDIGE PERLY TISSA DE SILVA
No. 109, Jayasiripura, Anuradhapura.
PETITIONER

VS.

1. **DIVISIONAL SECRETARY, NORTH NUWARAGAMPALATHA**
   Divisional Secretariat, North Nuwaragampalatha, Anuradhapura.

2. **HERATH BANDA RATNAYAKA**
   No. 577, Bulankulama Dissawa Mawatha, Anuradhapura.

3. **THE MUNICIPAL COUNCIL, ANURADHAPURA**
   Town Hall, Anuradhapura.

RESPONDENTS

AND NOW

JAYAKODI KURUNDUPATABENDIGE PERLY TISSA DE SILVA
No. 109, Jayasiripura, Anuradhapura.
PETITIONER-PETITIONER/ APPELLANT

VS.

1. **DIVISIONAL SECRETARY, NORTH NUWARAGAMPALATHA**
   Divisional Secretariat, North Nuwaragampalatha, Anuradhapura.

2. **HERATH BANDA RATNAYAKA**
   No. 577, Bulankulama Dissawa Mawatha, Anuradhapura.

3. **THE MUNICIPAL COUNCIL, ANURADHAPURA**
   Town Hall, Anuradhapura.

RESPONDENTS-RESPONDENTS

BEFORE:	Prasanna Jayawardena, PC, J. P. Padman Surasena, J. S. Thurairaja, PC, J.
COUNSEL:	Dr. Sunil Cooray with Heshan Pietersz for the Petitioner-Petitioner/Appellant. Rajitha Perera, SSC, for the 1st Respondent-Respondent. Vishwa de Livera Tennakoon with Lilani Ganegama instructed by Maheshika Patabendi for the 2nd Respondent-Respondent. Rasika Dissanayake for the 3rd Respondent-Respondent.
ARGUED ON:	26th February 2019.
WRITTEN SUBMISSIONS FILED:	By the Petitioner-Petitioner/Appellant on 22nd May 2012 and 04th April 2019. By the 1st Respondent-Respondent on 16th September 2013 and 01st April 2019. By the 2nd Respondent-Respondent on 31st May 2012 and 14th June 2019.

DECIDED ON: 12th December 2019.

Prasanna Jayawardena, PC, J

This appeal is with regard to the right to occupy an allotment of land [”the land”] which now bears Assessment No. 396/5, Bandaranaike Mawatha, Anuradhapura. There is a canal reservation within the land, along its western boundary.

In the year 1991, the land was within the territorial limits of the Urban Council of Anuradhapura. On 06th February 1991, the then Chairman of the Urban Council and the Petitioner-Petitioner/Appellant [“the petitioner”], who is a businessman living in Anuradhapura, entered into a written agreement marked “P1” in terms of which the petitioner agreed to construct a drain within the canal reservation and the Chairman of the Urban Council agreed that, upon satisfactory completion of that work, the Urban Council would consider a request made by the petitioner that he be permitted to occupy the land.

Soon after the agreement marked “P1” was executed, the petitioner entered into occupation of the land. This led the 2nd Respondent-Respondent [“the 2nd respondent”], who is an attorney-at-law, to institute Case No. 14087/L in the District Court of Anuradhapura against the petitioner. In his plaint, the 2nd respondent pleaded that the Provincial Land Commissioner of the North Central Province had, by his writing dated 06th February 1991 marked “R2(d)”, granted the 2nd respondent the right to possess the same land upon a temporary lease and that the petitioner had entered into wrongful occupation of the land on 10th February 1991. The 2nd respondent prayed for a declaration that he is the lawful lessee of the land, and for the ejectment of the petitioner from the land. In his answer, the petitioner denied that the 2nd respondent was the lessee of the land and pleaded that the petitioner was in lawful occupation of the land under “P1”. At the end of the case, the learned District Judge held that the Urban Council of Anuradhapura had the lawful authority to enter into “P1” and that the petitioner was in lawful occupation of the land. The 2nd respondent’s case was dismissed.

One week after the judgment was delivered, the then Chairman of the Urban Council, acting on behalf of the Urban Council, and the petitioner entered into a written agreement dated 27th January 1993 and marked “P7” in terms of which the Urban Council leased the land to the petitioner and the petitioner agreed to construct a drain and secure the canal reservation and also erect a commercial building on the land. Thereafter, the petitioner submitted the building plan marked “P8” to the Urban Council. “P8” was approved. The petitioner constructed a single storied shop premises on the

land. Upon the completion of the construction of the shop premises and drain, the petitioner received the Certificate of Conformity, marked “P9”. After completion of the construction, the petitioner commenced carrying on a business in the shop premises.

The 2nd respondent had appealed to the Court of Appeal from the aforesaid dismissal of his action in the District Court. On 04th November 1998, the Court of Appeal dismissed the 2nd respondent’s appeal. That decision is reported - *vide:* RATNAYAKE vs. DE SILVA [1999 3 SLR 57]. The petitioner appears to have remained in occupation of the land during the pendency of the appeal in the Court of Appeal.

Several years later, the petitioner received a Quit Notice dated 17th November 2003 marked “P10” issued by the Divisional Secretary of Nuwaragam Palatha - East, which stated that the land was State Land and that the petitioner was in unauthorized occupation. “P10” stated that the Divisional Secretary was acting under and in terms of section 3 of the State Lands (Recovery of Possession) Act No.07 of 1979, as amended, and required the petitioner to hand over vacant possession of the land on or before 31st December 2003. The petitioner replied by the letter marked “P11” sent by his Attorney-at-Law stating that he is in lawful occupation of the land under and in terms of a lease granted by the Urban Council and that the aforesaid judgments of the District Court and the Court of Appeal had affirmed this position. There was a further exchange of correspondence during which the petitioner appears to have continued to be in occupation of the land.

However, the petitioner does not appear to have challenged the validity of the Quit Notice marked “P10” by filing an appropriate application in Court, at any stage.

Subsequently, the petitioner became aware that the Divisional Secretary of Nuwaragam Palatha - East had issued a writing dated 01st November 2006 marked “P14” authorising the 2nd respondent to occupy the land on payment of a lease rental, pending the issue of a formal lease. “P14” is signed by the Divisional Secretary of Nuwaragam Palatha - East and bears a seal with the name of that officer and his aforesaid office. “P14” was to the effect that the 2nd respondent was given permission to occupy the land pending the issue of a formal lease and subject to payment of a lease rental. Thus, Condition 6 of “P14” expressly stated that a due and proper `lease permit’ would be issued to the 2nd respondent in due course [“*මෙම බද්ද වෙනුවෙන් නියමිත බදු බලපත්‍රයක් යතා කාලයේදී ඔබ වෙත නිකුත් කරනු ලැබේ*”]. “P14” states that the intended lease which was to be executed, would be for a period of 30 years. “P14” also specifies that the 2nd respondent must build a `lawyer’s office’ on the land.

“P14” does not state the enactment under which the proposed `lease permit’ was to be issued. However, the statement by the Divisional Secretary in “P14” that he was authorising the 2nd respondent to occupy the land pending the issue of a formal `lease permit’ [“*බදු බලපත්‍රය*”] and subject to payment of a lease rental, leads to the inference that

the intended 'lease permit' was to be issued under section 2 of the State Lands Ordinance No. 8 of 1947, as amended, which, *inter alia*, empowers the President to lease State Land. In this connection, it is to be noted that the Divisional Secretary was not been acting under and in terms of the Land Development Ordinance No. 19 of 1935, as amended, since that enactment does not appear to provide for the *lease* of State Land in consideration for the payment of *lease* rentals.

On 11th June 2007, the petitioner filed an application in the Court of Appeal naming the Divisional Secretary, the 2nd respondent, and the Municipal Council of Anuradhapura as the 1st to 3rd respondents respectively [The previous Urban Council had been declared to be a Municipal Council sometime after "P7" was entered into]. It should be mentioned here that the petitioner had erroneously named the *"Divisional Secretary, North Nuwaragampalatha"*, as the 1st respondent. However, there is no Divisional Secretariat by that description. The 1st respondent should have been correctly named as the "Divisional Secretary of Nuwaragam Palatha - East", as stated in "R2(d)" and "P14".

In his application to the Court of Appeal, the petitioner prayed for a writ of *certiorari* quashing "P14" by which the 1st respondent permitted the 2nd respondent to occupy the land pending the issue of a formal `lease permit' and subject to payment of a lease rental.

In support of his application for the writ of *certiorari*, the petitioner pleaded that the land belongs to the Municipal Council of Anuradhapura and that the Divisional Secretary had no power or authority to issue "P14" since this is not State Land. The petitioner went on urge that, even if the land was vested in the State, the alienation or disposition of State Land within a Province can only be effected by the President of the Republic on the advice of the Provincial Council, and that "P14" was null and void since it had not been issued by the President. Thus, the petitioner contended that the Divisional Secretary [the 1st respondent] had no power or authority to have issued "P14".

A statement of objections was filed in the Court of Appeal by the 1st respondent supported by his affidavit, in which he states he is the Divisional Secretary of Nuwaragam Palatha - East. By doing so, the aforesaid error in the caption of the petition has been recognised and the Divisional Secretary of Nuwaragam Palatha - East [the 1st respondent] has, nevertheless, entered an appearance and resisted the application.

The 1st respondent pleaded that the land is State Land and that the Urban Council of Anuradhapura had no authority to enter into the agreements marked "P1" and "P7" with the petitioner. In this connection, the 1st respondent stated that *"the State is the owner of the land in question"*. The 1st respondent averred that the petitioner is in unauthorized possession of State Land and that, in these circumstances, the Quit Notice marked "P10" had been duly issued under the provisions of section 3 of the State Lands (Recovery of Possession) Act. The 1st respondent [the Divisional Secretary] admitted

that he had issued "P14" to the 2nd respondent. However, the 1st respondent did not state the basis on which he issued "P14". He also did not state the effect of "P14" or maintain that "P14" was validly issued.

In his statement of objections, the 2nd respondent too stated that the land was State Land and that the Urban Council had no right to the land. The 2nd respondent pleaded that "P14" issued by the 1st respondent in favour of the 2nd respondent, was a *"lawful permit"* issued to him.

The 3rd respondent [the Municipal Council of Anuradhapura] filed a statement of objections supported by an affidavit affirmed by the Municipal Commissioner. The 3rd respondent stated that the land is vested the Municipal Council of Anuradhapura and that the Urban Council had lawfully leased the land to the petitioner by "P7". The 3rd respondent averred that the 1st respondent had no right, power or authority to have issued "P14" to the 2nd respondent since this is not State Land.

In his judgment, Sri Skandarajah J held that the land is State Land. His Lordship held that the Divisional Secretary had lawfully issued "P14" granting the 2nd respondent the right to occupy the allotment of land pending the issue of a formal instrument of lease signed by the President and subject to payment of a lease rental. Accordingly, the Court of Appeal dismissed the petitioner's application.

The petitioner sought special leave to appeal to this Court from that judgment of the Court of Appeal and obtained special leave to appeal on two Questions of Law. The first was framed by the petitioner and the second was framed by the 2nd respondent. These two Questions of Law are:

(i) When there is a judgment of the District Court affirmed by the Court of Appeal, that the land which is relevant to the present application is a land belonging to the Municipal Council, can the Court of Appeal in a writ application hold that this is not a land belonging to the Municipal Council but land belonging to the State ?

(ii) Whether the substantive relief sought by the petitioner in the Court of Appeal could have been granted having particular regard to the fact that the petitioner has failed to seek a writ of *certiorari* quashing the relevant quit notice marked as "P10" ?

When this case was taken up for argument before this Court, learned counsel for the petitioner sought the Court's permission to raise an additional [third] Question of Law. That application was not objected to by the other parties, and was allowed by Court. Accordingly, the following third Question of Law was formulated by the petitioner:

(iii) Is the alleged lease set out in the document dated 01/11/2006 marked "P14"/"2R1" null and void by reason of the Divisional Secretary having no power or authority in law to grant a lease of State Land for a period of 30 years ?

Thereafter, learned counsel for the petitioner stated that in light of the newly framed Question of Law No. (iii), he will no longer pursue Question of Law No. (i). As a result, we are now required to determine only Questions of Law No. (ii) and (iii).

Since the sole Question of Law pursued by petitioner is Question of Law No. (iii), it will be considered first.

In this regard, the Court of Appeal held that the land in issue is State Land. There is no Question of Law to be decided by us on whether that determination is correct. Thus, it appears to be undisputed that this particular allotment of land is State Land. Further, when one reads the sole Question of Law No. (iii) relied on by petitioner, it is apparent that it has been framed in a manner which implicitly recognises that the land in issue is State Land. Next, in his written submissions dated 04th April 2019 filed in this Court, learned counsel for the petitioner has merely mentioned that the case for the petitioner includes the contention that the land in issue is not State Land but has not made any submissions in support of that contention. Instead, his written submissions are on the footing that that the Divisional Secretary had no power or authority to lease State Land to the 2nd respondent. In paragraph [13] of these written submissions, learned counsel for the petitioner has stated that the written submissions to be filed by the 3rd respondent [the Municipal Council of Anuradhapura] will address the position of whether the land in issue is State Land. However, the 3rd respondent had not filed any written submissions in this Court or in the Court of Appeal. In these circumstances, I will proceed on the basis that the parties do not dispute in these proceedings that the particular allotment of land which is in issue, is State Land.

I should now move on to determine Question of Law No. (iii) - *ie:* whether the Divisional Secretary had the power and authority to issue the writing marked "P14".

Before doing so, it should be mentioned here that the Crown Lands Ordinance No. 8 of 1947, as amended, is now designated the State Lands Ordinance and that the powers of the Governor General under the Crown Lands Ordinance are now vested in the President under and in terms of the State Lands Ordinance. When the term "Crown Land" is used in this judgment in relation to Orders and Regulations made by the Governor General under Crown Lands Ordinance, that term refers to State Land.

With regard to Question of Law No. (iii), learned counsel for the petitioner submits that the provisions of section 2 of the State Lands Ordinance confer upon the President the

power and authority to lease State Land; that *"no statutory provision has empowered"* the President to delegate that power to another; and that, accordingly, *"no statutory provision has conferred any power at any time"* on a Divisional Secretary to lawfully lease State Land. Learned counsel seeks to buttress this contention by citing Article 33 (d) of the Constitution [as it stood at the times material to this appeal, prior to the 19th Amendment to the Constitution] which states that the President shall keep the Public Seal and have the power to make and execute under the Public Seal, grants and dispositions of State Lands as he is by law required or empowered to do. Thus, learned counsel submits that the Divisional Secretary of Nuwaragam Palatha - East [*ie:* the 1st respondent] had no power or authority to issue the writing marked "P14" and that Question of Law No. (iii) should be answered in the affirmative.

In contrast, learned Senior State Counsel submits that, while the provisions of section 2 of the State Lands Ordinance empower the President to lease State Land, section 105 of that Ordinance expressly empowers the President to delegate that power. He then refers to Regulation 24 of the `Crown Lands Regulations,1948' made by the Minister under the provisions of the State Lands Ordinance and draws our attention to the subsequent Order dated 22nd August 1949 made by the Governor-General under section 105 of the Ordinance read with Regulation 24 and published in Government Gazette No. 10,103 dated 02nd September 1949. Senior State Counsel states that, by this Order, the Governor-General has delegated his power to lease State Land to, *inter alia*, the Government Agent of an Administrative District. In this connection, learned Senior State Counsel states *"Gazette No 10,103 dated 02nd September 1949 contains the order dated 22nd August 1949 marked WS2 issued by the Secretary to the Governor General and the Schedule under column II (b) lists the Government Agent and gives the power in Clause (2) of section 2 to sell, lease or otherwise dispose of Crown Land"*. Senior State Counsel goes on to submit that, following the enactment of the Transfer of Powers [Divisional Secretaries] Act No. 58 of 1992, that delegated power conferred on a Government Agent to lease State Land under the provisions of the State Lands Ordinance, is now vested in the Divisional Secretary of the relevant Divisional Secretariat. On that basis, learned Senior State Counsel states *"Thus it is clear that the Divisional Secretary has the power to Lease State Land"*. Next, he points out that it is admitted that the land in issue is situated within the Divisional Secretariat of Nuwaragam Palatha - East. Thus, learned Senior State Counsel concludes by submitting that, in terms of the aforesaid provisions of law, Regulation 24 of the Crown Lands Regulations,1948 and the Governor-General's Order dated 22nd August 1949 referred to above, the Divisional Secretary of Nuwaragam Palatha - East [*ie:* the 1st respondent] had the power and authority to lawfully issue the writing marked "P14" authorising the 2nd respondent to occupy the land pending the issue of a formal `lease permit' ["*බදු බලපත්‍රය*"] and subject to payment of a lease rental. Learned Senior State

Counsel states *"Thus it is clear that the Division* [sic] *Secretary has the authority to Lease State land and the Argument of the Petitioner has to fail."*.

In this regard, a perusal of the State Lands Ordinance establishes that section 2 (2) to empowers the President to sell, lease or otherwise dispose of State Land, section 2 (3) empowers the President to enter into agreements for the sale, lease or other disposition of State Land and section 2 (4) empowers the President to issue permits for the occupation of State Land. The first three lines of section 2 make it clear that the President may exercise these powers and authority only *"subject to the provisions of this Ordinance and of the regulations made thereunder"*. I should mention that sections 2 (2), 2 (3) and 2 (4) are the only sub-sections of the six sub-sections of section 2 of the State Lands Ordinance, which may be relevant to this appeal.

Thereafter, section 95 of the State Lands Ordinance authorises the Minister to make Regulations for the purpose of giving effect to the principles and provisions of the Ordinance. Section 96 provides that such Regulations can be made with regard to any matter stated in or required by the Ordinance to be prescribed, including the *"forms"* to used: when granting leases or other dispositions of State Land and permits to occupy State Land; and the *"conditions to be attached"* to such leases, dispositions and permits.

Next, section 105 of the State Lands Ordinance specifically authorises the President to delegate, "*in such manner and in such cases as may be prescribed",* to the Minister or to the Land Commissioner or to any *"other prescribed officer"*, any power, duty, authority, discretion or function which is conferred or vested or entrusted or assigned or entrusted or assigned to the President, by or under the Ordinance.

As submitted by learned Senior State Counsel, the Minister has, in the exercise of his aforesaid authority under sections 95 and 96 of the Ordinance, made the *"Crown Land Regulations,1948"* which are dated 09th October 1948 and were published in the Government Gazette No. 9,912 dated 15th October 1948. Thereafter, the Minister has made an additional Regulation 22nd October 1963, which has been published in the Government Gazette No. 14,204 dated 23rd October 1964. That additional Regulation is referred to later on in this judgment.Our attention has not been drawn to any subsequent Regulations made under the Ordinance.

Although learned Senior State Counsel has not referred to section 8 (1), section 110 (1) and section 22 of the State Land Ordinance, those provisions are also relevant to the question before us.

Section 8 (1) of the Ordinance specifies that any *"disposition"* of State Land under the State Lands Ordinance *"must be effected **by an instrument of disposition** executed in such manner as may be prescribed."* [emphasis added by me].

Section 110 (1) defines the term ***"disposition"*** by declaring that the term "*with its grammatical variations and cognate expressions, means any transfers of whatever nature affecting land or the title thereto and includes any conveyance, transfer, grant, surrender, exchange, lease or mortgage of land"*. Section 110 (1) goes on to define an ***"instrument of disposition"*** to mean *"any instrument or document whereby any disposition of State land is effected and includes a grant, lease, permit or license relating to State land."*. The use of the word *"includes"* in the definition of the term *"disposition"* makes it clear that the term is not limited to the aforementioned seven types of *"transfers"* which are specifically mentioned in that definition. Next, the inclusion of the words *"permit or license relating to Crown land"* in the definition of the term *"instruments of disposition"*, leads to the conclusion that a written `permit' or `license' affecting State Land, is a *"disposition"* within the meaning of the State Lands Ordinance.

Next, section 22 of the Ordinance states that every instrument of disposition whereby any State Land *"is granted or sold or leased"* for a term *"exceeding the prescribed period"*, shall be signed and executed by the President, while every other instrument of disposition for a lesser period, *"shall be signed and executed by the prescribed officer"*.

The fact that section 8 (1) specifies that an instrument of disposition made under the State Lands Ordinance must be executed *"in such manner as may be prescribed."* and the fact that section 22 specifies that every such instrument of disposition for a period which exceeds the *"prescribed period"* must be signed and executed by the President while other instruments of disposition for periods which lesser periods *"shall be signed and executed by the prescribed officer"*, makes it necessary to examine the Crown Lands Regulations,1948 to ascertain the prescribed *manner* in which instruments of disposition should be executed and the related prescribed *periods*.

With regard to the prescribed *manner* in which an instrument of disposition made under section 6 of the State Lands Ordinance [which provides for *"Special Grants and Leases"* to be made at a nominal price or nominal rent or gratuitously for charitable purposes etc.] should be executed, Regulations 3 (1) and 3 (2) of the Crown Lands Regulations,1948 specify that `Special Grants' and `Special Leases' made under section 6 of the Ordinance shall be in the format set out in the `Form A' and `Form B' in the First Schedule to the Crown Lands Regulations,1948.

However, with regard to the prescribed *manner* in which instruments of disposition made under the several sub-sections of section 2 of the State Lands Ordinance should

be executed, the Crown Lands Regulations,1948 do not specify the format in which such instruments of disposition are to be made. Thus, there appears to be no prescribed format for instruments of disposition made under any of the sub-sections of section 2 of the Ordinance.

With regard to the prescribed *periods* for which instruments of disposition can be made under the State Lands Ordinance, Regulation 4 (1) and 4 (2) of the Crown Lands Regulations,1948 state:

"4 (1) The period to be prescribed for the purposes of section 22 of the Ordinance shall be fifty years.

(2) Each officer designated in column I of the Second Schedule hereto shall be the officer who shall sign and execute the instrument of disposition described in the corresponding entry in column II of that Schedule.".

Thereafter, the Second Schedule to the Crown Lands Regulations,1948 states:

"

SECOND SCHEDULE

(Regulation 4)

	I ***Designation of the Officer***	***II*** ***Description of the instrument of disposition***
1.	*Governor-General*	*Special lease under section 6 of the Ordinance.*
2.	*Land-Commissioner*	*Lease, for a period not exceeding fifty years of the right to mine or gem in any Crown land.....*
3.	*Government Agent*	*License or permit to mine or gem in any Crown land …… for a period not exceeding one year*
4.	*Government Agent*	*Disposition for a period not exceeding five years of Crown land in the charge of the Government Agent, other than a disposition referred to in item 1 or item 2 of the Schedule*
5.	*General Manager of Railways*	*.....*
6.	*Chairman of the Colombo Port Commission*	*.....*
7.	*Governor-General or Land Commissioner*	*Disposition of Crown land for any period not exceeding fifty years, other than a disposition referred to in item 1 of the Schedule*

The other Regulation which is relevant to the question before us is Regulation 24 of the Crown Land Regulations, which was relied on by learned Senior State Counsel. Regulation 24 is titled *"Delegation of Governor General's powers (Section 105)"* and states:

"24 (1) Every delegation under section 105 of the Ordinance shall be by order published in the Gazette and may be subject to such conditions and limitations as may be specified in that order.

(2) The power or duty conferred or imposed upon the Governor-General or the authority vested in him, or the discretion or function entrusted or assigned to him, by or under the provisions of this Ordinance specified in column I of the Third Schedule hereto may be delegated by him to the officer or officers specified in the corresponding entry in column II of that Schedule.".

Thereafter, the Third Schedule to the Crown Lands Regulations,1948 states:

" *THIRD SCHEDULE*
(Regulation 24)

	I	***II***
	Provisions of the Ordinance	***Officer or Officers***
1.	*Clauses (2) and (3) of section 2*	*The Settlement Officer* *The Government Agent* *…….*
2.	*Clauses (4) and (5) of section 2*	*The Government Agent* *…….*
3.	*Clause (6) of section 2 ……..*	*The Government Agent*
4.	*....."*	

It may be mentioned here that Items 4 to 9 of the Third Schedule provide for the Governor-General to also delegate, to the Minister, Land Commissioner and some other specified officers, the powers vested in him by sections 3,4,5,6,7,13,14,15, 24 (1),60,61 and 100 of the State Lands Ordinance.

Thus, as far as is relevant to this appeal, section 105 of the State Lands Ordinance together with Regulations 24 (1) and 24 (2) of the Crown Lands Regulations,1948 provided that the Governor-General may delegate his aforesaid powers under section 2 (2), 2 (3) and 2 (4) of the State Lands Ordinance to, *inter alia*, the Government Agent. However, that was subject to: (i) the specification in section 22 of the Ordinance read with Regulation 4 (1) that an *"instrument of disposition"* of State Land for a period exceeding the *"prescribed period"* of fifty years can only be signed and executed by the President; (ii) the specifications in Regulation 4 (2) read with the Second Schedule which describes the types of instruments of disposition which may be signed and executed by each of the *"prescribed officers"* listed in Column I of the Second Schedule; (iii) the specifications in Regulations 24 (1) and 24 (2) read with the Third Schedule

which specified the powers and duties which the Governor-General was authorised to delegate and the officers to whom such delegation could be made; and (iv) the specification in Regulations 3 (1) and 3 (2) read with `Form A' and `Form B' in the First Schedule to the Regulations that a `Special Grant' or `Special Lease' made under section 6 of the Ordinance has to be signed by the President or his Secretary on his behalf.

However, it has to be kept in mind that, although section 105 of the State Lands Ordinance empowered the Governor-General to delegate his powers as explained earlier, section 2 of the Ordinance statutorily empowered only the Governor-General to make instruments of disposition of State Land under the several sub-sections of section 2 of the Ordinance. Therefore, the aforesaid schemes of delegation set out in Regulation 4 (2) read with the Second Schedule to the Crown Lands Regulations,1948 and in Regulations 24 (1) and 24 (2) read with the Third Schedule to the Crown Lands Regulations,1948 remained inoperative until the Governor-General proceeded to make an Order delegating the powers or duties or authority conferred or imposed upon him by the State Lands Ordinance.

That delegation took place when the Governor-General made the Order dated 22nd August 1949, which learned Senior State Counsel has relied on. That Order was made by the Governor-General under section 105 of the Crown Lands Ordinance read with Regulation 24 of the Crown Lands Regulations,1948 and was published in the Government Gazette No. 10,013 dated 02nd September 1949. The Order states:

"

Order

The powers, duties and functions of the Governor-General referred to in column I of the Schedule hereto are hereby delegated to the officer or officers specified in the corresponding entry or entries in column II of that Schedule, subject to such conditions and limitations as are set out in the appropriate entries in column III of that Schedule.

Schedule

I	*II*	*III*
1. The power in clause (2) of section 2 to sell, lease or otherwise dispose of Crown land	*(a) The Settlement Officer* *(b) The Government Agent*	_____ _____
2.		
3.		
4. The power in clause (3) of section 2 to enter into	*(a) The Settlement Officer* *(b) The Government Agent*	_____ _____

	an agreement for the sale, lease or other disposition of Crown land		
5.	.....		
6.	*The power in clause (4) of section (2) to issue a permit for the occupation of Crown land and the . power in clause (5) of that section to issue a license to take or to obtain any substance or any thing found in Crown land*	*(a) The Government Agent* *(b) The General Manager of Railways* *(c) The Chairman of the Colombo Port Commission*	*that each of the officers referred to in this item exercises that power only in respect of land in his charge*
		.....	
7.	.....		
8.	……*”.*		

Thus, the aforesaid Order dated 22nd August 1949 establishes, *inter alia*, that the Governor-General had delegated the powers, duties and functions vested in him by section 2 (2) and section 2 (3) of that Ordinance to sell, lease or otherwise dispose of State Land or to enter into agreements for sale, lease or other disposition of State Land to, *inter alia*, Government Agents - *vide:* Items 1 and 4 of the Schedule to the Order. It is also evident from a reading of the Order that any *“conditions and limitations”* placed on that delegation would be specified in Column III of that Schedule. Consequently, the fact that Column III of Items 1 and 4 of the Schedule has been left blank, establishes that no *“conditions and limitations”* have been placed on the delegation, to Government Agents, of the power, functions and duties vested in the Governor-General by section 2 (2) and section 2 (3) of the Ordinance to sell, lease or otherwise dispose of State Land or to enter into agreements for the sale, lease or other disposition of State Land.

Further, it is seen from Item 6 of the Schedule to the Order that the Governor-General had also delegated the powers, duties and functions vested in him by section 2 (4) of the Ordinance to issue permits for the occupation of State Land to, *inter alia*, Government Agents, subject only to the *“condition and limitation”* specified in Column III of Item 6 that the Government Agent may issue such permits for the occupation of State Land *“only in respect of (State) land in his charge”*.

As highlighted by learned Senior State Counsel, the position which is set out above is reflected in section 191 in Chapter III of the Land Manual, which was published on 14th July 1985 - *vide:* Parts 6, 7 and 8 listed in the Index to the Land Manual. Thus, section 191 summarises the position set out above and states:

"191. රජයේ ඉඩම් බැහැර කිරීමට බලයලත් පුද්ගලයෝ. -

1 රජයේ ඉඩම් නොයෙක් ආකාරයෙන් බැහැර කිරීමේ බලතල ආඥාපනතේ 2 වැනි වගන්තියෙන් ජනාධිපතිවරයා වෙත පැවරී තිබේ, මෙම බලතලවලින් වැඩි කොටසක් ජනාධිපතිවරයා විසින් දැනට අමාත්‍යවරයා වෙතද, ඉඩම් කොමසාරිස් වරයා වෙතද, වෙනත් නියමිත නිලධාරීන් කිහිප දෙනෙකුවෙතද පවරා දී තිබේ. එසේ පවරා දී ඇත්තේ ආඥාපනත යටතේ පනවන ලද පහත දැක්වෙන රෙගුලාසි හා ආඥා මගිනි: -

(1) 1949 සැප්තැම්බර් 2 දින අංක 10,013 දරන ගැසට් පත්‍රයේ පළකරන ලද 1949 අගෝස්තු 22 දරන ආඥාව,
(2) 1950 ජූලි 21 දින 10,127 දරන ගැසට් නිවේදනය.
(3) 1962 ඔක්තෝබර් 19 දින දරන ගැසට් නිවේදනය.
(4) 1965 නොවැම්බර් 26 දින දරන අංක 14,569 ගැසට් නිවේදනය. .....

2. ආඥා පනත යටතේ රජයේ ඉඩම් දීමට බලයලත් නිලධාරීන් මෙසේය :

(අ) නිරවුල් කිරීමේ නිලධාරී
(ආ) ආණ්ඩුවේ ඒජන්ත .
(ඇ) ……..."

It should be mentioned here that, as stated in section 191 (1) of the Land Manual, the aforesaid Order dated 22nd August 1949 was amended by three subsequent Orders made by the Governor-General. These three Orders are: the Order dated 10th July 1950 published in Government Gazette No. 10,127 dated 21st July 1950, the Order dated 11th October 1962 published in Government Gazette No. 13,354 dated 19th October 1962 and the Order dated 25th November 1964 published in Government Gazette No. 14,569 dated 26th November 1965. These subsequent Orders deal with the delegation of the Governor-General's powers, in specified circumstances, to the Gal Oya Development Board, to the General Manager of Railways or Lands Officer of the Railway Department and to the Commanders of the Security Forces, respectively. These subsequent Orders are not relevant to the present appeal. I have also seen another Order dated 22nd August 1949 published in Government Gazette No. 10,013 dated 02nd September 1949. That Order deals with specified aspects of the Definition of Boundaries Ordinance No. 01 of 1844, as amended, and the Land Development Ordinance. It is also not relevant to the present appeal. Our attention has not been drawn to any other Orders made under the State Lands Ordinance.

It is also relevant to state here that the term *"Government Agent"* for the purposes of the State Lands Ordinance has been defined in section 110 (1) of the Ordinance to include Additional or Assistant Government Agents and *"any other prescribed officer"*. Further, the additional Regulation made by the Minister on 22nd October 1963, which I mentioned earlier, specifies that any District Land Officer is also a *"prescribed officer"*

who is to be regarded as a Government Agent for the purposes of the Ordinance. That position is also mentioned Item 189 (4) in Chapter III of the Land Manual.

Before parting with the Regulations and Orders made under the State Lands Ordinance, it may be said in passing that a comparison of Regulation 4 (2) read with the Second Schedule of the Crown Lands Regulations, 1948, on one hand, and Regulation 24 (2) read with the Third Schedule of the same Regulations, on the other hand, raises something of an anomaly. That is because, as set out above: Regulation 4 (2) read with Item 4 of the Second Schedule contemplates that, in the event of the Governor-General delegating his powers under the Ordinance, a Government Agent would *"sign and execute"* an instrument of disposition of State Land including those made under sections 2 (2), 2 (3) and 2 (4) of the Ordinance only in respect of State Land which is in his charge and that any such instrument of disposition can only be for a period not exceeding five years; however, Regulation 24 (2) read with Items 1and 2 of the Third Schedule provides that the Governor-General is entitled to *delegate* to the Government Agent, the entirety of the powers, duties and authority vested in the Governor-General by sections 2 (2), 2 (3) and 2 (4) of the State Lands Ordinance, without any limitation with regard to the location of the State Land or the period of any such instrument of disposition.

Thereafter, although Items 1, 4 and 6 in the Schedule to the aforesaid Order dated 22nd August 1949 state that the Governor-General has delegated his powers under sections 2 (2) and 2 (3) of the Ordinance to Government Agents without any restriction and delegated his powers under sections 2 (4) of the Ordinance to Government Agents without any restriction as to period of the permit, it has to be kept in mind that section 105 of the Ordinance empowers the Governor-General to delegate his powers, duties and authorities only *"in such cases as may be prescribed"* by the Minister.

Consequently, since Regulation 4 (2) read with Item 4 of the Second Schedule to the Crown Lands Regulations, 1948 specifically prescribes that a Government Agent could sign and execute an instrument of disposition only in respect of State Land which is in his charge and that any such instrument of disposition can only be for a period not exceeding five years, it appears that, the aforesaid delegation, made by the Order dated 22nd August 1949, of the Governor-General's powers under sections 2 (2), 2 (3) and 2 (4) of the State Lands Ordinance to Government Agents, would have to be read as being subject to the prescribed restriction that the power and authority to sign and execute an instrument of disposition was delegated to a Government Agent only in respect of State Land which is in his charge and subject to the restriction that any such instrument of disposition could only be for a period not exceeding five years. This is said

only by way of an observation as this question does not arise for determination in the present appeal.

The next step is to look at the Transfer of Powers [Divisional Secretaries] Act, No. 58 of 1992 which is referred to by learned Senior State Counsel. By way of background, it should be mentioned that, prior to the enactment of this statute, there were several Assistant Government Agent Divisions, each headed by an Assistant Government Agent, within each of the Administrative Districts of Sri Lanka. The administrative head of the public service in each Administrative District was the Government Agent. The Assistant Government Agents of each Division within the District, reported to the Government Agent. Section 2 of the aforesaid Act, empowered the Minister to establish Divisional Secretaries' Divisions within each Administrative District. In practice, these Divisional Secretaries Divisions broadly corresponded with the previous Assistant Government Agent Divisions. Section 3 (1) of the same Act specified that each Divisional Secretaries Division shall be assigned a Divisional Secretary. Next, section 4 (1) of the Act provided, *inter alia*, that wherever the words *"Government Agent"* occur in any written law or in any notice, permit, instrument or document issued, made, required, executed or authorised by or under any written law, such words *"shall be substituted therefor"* by the expression *"the Divisional Secretary of the Divisional Secretary's Division".* Thus, by the enactment of the Transfer of Powers [Divisional Secretaries] Act, the powers, functions and duties vested in Government Agents and Assistant Government Agents within a newly created Divisional Secretaries Division, were vested in the Divisional Secretary of that Division.

Thus, subsequent to the Transfer of Powers [Divisional Secretaries] Act coming into operation, the powers, duties and functions vested in the President by, *inter alia*, sections 2 (2), 2 (3) and 2 (4) of the State Lands Ordinance which had been delegated to Government Agents by the aforesaid Order dated 22nd August 1949, were held by the Divisional Secretary of the Divisional Secretariat within which such State Land is situated.

It should next be mentioned that Article 21 (h) of Republican Constitution of 1972 declared that the President had the power and function of making and executing grants and dispositions of State Land under the Public Seal. However, section 21 of the State Lands Ordinance specifically declares that an instrument of disposition under the Ordinance *"need not be issued under the Public Seal of the Island except in such cases and in such instances as may be prescribed".* A perusal of the State Lands Ordinance and the Crown Lands Regulations, 1948 shows no instance where it has been prescribed that the Public Seal is to be placed on any type of instrument of disposition made under the Ordinance. Consequently, it would appear that Article 21 (h) of the Republican Constitution of 1972 would not have affected the validity of the aforesaid

delegation of the Governor-General's powers [President's powers consequent to the Republican Constitution of 1972] under the State Lands Ordinance.

However, with the promulgation of the 1978 Constitution, Article 33 (d) of the Constitution [as it then stood] stated that the President shall have the power to keep the Public Seal and *"to make and execute under the Public Seal, ….. such grants and dispositions of lands and immovable property vested in the Republic as he is by law required or empowered to do, ….."*. Subsequently, the 13th Amendment to the Constitution which established Provincial Councils, stipulated in Item 18 of List I of the Ninth Schedule [the Provincial Councils List] that: Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvements are matters in respect of which Provincial Councils have legislative authority, to the extent set out in Appendix II to List I. Thereafter, Item 1:1:3 of Appendix II declared that *"Alienation or disposition of the State land within a Province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."*.

In view of the aforesaid constitutional provisions which now prevail after the 13th Amendment to the Constitution, the general rule that has been followed since the enactment of the 13th Amendment to the Constitution appears to be that the President would sign and execute grants and leases of State Land under the State Lands Ordinance. Thus, in the aforesaid decision in RATNAYAKE vs. DE SILVA [which was the 2nd respondent's appeal from the judgment entered against him in the aforesaid D.C.Anuradhapura Case No.14087/L], Jayasinghe J, then in the Court of Appeal, referred to the aforesaid document marked "R2(d)" which was signed by the Divisional Secretary and which the 2nd respondent claimed was a lease of State Land under the State Lands Ordinance [it was marked "P1" in that case], and stated *"….. P1* [*ie:* "R2(d)"] *does not purport to be made by or under the hand of the President as required by section 1 : 3 of the appendix II of the Constitution and therefore is not a valid conveyance and is of no force or avail in law. This submission cannot be assailed."*. On the same lines, in the present case, Sri Skandarajah J in the Court of Appeal took the view that the President would, in due course, sign and execute a formal lease of the land to the 2nd respondent.

However, the issue before us is the validity of "P14" and not the *intended* instrument of lease, which the Court of Appeal stated is to be signed by the President.

A perusal of "P14" establishes that it authorises the 2nd respondent to occupy the land prior to the signing and execution of an instrument of lease. Thus, Condition 6 of "P14" expressly states that a formal `lease permit' would be issued to the 2nd respondent in due course. Accordingly, "P14" cannot be regarded as constituting an instrument of

lease. Instead, “P14” is a granting of permission to temporarily occupy the land until the formal instrument of lease is signed and executed by the President.

In these circumstances and as mentioned earlier, the Court of Appeal held that the Divisional Secretary had the power and authority to issue “P14” permitting the 2nd respondent to occupy the land pending the President signing and executing the instrument of lease. In this regard, the learned judge of the Court of Appeal upheld the submission made by the learned Senior State Counsel who appeared for the 1st respondent in the Court of Appeal that, under and in terms of the State Lands Ordinance read with the Regulations made thereunder, *“Divisional Secretaries are empowered to execute the approval papers for long term lease”* pending the President signing the final instrument of lease or grant *“in terms of the State Lands Ordinance and the Constitution”* and that *“The time between the President’s signature and the approval the lessee occupies the State land leased out”*.

In this regard, it is evident from the provisions of the State Lands Ordinance, the Crown Lands Regulations,1948 and Chapter III of the Land Manual that the procedure followed in the case of leases of State Lands under the State Lands Ordinance after the enactment of the 13th Amendment to the Constitution, is for the Divisional Secretaries to carry out the preparatory work of the selection of the prospective lands to be leased, the selection of the prospective lessees, and the preparation of the intended lease for the President to sign and execute it etc. Thereafter, the President will, in due course, sign and execute the instrument of lease.

However, a scrutiny of the provisions of the State Lands Ordinance, the Crown Lands Regulations,1948 and Chapter III of the Land Manual establishes that there is no statutory or regulatory provision which authorises a Divisional Secretary or any other *“prescribed officer”* to place a prospective lessee in occupation or in possession of a State Land prior to the signing and execution of the intended instrument of lease by the President.

Further, in my view, it cannot be correctly said that a function of placing a prospective lessee in occupation or in possession of a State Land prior to the signing and execution of the instrument of lease by the President, is incidental to or consequential to a Divisional Secretary’s aforesaid duties under the State Lands Ordinance read with the Crown Lands Regulations,1948 and Chapter III of the Land Manual - *ie:* the duties of the selection of the prospective lands to be leased and prospective lessees and the preparation of the intended lease for the President to sign and execute it, etc.

In these circumstances, the resulting conclusion has to be that the 1st respondent did not have the statutory authority to issue “P14” placing the 2nd respondent in occupation

or in possession of the land prior to an instrument of lease being duly signed and executed under the provisions of section 2 of the State Lands Ordinance.

In ENVIRONMENTAL FOUNDATION LTD vs. THE LAND COMMISSIONER [1993 2 SLR 41], the Court of Appeal has taken a similar view. In that case, the Court considered an interim order which sought to restrain the Secretary to the Ministry of Lands, Irrigation and Mahaweli Development from placing the prospective `preferential lessee' of State Land under a `preferential lease', in possession of the land to be leased, prior to the publication of a notice inviting objections from the public as required by Regulation 21 (2) of the Crown Lands Regulations,1948. Silva J [as he then was] issued the interim order stating [at p.45] *"Certainly, there is no provision in the Crown Lands Ordinance or the Regulations made there under that empower the Secretary to take administrative action to place any party in possession of state land pending grant of a lease. Such action militates against the provisions of Regulation 21 (2) which requires a notice to be published inviting objections. No useful purpose will be served by such a Regulation if the Secretary could arrogate to himself the power to place a private party in possession of state land pending the completion of statutory procedures."*. No doubt, the fact that the requirements of Regulation 21 (2) of the Crown Lands Regulations, 1948 had not been complied with, loomed large in that decision of the Court of Appeal. But, the observation by Silva J that there is no provision in the State Lands Ordinance which authorises a prescribed officer to place an intended lessee in possession of State Land pending the signing and execution of the lease, would hold true with regard to any instrument of disposition made under section 2 of the State Lands Ordinance.

Further, a perusal of Chapter III of the Land Manual shows that section 195 stipulates that the usual requirement is that leases of State Land under the State Lands Ordinance can be granted only through a process of selecting the lessees by means of a public auction or, in special circumstances, by calling for tenders. Thereafter, sections 196 and 197 specify, in detail, the procedures which should be adhered to before a lease of State Land is granted for commercial purposes or for residential purposes. Section 199 makes it clear that a `preferential lease' which is to be granted without a competitive bidding process, can be proceeded with only after obtaining the Minister's written prior approval and then too, only after publication of the notice required by Regulation 21 (2) of the Crown Lands Regulations, 1948.

The respondents placed no material before the Court of Appeal which would suggest that these necessary steps were taken before the 1st respondent issued "P14" and authorised the 2nd respondent to occupy and take possession of the land prior to the signing and execution of the instrument of lease. This raises the inference that, in addition to the 1st respondent having no statutory authority to place the 2nd respondent

in possession of the land prior to the signing and execution of the lease, “P14” was improperly issued by the 1st respondent. Perhaps, these observations indicate the reason why the 1st respondent refrained from defending “P14”, in his affidavit.

For the reasons set out above, Question of Law No. (iii) is answered, as follows: the 1st respondent did not have the statutory authority to issue “P14” which has the effect of permitting the 2nd respondent to occupy and possess State Land prior to the signing and execution of a due and proper instrument of lease under the provisions of the State Lands Ordinance.

With regard to Question of Law No. (ii) raised by the 2nd respondent, the petitioner, who was in occupation and possession of the land relying on the agreement marked “P7” between him and the Urban Council of Anuradhapura, was aggrieved by the issue of “P14” to the 2nd respondent since “P14” threatened his occupation and possession of the land. As a result, the petitioner is no `mere stranger’ and he had the standing to make this application to the Court of Appeal seeking a writ of *certiorari* to quash “P14”. Further, it appears that no action has been taken for the ejectment of the petitioner from the land despite the issue of the Quit Notice dated 17th November 2003 marked “P10”. The fact that the petitioner has failed to challenge the Quit Notice marked “P10” may be relevant only if any fresh proceedings are taken for the ejectment of the petitioner from the land. Accordingly, Question of Law No. (ii) is answered in favour of the petitioner.

Before concluding, it may be mentioned that, since section 21 of the State Lands Ordinance read with the Crown Lands Regulations, 1948 specifies that the Public Seal need not be placed on instruments of disposition made under the Ordinance and since Item 1:1:3 of Appendix II to List I of the Ninth Schedule states that alienation or disposition of State Land shall be by the President *“in accordance with the laws governing the matter.”*, a question arises as to whether: (i) in view of the existing delegation of the President’s aforesaid powers under section 2 of the State Lands Ordinance [which was set out earlier and which remains in force unless and until the aforesaid Order dated 22nd August 1949 published in Government Gazette No. 10,013 dated 02nd September 1949 is amended or cancelled or revoked by the relevant authorities]; and (ii) in view of the fact that the exercise of those delegated powers by the *“prescribed officers”* would always be in the name of and for and on behalf of the President; those *“prescribed officers”* continue, after the enactment of the 13th Amendment to the Constitution, to be lawfully empowered to exercise those delegated powers and sign and execute instruments of disposition ? In this connection, it has to be also kept in mind that section 22 of the Ordinance specifically declares that all instruments of disposition [other than those for a period exceeding the prescribed period of fifty years which can only be signed by the President] *“shall be signed and executed by the prescribed officer”*. In these circumstances and as mentioned earlier, learned

Senior State Counsel has submitted to us that the Divisional Secretary has the delegated power and authority to grant a lease of State Land. However, the aforesaid question cannot be decided here since it does not arise for determination in this appeal which has been decided on the limited ground that the Divisional Secretary did not have the statutory power to place the 2nd respondent in possession and occupation of the land before the due execution of an instrument of lease under the provisions of the State Lands Ordinance. The aforesaid question will have to await consideration by this Court, if it arises on another occasion. In this connection, I should mention for the sake of completeness, that, in KUSUMAWATHIE vs. DIVISIONAL SECRETARY, NUWARAGAM PALATHA EAST [CA Writ Application No. 241/2014 decided on 28th November 2016], the Court of Appeal referred to the Crown Lands Regulations, 1948 and took view that the Government Agent of Anuradhapura was empowered in terms of the authority delegated to him by the President, to grant a valid long term lease of State Land to the petitioner under the State Lands Ordinance.

For the reasons I have set out earlier, the judgment dated 03rd November 2010 of the Court of Appeal is set aside.

A writ of *certiorari* is hereby issued, as prayed for in prayer (d) of the petition dated 08th December 2010 filed in the Court of Appeal, quashing the writing dated 01st November 2006 marked “P14” signed by the Divisional Secretary of Nuwaragam Palatha - East and addressed to the 2nd respondent. In the circumstances of the case, the parties will bear their own costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006 against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5 of the said Act.

S C Appeal No. 107/2016

SC/HCCA/LA No. 149/16

WP/HCCA/KAL/197/2010/F

DC Panadura case No. 1838/L

1. Balapu Waduge Sunil Mendis,
   No. 77/1,
   Kahapola,
   Madapatha.

PLAINTIFF - RESPONDENT - APPELLANT

-Vs-

2. Kathtagoda Widanelage Douglas Fernando,
   No. 108,
   Kahapola,
   Madapatha.

DEFENDANT - APPELLANT – RESPONDENT

Before: PRASANNA JAYAWARDENA PC J

P PADMAN SURASENA J

E A G R AMARASEKARA J

Counsel: Dr. S F A Cooray for the Plaintiff - Respondent - Appellant

Pradeep Perera for the Defendant - Appellant - Respondent

Argued on: 18-02-2019

Decided on: 30-07-2019

P Padman Surasena J

The Plaintiff - Respondent - Appellant (hereinafter sometimes referred to as the Plaintiff) filed plaint in the District Court of Panadura seeking to recover the possession of the land in extent of 8.28 perches (0.0210 Hectares) described in the amended schedule of the amended plaint dated 19th June 2006.

The Defendant - Appellant - Respondent (hereinafter sometimes referred to as the Defendant) filed his answer dated 27th November 2006. The Defendant in his answer has taken up the position;

1) that there is no such land in extent of 8.28 perches as described in the schedule to the plaint, (no such land physically exists);
2) that the land described in the schedule to the plaint is a land in extent of approximately 8 Kurunis of paddy;
3) that the Defendant owns undivided rights of the said land and cultivates and possesses the said land by virtue of the deed No. 18715 attested on 16th May 1995 by Malani Weerasinghe Notary Public;

4) that the land referred to in the documents produced marked **P 2** to **P 6** is not the land described in the schedule to the plaint but a separate and different land the extent of which is 3.5 perches;
5) that the land described in the schedule to the plaint is the land cultivated and possessed by the Defendant; and
6) that there are old longstanding fences in the said land and that the Defendant at no time forcibly built a fresh fence.

The Defendant had prayed that the plaint be dismissed.

The Plaintiff has thereafter filed a replication dated 19th March 2007 stating that the land described in the schedule to the plaint is not the land referred to in the deed bearing No. 18751 attested on 16.05.1995 by Malani Weerasinghe Notary Public referred to by the Defendant.

At the conclusion of the trial, the learned District Judge by his judgment dated 23rd November 2010, has delivered judgment in favour of the Plaintiff holding that the Plaintiff is entitled to the possession of the land described in the Plaint. The learned District Judge had also directed that a decree in favour of the Plaintiff be entered.

The Defendant being aggrieved with the said order of the learned District Judge, has appealed to the Provincial High Court canvassing the said order.

At the conclusion of the argument of the said appeal, the Provincial High Court by its judgment dated 10th March 2016, has set aside the judgment of the learned District Judge and directed that the plaint be dismissed with costs.

The Provincial High Court in its judgment has taken the view;

I. that the evidence led by the Plaintiff has shown that the land in suit is a land in extent of 3.5 perches,
II. that the Plaintiff in his evidence has claimed a land in extent of 3.5 perches,
III. that in the absence of any evidence to prove that the extent of the land in suit is 8.28 perches, the trial Court could not have entered a judgment in favour of the Plaintiff as it had done,
IV. that as the evidence led does not lead to the identification of the corpus pertaining to the case, the Plaintiff has failed to prove his case and
V. that in the above circumstances, the judgment of the District Court cannot be allowed to stand.

In the course of the submissions, neither party brought to the notice of this Court that the parties had agitated before the Provincial High Court, any other point other than the point relating to the failure to identify the corpus. Thus, this Court would conclude that the point decided by the Provincial High Court is the only point raised by the Defendant in the Provincial High Court.

Licensed Surveyor Gamini Malwenna upon a commission issued by the District Court has surveyed the land relevant to this case on 23rd August 2005.

Having been called by the Plaintiff, to give evidence before the District Court, the said Surveyor in the course of his evidence has produced (marked **P 15**), the survey plan (No. 2961) which had been prepared by him upon the Commission issued by Court. It would be helpful to summarize the parts of his evidence relevant for the decision of this case. The said items of evidence are as follows.

i. It was the Plaintiff, his wife and the mother of his wife who showed him the land relevant to the case and it is that land he surveyed upon the commission issued by Court.
ii. He found that it is a somewhat uncultivated land.

iii. The Defendant had objected to the survey being carried out by him.

iv. The Defendant did not make any claim to the said land.

The survey plan (**P 15**) clearly shows that the land possessed by the Defendant is the land bordering the northern boundary of the land, which was surveyed pertaining to this case.

The learned counsel who appeared for the Defendant, in the course of the cross examination of the witnesses had repeatedly elicited from them that the land claimed by the Plaintiff in the original plaint is a land in extent of 3.5 perches. This item of oral evidence appears to have influenced the Provincial High Court to conclude that according to the evidence led in the trial, the land relevant to this case has to be a land in extent of 3.5 perches and not a land in extent of 8.28 perches.

It would be relevant to note that the surveyor has stated in his evidence that the Plaintiff was residing on the disputed portion of the land. His report indicates that there was a fence, which appeared to have been put up about one year ago. (The Plaintiff had stated that the Defendant had put up that fence forcibly.)

The Defendant has not contested the conduct of survey on the Commission issued by Court. Further, it is a remarkable feature in this case that the Defendant had chosen not to adduce any evidence before the District Court. He has been content only with the cross examination of the witnesses called to give evidence on behalf of the Plaintiff. When one scrutinizes the survey plan (**P 15**), it can clearly be seen that the land, which has been surveyed, on the commission issued by the Court is a land in extent of 0.0310 Hectares. The learned counsel for the plaintiff submitted to this court that 0.0310 Hectares, when converted into perches would be much more than 3.5 perches. Learned counsel for the defendant did not controvert this calculation.

Moreover, one cannot observe anything in the said plan, which is indicative of the fact that the land, which has been surveyed for the purpose of this case, is a land in extent of only 3.5 perches. Thus, it is clear that the attempts made during the cross examination of the surveyor by the learned counsel who appeared for the Defendant in the District Court to show that the land which has been surveyed is a land in extent of 3.5 perches cannot succeed.

As has been stated before, the learned High Court Judges have taken the view that the original court could not have entered judgment in respect of 8.28 perch land since the Plaintiff in his evidence had only claimed the possession of a 3½ perch land. It is on that basis that the learned Judges of the High Court had held that the corpus of this action has not been identified and therefore the Plaintiff has not proved his case.

The learned High Court Judge has referred to the Plaintiff's evidence page 110 of the brief in this regard. It is to be noted that the answer given in page 110 of the brief flows from the questions and answers given in page 109. At page 109, the Plaintiff was questioned with regard to the schedule of the original plaint, which had erroneously referred to the extent as 'around 3½ of perches'. Even in other places it appears that the Plaintiff was questioned about marked documents, which refers to the extent of the corpus as 3½ perches. However, the said documents are documents prepared prior to the survey. This Court observes that the learned District judge who heard the case had been cautious not to treat the said answers as referring to a claim of 3½ of perches only. However, the learned High Court Judge appears to

have considered the quoted question and answer[1] in isolation and also out of its context and interpreted it as referring to a claim for a 3½ perch land. Thus, it is the view of this Court that the learned Judges of the High Court have misconceived the facts.

It is true that the Plaintiff had referred to the extent of the land as 'around 3½ perches' in the original plaint. By using the word 'around' it is explicit that the Plaintiff was unaware of the exact extent in terms of number of perches. There was no reference to any existing plan also at the time of filling the plaint. However, he has described the four boundaries of the land he had claimed in this possessory action. A commission was taken out and accordingly the plan No. 2961 (**P 15**) was made by Gamini Malwenna, licensed surveyor. The boundaries of this plan are compatible with the boundaries referred to in the schedule to the original plaint. The Plaint was accordingly amended without objection to describe the extent as 0.0210 hectares or 8.28 perches (actually, it should be 8.302 perches). After such amendment is effected to a plaint, no one can say that the claim by the Plaintiff is for some other land and not the land depicted in such plan. This

[1] quoted question and answer in the judgment.

is particularly so because the Plaintiff has referred to the said plan in his amended plaint to describe the land.

It is also true that even in some of the documents amongst **P 1** to **P 16** marked in support of the Plaintiff's case, the extent of the land is mentioned as 3½ perches. However, all such references had taken place prior to the preparation of the survey plan. It is pertinent to note that in his evidence in chief the Plaintiff has clearly stated that he knew the extent as 3½ kurunies but not the exact number of perches (vide page 91 of the brief).

The wife of the Plaintiff also has explained that the description of the land as 3½ perches was due to the ignorance of the Plaintiff and the land is of 3½ kurunies in extent. Her evidence indicates that 3½ kurunies were referred to as 3½ perches. She also had stated that they showed the land they cultivated to the surveyor. The surveyor had given evidence to state that he surveyed the land shown on behalf of the Plaintiff.

The Plaintiff had called some more witnesses to prove his case but the Defendant had not placed any evidence before the original court. The evidence led before the District court indicates that the reference to the extent in the original plaint and some other documents as 3½ perches were

done without knowing the exact amount in perches and prior to a plan being made. It appears that the said witnesses have been confused by a misconception that 3½ kurunies were equivalent to 3½ perches. However, one must not lose sight of fact that the plaint was amended to describe the land as per the plan prepared by the surveyor. The learned District Judge after considering all the evidence led before Court held in favour of the Plaintiff. The evidence supports the view taken by the learned District Judge. Thus, his conclusion is not perverse. In spite of the above position, the learned High Court Judge taking certain answers out of context and without considering all the evidence led in its totality, overturned the findings of the facts by the learned District Judge.

Thus, it is clear that the evidence adduced on behalf of the Plaintiff in this case, has positively established that the land surveyed as shown by the Plaintiff in this case, is a land, which is in extent of approximately 8.28 perches. Therefore, the assertion of the High Court that the land surveyed is a land in extent of 3.5 perches and that the Plaintiff has not proved his case, cannot be permitted to stand.

For the foregoing reasons, this Court decides to set aside the judgment of the High Court dated 10th March 2016 and proceeds to allow the appeal. This Court further directs that the judgment of the District Court dated 23rd November 2010 be restored. Learned District Judge of Panadura is hereby directed to enter the decree accordingly. Appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

PRASANNA JAYAWARDENA PC J

I agree,

JUDGE OF THE SUPREME COURT

E A G R AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI ANKA

In the matter of an application under article 17 and 126 of the constitution of the democratic socialist republic of Sri Lanka.

S.C.F.R.No: 21/2015

1. D.K.Karandawela
No.211/1Ihalakaragahamuuna, Genemulla Road, Kadawatha

2. U.S.Kariyawasam
No.43, Foster Cross Lane, Colombo.10

3. H.A.S.Perera
C21, Matha Road, Colombo.08

4. S.S.Wasanthasena
No. 64, Ketakalapitiya, Debahera, Nittambuwa

5. A.T.D.De Silva
No.59, Koswatte Road, Nawala, Rajagiriya

6. J.A.S.Rajapakse
No.83/29/C/01 St' Katherine Waththa Road, Hokandara East, Hokandara

7. C.D.K.Weeraman

No.385 1/1, Rajagiriya Road, Rajagiriya

8. R.P.Rajika
No.160/1/B, Dewala Road, Makola North, Makola

9. K.S.J.Shantha
No.16/3A,Chetnoll Road, Thumbagoda, Balangoda

PETITIONERS

Vs

1. Justice Sathya Hettige PC, Chairman
1A. Dharmasena Dissanayake, Chairman

2. S.C.Mannapperuma, Member
2A. A.Salam Abdul Waid, Member

3. Ananda Seneviratne, Member
3A. D.Shirantha Wijayatilaka, Member

4. N.H.Pathirana, Member
4A. Prathap Ramanujam, Member

5. Kanthi Wijetunge, Member
5A. V.Jegarasasingam, Member

6. Sunil S. Sirisena, Member
6A. Santi Nihal Seneviratne, Member

7. S.Thillanadarajah, Member
7A. S.Ranugge, Member

8. A. Mohamed Nahiya, Member
8A. D.L.Mendis, Member

9. I.M.Zoysa Gunasekara, Member
9A. Sarath Jayathilaka, Member

1st to 9th All of public service commission, No.177, Nawala Road, Narahenpita, Colombo.05

10. T.M.L.C.Senaratne

Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo.05

10A. H.M.G.Senevirathne

Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo.05

11. U.Marasinghe

Secretary, Minsitry of Education, Isurupaya, Battaramulla

12. 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: J.C.Weliamuna, PC with Pasindu Silva for Petitioners.

Nirmalan Wigneshwaran, SSC for the Attorney General.

Argued on: 29.11.2018

Decided on: 18.02.2019

L.T.B.Dehideniya, J.

The Petitioners invoked the fundamental rights jurisdiction of this court challenging the failure of authorities to select them to Sri Lanka Education Administration Service (SLEAS) Class III. Petitioners have applied for the following cadre vacancies of SLEAS by the gazette notice bearing no: 1808 dated 26.04.2013.

a) Open Competitive Examination- General Cadre
b) Seniority & Merit – General Cadre
c) Limited Competitive Examination- General Cadre & Special Cadre

The Petitioners state that, they sat for the Limited Competitive Examination on 24.11.2013 and the list of qualified candidates was displayed on the official website of the Ministry of Education and the names of the petitioners were not reflected therein. The Petitioners further state that they received the results of the aforementioned examination after the interviews were being held. The contention of the petitioners is that, they have not been called for the interviews for the aforesaid SLEAS vacancies due to the reason of obtaining less than 40 marks for one of the subjects at the examination which was considered as a pre requisite.

The Petitioners state that, 16 applicants who had scored less than 40 marks for one subject have been called for the interviews to be appointed under the special cadre of the Limited Competitive Examination and subsequently 21 persons, including the above 16 applicants with 5 additional individuals have been recruited and the criteria of selection was not disclosed to the public. The Petitioners state that they have made attempts to obtain the relevant information from the Ministry of Education but the attempts were of no avail.

The contention of the petitioners was that, the authorities have disregarded them in making the appointments to the SLEAS vacancies and they should have been given an opportunity to get selected. The Petitioners complain of

the failure of the respective authorities in being transparent, as there was no dissemination of information in relation to the individual marks obtained by the applicants at the interviews and still the authorities can appoint them to the SLEAS class III, as there are over 600 vacancies. The Petitioners' compliant is that the non- selection and non- appointment of the petitioners to the Sri Lanka Education Administration Service is arbitrary, irrational and unreasonable while in violation of the Fundamental Right guaranteed to them under the Article 12(1) of the Constitution.

The procedure which is to be followed, in making appointments to Class III, of the Sri Lanka Educational Administrative Service is depicted in the service minute of the Sri Lanka Educational Administrative Service, published in the Gazette Extraordinary bearing No: 1225/32 dated 1st March 2002. Clause 8 of the Gazette Notification specifies the fact that, 'Not more than 45% of the vacancies in class III of the service will be made by the Committee on the results of a Limited Competitive Examination'. Clause 10 states 'The method of application for the examination and fees required will be notified in the Gazette of the Democratic Socialist Republic of Sri Lanka'. The applications for the Limited Competitive Examination were called by the Gazette Notification 1808 dated 26th April 2013. According to the Gazette Notification 1808, subjects assigned to the Special cadre are 'English, Mathematics, Science, Art, Music (Eastern), Music (Western), Dancing, Physical Education, Agriculture, Commerce, Handicraft, Home Science, Special Education, Planning, Arabic, Information Technology and Piriven'.

The 1A respondent admits the appointment of 21 officers to the Sri Lanka Education Administrative Service Class III, with a reduced pass mark and the appointments were pertaining to the subjects Physical Education, Special Education, Dancing, Western Music, Eastern Music, and Art. The 1A respondent further states that there were insufficient candidates and the petitioners have not applied for the specific subjects. As per the contention of the 1A respondent, the insinuation made by the petitioners is disingenuous and misleading as the discussions were held prior to making the appointments. The 1A respondent states that, the names of the 21 appointees were not included in the list of names published on the website, as the 21 appointments were made after deliberation and to ensure that adequate number of officers are appointed to the specific subjects.

The 1A respondent further states that the procedure to make appointments to class III, of SLEAS is set out in the minute of the Sri Lanka Educational Administrative Service and published in the Gazette Extraordinary bearing No.1225/32 dated 01st March 2002. The 1A respondent states that, the issue which has arisen in this case is related to the decision to lower the pass mark to 35 for the special cadre subjects of Physical Education, Special Education, Dancing, Western Music, Eastern Music and Art and the decision of the Public Service Commission to lower the pass mark is due to a request of the Ministry of Education to that effect by letter dated 26th March 2014. The 1A respondent further states, The Public Service Commission is empowered by the Public Service Commission Procedural Rules published on Special

Gazette Notification bearing No.: 1589/30 dated 20th February 2009, to deviate from the rules, regulations and procedure laid down by the commission under exceptional circumstances subject to Article 12(1) of the Constitution. According to the 1A respondent, the Ministry of Education has sought the permission from the Public Service Commission to appoint 488 officers to the Sri Lanka Education Administrative Service by letter dated 05th March 2013. Further, by a letter dated 21st November 2013, the Ministry of Education has requested the permission to increase the number of officers to 558. The request made by the letter dated 21st November 2013 was approved by the Public Service Commission by the response letter dated 11th December 2013. The Ministry of Education was requested to submit a subject wise breakdown of the cadre vacancies under the limited stream, being 45% of the total vacancies by letter dated 12th February 2014 and 13th February 2014.

Public Service Commission has requested the Department of Examinations by letter dated 21st February 2014, to forward the result sheets of candidates, who obtained not less than 40% in any one subject in the order of merit in respect of the vacancies. In pursuance of the letter dated 21st February 2014, Department of Examinations submitted the results sheets. It is evident, the number of candidates who passed the examination were fewer than the number of vacancies allocated for the subjects Art, Eastern Music, Western Music, Dancing, Physical Education and Special Education, whereas in other subjects the number of candidates who passed the examination had exceeded the vacancies allocated. The 1A respondent further states that, the Public Service Commission has forwarded the results sheets of 203 applicants who

had scored high marks, to the Ministry of Education by the letter dated 24th February 2014, and the interviews were held on 20, 24, and 25 of March 2014.

The Ministry of Education by the letter dated 26th March 2014, has made a request to the Public Service Commission to reduce the cut off mark of the subjects; Art, Eastern Music, Western Music, Dancing, Physical Education and Special Education. As per the contention of the 1A respondent, the request was based in the interests of the exigencies of service, reasonable and in accordance with the law. By letter dated 07th April 2014, the Public Service Commission has approved the request of reducing the cut off mark, and requested the Ministry of Education to reduce the pass mark to 35% and submit the results sheets in the order of merit. The 1A respondent further clarifies, that the vacancies in respect of Physical Education and Special Education are 19 and 17 respectively and the subsequent increase of vacancies was due to the fact, that during the appointing process, the Public Service Commission did not approve all the recommendations of the ministry of education in respect of the said subjects and consequently a higher number of vacancies were to be approved by considering the number originally requested by the Ministry of Education.

The subjects which the petitioners have applied are different from that of, subjects which come under the reduced cut off mark. As the 1A respondent illustrates, the subjects which were applied by the Petitioners as General Cadre, Planning, Science, Mathematics, Information Technology, and Commerce. The 1A respondent states, that 1st, 6th 7th and 9th Petitioners would

not benefit from the cut off mark reduced to 35%, as they have obtained less than 35% for at least one subject. The aggregate of 3rd and 4th petitioners was less than the aggregate cut off marks for the subjects which were applied by them and they would not have benefited even if the individual subject wise cut off mark was reduced to 35%. The 1A respondent further clarifies the situation of 2nd, 5th and 8th petitioners. They have obtained more than the aggregate cut off mark for Information Technology, Mathematics, and General Cadre respectively but even if the pass mark is reduced to 35% across the board, there are other candidates who had obtained more than 40% marks in all the subjects and would not benefit the petitioners at any cost.

The 1st respondent states that, the Petitioners did not obtain more than 40% for each of the subjects which they have applied. The 1st respondent further states that, as there were insufficient number of candidates who have been qualified, the vacancies for the subjects of Art, Eastern Music, Western Music, Dancing, Physical Education and Special Education were filled by reducing the pass mark. The contention of the respondent is that, the appointments are based on the urgent need of SLEAS officers specializing the aforementioned subjects. In this instance, the Respondent affirms that Public Service Commission, as the appointing authority has an authority to deviate from rules and procedures hence granted approval to fill the vacancies of the subjects based on the pass mark 35%. This approval as the respondent states, is due to the urgent need of the service.

The Petitioners' complaint is that the Fundamental Right guaranteed to them by the Article 12(1) of the Constitution is violated. As Justice Sharvananda states 'Equal protection means the right to equal treatment, in similar cirmstances'. Equal treatment is considered as an important principle that any nation can take its ideal.'(Fundamental Rights In Sri Lanka; Justice Sharvananda 1993 pg 81) In **Gulf Colorada, Co v. Ellis (1897)165 U.S.150**, it was stated, 'It must appear that not only that a classification has been made but also that it is one based upon some reasonable ground- some difference which bears a just and proper relation to the attempted classification'. (Fundamental Rights In Sri Lanka; Justice Sharvananda 1993 pg 85).Willis, Constitutional Law 1936, defines equal protection of the law as protection of equal laws. He states that, 'it merely requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and on liabilities imposed.'(Fundamental Rights In Sri Lanka; Justice Sharvananda 1993 pg 85 &86).

The petitioners have applied for the subjects which did not undergo a reduction of the cut off marks; General Cadre, Planning, Science, Mathematics, Information Technology, and Commerce. The subjects relevant to the lowered pass mark to 35%, were Physical Education, Special Education, Dancing, Western Music, Eastern Music and Art.It is evident, that the petitioners and 21 appointees are not similarly circumstanced. It is axiomatic, that the law forbids the inequal treatment between equals. There is no equality between the Petitioners and the appointees. Article 12 of the constitution accepts the reasonable classification. As justice Sharvananda states, 'what is forbidden by Article 12 is invidious or hostile discrimination which is

arbitrary, irrational and not reasonably related to a legitimate objective'. (Fundamental Rights In Sri Lanka; Justice Sharvananda 1993 pg. 92) The respondents' decision to lower the pass mark and make appointments was solely based upon the interests of the exigencies of service. It is reasonable and in accordance with the law.

By considering the circumstances, it is evident that no violation of the fundamental right guaranteed to the Petitioners under Article 12(1) of the Constitution had taken place.

Petition dismissed.

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 under and in terms of Article 17 and 126 of the Constitution.

SC/FR/Application
No.52/2018

Sella Kapu Lilani Abeychandra,
No.46/4,R.E.De Silva Avenue,
Heppumulla, Ambalangoda.
On behalf of

Koonamge Omindu Dewmika Shriyanga,
No.46/4, R.E.De Silva Avenue,
Heppumulla, Ambalangoda.

PETITIONER

1. Principal,
   Dharmasoka College, Galle Road,
   Ambalangoda.

2. K.K.K.Kodithuwakku,
   The Principal,
   Christ King College, Baddegama.

3. R.N Mallawarachchi,
   Principal,
   Southland College,
   Galle.

4. S.K.S.De Silva,
   Dharmosoka College,
   Galle Road, Ambalangoda.

5. Monaka Niranjana,

Dharmosoka College,
Galle Road, Ambalangoda.

6. Ravindra Assalarachchi,
   Dharmosoka College,
   Galle Road, Ambalangoda.

7. Sunil Hettiarachchi,
   Secretary, Ministry of Education,
   'Isurupaya', Pelawatta, Battaramulla.

8. Akila Viraj Kariyawasam,
   Hon.Minister of Education.
   Ministry of Education,
   'Isurupaya', Pelawatta, Battaramulla.

9. Hon. Attorney General,
   Attorney General's Department,
   Colombp-12.

RESPONDENTS

Before: Buwaneka Aluwihare, PC, J.
L.T.B. Dehideniya, J,
Murdu Fernando, PC, J.

Counsel: Darshana Kuruppu for the Petitioner

Nirmalan Wigneshwaran, SSC for AG.

Argued on: 27.08.2018

Decided on: 08.08.2019

L.T.B.Dehideniya J.

The Petitioner invokes the fundamental rights jurisdiction of this court, by stating that the rights of her child, guaranteed under the Articles 12(1) and 12(2) of the constitution have been violated by the acts of the 1st to 9th or any one or more of the Respondents in the process of admitting her child to the Grade 1 of the Dharmashoka College, Ambalangoda.

The Petitioner being a 'Grama Niladhari', was appointed for No.21D Mahaladuwa Division on 02-03-2009 and transferred to No.88, Randombe South Division on or about 09-03-2016. Upon the transfer, she has left the residence where she resided while serving the previous Grama Niladhari Division and moved to No.27/3, R.E De Silva Mawatha, Heppumulla and alleges that she is registered in the electoral registry for the year 2016. Subsequently, she shifted to the current residence No.46/4, R.E. De Silva Mawatha, Heppumulla, Ambalangoda and further alleges that she is registered in that electoral registry under the latter address.

After being shifted to the latter address, the Petitioner has made an application to Dharmashoka College, Ambalangoda under the category of the 'children of parents who have been transferred upon the Government needs (hereinafter sometimes be called as the 'transfer category') to admit her child to the Grade 1 and the authorities have refused to admit the child. The Petitioner challenges the decisions of the authorities, which debarred her child from being admitted to the Grade 1.

The Petitioner's contention is that, as per the circular No.22/2017, 4% of the total vacancies available to Grade 1 should be allocated for the children who have applied under 'transfer category' and alleges that there were 08 such vacancies under 'transfer category'. The Petitioner states that of the applications received under transaction category, the 1st Respondent selected 32 candidates for the interviews and rejected the rest. Among the rejected applications, the Petitioner's child was included. The ground for the rejection was given as the Petitioner's child had not obtained necessary marks to be eligible for the interview. As there were 08 vacancies available, the 1st Respondent has selected only 03 candidates and the remaining 05 vacancies were distributed among other categories. The Petitioner argues that, the distribution of remaining vacancies among other categories can be justified only if there are no initially rejected applications and the Petitioner further insists that, it is unfair to distribute the vacancies among other categories, without considering the next-best candidates from the initially rejected applications under the 'transfer category'.

The Petitioner further illustrates a contradiction as to the act of the 1st Respondent. The initial reason which was given by the 1st Respondent for the rejection of the application of the Petitioner's child was that the latter had not obtained necessary marks to be eligible for the interview but subsequently it was revealed to the Petitioner, that the rejection is not based on the marks but on the qualifications.

The Petitioner's contention is that, the 1st Respondent changed his position later with the reasons unknown to her and was in failure to inform the Petitioner the reasons for disqualification. The Petitioner argues that the conduct of the 1st Respondent is contrary to the provisions of the circular, which lead to an infringement of fundamental rights of her and the child, guaranteed under the Articles 12(1) and 12(2) of the Constitution.

The Petitioner complains against the 2nd and 6th Respondents, who functioned as the members of the Appeal Board. The decision of the appeal board was that 'no marks can be allocated to the Petitioner's child as, the transfer was within 10 kilometres and in such an instance, marks cannot be given under the 'transfer category'. The Petitioner also challenges this decision in this application.

The 1st Respondent's contention in relation to the case is different. As per the view of the 1st Respondent, the Petitioner's transfer is a routine transfer and which does not fall into the 'transfer category'. The 1st Respondent further alleges that, the Petitioner's transfer is an 'assignment' and in accordance with the clause 7.6 of the circular, an assignment shall not be considered as a 'transfer'. The 1st Respondent states that, the type of transfer that the Petitioner was entitled to is a routine transfer, which has been made in the completion of services in one working station, does not represent a 'transfer made in exigencies of service'.

As per the contention of the 1st Respondent, the Petitioner's child was not called for the interview, as the Petitioner had failed to satisfy the eligibility criteria under clause 7.6 under transfer category. He further brings out the clause 12 of the 'Transfer policy for Annual transfers of Grama Niladharies. In this instance, the 1st Respondent's contention is opposite to the averment of the Petitioner. The 1st Respondent emphasizes, that according to the clause 12 of the transfer policy, transfers can be made on exigencies of service outside a particular divisional secretariat division and district.

In the perusal of the facts, it is clear to this court that, the Petitioner has worked in two working stations. The previous working station of the Petitioner was in Mahaladuwa division and the

present one is in Randombe south. As per the information produced by the Petitioner, it is clear that she has resided in several places within the same divisional secretariat.

The clause 7.6. of the circular states as follows,

.....The transfer to be made within a period of 05 years prior to the date of calling for applications ‘

It is clear to this court that, the Petitioner’s situation is different when compared with the intention of the circular. The relevant clause specifically, deals with the transfers of public servants. If more clearly defines, ‘a public servant who comes to a specific area from outside’. It is doubtful whether, the Petitioner can be similarly circumstanced with a public servant who falls under the ‘transfer category’.

The intention of the circular is to grant relief to the public servants, who have been transferred on exigency of service to an area situated outside from where he/she permanently resided.

The Petitioner’s situation is different here. As the map depicts, her previous address and the current address are within the feeder area of the school. Contrary to the intention of the circular, the Petitioner had resided in the feeder area approximately for 9 years, as her previous and current working places are situated in the same divisional secretariat. The Petitioner has not evacuated an area and came to reside in the feeder area.

Article 12(1), of the Constitution states that, ‘similarly circumstanced people should be treated similarly’. The Petitioner is a ‘public servant’ but is different from a public servant who resides in a feeder area of a school, as a result of a transfer. It is evident to this court that, the Petitioner cannot be similarly circumstanced with a public servant who is entitled to privileges under the ‘transfer category’ of the circular as the former has not come to the feeder area from outside.

Further, the court has scrutinized the discrepancies appeared on the applications which has been made by the Petitioner to two schools. The Petitioner has provided two different addresses to admit the child to Sri Gunananda Primary School, Balapitiya and Dharmashoka College, Ambalangoda. The permanent address which has been provided by the Petitioner to the former school is ‘near Siduhath Viduhala, Balapitiya’ which appears on the Birth Certificate of the child. This address was cited as the residence and alleged to the place where her husband’s parents live. Contrarily, the address mentioned in the application made to the latter school is 46/4, R.E. De Silva Mawatha, Heppumulla, Ambalangoda and thereby the Petitioner attempted to emphasize that address as her residence. This is controversial as it is axiomatic that a person

can have two addresses but it is impossible to have two residences. This apparently misleads the authorities.

It is emphasized in 'equity', that one who comes into court must come with clean hands. This implies that a party is not permitted to profit by his own wrong. If any party to the case is guilty of an improper conduct, that guilty party is debarred from relief. It is doubtful to this court whether the Petitioner has complied with the circular, in providing information to the school. It appears to the court that, the Petitioner has provided the two addresses citing two different residences. This is a contravention of the circular which needs the particulars as to the current place the parents reside with the child.

The purpose of 'clean hands doctrine' is predominantly directed to protect the integrity of the court. This amounts to the disapproval of illegal acts and deny the relief for bad conduct. The intention of the court in prioritizing the 'clean hands doctrine' is to discourage the 'improper conduct' as a matter of public policy. The court looks into the matter whether the specific improper conduct is intentional and the doctrine does not punish the carelessness or mistake. It is evident to this court that, being a public servant, the Petitioner is expected to be more responsible and transparent. The conduct of the Petitioner is prima facie misleading, as to the residence.

It is clear to this court that the Petitioner is not entitled to be privileged under the 'transfer category' of the circular No.22/2017 to admit the child to Grade 1 as she is not similarly circumstanced with the public servants who are transferred and reside in the feeder area of the school after evacuating the former area of living.

Further, it is apparent to this court that, the Petitioner has misrepresented the facts as to the residence, and in violation of the 'clean hands doctrine' in equity. This court is obliged to protect the integrity of the court and simultaneously, bound to prevent the 'improper acts' being committed in the matter of public policy.

By considering above circumstances, I am in the view that, the Petitioner had failed to establish that her child's fundamental rights have been violated.

Petition Dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, 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 in terms of Article 126 read with Article17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application

No. 54 / 2019

01 S M Halpe,
No 117/10,
Hendala Road,
Hendala,
Wattala.

02 D T Panduwawela,
No 4,
Chitra Lane,
Gampaha.

03 K P K Marapana,
No. 75/17,

Sirinanda Jotikarama Road,
Kalalgoda,
Pannipitiya.

PETITIONERS

-Vs-

01 Dr. Anil Jayasinghe,
Director General of Health Services,
Ministry of Health, Nutrition and Indigenous Medicine,
Suwasiripaya,
No. 385,
Rev. Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

02 Director General of Health Services (acting),
Ministry of Health, Nutrition and Indigenous Medicine,
Suwasiripaya,
No. 385,

Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

03 Hon. Dr. Rajitha Senarathne,
Minister of Health, Nutrition and
Indigenous Medicine,
Ministry of Health, Nutrition and
Indigenous Medicine,
Suwasiripaya,
No. 385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

04 Secretary to the Ministry of Health,
Nutrition and Indigenous Medicine,
Ministry of Health, Nutrition and
Indigenous Medicine,
Suwasiripaya,
No. 385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

05 Sri Lanka Medical Council,
No. 31,
Norris Canal Road,

Colombo 10.

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

RESPONDENTS

Ten others who intervened as respondents,

1ST TO 10TH ADDED RESPONDENTS

Fifty Seven others who intervened as respondents,

11TH TO 68TH ADDED RESPONDENTS

Nine others who intervened as respondents,

69TH TO 78TH ADDED RESPONDENTS

Before: **Buwaneka Aluwihare PC J**

L. T. B. Dehideniya J

P. Padman Surasena J

Counsel:

Upul Jayasuriya PC with Laknath Senevirathna, Chandana Perera instructed by Sampath Wijebandara for the Petitioners.

Suren Gnanaraj SSC for the 1st - 4th and 6th Respondents.

Manohara de Silva PC for the 5th Respondents.

M U M Ali Sabry PC with Ruwantha Cooray and Noomiq Nafath for the 1st - 10th Added Respondents.

Sanjeewa Jayawardena PC for the 58th Added Petitioner.

Saliya Peiris PC with Thanuka Nandasiri instructed by Sivanantham Associates for the 69th - 78th Added Respondents.

Ravindranath Dabare with M C S V Kumara instructed by Prabhani Samaraweera for the Intervenient Party, Government Medical Officers Association.

Argued on : 27-03-2019, 02-04-2019, 09-05-2019,. 28-05-2019.

Decided on: 30-07-2019

P Padman Surasena J

Petitioners are citizens of Sri Lanka and are medical graduates of the South Asian Institute of Technology and Medicine of Sri Lanka (hereinafter referred to as SAITM). They state that they belong to a group of 83 medical graduates who have passed out from SAITM.

The Petitioners state that they have duly completed the requisite period of study at the SAITM, sat for the requisite examinations and accordingly obtained the MBBS degrees from SAITM.

After obtaining their MBBS degrees from SAITM the Petitioners have tendered their applications for provisional registration as medical practitioners with the 5th Respondent (Sri Lanka Medical Council, hereinafter referred to as SLMC), in terms of section 29 of the Medical Ordinance.

It is the position of the Petitioners that the Court of Appeal in C A Writ Application No. 187 / 2016, filed by a similarly circumstanced Medical Graduate of the SAITM (namely Dhilmi Kasunda Malshani Suriyarachchi), has issued a Writ of Mandamus compelling the 5th Respondent to provisionally register (under section 29 of the Medical Ordinance), the Medical Graduate Petitioner in that case. The Supreme Court in the appeal[1] pertaining to the

[1] SC Appeal No. 184/2017.

said judgment of the Court of Appeal,[2] by its judgment dated 21-09-2018 has decided that the Petitioner in that case is entitled to provisional registration as a medical practitioner, under section 29(2) of the Medical Ordinance. It would suffice to reproduce the following two paragraphs from the said judgment of the Supreme Court to demonstrate this decision.

" …. 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). …. "[3]

"…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…." [4]

The Petitioners complain that the 5th Respondent in gross and blatant violation of the above judgment, has willfully refused to grant the Petitioners

[2] C A writ Application No. 187 / 2016.
[3] Last paragraph of page 52 of the judgment.
[4] Second paragraph of page 54 (last page) of the judgment.

and the other 82 similarly circumstanced SAITM medical graduates, the said provisional registration under section 29, despite the fact that the Petitioners have fulfilled the criteria set out in law for the eligibility of the said provisional registration.

Petitioners also complain that the 1st and / or 2nd Respondent has also subsequently taken steps arbitrarily to exclude the Petitioners and other 82 similarly circumstanced medical graduates of SAITM from eligibility for the provisional registration although they have satisfied the eligibility criteria, in terms of the prevailing law.

It is on that footing that the Petitioners complain that the Respondents have infringed the fundamental rights guaranteed to them by Article 12(1) of the Constitution denying them the equal protection of law and also the fundamental rights guaranteed by Article 14 of the Constitution denying them their right to engage in any lawful occupation, profession, trade, business or enterprise.

This Court having heard the submissions of the learned President's Counsel for the Petitioners, learned Senior State Counsel for the 1st to 4th and 6th Respondents and the learned President's Counsel for the 5th Respondent, by its order dated 26-02-2019, has granted leave to proceed in respect of the alleged violation of fundamental rights guaranteed by Article 12 (1) and 14 (1) (g) of the Constitution.

It is on that day that the learned President's Counsel for the Petitioners informed Court that he would be taking steps to file an amended petition and to file additional documents. The Court has given the opportunity for the Petitioners to file an amended petition and additional documents subject to the objections of the Respondents.

The Petitioners thereafter has taken steps to file the amended petition dated 01-03-2019 to which the 5th Respondent has filed objections.

This Court having considered the objections of the 5th Respondent had made order on 02-04-2019 accepting the amended petition filed by the Petitioners.

The arguments the Respondents have chosen to advance to counter the claim of the Petitioners that they are entitled to provisional registration as medical practitioners under section 29(2) of the Medical Ordinance could be identified under three broad categories. They could be described as follows.

(i) The Petitioners cannot seek relief for the parties who are not before Court.

(ii) The Petitioners' application is time barred.

(iii) Petitioners have not established that their degrees are from a recognized Degree Awarding Institute.

As I would deal with the first argument above at an appropriate later point in this judgment, I shall now begin to consider the second argument of the 5th Respondent that the Petitioners' application is out of time. The dates on which the three Petitioners had submitted their first set of applications are as follows.

(i) The 1st Petitioner had made the application on 21-10-2016 [**P 5 (a)**] to the SLMC. The said application was rejected by the 5th Respondent by letter dated 28-11-2016 with a refund of Rs. 4,000 deposited by the 1st Petitioner for provisional registration.

(ii) The 2nd Petitioner had made an application [**P 5 (a)**] to the SLMC on 25-10-2016. The said application was rejected by the 5th Respondent by letter dated 28-11-2016 with a refund of Rs. 4,000 deposited by the 1st Petitioner for provisional registration.

(iii) The 3rd Petitioner had made an application [**P 5 (a)**] to the SLMC on 21-10-2016. The said application was rejected by the 5th Respondent by letter dated 28-11-2016 with a refund of Rs. 4,000 deposited by the 1st Petitioner for provisional registration.

Accordingly the learned President's Counsel for the 5th Respondent took up the position that the Petitioners' application which was filed on 14-02-2019 is out of the one month period stipulated in Article 126 (2) as the refusal to grant provisional registration to the Petitioners which had given rise to the alleged infringement of fundamental rights of the Petitioners had taken place on 28-11-2016.

The 5th Respondent has also taken up the position that any subsequent applications made by the Petitioners for provisional registration do not create fresh violations and pursuing other remedies judicial or administrative do not prevent or interrupt the running of the said one month time period specified in Article 126 (2) of the Constitution.

In order to ascertain whether the Petitioners' application is out of time, it would be opportune at this juncture to apply the principles laid down in the judgment of His Lordship Justice Prasanna Jayawardena PC in the case of Demuni Sriyani de Zoysa and others Vs Chairman, Public Service Commission

and others. [5] (This case has also been adverted to, in the written submissions[6] filed on behalf of the 5th Respondent.)

When applying the aforesaid principles, one has to sequentially ask the following questions:

(i) (a) When did the alleged infringement occur?; or, if Petitioners claim they became aware of the alleged infringement only sometime after it occurred, when did they become aware of it or when should they have become aware if it?

(b) If the alleged infringement is in the nature of a continuing one which the Petitioners were aware of, till when did it continue?;

(ii) If the application has been filed more than one month after the latest date determined when considering (a) and (b) above, have the Petitioners established that, they were unable to invoke the jurisdiction of this Court due to circumstances, which were beyond their control and that, there has been no lapse, fault or delay on their part?

[5] SC FR 206 / 2008 decided on 09-12-2016.
[6] Paragraph 28 & 33 of the written submissions filed by the 5th Respondent.

(iii) If so, have the Petitioners filed this application within one month of any such disability ending?

As has been held in that judgment, 'the date determined in answer to the first subset of questions will determine the date on which the one month period stipulated in Article 126 (2) commences to run. Quite obviously, if the petition has been filed within one month of that date, it is within time'.

A similarly circumstanced student of the SAITM Dhilmi Kasunda Malshani Suriyarachchi had challenged the refusal of her application dated 6th June 2016 submitted to SLMC for provisional registration by way of a writ application filed in the Court of Appeal on 14-06-2016.[7] After conclusion of the argument in that case, the Court of Appeal by its judgment dated 31-01-2017 had issued, as has been prayed for, by the Petitioner in that case,

(i) a writ of certiorari quashing the said decision of the SLMC refusing to provisionally register the Petitioner in that case as a medical practitioner.

[7] The Supreme Court judgment (SC Appeal No. 184 / 2017) pertaining to the appeal of the said Court of Appeal case (C A Writ Appn No. 187 / 2016) produced by the 5th Respondent marked **5R 2**.

(ii) a writ of Mandamus compelling the SLMC to provisionally register the Petitioner in that case as a medical practitioner.

(iii) a writ of Prohibition preventing the SLMC from refusing to provisionally register the Petitioner as a medical practitioner.

Being aggrieved by the said Court of Appeal judgment, the SLMC appealed to the Supreme Court. Upon the conclusion of the said appeal, the Supreme Court by its judgment dated 21-09-2018 dismissed the said appeal by the SLMC and affirmed the judgment of the Court of Appeal.

It is the position of the Petitioners that although the SLMC had refused their application for provisional registration as medical practitioners, with the pronouncement of the judgment by the Supreme Court, they became entitled as of a right, for provisional registration, as the Supreme Court had conclusively decided that Dhilmi Kasunda Malshani Sooriyarachchi who is a similarly circumstanced student of the SAITM is entitled for provisional registration as a medical practitioner.

It is the position of the Petitioners that it was under those circumstances that they had once again submitted their applications in the year 2017 together with a sum of Rs. 4,000 to SLMC to obtain provisional registration

on the strength of the Supreme Court judgment. The SLMC had neither rejected nor refused this set of applications. It has also not so far refunded the said sum of money, as opposed to the refunding of the deposit made by the Petitioners when it rejected their applications submitted for provisional registrations in 2016 as referred to earlier.

Thus, it can be seen that the Petitioners submitted the second set of applications with a fresh hope that the SLMC would comply with the law at least at this stage. It is worthwhile to reproduce the wording[8] used by this Court in its judgment,[9] when it vindicated the right of the said Petitioner in that case for provisional registration. i.e. "…there is no doubt that the petitioner was and is[10] entitled to obtain provisional registration as a medical practitioner….". This means that this Court has concluded in that judgment that the said Petitioner's right vindicated by this Court in that case is a continuing right. The Petitioners of the instant case being similarly circumstanced Medical Graduates of SAITM are therefore justified in claiming a similar right on the basis that they are also similarly circumstanced. Thus,

[8] In the previously quoted paragraph.
[9] SC Appeal No. 184 / 2017.
[10] Emphasis is mine.

it would be for justifiable reasons that they have entertained a fresh hope in the backdrop of this Court's above conclusions.

The SLMC has neither contested the fact that the said judgment has vindicated that Petitioner's right for provisional registration as medical practitioners under section 29(2) of the Medical Ordinance nor contested the fact that the Petitioners in the instant application are also entitled on the same basis as the Petitioner in the previous Writ Application.[11] All what the SLMC states is that the Petitioners' application is time barred and that the said judgment of this Court is per incuriam.

Perusal of the said judgment makes it clear that this Court, in the said judgment of the said previous Writ Application,[12] has decided in unequivocal terms on 09-12-2016, that the Petitioner in that case is entitled to provisional registration as a medical practitioner, under section 29 (2) of the Medical Ordinance and the SLMC is required, by law, to forthwith grant that provisional registration to the said Petitioner. This means that the Petitioner in that case, after the said judgment, has become entitled as of a right, for

[11] Ibid.

[12] Ibid.

provisional registration as a medical practitioner, under section 29 (2) of the Medical Ordinance.

I think this is an appropriate stage to consider the first argument advanced on behalf of the 5th Respondent. That is, the argument that the Petitioners cannot seek relief for the parties who are not before Court.

All what the Petitioners have stated in their petition is that they are amongst the eighty three Medical Graduates of SAITM and the Petitioners have preferred the instant application on behalf of all of them whom the Petitioners state in their petition 'are innocent and helpless victims of grave prejudice and discrimination by the SLMC'. This Court cannot prevent itself from considering the case of the Petitioners for the mere reason that the Petitioners have referred to in their petition about many others who are also facing the same situation. Indeed, one must not forget the fact that the Petitioners in the instant application are three Medical Graduates of SAITM amongst those who are eagerly waiting for provisional registration as medical practitioners with fresh hopes after the Supreme Court pronounced the decision in the previous case filed by a Medical Graduate of SAITM. When

the Petitioner in that case[13], after the said judgment, becomes entitled as of a right, for provisional registration as a medical practitioner, under section 29 (2) of the Medical Ordinance, this Court cannot see as to how the SLMC being a statutory body, can refuse provisional registration to the other similarly circumstanced Medical Graduates of SAITM. What the Petitioners have done in this instance is to bring that situation to the attention of Court. Further, one must understand that it was necessary for the Petitioners to highlight that situation in order to convince this Court that there has been a clear discrimination, which has deprived the Petitioners of the equal protection of law guaranteed by Article 12(1) of the Constitution. In those circumstances, the argument that this application is misconceived on that account, must fail.

The Petitioners of the instant case are similarly circumstanced MBBS graduates as the Petitioner of the previous Writ Application.[14] Thus, it stands to reason that all those who are similarly circumstanced, become entitled to the same right as the said Petitioner in that case. This is because, this Court

[13] SC Appeal No. 184 / 2017 pertaining to the appeal of C A Writ Appn No. 187 / 2016.

[14] Ibid.

in that case has decided that SAITM is a Degree Awarding Institute as per the relevant legal provisions. Moreover, the Petitioner in that case was not the only student of SAITM who passed out as a MBBS graduate. It follows that, the Petitioners and all those who are similarly circumstanced, are entitled for provisional registration as medical practitioners, under section 29 (2) of the Medical Ordinance and the SLMC was required, by law, to forthwith grant such provisional registrations to each one of them. This entitlement was positively established only on 09-12-2016 with the pronouncement of the Supreme Court judgment.[15]

As has been stated before, the Petitioners had submitted their second set of applications in the year 2017 together with a sum of Rs. 4,000, which is the requisite fee to the SLMC to obtain provisional registration. This had happened after the Supreme Court judgment. The SLMC, so far, has neither rejected nor refused these applications. It has also not so far refunded the monies deposited by the Petitioners. Further, as has been mentioned above, according to the judgment of this Court, the rights the SAITM Medical Graduates for provisional registration are continuing rights. Therefore, the

[15] SC Appeal No. 184 / 2017.

fact that the SLMC has not yet granted them provisional registration would be a continuing infringement of their rights.

The entitlement of the Petitioners and those who are similarly circumstanced, for provisional registration as medical practitioners, under section 29 (2) of the Medical Ordinance flows from the law of the country. They will therefore continue to have that entitlement. That entitlement cannot be taken away by the SLMC. Therefore, the Petitioners and those who are similarly circumstanced shall be entitled to continue to enjoy the said right. Since the SLMC has not so far refused the applications for provisional registration, the SLMC continues to deprive them of their due registration. Thus, the SLMC is denying them the equal protection of law and their right to engage in any lawful occupation, profession, trade, business or enterprise. This no doubt would be a continuous infringement of the fundamental rights guaranteed to them by Article 12(1) and 14(1) (g) of the Constitution. Further, the said infringement continues to date. The said continuous infringement shows no signs of abating. Thus, the argument by the Respondent that the Petitioners' application is out of time cannot succeed.

In addition to the above, it must be noted that the Petitioners in the instant application, which was filed on 14-02-2019, have also challenged the notice / circular dated 29-01-2019 produced marked **P 6**.

The operative part of **P 6** is as follows.

"… The batch of Medical Graduates recruited to local universities for the academic year 2010/ 2011 (Repeat batch) Medical Graduates of Sir John Kotalawela Defence University and Medical Graduates of foreign universities, who are provisionally registered at SLMC will be given internship appointments in due course…"

One of the compulsory requirements **P 6** has insisted on foreign medical graduates is the requirement to submit a copy of the letter granting approval for the degree by the SLMC.

The Petitioners in challenging this document (**P 6**) have prayed from this Court, declarations to annul the said notice/circular. Prayers (e) and (f) of the amended petition[16] are to this effect and are as follows,

e) Declare and direct that the purported decision of the 1st and/ or 2nd Respondent and/ or the 3rd Respondent to exclude the 82 medical graduates of the South Asian Institute of Technology and Medicine Sri Lanka, including the Petitioners from being awarded internship appointments as Medical Officers as reflected in the notice/circular

[16] This Court having considered the objections of the 5th Respondent had made order on 02-04-2019 accepting the amended petition filed by the Petitioners.

*dated 29.01.2019 produced marked **P 6** is illegal, null and void ab initio and of no force or avail in law;*

f) *Declare and direct that the portion of purported decision of the 1st and/ or 2nd Respondent and/ or the 3rd Respondent to exclude the 82 medical graduates of the South Asian Institute of Technology and Medicine Sri Lanka, including the Petitioners from being awarded internship appointments as Medical Officers as reflected in the notice/circular dated 29.01.2019 produced marked **P 6** is illegal, null and void ab initio and of no force or avail in law;*

As the Petitioners have filed this application on 14-02-2019 and the notice/circular under challenge in the above prayers was issued on 29.01.2019 (**P 6**) the application of the Petitioners is not out of time.

Despite the fact that the complaint of the Petitioners to this Court in the instant application is the failure on the part of the SLMC not affording them the equal protection of law on the strength of the judgment in SC Appeal 184 / 2014, the 5th Respondent has unsuccessfully attempted to paint a picture before this Court that the application of the Petitioners is time barred as the violation of the right had taken place on 28-11-2016. For the above

reasons this Court decides to reject the argument of the 5th Respondent that the Petitioner's application is time barred.

What remains to be considered is the second argument advanced by the respondents that the SAITM is not a 'Degree Awarding Institution' in terms of section 29 of the Medical Ordinance.

As has been already stated before, it is not in dispute that this Court by the judgment in SC Appeal 184 / 2014 has positively decided that the SAITM is a Degree Awarding Institution and that the SLMC is obliged to grant the Petitioner in that case, the provisional registration as a Medical practitioner. The argument advanced by the learned President's Counsel for the 5th Respondent in the instant application is that the decision contained in the above judgment is per incuriam for the reasons set out in his objections and subsequently in his written submissions. It is on that basis that the 5th Respondent argues that the judgment in SC Appeal 184 / 2014 should not be considered as a correct judgment.

The Petitioners have brought to the notice[17] of this Court that the 5th Respondent has not so far granted the provisional registration to Dhilmi

[17] Paragraph 23 of the amended petition.

Kasunda Malshani Sooriyarachchi, the Petitioner who filed the writ application[18] in the Court of Appeal. The Petitioners have further brought to the notice of this Court that the Petitioner in that case has filed in the Court of Appeal, Contempt of Court proceedings[19] against the 5th Respondent and that the Court of Appeal has directed the 5th Respondent to show cause as to why it should not be punished for Contempt of Court for noncompliance of its order. It is in that backdrop that the Petitioners have complained to this Court that the 1st - 5th Respondents have unlawfully, illegally, without any justifiable grounds and in blatant and gross contempt of Court, has failed to process the applications submitted by them and the other similarly circumstanced 80 Medical Graduates of SAITM. It is this failure (on the part of the 5th Respondent) that infringes the fundamental rights of the Petitioners and those who are similarly circumstanced.

It is the position of the Petitioners that the SLMC, in gross violation of their fundamental rights (guaranteed by Article 12 (1) and 14 (1) (g) of the Constitution), has taken steps to grant provisional registration to some other candidates while denying the same to the Petitioners who also have fulfilled

[18] C A Writ Application No. 187 / 2016.
[19] Contempt of Court Application No. CC / 09 / 18.

the legal requirements for such provisional registration as per prevailing law. The 5th Respondent has not stated that it is not so.

The sole defence raised by the 5th Respondent to justify the alleged infringement by it, is just raising an issue that the judgment[20] of this Court is per incuriam. In other words, the SLMC is not prepared to comply with the said judgment because it thinks that the decision of the Supreme Court is per incuriam.

Thus, the question arises as to whether it is open for the 5th Respondent to take up such a position.

According to Article 127 of the Constitution, the judgements of the Supreme Court shall be final and conclusive. The said Article is as follows.

Article 127 (1) - *The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance,*

[20] SC Appeal No. 184 / 2017 decided on 21-09-2018 (CA writ application No. 187 / 2016 decided on 31-01-2017).

tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

In the case of Jayraj Fenandopulle Vs. Premachandra de Silva[21] a bench of five Judges of this Court has unanimously held that 'when the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other judges to be called upon to review or revise a matter.' [22] His Lordship Justice Amerasinghe in the said judgment went on to state as follows.

" … However, as we shall see, the Court has inherent power in certain circumstances to revise an order made by it on the basis that one division of the Court may do what another may do, it would be competent for one division, in the exercise of that power, to set aside an order of another division of the Court. This must be so, for there may be circumstances in which it may not be possible for the review to be undertaken by the same bench: For instance, one or more of the Judges who decided the first matter may not be available, due to absence abroad, or retirement or some such reason. E.g. *see Palitha O.I.C. Police Station Polonnaruwa and Others,*[23]

[21] 1996 1 Sri L R 70.
[22] Ibid, at page 86.
[23] 1993 (1) Sri L R 161.

Justice cannot be denied because one or more of the Judges are not available. However, where they are available, such matters should be considered by the same Bench of Judges. …"

It is of paramount importance to observe that the SLMC despite being the appellant at whose instance this Court had entertained the said appeal, has ever taken any step to bring to the notice of this Court that the judgment of that case is per incuriam. The SLMC has not made any application so far seeking any correction of any such error in the said judgment. Further, the SLMC has not made any application so far to have such error brought to the attention of His Lordship Justice Prasanna Jayawardena PC who pronounced that judgment. This is despite the fact that His Lordship Justice Prasanna Jayawardena PC continues to sit on the bench as a Judge of this Court to date. This amply demonstrates that the 5th Respondent in the instant case, who stood as the primary respondent in SC Appeal No. 184 / 2017 has had no such complaint since the time of pronouncement of that judgment i.e. 21-09-2018. It was in the objections filed by the 5th Respondent in the instant case that it has raised such a ground. This is also not with a view of seeking any correction of any error in the said judgment but as a defence for not

carrying out the decision contained in the said judgment of the Supreme Court.

Although this Court, in view of the decision of Jayraj Fenandopulle's case[24] cannot consider the correctness of the said judgment of the Supreme Court to ascertain whether it is per incuriam, in order to demonstrate the fallacy of the above argument, the paragraph (h) of the statement of objections filed by the 5th Respondent setting out the basis for the said judgment to be per incuriam, is worthwhile being reproduced. It is as follows.

Paragraph (h)

" ….The judgment entered in CA writ 187/2016 and SC Appeal 184/2017 have been made per incuriam in as much as

(i) In the SC Appeal 184/2017, there were several vital documents which has been considered in the judgment, being introduced by the State after the hearings were concluded through their written submissions and denied the 5th Respondent from responding to the said vital documents,

[24] Supra.

(ii) The 5th Respondent state that the Petitioners of the instant application cannot seek relief under the judgment of the SC Appeal 184/2017, and the 5th Respondent reserves the right to collaterally challenge the application of the judgment of SC Appeal 184/2017 to the Petitioners.

The 5th Respondent annexes herewith marked '**5 R 1**' the written submissions filed by the State in SC Appeal 184/2017 and '**5 R 2**' the judgment of SC Appeal 184/2017 and respectfully pleads that same be considered as part and parcel of these statement of objections. … "

The written submissions referred to above (**5 R 1**) is dated 19th October 2017. However, the next document the 5th Respondent has filed, the Supreme Court judgment in SC Appeal No. 184/2017 (**5 R 2**) amply demonstrates that it was on 29-09-2017 that the Supreme Court (upon the application by the 5th Respondent), by the majority decision, had granted special leave to appeal. Thus, it is clear that the written submission referred to above by the 5th Respondent is a written submission filed not very long after this court had granted special leave to appeal in the said case.

This was so confirmed by the firm submissions made by Senior Additional Solicitor General Sanjaya Rajaratnam PC who specifically appeared before this court to clarify that particular issue.

Hence, the argument advanced by the 5th Respondents that the said judgment by this Court in SC Appeal No. 184/2017 is per incuriam on the basis that state introduced several documents with their written submissions after the hearings were concluded denying the opportunity of the 5th Respondent of responding to the said vital documents, is manifestly a frivolous argument.

It is not in dispute that this Court has held that the said Petitioner in the previous case is entitled to the provisional registration as a medical practitioner and the SLMC is obliged to grant such registration to that Petitioner. Therefore, the SLMC cannot have any discretion to deviate from the said direction of the above case. The SLMC must grant provisional registration to the Petitioner in that case. When the SLMC is obliged under law to grant to that Petitioner, provisional registration without any restriction, it cannot in law, treat the Petitioners of the instant application and everyone else who is similarly circumstanced in a different way. Doing

so would be a gross and blatant violation of their fundamental rights guaranteed by the primary law of the land itself.

As stated above, the 5th Respondent is not entitled to challenge the validity of the judgment of this Court. There is a general rule in the construction of statutes that what a Court or a person is prohibited from doing directly, cannot be done indirectly or in a circuitous manner.[25] What the 5th Respondent has done in the instant case is exactly that.

The above decisions clearly indicate that the present Bench cannot reconsider the judgment pronounced in the above case. It must be observed that the validity of the said judgment was questioned by the 5th Respondent as justification for defiance when its very compliance was in issue in the instant case. The reason as to why the Petitioners relied on the said judgment is rather simple. It is just their innocent expectation that the SLMC being a statutory body would in all probabilities have respected the conclusions of the apex court of the country. Unfortunately for them that turned out not to be the case.

[25] Bandaranayake Vs. Weeraratne & others 1981 (1) Sri L R 10 at 16.

As has been decided by this Court in that case,[26] the SLMC is not exempted 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.

Thus, when considering the totality of the circumstances relating to the instant case it is not difficult for this Court to conclude that the actions and the conduct of the 5th Respondent being a council created by the statute has amounted to taking the law into its hands with a deliberate intention to flout the law and violate the order made by this Court as well as the Court of Appeal.

The interim order staying and/or suspending the award of any internship appointments as Medical Officers to the Medical Graduates stipulated in the notice/circular dated 29.01.2019, produced marked **P 6**, issued by this Court at initial stages, was vacated by this Court on 02-04-2019 subject to the condition that the seniority of the Petitioners and their placements will not

[26] At page 53 of the judgment of SC Appeal 184/2017.

be jeopardized in the event the Petitioners become successful in this case and that the seniority of the Petitioners should be considered on par with the 278 Intervenient Petitioners who intervened into this case. Therefore, this Court needs to be mindful of that fact when granting relief to the Petitioners.

For the foregoing reasons, this Court decides;

a) to declare that the 5th Respondent has infringed the Petitioners' fundamental rights to equality and equal protection of law guaranteed by Article 12(1) of the Constitution;
b) to declare that the 5th Respondent has infringed the Petitioners' fundamental rights to the freedom to engage in their preferred lawful occupation or/and profession, guaranteed by Article 14(1)(g) of the Constitution;
c) to direct the 5th Respondent to provisionally register the Petitioners as medical practitioners in terms of Section 29(2) of the Medical Ordinance forthwith,
d) to declare that any decision by the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to exclude the Medical Graduates of the South Asian Institute of Technology and Medicine Sri Lanka, from being eligible for the award of internship appointments as Medical Officers on the sole basis that they are Graduates of the South Asian Institute of Technology and Medicine Sri Lanka, as reflected in the

notice/circular dated 29.01.2019 produced marked **P 6** is illegal, null and void ab initio and of no force or avail in law;

e) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to include in the notice/circular dated 29.01.2019 produced marked **P 6**, the Medical Graduates of the South Asian Institute of Technology and Medicine Sri Lanka, as being eligible for the award of internship appointments as Medical Officers;

f) to direct the 5th Respondent to pay as compensation Rs. 200,000/= each to each of the Petitioners separately;

g) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to include the Petitioners and those who are entitled for provisional registration as medical practitioners in terms of Section 29(2) of the Medical Ordinance on similar basis, in the same list in which the names of Intervenient Petitioners appear as provisionally registered medical practitioners as per the notice/circular dated 29.01.2019 produced marked **P 6**

h) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to take all necessary steps to ensure that the seniority of the Petitioners and their placements will not be jeopardized due to the arbitrary decision on its part to exclude them from being granted the provisional registration as medical practitioners in terms of Section 29(2) of the Medical Ordinance,

i) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to take all necessary steps to ensure that the seniority of the

Petitioners to be considered on par with the other 278 Intervenient Petitioners who intervened into this case,

j) To direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to take all necessary steps to comply with the directions given in this judgment within three weeks from the date this judgment is pronounced.

The Petitioners are entitled to the costs of this application.

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 in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Application No. SC (FR) 137/2011.

S.D.P.W. Waidyarathne
Siri Wedamadura,
6th Mile Post,
Mawathagama.

Petitioner.

Vs.

1. Provincial Commissioner Local Government, Provincial Council of the North Western Province (NWP), Kurunegala.

2. Chairman,
   Mawathagama Pradheshiya Sabha,
   Mawathagama.

3. Secretary,
   Mawathagama Pradheshiya Sabha,
   Mawathagama.

4. Hon. Governor,
   Provincial Council North Western Province,
   Kurunegala.

5. Dr. Uthpalani Herath,
   Provincial Commissioner of Ayurveda
   North Western Province,
   Kurunegala.

6. Dr. R.A. Chaminda Kumara,
   Public Health Medial Officer
   Mawathagama Pradheshiya Sabha,
   Mawathagama.

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

Respondents.

Before : Buwaneka Aluwihare, PC, J
P. Padman Surasena, J
E.A.G.R. Amarasekara, J.

Counsel : Rasika Dissanayake with Sandun Senadhipathi for the Petitioner.

Rajiv Goonetillake, SSC, for the 1st, 4th & 7th Respondents.

Argued on : 18.03.2019

Decided on : 25.10.2019

E.A.G.R. Amarasekara, J.

The Petitioner by her Petition dated 20.04.2011 has complained to this court that her fundamental rights guaranteed by Article 12 and 14(1)(g) of the constitution have

been infringed by 1st – 5th Respondents. She alleges that she has been transferred from the Mawathagama Pradeshiya Sabha to the Bingiriya Pradeshiya Sabha by letter dated 29.03.2011, marked as P14, with effect from 2011.03.31. She further alleges that the said transfer as made in P14 is illegal, unreasonable, and irregular and calls upon this court to declare that it is bad in law and has no force in law. This court, by its order dated 27.07.2011 granted leave to proceed under Article 12(1) of the constitution.

The Petitioner was an Ayurvedic medical officer attached to the Mawathagama Pradeshiya Sabha until she was transferred to Bingiriya Pradeshiya Sabha with effect from 2011.03.31.

The Public Service Commission appointed the Petitioner as a primary grade medical officer, in the Ayurvedic medical service of the Department of Ayurveda, by letter marked P1 dated 31.07.2001. Thereafter, the petitioner was absorbed into the provincial public service of the North Central Province as an Ayurvedic Medical Officer and was assigned to the Dimbulagala Pradeshiya Sabha. Subsequently, on a request made by the petitioner she was transferred to Ipologama Pradeshiya Sabha in the same capacity. The Petitioner states that both Dimbulgala and Ipalogama are classified as difficult and remote areas in the North Central Province, and having served in difficult areas for more than 3 years (The Petitioner worked for 4 years and 8 months) she was entitled to a transfer to a preferred station. Accordingly, the petitioner was released from the service in the North Central Provincial Council to join the service of the North Western Province. Anyhow, no documentary proof is adduced to show that she was entitled to such preferred station as aforesaid. Nevertheless, it is not a disputed fact that she was released from service in the North Central Province to serve in the North Western Province. The Petitioner states that, thereafter, the Petitioner

was assigned to the Mawathagama Pradeshiya Sabha with effect from 2007.09.15, but the Petitioner was not permitted to assume duties by the incumbent Ayurvedic Medical Officer Mrs. Uthpalani Herath who refused to go on transfer. As a result, the Petitioner was not paid her salary for one and half months and on 2007.06.18 the Commissioner of the Department of Ayurveda retransferred the petitioner to Meethanwela Central Ayurvedic Dispensary. No document was produced to show that she was assigned to Mawathagama Pradeshiya Saba from North Central Province. Anyway, the Respondents explains that the transfer from North Central Province to North Western Province, in other words to Mawathagama or Meethanwala were not actions of the Respondents of this case and were actions by the Central Government Commissioner of Ayurvedha. In proof of this, the Respondents have tendered the document marked as R2.

However, the Petitioner had made a complaint to the Human Rights Commission and subsequent to a report and a recommendation (P4 and P 5) of the Human Rights Commission, the Petitioner assumed duties at Mawathagama Pradeshiya Sabha as an ayurvedic medical officer and Mrs. Uthpalani Herath, 5th Respondent medical officer, who was serving at the said station was transferred out of the said Pradeshiya Sabha. The said 5th Respondent has now become the Provincial Commissioner of Ayurveda, North Western Province.

However, the present application is not with regard to the aforesaid incidents that had apparently taken place several years prior to the date of the Petition, during the period between 2007 to 2009. It appears that the Petitioner's intention, in relating the above incidents, was to show that that the Respondents were acting in retaliation to what

had taken place prior to the present incident in issue, namely her transfer to Bingiriya Pradeshiya Sabha.

The Petitioner further states that while serving at Mawathagama, on 06.05.2010, the Petitioner had had a fall from the 1st floor of her house and was severely injured. After being treated in the hospital from 06.05.2010 to 12.05.2010, she was strictly advised to bed rest for 3 months since she had injured her spine. However, the Petitioner states that she was granted only 2 months sick leave although she requested for 3 months (A true copy of the diagnosis card is marked as p6). It is pertinent to note that P6 or any other document marked by the Petitioner does not indicate that she requested for 3 months sick leave or she was recommended 3 months bed rest other than the entry in P6 recommending bed rest, possibly for 5 weeks. However, this application is not based on this alleged refusal of sick leave. On the other hand, it is an incident that had taken place many months prior to filing of this application. As such any fundamental rights violation on that issue, cannot be considered now.

Afterwards, the 1st Respondent by his letter dated 2011.01.07 (P8) transferred the Petitioner to Bingiriya Pradeshiya Sabha with immediate effect. The Petitioner states that she was receiving native treatments to her injured spine even at the date of this application and has been strictly advised by the doctor not to travel for long hours, to travel by bus or to carry weight. In support of this, the Petitioner has produced a true copy of a medical certificate issued by a native doctor marked as P7. The date of the said certificate is 04.04.2011 which was issued only 14 days prior to the date of this application and many days after the aforesaid letter marked (P8) which transferred her to Bingiriya. Thus, it is clear that the Respondents were not aware of the contents of the medical certificate marked P 7 prior to the transfer of the petitioner to Bingiriya.

Hence, the Respondents have referred to this medical certificate as a self-serving document. Even the medical certificate marked and submitted as P22 with the counter affidavit of the Petitioner bears its date as 04.05.2012. No medical certificate has been attached to the appeals marked as P12a and P12b.Thus, it is clear no medical certificate was before the relevant authorities when they decided to transfer the Petitioner by P8 dated 07.01.2011 or when considering the appeals tendered by the Respondent. Other than the mere statements by the Petitioner in her appeals with regard to her ailments, there is no material to show that there was sufficient medical evidence before the authorities when they decided to transfer her to Bingiriya or confirmed the transfer after her appeal. In that backdrop, this court cannot presume that her transfer was done unreasonably without considering her health condition. On the other hand, R6 and R7 tendered with the objections indicate that her transfer was varied to Polgahawela after filing this application. Most probably this would have been done after considering the medical reports available at that time. In her counter affidavit, the Petitioner complains that even the transfer to Polgahawela is not conducive to her health condition. She has tendered medical reports taken during the pendency of this application, marked P19 and P21, with her counter affidavit. Documents made after the alleged incident or transfer referred to in the Petition cannot be considered with regard to the alleged violation as they were not available for the perusal of the authorities before they made the transfer or confirmed the transfer after the appeal. As such those documents cannot be used to conclude that the transfer was unreasonable.

The Petitioner further agitates that her transfer to Bingiriya would subject her to many difficulties due to her illness as well as her obligations towards her children and parents. On the other hand, an employer may sympathetically consider medical

grounds and other difficulties of an employee in placing the employee to a certain station or work place but such grounds cannot be taken as grounds for an employee to demand a work place of his or her choice as of a right. Recognition of such a right may disrupt the maintenance of a sustainable service by the employer since almost all the employees face difficulties and ailments during their employments. On the other hand, as pointed out by the Respondents, by accepting her letter of appointment, she had agreed to serve in any part of the Island – vide P1.

The Petitioner alleges that the reason for the aforesaid transfer was **solely** based on false allegations made against the Petitioner by the 2nd Respondent and the transfer was on disciplinary grounds as stated in the letter of transfer marked as P8 – vide paragraph 18 of the petition. However, this court observes that the letter P8 does not state that the transfer is made due to disciplinary grounds. Contradictorily, she, in paragraph 10 of her petition states that the reason for the transfer is a request from the 5th Respondent made to the 1st Respondent seeking approval to transfer the Petitioner out of Mawathagama Pradeshiya Sabha in order to accommodate the request of the 6th Respondent. In support of this she has submitted a letter marked as P9. P9 is a letter written to the Chief Secretary of the North Western Province by Provincial Commissioner Local Government. This letter informs the necessity of transferring the Petitioner from Mawathagama to Bingiriya as well as transferring the 6th Respondent from Galgamuwa to Mawathagama. It also reveals that there was a request from the 6th Respondent for a transfer and that request was forwarded to the author of the letter through the 5th Respondent. Merely because the 5th Respondent, as part of her duty, forwarded the 6th Respondent's request for a transfer to the Provincial Commissioner of Local Government of North Western Province, this court cannot presume that it was an act of retaliation for the transfer of the 5th Respondent

from Mawathagama due to the recommendation of the Human Rights commission contained in P4 and P5 . The Respondents' position is that the transfer of the Petitioner was due to the exigencies of the service and due to the vacancy resulting with that transfer, they had to consider the request made by the 6th Respondent. However, it appears that on one hand, the Petitioner takes up the position that her transfer was on disciplinary grounds solely based on false allegation made by the 2nd Respondent and on the other hand, she takes up the position that the transfer was done to accommodate a request for a transfer by the 6th Respondent. At the same time, she tries to make out that the transfer was a result of retaliation process due to her previous complaint to the Human Rights Commission. This court feels that she is trying to assume or pretend as far as many reasons for her transfer than logically placing the causes and effects that ended up with the transfer.

P10 is an approval of the transfer of the Petitioner to Bingiriya by the 4th Respondent. The Petitioner states that she had been transferred to Bingiriya even before this approval in P10 was obtained by the chief secretary of the Province. The Respondents position is that it is not necessary to get the approval of the Governor to transfer the Petitioner. The Petitioner has not placed any material that the obtaining of approval of the Governor was essential prior to the transfer. She might be hiding her conduct reported in R5 which is mentioned below in this judgment.

P11 is a letter that informs the Petitioner to hand over the duties to the 6th Respondent in view of the transfer.

The petitioner has tendered her appeals to the 1st and 4th Respondents to reconsider her transfer - vide P12A and P12 B. By P13, the Petitioner was asked to hand over her

duties to the 6th Respondent pending the decision of the aforesaid appeals. The Petitioner admits that she remained at Mawathagama and drew her salaries from January to March of 2011. By P14 dated 29.03.2011, with reference to the appeals made, the 3rd Respondent had informed the Petitioner that the 4th Respondent had no objections to the Petitioner's transfer to Bingiriya and he was asked to give effect to the transfer. Accordingly, the Petitioner was released from Mawathagama Pradeshiya Sabha with effect from 31.03.2011 by letter dated 29.03.2011. This court observes that even though P8 contemplates an immediate transfer it appears that the petitioner was allowed to remain at Mawathagama pending her appeal. If the transfer was done with an intention to cause harassment, she would not have been allowed to stay in Mawathagama pending the appeal. P8 or P9 do not directly indicate that the transfer was due to or as a result of a disciplinary cause. However, P 9 states that the intended transfers are essential. The position of the Respondents is that the exigencies of the service necessitated this transfer to be made.

However, P14 indicates that her appeal made through P12a and P12b were not successful.

It appears from the averment 27 of the Petition that the Petitioner presents this application based on the alleged violations of her fundamental rights caused by this letter marked P14. She alleges that;

- P14 is illegal, irregular, and unreasonable.
- The Petitioner is in an Island wide service and governed by the minutes of the Sri Lanka Ayurvedic Services. Accordingly, it is the Secretary to the Ministry of Indigenous Medicine who has the authority of transferring the Petitioner and not the 1st Respondent. (However, said minutes of the Sri Lanka Ayurvedic Service are not tendered for the perusal of this court.)

- The transfer made in P14 by the 1st Respondent with the approval of the 4th Respondent is bad in law as the 1st Respondent had no authority to do so in view of the regulations published by the Public service Commission in gazette extraordinary dated 2003.07.02, marked as P15.
- The transfer made in P14 cannot be justified by any reason other than the reason to accommodate the request of the 6th Respondent.
- The said transfer has been instigated by the 4th Respondent as she was not on good terms with the Petitioner after the findings of the Human Rights Commission. (She may be referring to the 5th Respondent here as the 4th Respondent is the Governor who was not a party or one affected by the findings of the Human Rights Commission.).

It is true that 5th Respondent was transferred from Mawathagama Pradeshiya Sabha after the complaint made to the Human Rights commission by the Petitioner and now, she is the Provincial Commissioner of Ayurveda. As said before, merely because she forwarded the 6th Respondent's request for a transfer to the 1st Respondent as reflected in paragraph 2 of P9, this court cannot come to a conclusion that the 5th Respondent instigated this impugned transfer. It appears, that forwarding of the 6th Respondent's request had been done as part of functions in the discharge of duties. No sufficient material is placed before this court to prove a contrary position. Though the Petitioner argues that her transfer cannot be justified by any reason other than the reason to accommodate the request of the 6th Respondent, the Respondents' version is that 6th Respondent's transfer was considered to fill the vacancy that would be created with the transfer of the Petitioner which was done on exigencies of the service. In support of this they have placed R5 to indicate the unpleasant situations and unhealthy relationship between officers, created by the conduct of the Petitioner.

There is no sufficient material to give more weight to the stance of the Petitioner in this regard.

The Petitioner alleges that P14 is ultra vires, illegal, irregular and unreasonable and she based her action on P14. A careful perusal of P14 shows that;

- it is only a communication, written after her appeal, by the Secretary of Mawathagama Pradeshiya Sabha to the Petitioner informing that the Secretary to the Governor, the 4th Respondent had conveyed that there is no objection to the implementation of the transfer order.
- He had been asked to implement the transfer order as per the letter written by the 1st Respondent dated 25.03.2011.
- This communication relates to the transfer letter by the 1st Respondent dated 07.01.2011.

Thus, it is clear P14 is a letter written to inform the outcome of the Petitioner's appeal to the Governor, which confirms the transfer. After making an appeal to the Governor, the 4th Respondent, the Petitioner cannot be allowed to state that the communication of the outcome of it is illegal, irregular or unreasonable. If she wants to challenge the transfer on ultra vires, illegality or irregularity, she must challenge the transfer letter. The Petitioner has submitted the transfer letter as P 8. There is no averment in the petition stating that P8 is illegal or irregular or ultra vires. Accordingly, there is no prayer in the petition to declare that P8 is such a document. On the other hand, if it is the illegality, irregularity or lack of authority of the author of P8, that caused the infringement of Fundamental Rights as alleged, such infringement would have taken place on the receipt of the P8. After receiving P 8, the Petitioner had tendered appeals to other authorities on other grounds. P11, P12a, P12B, show that the Petitioner was

aware about P8 by 13.01.2011. However, the instant Petition was filed only on the 20th April 2011.In that sense this application is time barred. Even if it is considered that the action is not time barred as she was allowed to remain in Mawathagama Pradeshiya Sabha till the issuance of P14, there is no challenge in the petition to P8.

However, the contention of the Petitioner is that she belongs to an Island wide service and governed by the minutes of Sri Lanka Ayurvedic Service and the transfer made by the 1st Respondent in P 14 with the Approval of the 4th Respondent is bad in Law. In this regard the Petitioner marks the regulations published by the Public Service Commission in gazette extraordinary dated 02.07.2003 as P15. According to the said regulation the Public Service Commission has delegated its powers to transfer Ayurvedic Doctors to the Secretary to the Ministry of Indigenous Medicine. Anyhow, it is not clear whether the same authority (the Public Service Commission) has the power to transfer when an Ayurvedic Doctor is absorbed into the Provincial service. In this regard the Petitioner has marked P17 and P18 with her counter affidavit. P17 is an unsigned complaint, supposedly written by the President of All Ceylon Government Ayurvedic Medical officers' Union to the relevant Minister complaining that there was an attempt by the 5th Respondent to follow the transfer procedure in breach and this complaint is dated 07.02.2011; a date close to the impugned transfer. However, this court cannot give any weight to this document as it is an unsigned document. On the other hand, though it refers to a transfer procedure, the Petitioner has not tendered a copy of that transfer procedure or service minutes referred to in paragraph 27 to ascertain whether the allegations made above are justifiable. Furthermore, P18 is a letter issued by the Secretary to the Ministry of Indigenous Medicine quoting an advice of the Attorney General. According to that letter, the Attorney General had opined that as per and for the purposes of Article 12(1) of the Constitution of the Sri Lanka

Ayurvedic Service, all matters connected with Ayurvedic Doctors including their transfers within the provinces have to be done by the Public Service Commission. This court however, is not bound to follow this opinion. Yet the petitioner has not submitted the copy of the said Constitution or its Article 12(1) for the perusal of this Court. Thus, the Petitioner has failed to tender the necessary documents to prove her contention, that the transfer is illegal, irregular or ultra vires. In addition, this court observes that when the Petitioner was serving in the North Central province, her transfers within that province were done by the Provincial Commissioner of Local Government of that Province- Vide P3. This indicates that transfers within the provinces are done by the Provincial Commissioner of Local Government. The Respondents have submitted the document marked R1 to show that Commissioner of Ayurveda has delegated powers to Commissioners of Local Government and the Provincial Commissioners of Ayurveda to transfer ayurvedic doctors within their respective provinces, while requesting that, transfers to the other provinces from their respective provinces be referred to him. This seems to be the procedure followed by the Ayurvedic Service as evidenced by R2 (The Petitioner had been transferred from North Central Province to North Western Province by the Commissioner of Ayurveda) and R6, P8, P3 (The transfers within the relevant Provinces had been done by the relevant Provincial Commissioner of Local Government). On the other hand, if P8 was issued without authority, it is a matter that falls within the remedies under Public Law. To fall within the Article 12(1) of the Constitution, there should be material to show that there was inequal treatment with regard to transfers effected, to the Petitioner vis-a-vis other Ayurvedic medical officers. There is no material to show that transfer of others within the province was done by the Secretary to the Ministry of Indigenous Medicine or some other authority other than the author of P8, namely the 1st Respondent. As shown before, some documents marked by the Petitioner herself in

relation to her transfers within north central province indicate that transfers within a province was done by the relevant Commissioner of Local Government.

However, this court observes that the approval of the 4th Respondent was given to the transfer by P10 dated 11.01.2011. P14 conveys again that the 4th Respondent has had no objection for the transfer, even after the appeal was made. The Respondents' position is that the 4th Respondent's approval is not necessary to effectuate a transfer. Their position is that the Ayurvedic Commissioner has given authority to Commissioners of Local Government, including 1st Respondent to transfer Ayurvedic doctors within their respective provinces. This seems to be the practice even in other provinces as per the Petitioner's own documents.

She further alleges that another reason for the transfer was a false complaint made by the 2nd Respondent by his letter dated 01.11.2010 marked as P16 which she believes to have been made on the advice of 5th Respondent. There is no material to establish that it was so. P16 was written to the 1st Respondent by the 2nd Respondent, a couple of days after a prize giving ceremony, referring to the petitioner's unbecoming conduct over a prize given on the occasion of the prize giving as well as after the ceremony. While denying the allegations in P16, the Petitioner states that;

- the cheque referred to therein was never destroyed by her but handed over to the 3rd Respondent which has now been deposited to the account of the Pradeshiya sabha.
- The certificate referred to therein is framed and displayed at the Dispensary, and it has not been destroyed as alleged.
- It is a false statement to say that she carried a bag of urine to be thrown at the public health officer as alleged therein.

Nevertheless, there had been an investigation into this incident and the relevant report is marked as R5. Investigating officer has revealed that the Petitioner had acted in a manner to give the impression that she was burning the cheques and the certificate causing the Pradeshiya Sabha officers to believe that she burnt them. He also had reported that she had refused to accept the letter sent by the Secretary requesting to hand over the cheque and the certificate. The remaining of the burnt certificate in the custody of the Secretary to the Pradeshiya Sabha evidenced that the petitioner burnt photocopies of the certificate and the cheque, says the investigating officer in his report marked R5. The investigating officer had come to the conclusion that, even though it is not apparent that the Petitioner had engaged in a misconduct, he observed that she had acted in a manner causing disrepute and inconvenience to the Pradeshiya Sabha and its officers. The investigating officer had commented that to maintain the administration of Pradeshiya Sabha in regular manner, it is appropriate to transfer the Petitioner to a different station since, from the date she came, she had had conflicts with the Chairman, Secretary and the Officers of the Pradeshiya Sabha. To run a work place or a service smoothly and efficiently there must exist a good relationship among the officers involved. If they are at loggerheads or not in good terms it affects the service tendered by the relevant institution. In such a backdrop, one may have to be transferred to maintain the service and such a situation falls within the scope of the term, “exigencies of service”. The position of the Respondents is that the Petitioner created a restive situation and an unpleasant atmosphere. It appears that the letter marked P16 alleging her misconduct would have been written under the misapprehension that she burnt the original certificate and cheque but the investigation report indicates that there had been a quite a drama staged by the Petitioner that created an unpleasant situation and nurtured unhealthy relationship.

This gives a weight to the version of the Respondents that the transfer was done on exigencies of the service.

The Petitioner complains that there was no disciplinary inquiry against her, but the position of the Respondent is that the transfer was not on disciplinary grounds but on exigencies of the service. When there are grounds to satisfy that there was a situation that demanded her transfer was necessary for the proper administration of the service and the workplace, a need of a disciplinary inquiry does not arise.

Additionally, the Petitioner states that the 1st to 4th Respondents failed to adhere to the procedure laid down to effect annual transfers of Ayurvedic Medical Officers but she has not tendered the approved procedure in that regard for the perusal of this court and on the other hand the transfer concerned appears to be done not as an annual transfer but on the exigencies of the service.

When the restive situation arisen of which she is also a part caused the situation to transfer her on exigencies of the service, she cannot ask her to be given the same place to work. If Bingiriya Pradeshiya Sabha is not suitable she must show what are the other reasonable places that she could be stationed. It appears that she had been given Polgahawela subsequently. But she complains that it also does not suit her health conditions as she has to travel 20 miles. As said before, medical condition of an employee can be considered by an employer when implementing a transfer but it cannot be taken as a ground to give a working place of his or her choice as it may cause disruption to the relevant service. If the distance to work place from the residence affects the health condition, the alternative is to find a place close to the working place.

The Petitioner has marked another appeal she tendered during the pendency of this application with regard to the transfer made to Polgahawela and requesting that she would be given Mawathagama Pradeshiya Sabha and the refusal of that appeal as P20 and P21. Whether an infringement was occurred when she was transfered to Bingiriya Pradeshiya sabha has to be decided according to the facts and material available and was in existence at that time. These two documents and related facts that came into existence pending the result of this application cannot be considered in deciding the said alleged infringement. However, P21 also confirms that transfer to Polgahawela was considered due to the health condition of the Petitioner. It also states that she was transferred from Mawathagama due to the restive situation created by her. Hence, she could not be placed in Mawathagama Pradeshiya Sabha. As said before, when it appears that the Petitioner's conduct caused the transfer her from Mawathagama on exigencies of service, it is unreasonable for her to ask the same station through an appeal. She has not placed material to show that there are other better places that suits her health condition. As such this court cannot come to a conclusion that Respondents were unreasonable in varying the transfer order to Bingiriya and giving her Polgahawela.

In the appointment letter she had undertaken to work anywhere in the Island. When she was transferred within the province on exigencies of service this court cannot consider that it deprives her right of freedom to engage by herself or in association with others in any lawful occupation, profession, trade, business or enterprise in violation of Article 14(1)(g) of the Constitution.

This court observes that there are many documents tendered to the brief by the petitioner herself through letters without notice to the opposite parties. When there

is a registered attorney, she must tender her documents through him and through her pleadings so that the opposite party could meet them and reply. Thus, this court discourages such practice and does not entertain or treat them as part of the case record to come to a decision in this regard. This court considers only the documents tendered with the pleadings of the parties or with the sanction of the court.

The matters discussed above show that;

- There are no sufficient grounds to hold that the Petitioner was transferred to Bingiriya on disciplinary grounds, without holding a disciplinary inquiry as alleged by the Petitioner.
- It appears more probable that she was transferred on exigencies of service.
- The Petitioner has not placed sufficient materials to show that the decision to transfer her was illegal, ultra vires or unreasonable. She has not submitted the relevant materials referred to in this regard in her pleadings and supporting documents. For Example; Minutes of the Sri Lanka Ayurvedic Service referred to in paragraph 27 a of her petition, Constitution of Sri Lanka Ayurvedic Service referred to in P18.

As per the petition, the Petitioner has based her application on alleged infringements of her fundamental rights caused by the letter P14. As said before, By P14, the Secretary to the Mawathagama Pradeshiya Sabha, the 3rd Respondent conveys the outcome of her appeal to the 4th Respondent and that he has been directed to effectuate the transfer order. Thus, it is not the original transfer letter or Order. As Petitioner herself has appealed to the 4th Respondent, communication of the result of it through P14 cannot be considered as illegal, unreasonable or ultra vires. She has not prayed any relief to declare P8, which seems to be the transfer letter, as illegal, ultra

vires or unreasonable. On the other hand, it appears that she was transferred on exigencies of the service. Hence, this court decline to hold that the fundamental rights of the Petitioner were infringed by the Respondents and dismiss the application of the Petitioner without costs.

Judge of the Supreme Court

Justice Buwaneka Aluwihare, PC,

I agree.

Judge of the Supreme Court

Justice P. Padman Surasena,

I agree.

Judge of the Supreme Court

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

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Sunway International (Pvt) Ltd.
   'Sunway House'
   No.25, Kimbulapitiya Road,
   Negombo.

2. Ramesh Dassanayake
   Managing Director
   Sunway International (Pvt) Ltd
   'Sunway House'
   No.25, Kimbulapitiya Road,
   Negombo.

SC (F/R) No. 147/2017

Petitioners

Vs.

1. Airport & Aviation Services (Sri Lanka) Limited
   Bandaranaike International Airport,
   Colombo, Katunayake.

2. Chairman,
   Airport & Aviation Services (Sri Lanka) Limited
   Bandaranaike International Airport,
   Colombo, Katunayake.

3. Ministry of Transport and Civil Aviation
   7th Floor, Sethsiripaya,
   Stage II,
   Battaramulla.

4. Secretary,
   Ministry of Transport and Civil Aviation
   7th Floor, Sethsiripaya,
   Stage II,
   Battaramulla.

5. Mr. R. W. L. B. Medawewa
   Chairman,
   Technical Evaluation Committee (TEC),
   Airport & Aviation Services (Sri Lanka) Limited,
   Bandaranaike International Airport,
   Colombo, Katunayake.

6. Mrs. K. D. Yamuna Chandani
   Member,
   Technical Evaluation Committee (TEC),
   Airport & Aviation Services (Sri Lanka) Limited,
   Bandaranaike International Airport,
   Colombo, Katunayake.

7. Mr. Eranda Gunathilaka
   Member,
   Technical Evaluation Committee (TEC),
   Airport & Aviation Services (Sri Lanka) Limited,
   Bandaranaike International Airport,
   Colombo, Katunayake.

8. Mr. R. M. S. Ratnayake
   Chairman,
   Ministerial Procurement Committee (MPC),
   Additional Secretary (Aviation),
   Ministry of Transport and Civil Aviation
   7th Floor, Sethsiripaya,
   Stage II,
   Battaramulla.

9. Mr. S. S. Ediriweera
   Member,
   Ministerial Procurement Committee
   (MPC),
   Chairman,
   Airport & Aviation Services (Sri Lanka)
   Limited,
   Bandaranaike International Airport,
   Colombo, Katunayake.

10. Mr. E. M. N. R. Bandara
    Member,
    Ministerial Procurement Committee
    (MPC),
    Accountant,
    Department of the Registrar of
    Companies,
    No.400, D. R. Wijewardena Mawatha,
    Colombo 10.

11. Airport Tourist Drivers Association
    No. 1454,
    Colombo Road,
    Kurana,
    Katunayake.

12. Sunhill Group of Hotels
    No. 26, Palmyrah Avenue,
    Colombo 03.

13. Ancient Lanka Tours and Travels
    No. 530/8, 12th Lane,
    Deminigahawatta,
    Kimbulapitiya,
    Katunayake.

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

Respondents

Before:	Buwaneka Aluwihare, PC. J. Sisira J. de Abrew, J. L.T.B. Dehideniya, J.
Counsel:	Shavindra Fernando, PC with Eliza Kandappa for the Petitioners. N. M. Riyaz with Madhushani Chandrika for the 11th Respondent. Ms. Yuresha de Silva, SSC for 1st to 10th and 14th Respondents.
Argued on:	11. 01. 2019 and 17.01.2019
Decided on:	02.12.2019

Aluwihare PC. J.,

The 1st Petitioner Company, Sunway International (pvt.) Ltd. (Hereinafter sometimes referred to as the 'Petitioner Company') and the 2nd Petitioner, who is the Managing Director/Founder of the said Sunway International (pvt.) Ltd., together in partnership operate a Destination Management Company under the name and style of "Sunway Holidays" which provides, *inter alia*, services in the nature of a tour operator and a travel and air ticketing agent.

In the sequence of events leading up to the present application, it is submitted by the Petitioners that in response to a public notice published in the newspapers on 4th December 2015, inviting bids to operate the six (06) Travel

Service Counters at the arrival public concourse of the Bandaranaike International Airport (BIA), Katunayake, issued by the Chairman of the Airport and Aviation Services (Sri Lanka) Limited (2nd Respondent), the Petitioner Company submitted its bidding documents on 27th of December 2015, for the Travel Service Counters Nos. 1, 3 and 5.

The Petitioners maintain that 'Sunway Holidays' was in complete compliance with **Clause 6 of Instructions to Bidders** marked as P5, which lays down the "Eligibility and Qualification Requirements of Bidders". The relevant excerpts from the said Clause is reproduced below for ease of reference:

"6. <u>Eligibility and qualification requirements of Bidders</u>

(a) The bidder should be a duly registered company with the Registrar of Companies…or a duly registered firm with the Registrar of Business names in case of partnerships or individuals……

(b) The bidder shall have valid license to carry on business as a travel agent issued by Sri Lanka Tourism Development Authority…

(c) Firms, Companies or Institutions registered outside Sri Lanka may also apply...

(d) The prospective bidder must possess financial capability for the proposed operation throughout the contract period without any interruption, disruption or premature termination of the contract. Such financial capability should be supported by financial documents such as Balance Sheets, Income Statements and annual audited accounts together with cash flow statements for the immediate past three years that shall be attached to the Qualification Questionnaire.

(e) The Bidders shall have at least 3 years of experience in the relevant field.

(f) The proposed operation of the bidder stated in the Bid document should be related to the objectives of Bidder's Registered Business."

It is averred by the Petitioners that, at the time of submitting the bid, they together formed a Business Firm duly registered with the Provincial Registrar of Business names of Western Province (P2), possessing the required licence issued by the Sri Lanka Tourism Development Authority to carry on business as a travel agent, and possessed the financial capability to operate the Travel Service Counters during the contract period, without any "interruption, disruption or premature termination of the contract".

It is the Petitioners' claim that even though the Petitioner Company was the fourth highest bidder for Counter No.01, it was nevertheless the **highest 'responsive' bidder** by virtue of fulfilling all of the above requirements, and owing to the other three (03) bidders who had submitted higher bids than the Petitioner Company, suffering certain infirmities. These infirmities were, viz. the **11th Respondent- Airport Tourist Drivers Association** having no financial capability to meet the bid submitted, therefore not being qualified as per Clause 6. d., the **12th Respondent- Sunhill Group of Hotels** having no license from Sri Lanka Tourism Development Authority nor financial capability, therefore not being qualified as per Clauses 6, b and d, and the **13th Respondent- Ancient Lanka Tours and Travels** having no licence, nor the financial capability, nor the experience- and failing to qualify as per Clauses 6. b, d and e.

In these circumstances, the Petitioners contend that, despite being assured at the pre-bid briefing on 23rd December 2015 that the *conditions of the bidding documents will be adhered to and the tender will not be merely awarded on the basis of being the highest bidder*, the tender for the operation of Counter No. 1 was awarded to the 11th Respondent- Airport Tourist Drivers Association-by the decision of the **Ministerial Procurement Committee** dated 6th April 2016 (hereinafter also referred to as "**MPC**") (8th, 9th and 10th Respondents), allegedly in **disregard of Clause 6. d [financial capability of the bidder]** of the Instructions to Bidders and in **disregard of the recommendations provided after a technical evaluation by the Technical Evaluation Committee** (hereinafter also referred to as "TEC") (5th, 6th and 7th Respondents).

It is claimed by the Petitioners that the TEC Report dated 29th January 2016 (marked 2R3) which evaluated the bids received, revealed that the TEC had recommended to the Tender Board that Counter No.1 should be awarded to the Petitioner Company, and that in the said Report, the 11th Respondent was not even identified as an eligible and a responsive bidder by the Committee (Page 3 of 2R3). However, the minutes of the MPC Meeting held on 6th April 2016 (marked 2R5), indicate that the MPC had decided that "the awards must be awarded to the **highest bidders ranked according to bid value** and should be amended by **waiving off financial capacity requirement given in the tender document…"** (emphasis added), and decided to award the tender for Counter No.01 to the 11th Respondent on the basis that it would yield a higher income to the 1st Respondent- Airport & Aviation Services (Sri Lanka) Limited.

It is therefore averred by the Petitioners, that the tender for the operation of Counter No.1 has been awarded to the 11th Respondent **merely on the basis of higher bid value**, in violation of the published eligibility requirement in the tender documents, pertaining to the requisite financial capability to operate the Travel Service Counters, and it therefore amounts to a changing of the 'goal post' after the bids have been closed on 30th December 2015 and the evaluation process had commenced with the TEC recommendations submitted.

Aggrieved by the above decision of the Ministry of Transport and Civil Aviation, the **Petitioners submitted an appeal on 2nd May 2016, to the Secretary of the Ministry of Transport and Civil Aviation,** setting out their grounds of protest. However, they had not received any communication of the decision of the Appeal Board. Thereafter, the Petitioners had written to the Head of Commercial and Properties of Bandaranaike International Airport (BIA) seeking a hearing with regard to the matter, to no avail.

The 11th Respondent had thereafter commenced the operation of the Counter No.1 on 1st January 2017. The Petitioners assert that after the commencement of operations, there was a delay of over 03 months in the 11th Respondent entering into the relevant Contract Agreement (entered into only on 24th April

2017) which the Petitioners point out, was in violation of **Clause 13.7** of the Instruction to Bidders, by virtue of which *"the successful Bidder shall enter into a Contract Agreement with the Company within 14 days from the Letter of Award…Failure to enter into a contract within the stipulated time period shall be a just cause for the annulment of the award".* But no such step had been taken against the 11th Respondent in the present case.

In light of the above circumstances, the Petitioners allege that awarding of the tender of Counter No. 1 to the 11th Respondent, who is ill-qualified, and allowing the 11th Respondent to continue operating Counter No.1, have violated and continue to violate the Fundamental Rights guaranteed to the Petitioners under **Articles 12(1) and 14(1)(g)** of the Constitution. Leave to Proceed was granted by this Court for the alleged violation of the said two Articles.

As such, the Petitioners seek a declaration on the violation of their Fundamental Rights, pray for compensation and a direction by the Court, awarding the tender for the operation of the Counter No.1 to the Petitioners - for a period of three (03) years forthwith, or by 1st January 2020 and three (03) years thenceforth.

It was the contention of the 11th Respondent that, due to the1st Petitioner Company not being a 'citizen', and the 2nd Petitioner not having disclosed his citizenship in the Petition, they do not qualify for the protection provided by Article 14(1)(g). Consequently, it was contended that by reason of Article 12(1) being prayed conjunctively with Article 14(1)(g), the Petitioners have no standing to claim relief under the regime of Fundamental Rights.

The 1st Petitioner is a limited liability company duly incorporated in Sri Lanka under the Companies Act, No. 1982 and Act No. 07 of 2007 (Certificate of incorporation marked as P1), and therefore qualifies as a juristic person/corporate entity. 'Sunway Holidays' is the registered business name of the Firm of which the 1st Petitioner-Sunway International (pvt.) Ltd and the 2nd Petitioner are Partners (Certificate of Registration of the Firm marked as P2).

As a juristic person, the 1st Petitioner Company possesses locus standi to make a Fundamental Rights application against a violation of the right to equality before

the law and equal protection of the law, as protection under Article 12(1) extends to juristic persons as well, by reason of that Article's reference to "all persons". Resonating this principle, His Lordship Justice **Sharvananda** in the treatise, **"Fundamental Rights in Sri Lanka" (**at page 43,-44,) states that, "[T]here is nothing in principle which prevents a corporation or company from securing the equal protection of the law specified in Article 12…the word 'person' in the several Articles including Article 17 in Chapter III of the Constitution will have to be construed to include both a natural person and a body corporate."

However, regarding a violation of Article 14(1)(g) namely, the freedom to engage in any lawful occupation, trade, business or enterprise, only 'citizens' are empowered to avail themselves of the protections provided therein. In this regard, His Lordship Chief Justice S. N. Silva made the following observation in the case of **Environmental Foundation Limited vs. Urban Development Authority of Sri Lanka and others** (2009) (1) SLR 123 at page 131, 132:

> "An objection has been raised that the Petitioner cannot have and maintain this application, since it is an incorporated company and that the fundamental rights guaranteed by Articles 12(1) and 14(1)(a) can be invoked only by **persons** and in the case of Article 14(1)(a) by a **citizen.** In my view the word **"persons"** as appearing in Article 12(1) should not be restricted to "natural" persons but extended to **all entities having legal personality**… Although Counsel contended that Article 14(1) should be read differently in view of the reference to a **"citizen"**, I am of the view that this distinction **does not carry** with it a difference which would enable a company incorporate [sic] in Sri Lanka, to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1)." (Emphasis added)

The view that the protection afforded under Articles 12(1) and 14(1) can be extended to incorporated companies in Sri Lanka was reiterated by His Lordship Chief Justice K. Sripavan in **Noble Resources International Pte Limited vs. Hon.**

Ranjith Siyambalapitiya and others (The Bar Association Law Journal 2016 Vol. XXII at page 161). Therefore, by parity of reasoning, the 1st Petitioner Company, which is an incorporated company in Sri Lanka as evidenced by P1 and P2, is entitled to the protection granted under Article 12(1) and 14(1)(g).

The 2nd Petitioner, is a citizen of Sri Lanka (as evidenced by P2) and also the Founder, the Managing Director and a Partner in the Partnership formed under the name and style of "Sunway Holidays". In such capacity, the rejection of the Bid of the Partnership Firm, thereby entitles him to have sufficient standing to avail himself of the Fundamental Right guaranteed to him as a natural person and a citizen under Articles 12(1) and 14(1)(g).

The learned Senior State Counsel appearing for the 1st to 10th and the 14th Respondents made submissions by way of a preliminary objection regarding the maintainability of this application, in light of the one month period stipulated in Article 126(2) of the Constitution, and that this application should be dismissed *in limine.*

In terms of Article 126(2) of the Constitution, an action for infringement/imminent infringement of a Fundamental Right by executive or administrative action should be brought within one month of such impugned action.

It is common ground that the decision of the Ministerial Procurement Committee to reject the Petitioners' bid was communicated to them by way of a letter dated 28th April 2016 (P6/2R6). Thereafter, on 14th July, the 1st Respondent (Airport and Aviation Services (Sri Lanka) Ltd.) had notified the Petitioners that the disputed tender **has been cancelled** by the Secretary, Ministry of Transport and Civil Aviation (P11). On 25th October 2016 the 1st Respondent had again notified the Petitioners that the Secretary to the Ministry had **reverted the aforesaid decision to cancel the disputed tender and that the tender stands valid.** (P12/2R9).

The Respondents contend that the Petitioners took no action in this regard from that point of time, up until **11th April 2017**, when they came to court to file the present application.

However, the sequence of events which led to this delay needs to be examined. Upon the receipt by the Petitioners of the letter of award (P6) communicating the rejection of their bid by the MPC, immediately on 2nd May 2016, within a week of notice, the Petitioners preferred an appeal (P7) to the Secretary of Ministry of Transport and Civil Aviation, in compliance with **Clause 8.3** of the **Government Procurement Guidelines 2006 on Goods and Works.** Thereafter, on 25th May 2016, the 1st Respondent had written to the Petitioner Company requesting them to further extend their bid bond and the bid until August 31st and September 30th, respectively (by letter marked P8) on the basis that the evaluation of the tender was in progress. The Petitioners complied with the request the very next day [as evidenced by P9(a), (b),(c) and P10].

As referred to earlier, on 14th July 2016 (after the Petitioners had appealed against the MPC decision), they were informed by letter marked as P11 that the impugned tender was cancelled, only to be informed again on 25th October 2016 that the above decision to cancel the tender had been reverted by the Secretary to the Ministry of Transport and Civil Aviation and the former tender stands valid (by letter marked P12), thereby restoring the *status quo ante*.

Thereafter, the Petitioners who were still unaware of the status of their appeal, had written to the 1st Respondent seeking **a hearing with regard to their appeal** (P13) on 10th November 2016, but their request was not granted. On 22nd December 2016 they wrote to the 2nd Respondent with regard to the Writ Application concerning this tender before the Court of Appeal, bearing Case No. CA (WRIT) 402/2016 which was pending, and requested to hold any decision for awarding the tender till the final determination of that case (P14).

They had again written to the 2nd Respondent on 18th January 2017 and 1st March 2017 (The Writ Application referred to above had been dismissed on the same date). They **only received a response on 7th March 2016** by the 1st

Respondent that the counters were awarded in December 2016 and are currently in operation. A final letter dated 1st April 2017 was addressed by the Petitioners to the 4th Respondent-Secretary of the Transport and Civil Aviation Ministry- calling for immediate attention to this matter before calling for fresh bids in order to initiate a re-bid for the same Counter.

It is the Petitioners claim that until the making of the present application which was necessitated by fresh bids being called for Counter No.1, the Petitioners were unaware of whether their appeal was considered or not. They aver that they were not granted a hearing, nor informed of the decision and the reasons for the decision of the Appeal Board which sat on **10th June 2016**.

A pertinent observation in this regard has been made by **Dr. Jayampathy Wickramaratne** in **'Fundamental Rights in Sri Lanka'** at **page 460** stating that, "Until there is a *final refusal by the relevant authorities to grant relief*, seeking alternative relief should not be a bar to an application under Article 126. In fact, it is only when the *appellate authority refuses to interfere and grant redress* that the injury complained of becomes effective and fundamental right infringed." (Emphasis added)

In the absence of a communication to the effect that their appeal had been rejected, the general principle on exemption from the time limit of one month, as set out by His Lordship Justice Mark Fernando in **Gamaethige vs. Siriwardena and Others** [1988 1 SLR 384] needs consideration. His Lordship states (at page 402) as follows, "While 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 if time."

Therefore, the Petitioners have established that they were prevented from invoking the jurisdiction of this Court due to circumstances which were beyond their control and owing to no lapse on their part, but due to the remissness on the part of the Respondents. Therefore, the preliminary objection regarding the maintainability of this application due to it being time-barred is overruled.

Having thus clarified the preliminary issues, attention must be paid to the main grounds of contention of the Petitioners which can be synthesized as follows:

Whether the Tender Guidelines were not adhered to in awarding the tender;

The TEC Report (2R3) had recommended that Counter No.1 be awarded to the 1st Petitioner, Sunway International (Pvt) Ltd. The MPC, however, by its decision dated 06th April 2016 (2R5) had decided to unilaterally waive off the **requirement of financial capacity laid down under clause 6.d ,which stipulates the "Eligibility and qualification requirement of Bidders" in the Instructions to Bidders (P5).** The document referred to (P5) requires that the financial capacity of the Bidders be proved by tendering audited statements of accounts for the immediate past 03 years. The MPC's decision to award the tender for Counter No. 1 to the 11th Respondent (who was disqualified by the TEC for not being a responsive bidder) was based on the motive of obtaining the maximum income for the benefit of the 1st Respondent Company.

In the decision of the MPC Meeting held on 6th April 2016 (R25), under the heading 'decisions' it is stated as follows:

> "Having pursued the bids **to obtain maximum income to the company**, MPC members are of the opinion that the awards must be awarded to the **highest bidders ranked according to the bid value** and should be **amended by waving [sic] off financial capacity requirement given in the tender document,** in the following manner for a period of 03 years." (Emphasis added).

The MPC had through this decision, in a context of national competitive bidding, changed the 'goal post' **after the closure of bids** on 30th December 2015 and after the TEC evaluation. If there was a genuine need to waive a certain eligibility requirement to serve the interests of the 1st Respondent, the process provided by Clause 11.1 of the Instructions to Bidders (P5) could have been resorted to, and an Addendum amending the Bidding Documents could

have been issued by the Tender Board, "prior to the deadline given for submission of bids" and communicated to, and acknowledged by the Bidders.

Therefore, it is observed that according to 2R5 and the affidavit of the 2nd Respondent, the overriding concern of the MPC in awarding the Counters according to its new recommendation, had been the additional financial gain amounting to Rs. 80,190,686/= which can be accrued by waiving off one requirement of eligibility. Similarly, the 11th Respondent avers in paragraph 26 of the written submissions that the TEC recommendation was "wrong" due to the fact that the 11th Respondent offered a phenomenally higher price than that offered by the Petitioner Company. It must be noted, however, that the 11th Respondent had at no point challenged the TEC's determination that the 11th Respondent was not a 'responsive bidder'.

The decision to award the tender based solely on the concern of accruing a higher income, to the detriment of other qualifications, renders the determination of a bidder's "responsiveness" by the Tender Board, nugatory (Clause 13.3 of P5). Furthermore, the meticulously detailed 'eligibility requirements' (Clause 6 of P5), the provisions for a 'technical evaluation' to be performed by the TEC, (mandated under Clause 13.5 of P5) as well as the Government Procurement Guidelines of 2006, are also rendered futile by such an arbitrary decision.

The **Clause 13.3 and 13.5 of Instructions to Bidders** read as follows:

> **13.3 Examination of Bids and Determination of Responsiveness**
>
> Prior to the detailed evaluation of the Bids, the **Tender Board 01 will determine** whether each bid; (a) **meets the eligibility and qualification requirements** stipulated in the Bidding Documents…(d) is **substantially responsive** to the requirements of the Bidding Documents (Emphasis added).

13.5 Selection

> The bids which are determined to be **substantively responsive** shall be **evaluated by a Technical Evaluation Committee** appointed by the Tender Board 01. Selection of the bidders will be made by the Tender Board 01 **based on such detailed evaluation** which shall be in **the best interest** of the company. (Emphasis added)

A similar procedural requirement is stipulated in the **Clause 7.9.10** of the **Procurement Guidelines 2006** on Detailed Bid Evaluation which states thus:

> "Bids shall be **first evaluated strictly according to the criteria and methodology specified in the bidding documents** and such evaluated Bids shall be compared to determine the lowest evaluated substantially responsive Bid." (Emphasis added)

However, it is the contention of the 11th Respondent that the eligibility requirements in Clause 6 should be read with Clause 13.5 of Instruction to Bidders (P5), having regard ultimately to the 'best interest' of the 1st Respondent Company. The 11th Respondent further avers in paragraph 31(c) of statement of objections that it was selected not solely on the basis of being the highest bidder, but also due to its *"long and uninterrupted service…absence of complaints, excellent service, modern fleet, uniformed disciplined drivers…" inter alia*, which are all factors extraneous to the eligibility requirements laid down by Clause 6 of Instructions to Bidders, thus, are of no relevance as far as *eligibility requirements* are concerned.

The 8th Respondent – Chairman of the Ministerial Procurement Committee- in his affidavit avers that, Counter No.1 was awarded to the 11th Respondent, as **the highest Bid of Rs. 75,487,860.00 was submitted by the 11th Respondent,** whereas, the value of the Bid submitted by the Petitioner was only **Rs. 40,514,400.00**.

The 1st to 10th and the 14th Respondents further aver in their written submissions that documents submitted by the Bidders in accordance with

Clause 6(d) pertaining to their financial capabilities were examined, *even though in the MPC decision it is stated that the said requirement of financial capability should be waived off.* They state that the requirements given in Clause 6(d) were after all ultimately, in light of Clause 13.5, *for the Bidders to submit the necessary documents in order to assess their ability to perform the Contract based on best interest of the Company.*

Petitioners' counter-argument is that the above Clause on 'best interest' can't be misused to change the 'goal post' when the bids have been closed and the tender evaluation period had commenced, which is a practice essentially frowned upon in awarding of public tenders.

These averments elaborated above are indicative of the fact that the overriding concern in the selection process has only been the highest income receivable from the tenders which had been equated to the best interest of the 1st Respondent Company. Emphasis should have been given by the MPC to the selection of one out of the 'responsive bidders' who had fulfilled all the requirements for eligibility, which were laid down and communicated to bidders through the Instructions to Bidders (P5) to serve a certain rational purpose and to ensure transparency of the government procurement process.

The MPC decision has also not given any weight to the evaluation Report submitted by the TEC, and the MPC appears to have completely disregarded the consideration of the same, which is a necessary step made obligatory by Government Procurement Guidelines.

The case of **SmithKline Beecham Biologicals S.A. and another Vs. State Pharmaceutical Corporation of Sri Lanka and others** (1997 3 SLR 20) is of relevance here, as it concerns a similar scenario where the Respondent- a State Corporation- awarded a tender for supplying the Rubella vaccine to an unqualified Company that offered the lowest bid, but, however, was not the lowest 'responsive' bidder. The said Company was awarded the tender by adopting the minimum cost to the State as the ultimate criterion. His Lordship Justice Dr. Amersasinghe at page 55 opined that, "[T]he only complete tender

was that of SmithKline Beecham Biologicals and therefore it was the only tender that qualified for evaluation. The Tender Board misdirected itself by believing that it was obliged to recommend the acceptance of the tender of Biocine S.p.A. because its price was "the lowest responsive offer". **It may have been the lowest offer, but at the relevant date… it was not a "responsive" offer at all, for Biocine S.p.A. had failed to comply with the condition of registration.**"

In addition to the higher income, the 1st Respondent in the present case avers that the past performance (as opposed to 03 years' experience in the field) of the 11th Respondent in operating the Counter No. 1 in 2016 and being in the operation of various other counters since 2005 to the satisfaction of the 1st Respondent, influenced the MPC's decision to award the Counter to 11th Respondent. Such considerations violate the requirements laid down in the bidding documents and the Government Procurement Guidelines 2006. This is apparent from a scrutiny of the Guidelines.

The **Clause 7.9.1** of the **Guidelines**, lays down the **general principles of bid evaluation by the TEC** as follows:

> 7.9.1 (a) The **manner in which the bids are to be evaluated**, including the **criteria for selection** of the lowest evaluated bid must be **stipulated in the bidding document.**
>
> (b) The evaluation of bids shall be **consistent with the method, terms, and conditions disclosed in the bidding documents.** (Emphasis added)

Furthermore, **Clause 7.8.2** classifies deviations from Instructions to Bidders as minor deviations which are acceptable, or **major deviations which are unacceptable.** As per **Clause 7.8.4, major deviations** include:

> (e) Eligibility requirements (if specified);
>
> (n) Bids which are not responsive to critical, technical or commercial requirements in the bidding documents.

Thus, the waiving off of an eligibility requirement in favour of the 11th Respondent, qualifies as a major deviation from the tender documents. Furthermore, the Guidelines define a substantially responsive bid as **"one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation" (Clause 7.8.6)**, by which estimation, the bid of the 11th Respondent is rendered unresponsive and unacceptable to compete for Counter No.1.

This classification of deviations from Bidding Documents as major or minor, is widely accepted and was made reference to by the Andhra Pradesh High Court in **Baxalta Bioscience India Pvt. Ltd vs. The State of Telangana, Health, Medical and Family Welfare Department and Others** (Writ Petition No. 40315 of 2016 on 13.03.2017), where it was stated that "The requirements in a tender notice can be classified into two categories - those which lay down the *essential conditions of eligibility* and the others which are *merely ancillary or subsidiary with the main object to be achieved by the condition*. In the first case, the authority issuing the tender may be required to **enforce them rigidly**. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases." (Emphasis added)

According to the above classification, and in light of the MPC's primary objective of awarding the tender being the accruing of the highest possible income, the financial capability and solvency of the bidders to meet the unrealistic rates they have submitted, becomes an essential condition of eligibility. Therefore, Clause 6.d can be considered a requirement which must be rigidly enforced, rather than be waived off.

Such deviations are questionable in the light of Clauses **5.3.19 and 5.3.20 of the Guidelines** on "Evaluation criteria", which state:

> **5.3.19 (a)** The bidding documents shall also specify the **relevant factors, in addition to price, to be considered in bid evaluation** and the manner in

which they will be applied for the purpose of determining the lowest evaluated bid.

5.3.20 (b) The **disclosed criteria shall not be modified** or **additional criteria** shall not be introduced **during evaluation**. (Emphasis added)

In the instant case, not only had the MPC taken factors which were extraneous to the eligibility criteria into consideration, but had also deviated from them after the evaluation process had commenced and the TEC had submitted their recommendations as to eligible bidders. The undesirability of such practices was highlighted by this court in a number of decisions.

In the case of **Jayawickrama Vs. Prof. W. D. Lakshman, Vice Chancellor, University of Colombo and Others** (1998) 2 SLR 235 at 249, dealing with a decision of the Post-graduate Institute of Medicine and its Board of Management and Study, His Lordship Justice Mark Fernando observed that, "It is true that regulations can be amended. But even the **authority which made the regulations is bound by them**, unless and until they are duly amended; and **disregarding its own regulations is not a method by which that authority can amend them**." (Emphasis added)

His Lordship Justice Amerasinghe expressing his view in **Pamkayu (M) SND BHD (Appearing By Its Attorney, Hemachandra) and Another Vs. Liyanaarachchi, Secretary, Ministry of Transport and Highways and Another** (2001) 1 SLR 118 at page 125, stated that, "The award of a tender must be based on compliance with the terms and conditions of the tender documents on the date and at the time specified for the closing of the tender. An offer that does not comply with the terms, conditions and specifications at that date and time must be rejected in the same way as a late offer."

As held in **SmithKline Beecham (supra** at page 44), "[T]he Guidelines make it clear that a Tender Board may only consider bids which are **responsive and qualified** by substantially conforming with the tender documents. **The State and its agencies are bound by and must rigorously and scrupulously observe the**

procedures laid down by them on pain of invalidation of an act in violation of them." (Emphasis added)

In a similar vein it was held in **Noble Resources International** (supra, at pages 155 and 161) that "[I]t is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power …When specific provisions are laid down in the Government Procurement Guidelines- 2006 and in the Bid Documents, the rule of law will imply that the requirements of those provisions are not violated." (Emphasis added)

Thus, taking account of the circumstances of the present case, it is evident that the 8th to 10th Respondents have acted in blatant disregard of and in violation of the Government Procurement Guidelines, as well as the eligibility requirements in the tender documents, in awarding Counter No.1 to the 11th Respondent.

It must also be inquired into at this point, whether rules of natural justice were breached in deciding the appeal of the Petitioners. When an Appeal was preferred by the Petitioner on 2nd May 2016 in accordance with the **Clause 8.3 of the Guidelines** to the Secretary, Ministry of Transport and Civil Aviation, an Appeal Board to hear the appeals of unsuccessful bidders was appointed by the Secretary to the said Ministry (as evidenced by 2R7). It consisted of the Chairmen and members of the TEC and MPC, who were involved in the technical evaluation and made the decision to award the Counter No. 1 to the 11th Respondent- the very decision against which the appeal was made.

Consequently, the said MPC Chairman and members sitting in the Appeal Board, determined the correctness of their own decision, and so affirmed the decision of the MPC dated 30th March 2016. This is against the widely accepted principle of natural justice, *Nemo judex in causa sua*- no one shall be the judge of his own case- which signifies that no person can judge a case in which he/she has an interest. Albeit, however, the TEC members had signed the Appeal Board's decision, they made reference to their initial position in the TEC report, by making a notation under their signatures which reads, "Ref. TEC memo to AASL Secretary TB1 (attached) dated 30.06.2016". Therefore, the decision of

the MPC members sitting in the Appeal Board (marked 2R7), appears to be in clear violation of this rule of natural justice.

In addition, the Petitioners had written to the 1st Respondent **seeking a hearing with regard to their appeal** (P13) on 10th November 2016, but their request was not granted, nor was the decision of the Appeal Board and reasons for such decision communicated to the Petitioners. This is in violation of Clause **8.4.1(b) of the Procurement Guidelines** which provides an opportunity for an aggrieved party to make representations at a hearing in support of his/her appeal. The clause is reproduced below:

> 8.4.1(b) **After investigating into such representations**, the Appeal Board shall submit its independent report to the Cabinet of Ministers, with copy to the Secretary of the Line Ministry and such report shall:
>
> (i) **provide their reasons** for endorsement of the decision of the Cabinet Appointed Procurement Committee; or
>
> (ii) **for rejecting same together with their independent recommendation of contract award.** (Emphasis added)

The tenor of the Guidelines suggests that an "investigation into such representations" made by aggrieved parties should be carried out. But on the contrary, at the Appeal Board meeting on 10th June 2016, the Board had cursorily rejected all appeals without a hearing, and the appeal of the Petitioners was rejected on the ground that *"The Tender Board has emposed [sic] new conditions on Airport Tourist Drivers Association…in order to safeguard that revenue would be paid without interruption"*, thus making amends for the 11th Respondent's lack of required financial capability (2R7).

Therefore, it can be observed that, as held in **Noble Resources International** (supra) at 160, "[T]he failure on the part of the Procurement Appeal Board (PAB) to afford a hearing to the Petitioner is in violation of the principles of "natural justice"…If the PAB had considered the appeal of the Petitioner, without giving the Petitioner an opportunity of being heard, any decision taken

by the PAB… would be in violation of the *audi alteram partem* rule…." In light of these circumstances, it is established that the conduct of the Appeal Board members (5th to 10th Respondents) was in violation of this principle of natural justice.

It is pertinent in the present case to discuss whether the awarding of the tender for Counter No. 1 to the 11th Respondent is in violation of the Petitioners' Fundamental Right to equality before the law and equal protection guaranteed by **Article 12(1) of the Constitution.**

The actions of the MPC members, namely, the waiving off of the essential requirement of financial capability at the bid evaluation stage, and introducing a different threshold of financial capability for the 11th Respondent by way of an **additional sum equivalent to one-month rental applicable to the final year of contract**, in lieu of the stricter requirement stipulated in Clause 6.d, are in themselves discriminatory and arbitrary.

Such conduct has clearly changed the 'goal post' and hindered the providing of an equal opportunity, by precluding other bidders who could have otherwise submitted a higher bid than the 11th Respondent, unencumbered by the financial capability requirement, from participating in the bidding process. Had the waiver been notified at the point of calling for bids, more entities would have been eligible to submit bids.

It is also discriminatory towards all the other bidders in the present case, who were evaluated by the TEC, including the Petitioners, based on all the prescribed qualification requirements, including that of financial capability, while the 11th Respondent's compliance to it was dispensed with.

Especially, owing to the stipulation in **Clauses 12.4 and 13.5** of the Instructions to Bidders that only one counter space will be allocated per bidder, the Petitioner Company was not considered by the TEC for any other counter after recommending it to Counter No.1. In such a backdrop, modifying the requirements later on and rejecting the Petitioners has meted out unfair treatment and denied equal opportunities to the Petitioners.

It should also be noted at this point, that the Procurement Guidelines comprehensively provide the procedure to follow in cases where the Bidders provide unrealistic rates, such as the 'phenomenal' rates offered by the 11th Respondent, albeit where such bids are substantially responsive:

Unrealistic Rates

7.9.11 Upon selection of the lowest substantially responsive Bid:

(a) If such bidder has quoted unrealistically low rates on critical or very important items, the **bidder shall be requested to prove to the satisfaction of the TEC, how the bidder intends to procure such items/perform the Works/provide the Services as per the quoted rates,** for such purposes the bidder may be asked to provide a rate analysis.

(d) If the TEC continues to entertain **some doubt about the contractor's/supplier's ability** to procure such items/perform the Works/provide the Services as per the quoted rates despite explanation/justification provided, **a higher performance security may be requested to mitigate such risks.** (Emphasis added)

There is no evidence submitted to substantiate the fact that the 11th Respondent had been requested to prove how it intends to provide services for the quoted rate and the 1st Respondent in the written submissions had merely stated that "the 11th Respondent had operated Counter No. 1 in the year 2016 and had been operating various counters since 2005 to the satisfaction of the Company…". Such peripheral considerations are suggestive of unequal treatment among bidders who are similarly circumstanced and of differentiated application of eligibility requirements and Guidelines.

Furthermore, even if such proof and justification was tendered by the 11th Respondent, the imposition of a higher performance security in the present case (one-month additional rental) can only be deemed as evidence of "some doubt about the contractor's ability to provide the service as per the quoted rates", continuing to be entertained.

This waiving off of requirements also frustrated the legitimate expectations of the Petitioners. The arbitrariness of waiving off one requirement (Clause 6(d)) in favour of the 11th Respondent, is further apparent in the hypocrisy of the Appeal Board's decision by which the appeals of Ancient Lanka Tours & Travel (Pvt.) Ltd. and Sunhill Group of Companies were rejected for not fulfilling one of the eligibility requirements [the absence of the license of the SLTPB in accordance with Clause 6(b)].

As held in **SmithKline Beecham (supra)** at page 29, when referring to inequality before 'law' and equal protection of the 'law', the 'law' mentioned therein is *"not confined to the enactments of Parliament, and includes the regulations, rules, directions, instructions, guidelines and schemes that are designed to guide public authorities."* Therefore the Government Procurement Guidelines of 2006 on Goods and Works, which in its Preface itself assures that the purpose of its enactment is to, *"enhance the* ***transparency*** *of Government procurement process to minimize delays and to obtain* ***financially the most advantageous and qualitatively the best services*** *and supplies for the nation"* should be upheld when awarding bidders on public tenders (Emphasis added).

However the waiving off of certain requirements and introducing lower thresholds, after the closure of bids, solely for increased revenue is a compromise on the quality as well as a stark violation of the transparency and certainty of government procurement process.

A case concerning an identical scenario Decided by the Supreme Court of India is of relevance here. In **Ramana Dayaram Shetty Vs. The International Airport Authority of India and Others** 1979 AIR 1628**,** tenders were invited for putting up and running a second class restaurant and two snack bars at the Bombay International Airport. Being a registered second class hotelier having at least five years' experience was an eligibility requirement, which the 4th Respondent had not fulfilled. Yet his tender was accepted by the 1st Respondent, even in the absence of documentary evidence on the above requirement. It was held that such acceptance was clearly discriminatory since it excluded other persons

similarly situated from tendering for the contract and it was arbitrary and without reason, thus violating the equality clause of the Constitution of India (Article 14 of the Indian Constitution, identical to the Article 12(1) of our Constitution). The Court held that:

"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action ***must not be arbitrary*** *but must be based on some* ***rational and relevant principle which is non- discriminatory:*** *it must not be guided by any* ***extraneous or irrelevant considerations,*** *because that would be denial of equality…* ***Equality of opportunity should apply to matters of public contracts... The State has the duty to observe equality.*** *An ordinary individual can choose not to deal with any person.* ***The Government cannot choose to exclude persons by discrimination.*** *"*

Similarly, in **Pamkayu** (supra) at page 125 it was held that, *"The terms and conditions of a tender* ***cannot be arbitrarily dispensed with*** *or varied by an evaluation committee or tender board* ***to accommodate a particular tenderer.*** *If there are to be negotiations in regard to variations in conditions or specifications … all the tenderers should have due notice of such negotiations … It is in that way that a* ***'level playing field'*** *on which there is* ***equal opportunity*** *for persons to participate and compete on* ***identical terms,*** *and* ***transparency and uniformity*** *of the evaluation procedure of the tender process which the Guidelines on Government Tender Procedure aim to achieve, can be achieved."* (Emphasis added)

Therefore, it can be observed that neither equality of opportunity nor transparent State action based on rational and non-discriminatory principles, can be gathered from the actions of the 8th, 9th and 10th Respondents, who have acted arbitrarily, taking extraneous factors in to account and extending favoured treatment, thereby creating inequality among the bidders. Therefore, by failing to ensure equality and equal protection of the law to the Petitioner, the said Respondents have acted in violation of Article 12(1) of the Constitution.

Article 14(1)(g) of the Constitution stipulates that "Every citizen is entitled to – the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise". However, this fundamental Right is limited by the restrictions imposed by Articles 15(5) and 15(7). The Petitioners who were discriminated against by the arbitrary actions of the Respondents, suffered the injury of being precluded from operating Counter No.1 during the 03 year tender period from 2017 to 2019.

In this regard, His Lordship Chief Justice Y.V. Chandrachud in **Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India and Others** 1981 AIR 344 stated that, "Article 19(1)(g) [which corresponds to Article 14(1)(g) of the Constitution of Sri Lanka] confers a broad and general right which is available to all persons to do **work of any particular kind** and of their choice. **It does not confer the right to hold a particular job or to occupy a particular post of one's choice**" (Emphasis added).

Resonating this view, His Lordship Chief Justice Sharvananda opined in **Elmore Perera vs. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others** (1985) 1 SLR 285 at page 323 that, "The right to pursue a profession or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment… Article 14(1)(g) recognizes a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice."

Therefore, the Petitioners have not adduced sufficient evidence to support the contention that the decision of the MPC to waive off a requirement and award the Counter No.1 to the 11th Respondent infringed their general right and freedom to engage in the lawful occupation as tour operators and travel and ticketing agents. This is so, as the right to carry on an occupation as travel agents cannot be equated to the right to work in a particular post under a particular contract, such as the disputed tender agreement in the present case. Thus, it is

my view that the Petitioners have failed to establish that their Fundamental Right enshrined in Article 14(1)(g) has been infringed.

In the aforesaid circumstances, I hold that the 1st and 2nd Petitioners' Fundamental Rights under Article 12(1), have been infringed by the 8th, 9th and the 10th Respondents, acting in their capacity of the Chairman and members respectively of the Ministerial Procurement Committee. The court takes serious note of the fact that, in innumerable cases this court had held, that the award of a tender must be based on compliance with the terms and conditions of the tender documents on the date and at the time specified for the closing of the tender and further, the State and its agencies are bound by and must rigorously and scrupulously observe the procedures laid down, in awarding tenders. The 8th, 9th and the 10th Respondents have acted in callous disregard and in flagrant violation of the stipulated eligibility and qualification requirements of bidders.

I award the 1st Petitioner a sum of Rs 100,000, as compensation and a sum of Rs. 50,000 as costs, to be paid by the State. I also direct the 8th, 9th and 10th Respondents to personally pay a sum of Rs. 150,000/-each to the 1st Petitioner as compensation.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J DE ABREW

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 Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.F.R. Applications

No: 149/2019, 145/2019

1. Meragal Pelige Dinuka Namalee Dissanayake,
   No.24/A, Vajira Road,
   Bambalapitiya.

2. Jamuni Nipuni Nisansala Wimalarathna,
   No.16, Rathuwila Watta,
   Athurugiriya.

3. Niluka Viroshini Marasinghe,
   "Wimalasiri",
   Pahala Walahapitiya,
   Natandiya.

4. Haputhanthrige Kalani Haputhanthri,
   No. 127, Balummahara,
   Mudungoda.

5. Ameer Hamza Mohamed Haares,
   No. 35B, Kurunduwatta,
   Chilaw.

6. Lorensu Hewage Sathishka Eranda,
   No.3, Kotuwa Road,
   Trincomalee.

7. Praveena Vianini Mary Andrew,
   No 103/18, Paramananda Vihara Mawatha,
   Colombo 13.

8. Annakkarage Lahiru Dulanja Peiris,
   No. 866/1, Station Road, Hunupitiya,
   Wattala.

9. Alahapperuma Arachchige Jayathri,
   "Amara Niwasa",
   Pattiyawela, Nihiluwa,
   Beliatta.

10. Semasingha Mudiyansekage Sanjula Yashodara Semasingha,
    No. 825, Thammennapura, Thabuttegama,
    Anuradhapura.

11. Bandaranayaka Mudiyanselage Thilak Senarath Bandara,
    No. 19, Kukuloya Road,
    Narampanawa.

12. Ranmuni Chamila Indumali de Zoyza,
    No. 91, Elpitiya Road,
    Wathugedara.

13. Fairoos Mohamed Faizul Ihsan,
    No 174, "Jahan Manzil", Kalpitiya Road,
    Puttalam.

14. Ponrasa Mauran,
    No. 56, Thirugnana Sampanther Street,
    Trincomalee.

15. Vivekanathan Renukanth,
    “Shirirangam”, Velupillai Street,
    Thirukovil (EP).

16. Samarakkodi Arachchige Dilini Priyangika Perera,
    No. 17, Samudragama, Bendiwewa,
    Polonnawara.

17. Lekamge Chalodya Thilini,
    Daladagama,
    Maho.

18. Ariyanagam Dikson,
    No. 145/4, Galle Road, Wellawatta,
    Colombo 06.

19. A.M.W.S.H.B. Karunarathna,
    No.79/4, Nagolla Road,
    Mihindu Mawatha,
    Matale.

20. Kankanam Kapuge Lakshika,
    “Yamunani”, Uluwitike,
    Galle.

21. P. Jebarasan,
    No.G-35, Torrington Flats, Torrington Avenue,
    Colombo 05.

22. Ramathas Nishnathan,
Upatissa Road,
Colombo 04.

PETITIONERS (SC/FR/149/2019)

1. Subasinghe Arachchilage Appuhamy Isuru Dinuwan,
No.58, Palangathure West, Kochchikade.

2. U.P.K Dissanayke.
No.1297/7, 'Ruchira', Eksath Mawatha,
Moragahakanda, Pannipitiya.

PETITIONERS (SC/FR/145/2019)

Vs

1. Sri Lanka Medical Council,
No.31, Norris Canal Road,
Colombo10.

2. Hon. Dr. Rajitha Senarathne,
Minister of Health, Nutrition and Indigenous Medicine,
Ministry of Health, Nutrition and Indigenous Medicine, Suwasiripaya, No. 385, Rev. Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

3. Dr. Anil Jayasinghe,
Director General of Health Services,
Ministry of Health, Nutrition and Indigenous Medicine,

Suwasiripaya,
No. 385, Rev. Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

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

RESPONDENTS

Before: Prasanna Jayawardena, PC, J.
L.T.B.Dehideniya, J.
Murdu Fernando PC, J.

Counsel: Upul Jayasuriya, PC, with Sujith Perera and Laknath Seneviratne for the Petitioners.
Canishka Vitharana for the 1st Respondent, Suren Gnanaraj, SSC, for the 2nd, 3rd and 4th Respondents.

Argued on: 18.06.2019

Decided on: 09.08.2019

L.T.B.Dehideniya, J.

This judgement is related to the cases SC/FR/149/2019 and SC/FR/145/2019.

The Petitioners invoked the fundamental rights jurisdiction of this court, challenging the wilful refusal or/ neglect or/ omission of the 1st Respondent to grant the Petitioners admission to complete the remaining part/ parts of VIVA examination of the Examination for Registration to Practise Medicine (hereinafter sometimes called as' ERPM'), which is conducted by the 1st Respondent. As per the Petitioners, they have received the due approval from the 1st Respondent, and completed a significant portion of the ERPM. The Petitioners further state that, the 1st

Respondent's decision to exclude the former from admission to the remaining part/ parts of the ERPM amounts to a wilful refusal or/ neglect or/ omission of the latter which is ultra vires, grossly indefensible, unreasonable, arbitrary, capricious, mala fide, unfair and in violation of the principles of legitimate expectation, natural justice and reasonableness and amounts to an infringement or an imminent infringement of the Petitioners' fundamental right to equality and equal protection of the law guaranteed by Article 12 (1) and the fundamental right to engage in any lawful occupation or profession guaranteed by Article 14(1)(g) of the constitution. The Petitioners plead that, the conduct of the 1st Respondent has caused a severe personal difficulty and hampered the future career prospects of the Petitioners, which is in violation of the basic principles of natural justice and due process.

The 1st Respondent's contention in this regard is that, it has the sole authority and power to decide on the criteria for the recognition of universities or medical schools while considering the standard of medical education or medical school. If further elaborated, the 1st Respondent emphasizes, that its authority includes the power to introduce changes to criteria and subjecting previously imposed criteria to additional qualifications. Thus, the 1st Respondent seeks to justify imposing a retrospective pre entry requirement stating that, the Medical students admitted to the medical schools should have had not less than thirteen years of formal education, and three passes in Biology, Chemistry and Physics/ Mathematics with at least two credit passes in those subjects at the GCE Advanced Level (Sri Lanka) or equivalent examination approved by the Sri Lanka Medical Council prior to entry to the medical school.

When considering the facts of the present case, it is apt to consider the facts and the decision of S.F. Zamrath v. Sri Lanka Medical Council (SC.FR 119/2019). The main issue which had to be decided by this court in that case was a complaint by the Petitioner, who was a foreign medical graduate subsequently deprived of the provisional registration in terms of the Section 29(2) of the Medical Ordinance. The 1st Respondent had retrospectively imposed a pre entry requirement, which barred the Petitioner from obtaining the provisional registration. The court held that, the 1st Respondent acted arbitrarily when it imposed that pre entry requirement, which violated the legitimate expectation of the Petitioner. It was discussed in this case that, the Supreme Court being the apex court of the country has a supportive function in encouraging the flexibility and the adaptability of the administrative authorities in the point of making policies and taking decisions. But, the court insisted on the fact that, the conduct of such authorities should not be unfair and arbitrary. Further, it was accepted that, the function of this court to strike a balance between the power of an administrative authority to change the policies and to prevent such

changes in policies to affect the legitimate expectations of the public. The doctrine of legitimate expectation is aimed at the prevention of administrative authorities from abusing discretionary powers against the legitimate expectations of the individuals. In the present case, the Petitioners are deprived of their admission to sit for part/parts of the ERPM by the 1st Respondent, imposing a pre entry requirement after the completion of the degree, which is manifestly an arbitrary act of the 1st Respondent, in violation of the legitimate expectations of the Petitioners. In S.F. Zamrath v. Sri Lanka Medical Council (Supra), the Petitioner was deprived of provisional registration as a medical practitioner, whereas the Petitioners in the present case are deprived of sitting the ERPM. The court sees no difference between the incidents of the two cases. In the former case, the court held that, the Petitioner had a legitimate and a protectable expectation. The admission to sit for the ERPM also amounts to a protectable expectation.

The court has insisted on the predominance of the ordinary law of the land and specifically upheld that, a law which was passed by the Parliament as the supreme legislative organ cannot be overridden by a regulation which has been arbitrarily imposed by a subordinate authority. There, it has quoted the statement of Thomas Hardiman, a judge in the United States as 'In the legislative branch, you make the laws... and our role as judges is to interpret the law, not to inject our own policy preferences. So, our task is to give an honest construction to what laws are passed by the legislature'.

That case has elaborated on the perception of medical education. It has clearly been stated that, the purpose of medical education is not merely the increase of knowledge and skills but also to enable the application of that knowledge for the betterment of the field. Depriving the medical graduates from provisional registration was considered as depriving them the opportunity to put their talents, capacity and knowledge into practice. In the present case, the situation is same. The Petitioners have been deprived of the admission to sit for the ERPM, which is a severe violation of their future prospects of professional life and the legitimate expectation which has a legal certainty.

This, being the apex court of the country, is the last resort of the people at an instance of grievance. Thus, unlike in a case where the private parties are involved, a public related case has significant gravity in the context of society. The public officials are obliged to play a major role in the court's process of dispensation of justice. Thus, the public officials are expected to obey the decisions of the court as they are bound by the rule of law to protect the public order of the country. This is a

duty with high imperativeness which cannot be denied by any public official as their main focus should be positioned on the protection of the public interest.

Further, this court considers a statement which has been made by a member of the 1st Respondent, at a public meeting which is mentioned in the counter affidavit marked X1, produced in this court by the Petitioners. It has been stated that, 'irrespective whether there is a court order mandating the registration of SAITM medical graduates, even if members of the SLMC have to go to jail, they will not register the SAITM students'. It should be kept in mind by the 1st Respondent that, the final expectation of this court is the dispensation of justice and to ascertain the fact that, the rightful person has gained what he deserved justly. It does not involve in pursuing and punishing people. The 'contempt of court' is a discipline. I hereby quote, Browen L.J, in Hellemore v. Smith (2) (1986), L.R.35C.D 455, where his Lordship stated that,

> *'The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice.'*

The court's main focus is on the proper administration of justice, and to most straightforwardly stand against the interference with the justice and make sure that, no impediment is imposed on lawfulness and justice of a court decision. Thus, the 1st Respondent must consider the fact that, the court is prioritizing the justice which must be dispensed to the Petitioners as they have undergone a grave personal difficulty in life. All the Petitioners have equally sacrificed their time, resources in order to complete the medical education with the prospect of becoming medical practitioners. The court has a duty to do justice to them. As his Lordship the Justice Hardwicke stated in 'Case of Printer of St. James's Evening Post '(1742) 2 Atk, 471,

> *'There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.'*

Further, the stay order issued by this court on 03/04/2019 which had the effect of suspending the 1st Respondent from releasing the results in respect of the foreign medical graduates who have sat for the March/ April 2019, VIVA examination of the ERPM without first granting admission to the Petitioners to sit for the examination and considering the results of all the said foreign medical graduates is dissolved hereby in the interest of the public and considering the dire need of Sri Lanka necessitating the services of the medical practitioners to the hospitals. This court prioritizes

the public interest and it is emphasized that, no citizen shall be suffered by an order or a decision of the court in the process of justice administration.

Considering the above circumstances, the court decides that, the Petitioners' fundamental rights guaranteed to them by the Articles 12 (1) and 14 (1)(g) of the Constitution have been violated by the arbitrary act of the 1st Respondent. Further, the court orders the 1st Respondent to enable the Petitioners to sit for the remaining part/ parts of the ERPM within a reasonable time.

Judge of the Supreme Court

Prasanna 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 application in terms of Article 17 and Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 208/2012

N.A Nimal Ranjith

No.752, Navodagama, Sevanagala

Petitioner

Vs.

1. N.Bandara
   Officer-in-Charge,
   Sevanagala Police Station.
   Sevanagala
2. Edirisinghe
   Sergeant,
   Sevanagala Police Station.
   Sevanagala
3. Dr. C Vithana
   Medical Officer-in-Charge,
   Divisional Hospital,
   Sevanagala.
4. N.K. Illangakoon
   Inspector General of Police,
   Police Head Quarters,
   Colombo1
5. Hon. Attorney General
   Attorney General's Department
   Colombo12.

Respondents

Before : Sisira J De Abrew J
L.T.B. Dehideniya J
Murdu Fernando PC J

Counsel : JC Waliamuna with Pulasthi Hewamanna and
Pasindu Silva and Thilini Vidanagamage for the Petitioner
Sanjeewa Dissanayake SSc for the Attorney General.

Argued on : 21.6.2018

Decided on : 6.3.2019

Sisira J de Abrew

The Petitioner complains that his fundamental rights guaranteed by Article 11, 12(1), 13(1) and 13(2) of the Constitution have been violated by the 1st to 3rd Respondents. This court by its order dated 13.9.2012, granted leave to proceed for alleged violation of Article 11 of the Constitution. The facts of this case may be briefly summarized as follows.

The Petitioner is a sanitary labourer attached to Sevanagala Divisional Hospital. The Petitioner states that on 3.2.2012, the 3rd Respondent who is the Medical Officer-in-Charge of the said hospital called the Petitioner to staff rest room; that the 3rd Respondent questioned the Petitioner about the poisoning of the Water tank of him (the 3rd Respondent); and that thereafter the 3rd Respondent assaulted him with a rubber pipe. The Petitioner sustained injuries. The Judicial Medical officer (JMO) who examined the Petitioner on 4.12.2012 observed five contusions on the right upper arm, back of the chest and right buttock of the Petitioner. The JMO in

his report states that the injuries have been caused within two to three days from the date of examination.

The 3rd Respondent in his affidavit dated 19.3.2013 states that when he questioned the Petitioner regarding poisoning of the water tank of his official quarters, he admitted the poisoning of the water tank; that he assaulted the Petitioner with a conduit pipe due to provocation and loss of self control. Learned SSC tried to contend that the assault by the 3rd Respondent on the Petitioner could not be considered as torture. When considering this contention Article 11 of the Constitution should be considered. It reads as follows.

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

In WMK de Silva Vs Chairman of Ceylon Fertilizer Corporation [1989] 2 SLR 393 Amerasinghe J held as follows.

> *"In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental, is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as the victim) by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach of a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official*

concerned believes the victim or the third person ought to do or refrain from doing, as the case may be."

The JMO confirms in his report that that the Petitioner had sustained five contusions and that they could have been caused by a flexible rubber pipe within two to three days prior to the date of examination. The date of examination had been on 4.2.2012. The alleged incident according to the Petitioner was on 3.2.2012. When I consider the above facts and the above mentioned legal literature, I am unable to agree with the contention of the learned SSC.

The learned SSC further contended that the allegation of torture on the Petitioner has not been proved with high degree of certainty. In Channa Peiris and Others Vs Attorney General [1994] 1SLR 1 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.

The 3rd Respondent in his affidavit filed in this court has admitted that he assaulted the Petitioner with a conduit pipe. When I consider the aforementioned matters, I

hold that the assault on the Petitioner has been proved with high degree of certainty. The 3rd Respondent is the Medical Officer in Charge of Sevanagala Divisional Hospital and the Petitioner is a Sanitary Labourer attached to the said hospital. When I consider facts of this case, I hold that the Petitioner was subjected to torture, cruel, inhuman and degrading treatment by the 3rd Respondent and the 3rd Respondent has violated fundamental rights of the Petitioner guaranteed by Article 11 of the Constitution. The Petitioner is entitled to receive a sum of Rs.50,000/- as compensation from the 3rd Respondent. The 3rd Respondent is directed to pay the above amount within three months from the date of this judgment.

Judge of the Supreme Court.

L.T.B 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

In the matter of an Application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/ FR Application No. 285/2012

1. R.D.M.K.K. Wimalachandra.
   "Isuru Sevana",
   Bandarawela Road,
   Dambawinna,
   Welimaa.

2. K.A. Mallawarachchi.
   No.197, Koskandawela, Yakkala.

3. D.P.K. Yapa.
   "Kumarawasa", Atale, Kegalle.

4. P.W.U.B. Palipana.
   37/34, Eragoda, Gampola.

5. D.L.G. Tillakaratne.
   Panawela, Eheliyagoda.

6. D.D. Weerakoon.
   Udugalkanda, Bulathsinghala.

7. G.I.K. Zoysa.
   No.40, Mulgampola Road, Peradeniya.

8. H.L.K. Liyanage.
   Temple Road, Kowdawatta, Kurunegala.

9. W.M.K.A. Wickramasinghe.
   A, Muththettuwa Watta, Kuliyapitiya.

10. M.A.W. Malkanthi.
    363/1, Udupila North, Delgoda.

11. A.R.M.N. Rathnayake.
    135, Doragamua, Waththegama.

12. K.C. Wasalathanthri.
    No.23, Saddhammawasa Mawatha,
    Kaluthara South.

13. S.H.N. Jayawickrema.
    No. 42/19, East Lane, Kiriwella,
    Kadawatha.

14. N.M.G.D.N. Menika.
    Sirikotha, Kawudupelella, Matale.

15. P.K.D. Nilmini Deepika.
    No.89, Kirinda, Hondiyadeniya,
    Gampaha.

16. D.M.M.C.K. Nawarathne.
    113A, Moladanda, Kiribathkumbura.

17. L.H.D. Kulathunga.
    Othanapitiya, Nelumdeniya.

18. G.A. Ariyasena.
    "Uthuru Sevana", Girambe, Nugathalawa.

19. G.L.S.N. Liyanage.
    515/2, Ranmuthugala, Kadawatha.

20. R.M. Sarath.
    Rohana Nivasa, Badulla Road, Welimada.

21. S.M.C.P. Siriwardena.
    "Sanduni", Udanaluwela, Balangoda.

22. K.P.K.K. Pathirana.
    126/3, Panawela, Nittambuwa.

23. All island Agriculture Monitoring Officers Union.

    Of Regional Agriculture Research and Development Centre,
    Diyathalawa Road,
    Bandarawela.

PETITIONERS.

V.

1. Mahinda Yapa Abeywardena.
   Minister of Agriculture,
   "Govijana Mandiraya",
   80/5, Rajamalwatte Lane,
   Battaramulla.

   1A. Hon. Duminda Dissanayake.
   Minister of Agriculture,
   Ministry of Agriculture,
   "Govijana Mandiraya",
   80/5, Rajamalwatte Lane,
   Battaramulla.

   1B. Hon. P. Harrison,
   Minister of Agriculture, Rural Economic Affairs, Livestock

Development, Irrigation and Fisheries & Aquatic Resources Development,
Ministry of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries & Aquatic Resources Development,
No.288, Sri Jayawardhanapura Mawatha, Rajagiriya.

2. W. Sakalasooriya.
Secretary, Ministry of Agriculture,
"Govijana Mandiraya",
80/5, Rajamalwatte Lane,
Battaramulla.

2A. B. Wijayarathne.
Secretary, Ministry of Agriculture,
"Govijana Mandiraya",
80/5, Rajamalwatte Lane,
Battaramulla.

2B. Mr. K.D.S. Ruwanchandra,
Secretary,
Ministry of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries & Aquatic Resources Development,
No.288, Sri Jayawardhanapura Mawatha,
Rajagiriya.

3. K.G. Sriyapala.
   Director General of Agriculture,
   Department of Agriculture,
   Sarasaviya Mawatha, Peradeniya.

   3A. Dr. Rohan Wijekoon.
   Director General of Agriculture,
   Department of Agriculture,
   Sarasaviya Mawatha,
   Peradeniya.

   3B. Dr. W.M.W. Weerakoon.
   Director General of Agriculture,
   Department of Agriculture,
   Sarasaviya Mawatha,
   Peradeniya.

4. D.P.S. Abeygunaratne.
   Director General of Combined Services,
   Ministry of Public Administration and Home Affairs,
   Independence Square,
   Colombo 7.

   4A. K.V.P.M.J. Gamage.
   Director General of Combined Services,
   Ministry of Public Administration and Management,
   Independence Square,
   Colombo 7.

5. Saliya Mathew.
   Chairman,
   National Salaries and Cadre Commission,

Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

5A. D.H.N. Piyadigama.
Co-Chairman,
National Pay Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

5B. S. Ranugge,
Chairman,
National Salaries and Cadre Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

6. M.N. Junide.
Chairman,
National Pay Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

6A. J.R.W. Dissanayake.
Co- Chairman,
National Pay Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

7. B. Wijeratne.
Secretary,

National Salaries and Cadre Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

7A. B. Wijeratne.
Secretary,
National Pay Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

7B. Anura Jayawickrama,
Secretary,
National Salaries and Cadre Commission,
Room No.2G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 7.

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

RESPONDENTS

BEFORE : **PRASANNA S. JAYAWARDENA, PC, J.**
MURDU N.B. FERNANDO, PC, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Faiz Musthapha, PC with Faisza Marker for the Petitioners, instructed by Gowry Thawarasa.
Rajiv Goonetilleke, SSC for the AG.

ARGUED ON : 28th March 2019.

WRITTEN SUBMISSIONS : Respondents on 28th June 2019.

DECIDED ON : 26th July 2019

S. THURAIRAJA, PC, J.

The Petitioners have filed this Application alleging that their fundamental rights guranteed by Articles 12(1) and 14(1)(g) have been violated by the Respondents.

The brief facts of the case, in the chronological order are as stated below.

All Island Agriculture Monitoring Officers Union i.e. the 23rd Petitioner is a duly registered Trade Union and has made this application on behalf of its members i.e. the 1st to 22nd Petitioners (hereinafter collectively referred to as the 'Petitioners'). The Petitioners are employed as Agricultural Monitoring Officers under the Ministry of Agriculture and hold bachelor's degree in science/agriculture and some of them hold a master's degree in science.

The 1st, 3rd and 4th Petitioners, in terms of a cabinet decision in 1994, were inducted into the Department of Agriculture as 'Graduate Trainees' on a probationary basis between 1994-1995 and 1995-1996. After two to three years of training, the said Petitioners were absorbed into the Department of Agriculture as 'Research Assistants' (in Sri Lanka Technical Service) to the permanent cadre on or about 15.01.1998. Simultaneous to the recruitment/appointment of 'Research Assistants', the Department of Agriculture also recruited/appointed 'Economic Assistants', for which the eligibility criteria was a Degree in Arts with Economics being offered as a subject.

The 2nd Petitioner and the 5th to 22nd Petitioners were recruited in 1999 under the Graduate Trainees Scheme and later, some of the graduates were confirmed as 'Graduate Agricultural Development Officers' in the year 2000. Thereafter, the 1st, 3rd and 4th

Petitioners along with several others filed an application bearing No. SC (FR) 528/2000, alleging that their fundamental rights had been violated and that they be appointed to the post of 'Graduate Agricultural Development Officers'. Subsequently, the said Petitioners were appointed to the said post of 'Graduate Agricultural Development Officers'. Later, the Petitioners were assigned a new designation as 'Agriculture Monitoring Officer', which was approved with effect from 04.03.2004.

By virtue of discussions that ensued between the Petitioners and the then Minister and Secretary of Agriculture regarding the non-implementation of Recruitment and Promotional Schemes, a Cabinet Memorandum bearing No 1452 dated 21.10.2004 (marked as 'P-14') was submitted to the Cabinet of Ministers for the creation of a new Recruitment and Promotional Scheme for Agricultural Monitoring Officers.

On 01.11.2004, the cabinet sub-committee on establishment matters decided that the proposal in the said Cabinet Memorandum be referred to the Department of Management Services for examination and report. The Department of Management Services did not recommend the proposed salary scale for Agriculture Monitoring Officers and proposed an alternative grading system on the existing salary scale for Agriculture Monitoring Officers. (marked as 'P-15'). Thereafter, the Cabinet Memorandum was approved on 06.01.2005.

Pursuant to the above events, the then Director General of Agriculture, on account of representations made by some of the Petitioners before the Secretary, Ministry of Agriculture, issued a recruitment/promotion scheme for Agriculture Monitoring Officers [marked as 'P-17(b)'] in terms of letter dated 15.02.2005 [marked as 'P-17(a)'].

The then Deputy Director of Agriculture addressed a letter dated 28.02.2006 to the Secretary, Ministry of Agriculture, stating that the holding of the efficiency bar examination was delayed since the Scheme of Recruitment had not been approved. Thereafter, the 23rd Petitioner filed a case bearing no. SC (FR) 61/2006 alleging that the

rights of its members have been violated since their promotional prospects were being affected. The proceedings of the application were terminated since the parties arrived at a settlement and a new Service Minute was drafted.

On the issuance of Public Administration Circular No. 06 of 2006, the Petitioners were placed in the salary scale of MN-4. The Petitioners objected to being placed in the said salary scale of MN-4, while Economic Assistants were placed in the salary scale of MN-6 (which is two grades higher than the salary scale of the Petitioners). Thereafter, the Petitioners made an application bearing SC (FR) No. 474/2009 seeking that they be placed in the salary scale of MN-6 and when the matter came up for support, leave was refused.

Thereafter, the Service Minute of the Sri Lanka Agriculture Service was amended by Gazette notification bearing no. 1619/25, (marked as 'P28') enabling the Petitioners to sit for a limited competitive examination, with view to entering a named Public Service with promotional prospects. The Petitioners were not in agreement with the purported criteria, speculated in P28 for the determination of their seniority and the Petitioners claim that they had filed an FR Application, in this regard, for which leave to proceed was refused.

Thereafter, the Minute of the Programme Officers' Service (hereinafter referred to as the 'Service Minute') dated 14.02.2012 was published in the Gazette-Extra Ordinary bearing No. 1745/11 (marked as 'P-30'). Clause 14 of the said Minute provides that officers who had been recruited under different designations in line with the government policy of providing employment for the unemployed graduates from 1994 till the date of implementation of the service minute i.e. 01.08.2011 and are in the salary scale MN 4-2006(A) were entitled to be absorbed as Programme Officers in accordance with the provisions laid down in Clause 14. In order to give effect to the said Clause 14, Public Administration (PA) Circular No. 10/2012 (hereinafter referred to as 'PA Circular') dated 08.05.2012 (marked as 'P-33') was issued.

The Petitioners have filed the present application before this Court alleging that their fundamental rights under Article 12(1) has been violated by the Service Minute (marked as 'P30') and the PA Circular (marked as 'P33') relating to the implementation of the said service minute. On 12.07.2012, leave was granted to proceed on the alleged infringement of Article 12(1) of the Constitution.

Having referred to the facts of this application as submitted by the learned Counsel for the Petitioners and agreed to by the learned Counsel for the Respondents, I now turn to consider the grievance of the Petitioners and the corresponding contentions of the Respondents.

In the present application, the Petitioners, *inter alia*, have prayed that the Court declare the Service Minute (marked as 'P30') and the PA circular (marked as 'P33') relating to the implementation of the said service minute null and void. The contention of the Petitioners *vis-à-vis* the said Service Minute and PA Circular is two-fold-

Firstly, according to the Petitioners, as stated in Paragraph 39 of the Petition dated 07.06.2012, in the event that they are absorbed to the Program Officers' Service in terms of the Service Minute, *inter alia*, their designations would change and they would not be eligible to sit for the aforementioned limited competitive examination.

I find that, Paragraph 17.2 of the Service Minute (marked as 'P30') provides that officers who do not elect to be absorbed to the Programme Officers' Service can continue to serve in their respective posts, thereby imposing no mandatory absorption into that service, on the Petitioners. Therefore, the Petitioners have the option to sit for the limited competitive examination by remaining in their respective posts.

Secondly, according to the Petitioners, in the event that they choose not to be absorbed, there exists the possibility of a transfer with a change in their designations and they would then not be eligible to sit for the limited competitive exam, as a result of which they would

not be eligible for promotions. The Petitioners have on the contrary, also stated in paragraph 44 of the Petition dated 07.06.2012 that, if they were to remain in their present posts without a transfer, they would be affected since there exists no scheme of recruitment for them in relation to their present posts

In response to the above contention, in the affidavit of the 3rd Respondnet dated 24.11.2014, it has been stated in paragraph 31 that, promotions can be granted for officers who are not willing to be absorbed into the Programme Officers' Service once a scheme of recruitment is approved. Therefore, I find that, efforts are in place to facilitate promotions in the event that the petitioners choose not to be absorbed into the Programme Officers' Service.

The Petitioners, in furtherance of their contentions, had stated in paragraph 46 of the Petition dated 07.06.2012, that, the said Service Minute (marked as 'P30') and PA Circular (marked as 'P33') are *inter alia* arbitrary and in violation of the Petitioners' rights under Article 12(1). I find it crucial to properly provide the meaning of arbitrariness with regard to the principles enumerated in Article 12(1). The concept of arbitrariness under Article 14 of the Indian Constitution, which is the equivalent of Article 12(1), has been interpreted in several decisions.

In the case of ***Sharma Transport v. Government of A.P. (2002) 2 SCC 188***, it was observed-

> *"The expression* ***'arbitrarily' means: in an unreasonable manner****, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."*
>
> *(Emphasis added)*

In the case of ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***, it was observed-

> *"The principle of reasonableness, which legally and philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."*

The above view was re-iterated in the case of ***R.D. Shetty v. International Airport Authority, (1979) 3 SCC 489***-

> *"The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law."*

Therefore, deducing the interpretation from the above cases, it is clear that reasonableness is an essential element of non-arbitrariness or in other words, an arbitrary action lacks reasonableness.

In the case of ***Perera v. Monetary Board of the Central Bank and Ors. (1994) 1 Sri L.R 152***, with regard to promotion/recruitment in the public sector, it was observed that-

> *"Persons are entitled to complain … if they were invidiously or arbitrarily treated by or in the selection process"*

In the present case, the absorption into the Programme Officers' Service, in terms of the Service Minute (marked as 'P30') and the PA Circular (marked as 'P33') is at the option of the Petitioners. The absence of a mandatory imposition of absorption makes the said Service Minute and the PA Circular reasonable. On account of the presence of reasonableness, I find that the terms and conditions set out in the said Service Minute (marked as 'P30') and PA Circular (marked as 'P33') are not arbitrary and not violative of Article 12(1) of the constitution.

In addition to the above, I find it pertinent to make the following observations.

I find that that the Petitioners have, since their recruitment, filed at least three FR applications prior to the present application before us, namely, SC (FR) 528/2000, which resulted in their appointment to the post of 'Graduate Agricultural Development Officers'; SC (FR) 61/2006, on account of which they arrived at a settlement for a new service minute to be drafted and SC (FR) No. 474/2009, seeking that they be placed in the salary scale of MN-6, for which leave was refused when the matter came up for support.

In the present application before us, the Petitioners, in clause (e) of the Prayer in the Petition dated 07.06.2012, had pleaded that the Court direct the Respondents to place the Petitioners in an appropriate salary scale commensurate with their qualifications and their service. With regard to the said relief sought in clause (e), I am of the view that, the petitioners have already invoked the Jurisdiction of this Court in SC (FR) No. 474/2009, for which leave was refused, as enumerated above. Therefore, I find that the Petitioners are estopped from seeking the same relief from this Court.

Moreover, the Petitioners, while alleging that their fundamental right under Article 12(1) had been violated, had stated in paragraph 46(e) of the Petition dated 07.06.2012, that, the Petitioners being degree holders were placed in the salary scale of MN-4 whereas Diploma holders attached to the Technical Service have been placed in the salary scale of MN-3. The Petitioners had also stated in paragraph 27 of the Petition dated 07.06.2012, that, 'Economic Assistants' who joined under the Graduate Scheme along with the Petitioners have been placed in the salary scale of MN-6. I find that, these contentions are baseless for the following reasons.

The Diploma holders attached to the Technical Service have been placed in a salary scale of MN-3, which in any case, is below the salary scale of the Petitioners. In Page 7 of the written submissions on behalf of the Respondents, it has been submitted that the 'Economic Assistants' had been recruited in terms of the Sri Lanka Technical Service

Minute after a competitive recruitment procedure while the Petitioners were not recruited on a competitive examination but on the basis of a Cabinet Decision to recruit unemployed graduates.

I am of the view that, the Petitioners have not made out that they have been treated differently from persons similarly placed but have rather contended that they be given similar treatment as provided to those who belong to a different class/category. Therefore, I find that, there exists no differential treatment.

I find that, there is no violation of the fundamental right of the Petitioners under Article 12(1), for the reasons already enumerated by me.

Accordingly, I dismiss the Application and order the Petitioners to pay a cost of Rs. 10,000/- each to the Secretary, Ministry of Agriculture.

Application dismissed.

JUDGE OF THE SUPREME COURT

PRASANNA 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 under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 307/2017

1. Gabbala Ralalage Kirula Hastha Bandara

2. Gabbala Ralalage Kasun Manaram Bandara
both of, No. 528/14 D,
2nd Division, Maradana,
Colombo 10.

Petitioners

Vs.

1. Mr. S. M. Keerthirathna
The Principal
Ananda College,
P. de S. Kularatne Mawatha,
Colombo 10.

2. Mr. T. A. D. Dhammika T. Perera
Member of Interview Board
Ananda College,
P. de S. Kularatne Mawatha,
Colombo 10.

3. Mr. K. Bimal P. Wijesinghe
Member of Interview Board
Ananda College,

P. de S. Kularatne Mawatha,
Colombo 10.

4. Mr. R. M. D. D. C. Randeniya
   Member of Interview Board
   Ananda College,
   P. de S. Kularatne Mawatha,
   Colombo 10.
   (The 2nd – 4th Respondents are members of the panel of Interview for Admission of students to Grade 1 for 2018 to Ananda College,
   Colombo 10)

5. Mr. Sunil Hettiarachchi
   Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla

6. Director of National Schools
   Ministry of Education,
   Isurupaya,
   Battaramulla

7. 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 : Ranjan Gooneratne for the petitioners

Sureka Ahmad, SC for the respondents

Argued on: 2nd of April, 2018

Decided on: 28th of February, 2019

Priyantha Jayawardena PC, J

Facts of the case

The 2nd petitioner filed this application as the next friend, on behalf of his son, the 1st petitioner, who was a minor at the time of filing this application. The petitioners submitted that the acts of the 1st to the 6th respondents constituted 'executive or administrative action' in terms of Article 126 of the Constitution and the said respondents had infringed the fundamental rights of the petitioners guaranteed under the Constitution.

The 1st respondent is the Principle of Ananda College, Colombo 10. The 2nd to 4th respondents are members of the interview panel for admission to grade 1 for the year 2018. The 5th respondent is the Secretary to the Ministry of Education and the 6th respondent is the Director in charge of National Schools.

The 2nd petitioner submitted that, in response to a notification published by the 5th respondent in national newspapers, he submitted an application in terms of Clause 6.1 of Circular No. 22 of 2017, seeking admission of the 1st petitioner to Ananda College, which is a Government National School, on the basis that the petitioners are living in close proximity to the school. Further, it was submitted that the petitioners reside in premises bearing assessment No. 528/14D, which is about 75 meters from Ananda College.

Along with the said application for admission, the petitioners had submitted the Registered Electoral lists from the year 2010 to 2016, a Household Enumeration card issued by the Colombo Municipal Council, a copy of a pass book issued by the Bank of Ceylon branch in

Maradana, a health certificate of the 1st petitioner, the school leaving certificate of the 2nd petitioner issued by Asoka Vidyalaya Colombo 10, a certificate of residence and a character certificate of the 2nd petitioner issued by the Grama Niladhari.

Interview

The petitioners submitted that they were called for an interview by the 1st respondent. Accordingly, they went for the interview and was requested to mark the house that they reside in, on a google map. Thereafter, they were informed to produce documentary proof to prove the ownership of their residence. Consequently, the 2nd petitioner had produced a Household Enumeration Card issued by the Colombo Municipal Council in 1987, in order to prove the ownership of their residence. However, the interview panel had refused to consider the said Household Enumeration Card as proof of ownership of the house bearing assessment No. 528/14D, as it is not a document stipulated in Clause 6.1 of Circular No. 22 of 2017. Furthermore, the interview panel had refused to consider the rest of the documents submitted by the petitioners in support of the application for admission as the petitioners did not produce a document to prove the ownership of the house that they were residing in.

Appeal

Thereafter, the 2nd petitioner submitted an appeal in terms of Circular No. 22 of 2017, stating that the petitioners were living in close proximity to the school and their application was not considered by the interview panel. The petitioners further submitted that, it was the duty of the 1st to 4th respondents to consider all documents submitted by the petitioners along with the application for admission to the school and to award marks accordingly.

The petitioners contended that the documents referred to in Clause 6.1 of the said Circular are not exhaustive and the Enumeration Card issued by the Colombo Municipal Council was sufficient proof of the ownership of the residence. Moreover, the petitioners submitted that not awarding marks for the documents furnished by them, in support of the application, was illegal and unlawful.

Fundamental Rights Application

The petitioners submitted that, the petitioners had a ***"grant"*** issued in respect of premises bearing Assessment No. 528/14D and accordingly, the 2nd petitioner had ownership to the said premises in terms of the said **"*grant"***. Therefore, the 2nd to 4th respondents who were members

of the Interview Panel acted in violation of the said Circular No.22 of 2017 by rejecting the petitioners' application on the ground that the 2nd petitioner had not produced documents to prove the ownership of residence in terms of the said Circular.

Thus, the petitioners submitted that the rejection of the 1st petitioner's application for admission to Ananda College; is arbitrary, capricious, unreasonable, discriminatory and amounts to an infringement of the petitioners' fundamental rights guaranteed to them under Article 12(1) of the Constitution.

Submissions of the 1st Respondent

The 1st respondent filed objections and submitted that though the marks were not allocated for the documents furnished by the petitioners by the interview Panel, the Appeals Board considered all the documents furnished by the petitioners and awarded marks to the petitioners according to the said Circular.

Decision of the Appeals Board

The 1st respondent submitted that, after considering the appeal submitted by the petitioners, the Appeals Board granted the following marks to the petitioners.

1) Marks for registering in the Electoral Register of both parents – 15
2) Ownership of residence – 00
3) Additional documents to confirm the place of residence – 2.75
4) Proximity to the school from the place of residence – 45

However, marks were not given to the Household Enumeration card submitted by the petitioners, as it is not a document stipulated in Clause 6.1 of the said Circular to prove the ownership of the residence.

Accordingly, the petitioners had been awarded 62.75 marks in total, based on the documents furnished by them to support their application. However, as the cut off mark was 71.75, the 1st petitioner was not admitted to the school.

In the circumstances, the respondents submitted that, the petitioners had failed to establish a violation of their Fundamental Rights guaranteed to them by the Constitution.

Now I will consider the method of selection to Government schools.

Allocation of Marks

Clause 6.0 of the Circular No. 22 of 2017 states that out of the vacancies existing in Grade One in a school, the children belonging to different categories including children of residents in close proximity to the school should be selected through an interview. The subject matter of the instant application is in respect of the said category.

Clause 6.1 of the "Instructions related to the admission of children to Grade One in Government Schools for the year 2018" issued by the Ministry of Education, stipulates that the marking scheme applicable to applicants applying for admission under the category of children living in close proximity to the school. i.e.

1) Marks for registering in the Electoral Register of both parents – 30
2) Ownership of residence – 15
3) Additional documents to confirm the place of residence – 05
4) Proximity to the school from the place of residence – 50

The said Circular set out the criteria of which the marks should be given to each of the above categories. Since the subject matter of this application is in respect of "ownership of residence", the allocation of marks under the said category will be considered in this judgment.

Documents in proof of ownership of residence

The Clause 6.1 of the said Circular stipulates the documents that are required to prove the ownership of the residence. Clause 6.1 states;

> "The following documents will be accepted as the **documents in proof of ownership** of the place of residence.

a. Title Deeds
b. Deed of Gift/Certificates of ownership
c. Government awards
d. Documents issued under Temples and Devala Act
e. Declaration Deeds more than 10 years confirmed by extracts
f. Houses purchased on housing loans/hire purchased schemes (the lease agreement with the owner and payment receipts)

In case a title deed or a deed of gift is written on a declaration deed, the said declaration deed should have been registered for 10 years or more.

- If the ownership of the place of residence is in the name of the applicant/spouse – 15 marks
- When the ownership is in the name of the mother/father of the applicant/spouse – 10 marks
- **When the ownership is in another name, <u>these marks shall not be given.</u>** [emphasis added]

If required the ownership could be verified by examining the extracts and duplicate copies.

- Registered leased bond/Government quarters (the letter of confirmation by the department head) (Residents in bachelor's quarters are not applicable) / documents to confirm as lease residents under the housing rental act. - 6 marks
- In case of a registered leased bond is written on a declaration deed, the said declaration deed should have been registered for ten years or more."

The issue that is required to be determined in the instant application is as follows;

> *Whether the Household Enumeration Card issued by the Colombo Municipal Council can be considered as documentary proof to establish the ownership of the premises bearing Assessment No. 528/14D, in terms of Clause 6.1 of Circular No. 22 of 2017 issued by the Ministry of Education?*

Conclusion

The 2nd petitioner submitted that the Colombo Municipal Council issued an Enumeration Card for the premises bearing Assessment No. 528/14D, 2nd Division, Maradana, to Godagama Arachchige Sominona who is the maternal grandmother of the 2nd petitioner.

It was submitted that, Godagama Arachchige Sominona died intestate and on her death, the said premises bearing Assessment No. 528/14D, devolved on her daughter Thomas Gamage Swarnalatha, the mother of the 2nd petitioner, who has been residing in the said premises from 1987 with her husband and three children.

The 2nd petitioner relied on the said Household Enumeration Card, to prove his ownership to the said premises. The 2nd petitioner further submitted that it is his ancestral home and the petitioners have been residing in the said premises since their birth.

The 2nd petitioner submitted that, the premises devolved on his mother after the demise of his maternal grandmother, G. A. Sominona. However, it is pertinent to note that, the said Enumeration card contained the name of one G.A. Sominona as the chief occupant of the said premises and the names of the petitioners are not included in the said Enumeration card.

The petitioners produced an affidavit from the other five children of the said G. A. Sominona (maternal grandmother of the 2nd petitioner), stating that they are not residing in the premises bearing Assessment No. 528/14D, and does not claim the ownership of the said premises.

As mentioned above, Clause 6.1 of the said Circular, stipulates the list of documents that are accepted as documents in proof of ownership of the place of residence. Accordingly, the petitioners had been awarded 2.75 out of 5 marks by the Appeals Board, for confirming their residence after considering the "additional documents to confirm the place of residence" produced by them.

However, no marks were awarded for the household enumeration card issued by the Colombo Municipal Council in proof of the ownership of the residence as it is not a document specified in terms of Clause 6.1 of the said Circular.

Further, I am also of the opinion that the Household Enumeration Card cannot be considered as proof of ownership of a residence in terms of Clause 6.1 of the Circular. In terms of Clause 6.1, marks could not be awarded for the Household Enumeration Card furnished by the petitioners as it is not a document specified in the said Clause of the Circular

In any event the said Household Enumeration Card is not in the name of the 2nd petitioner or his spouse. According to Clause 6.1, no marks can be awarded when the ownership is in someone else's name. Further, the said Household Enumeration Card cannot be considered as a "grant" as submitted by the petitioners.

In the circumstances, I am of the opinion that the petitioners are not entitled to claim marks for the ownership of the premises bearing assessment No. 528/14D. Hence, the Appeals Board has not violated the Circular No. 22 of 2017, by not granting marks under Clause 6.1 of the said Circular.

However, I am of the opinion that, the interview panel should have considered the other documents submitted by the petitioners and granted marks for the said supporting documents in terms of Clause 6.1 of Circular No. 22 of 2017, even though the petitioners did not have documentary proof to prove the ownership of their residence.

Later, this error had been rectified by the Appeals Board. Hence, I hold that the petitioners' fundamental rights have not been violated by the respondents. Accordingly, the application is dismissed.

No costs.

Judge of the Supreme Court

Buwaneka Aluwihare, 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 DEMOCRATRIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Articles 17 and 126 of the Constitution.

1. **M.R.C.C. ARIYARATHNE**
   No. 27/55, 1st Lane, Colombo Road, Ratnapura.
2. **H.K.B. JAYARUWAN**
   'Issuru', Karambaketiya, Beliatta.
3. **N.U.S. ARIYARATHNE**
   Galkadagodawaththa, Horawala, Welipenna.
4. **W.H.M.A.G.S. BANDARA**
   Wijethunga Niwasa, Ihalagama, Millawana, Matale.
5. **J.K.S.F. PERERA**
   No. 25/2, Asoka Mawatha, Dandagamuwa, Kuliyapitiya.
6. **U.P. ABEYWICKRAMA**
   No. 26A, Diyawana, Kirindiwella.
7. **N. WANIGASEKARA**
   No. 512/C, Near the Milk Board, Dikhenapura, Munagama, Horana.
8. **D.M.M.C. DISSANAYAKE,**
   Boraluwa, Kalugalla, Molagoda, Kegalle.
9. **R.W. DAYARATHNE**
   No. 49, Gurudeniya Road, Ampitiya.
10. **B.L.A. HEMANTHA**
    No. 429/2, Walawwa Road, Homagama.
11. **G.L. CHAMINDA**
    No. 156/1, Kirinda, Puhulwella.
12. **C.Y. ABEYWARDENA**
    No. 154/5/C, Uduwana, Homagama.
13. **U.G. WEERASINGHE**Nirigahahena, Galagama-North, Nakulugamuwa.

14. **D.M.C.C.K. DISANAYAKE**
    No. 34/A, Getamanna Road, Beliatta.
15. **K.D.D.T. KARUNARATHTHNE**
    Ranga Nivasa, Terungama, Agunakolapelassa.
16. **P.R. WARNAKULA**
    'Jayamini', Thalapekumbura, Alapaladeniya, Morawaka.
17. **G.G.P.B. GAMAGE**
    No. 339/10, Wakwella Road, Galle.
18. **H.G.N. DHARSHANI**
    No. 34/8, Malgalla, Tangalle.
19. **K.G.B. THUSHANTHI**
    No. 08, Nadun Uyana, Andugoda, Dikkumbura.
20. **W.G. SUNIL**
    No. 82/A, Hakwadunna, Nittambuwa.
21. **J.T.L. FERNANDO**
    No. 37, Yatiyana, Minuwangoda, Gampaha.
22. **I.G. ABHAYATHILAKA**
    No. 319/12, Rajamahavihara Road, Mirihana,Kotte.
23. **A.N. JAYAWEERA**
    No. 77, Rajyasevaka Gammanaya, Devurumpitiya, Getaheththa.
24. **A.I.C. JAYASEKARA**
    No. 416, Uda Ellepola, Balangoda.
25. **K.M.P. BANDUJEEWA**
    'Ashoka Nivasa', Rilpola, Badulla
26. **N.K.L. PRIYANGIKA**
    Mahagangoda, Ambalangoda Road, Aluthwala.
27. **U.G.J.S. KUMARA**
    C/O Namal Stores, Niyampaluwa, Godamuna, Pitigala.
28. **S.A.D.N. MANORI**
    Kendaduwa Waththa, Galthuduwa, Gonagalapura, Bentota.

29. **D.M.G.P.M. SHAMALEE**
    Delgaha Badda Road, Kirimatiya, Batapola.
30. **A.M.S ATHTHANAYAKE**
    No. 27, Sarasavigama, Mahakanda, Hindagala.
31. **J.A. SOMAWEERA**
    No. 55/A, Aluthapola, Wegowwa, Gampaha.
32. **S.D.J. NIROSHANA**
    Haldola Road, Bellana, Agalawatta.
33. **S.P.K. WIJESINGHE**
    No. 244, Sri Sobitha Road, Nagoda, Kalutara.
34. **A.V.P. AJITH SHANTHA**
    No. 100/1, Gamunu Mawatha, Panapitiya, Kalutara.
35. **Y.N. ARIYASIRI**
    Pelawatte, Bombuwala, Kalutara South.
36. **M.A.J. THUSHARA**
    No. 290, Omaththa Road, Agalawatta.
37. **E.L.M.K. ELVITIGALA**
    No. 133, Madulgoda, Pannipitiya.
38. **B.V.J. PRIYANTHA**
    Paniyawala Janapadaya, Pareigama.
39. **C.L.I.M.T.S. CHANDRASEKARA**
    Dostara Watte, Dadagamuwa, Kuliyapitiya.
40. **D.M.H.G.D.P.K. TILAKARATHTHNE**
    No. 22/36, Weerapuran Appu Place, Matale.
41. **M.G.L.S. JAYASINGHE**
    Hakirillagoda, Walagedara, Wattappala, Pilimatalawa.
42. **R.M. RANMULLA**
    No. 30, Ranmulla, Udispattuwa, Kandy.
43. **T.D.G.C.S. JAYAWARDANE**
    'Namal', Madagoda, Galagedhara, Kandy.
44. **R.M.I.K. RATHNAYAKE**
    No. 2/29, Kohombiliwala, Matale.

45. **S.K.W.M.K. SENEVIRATHTHNE**
    No. 30/07, Patum Uyana, Naranwala, Gampaha.
46. **D. CHANDRALATHA**
    No. 264, Quila 04, Kottukachchiya.
47. **R.M. PIYATHISSA**
    No. 533/04/A, Janatha Mawatha, Eldeniya, Kadawata.
48. **A JAYASURIYA**
    No. 116/02, Pahalabiyanwala, Kadawata.
49. **M.A.W. PUSHPAKUMARA**
    No.114/19, Mihindu Mawatha, Wattegedhara Road, Maharagama.
50. **M.S.P.K. FERNANDO**
    No. 28, Nawodayagama, Kirimitithanne, Balangoda.
51. **J.M.R.B. JAYASINGHE**
    No. 119/58, Sooriyapura Watte, Diuldeniya.
52. **R.P.N. PATHIRANA**
    No. 484, Old Rest House Road, Giriulla.
53. **W. RATHNASIRI**
    Gamini Bekariya, Wannithammannawa, Anuradhapura.
54. **U.M.M.B. WIJESOMA**
    Masanwaththa, Wehera, Kurunegala.
55. **V.A. HETTIARACHCHI**
    Kadulawa, Ibbagamuwa.
56. **W.R.D.S.G. WEERAKOON**
    'Kavinda', Pugalla Road, Kalugauwa, Kurunegala.
57. **K.A. RATHNAWEERA**
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58. **N.G.M.S. RATHNAYAKE**
    No. 25, Anandarama Road, Moratumulla, Moratuwa.

59. **K.A.D.S.P. WEERASINGHE**
    No. 118/6, Navoda Udyanaya,
    Soysapura, Moratuwa.
60. **W.G. ANURA**
    No. 418/14, Pegathi Mawatha,
    Kahathuduwa, Polgasowita.
61. **P.A. BANDU KUMARA**
    Damayanthi Stores, Akkara 10,
    Bopitiya, Pelmadulla.
62. **A.P.U. NISHANTHA**
    No. 663/A, Mihindugama, Sevanagala.
63. **U.W.A.C. RANATHUNGA**
    'Madura', Balavinna, Pallebadda,
    Ratnapura.
64. **H.P.D.A.L. HADUNPATHIRANA**
    No. 150H, Maththegoda.
65. **K.M. SISIRA**
    No. 722B, Malabe Road, Kottawa,
    Pannipitiya.
66. **W.P.A. DHARMASENA**
    No. 14, Walpola, Rukgahawila,
    Nittambuwa.
67. **K.P.K. GRASHION**
    Mandalapura, Neluwa, Galle.
68. **U.T. SENAVIRATHNE**
    No. 782, Habaraluwawa, Sevanagala.
69. **S.A.B. SUBASINGHE**
    No. 60, Kahadawa, Mirigama.
70. **W.T. WIJEWARDENA**
    'Sirinivas', Hubaswalana, Ruwanwella.
71. **W.P.D. RANASINGHE**
    Pansala Road, Karadeniya, Danowita.
72. **D.R.T. RANASINGHE**
    No. 180, Hokandara South, Hokandara.
73. **M.A.S.W. PERERA**
    'Piyasevana', Paluwaththa, Waralla,
    Thalwita.
74. **D.L.D. PRASANNA**
    No. 623, Egodawaththa, Arrawwala,
    Pannipitiya.

75. **H.M.R. DISSANAYAKE**
No. 112, Sadagala, Uhumiya.
76. **M.P.J.L.A. KARUNARATHNE**
'Asiri', Wataraka, Iguruwaththa, Mawathagama.
77. **R.N.J. RAVINDRA**
No. 451/A/22, Supreme City, Artigala Road, Meegoda.
78. **H.K.U. DEHAPPRIYA**
'Dhammi', Deewala, Pallegama, Kegalle.
79. **K.S.C. GUNATHUNGA**
No. 31, Dharmapala Udyanaya, Dharmapala Mawatha, Tittawela, Kurunegala.
80. **N.D.G.R. WEERASINGHE**
Rusigama, Ehalagama, Pallepola, Matale.
81. **H.P.R.R. PIYATHILAKE**
Jahapagama, Kumbukwewa.
82. **N.N.W.M.R. BANDARA**
No. 109/1A, Rajawella, Matale.
83. **H.B.M.P. KUMARA**
No. 372/10, Wilgoda Road, Yanthampalawa, Kurunegala.
84. **H.A.C.D. PERERA**
No. 148, Eksath Mawatha, Mahara, Kadawatha.
85. **M.M.D.C. REMIGEOUS**
No. 316/7, Neliagama, Ragama.
86. **S.M.U.S. SAMARAKOON**
No. 245A, Gemunu Mawatha, Kotuwegoda, Rajagiriya.
87. **D.G.R.S. RANASINGHE**
Diddeniya, Hawella.
88. **K.G.D. SUBASHINI**
Heritage Park, Gamudawa, Kamburupitiya.
89. **W.A.A. SHANTHA**
No. 254 ½, Batadomba Thuduwa, Road, Alubomulla.

90. R.D.S.R. KUMARA
Hammalawa Waththa, Diyakalamulla, Kuliyapitiya.

91. A.M.S.A. ATHTHANAYAKE
6th Mile Post, Diyakobala, Bibile.

92. K.I.C. KOONGAHAWATHTHA
Doloswala Walawwa, Nivitigala.

93. S.L.P. RAJAPAKSHA
Giraketiya Kumbura, Kuliyapitiya.

PETITIONERS

SC FR Application No. 444/2012

VS.

1. **N.K. ILLANGAKOON**
   Inspector General of Police, Police Headquarters, Colombo 01.
2. **VIDYAJOTHI DR. DAYASIRI FERNANDO**
   Chairman
3. **S.C. MANNAPPERUMA**
   Member
4. **ANANDA SENEVIRATNE**
   Member
5. **N.H. PATHIRANA**
   Member
6. **PALITHA M. KUMARASINGHE**
   Member
7. **SIRIMAVO A. WIJERATNE**
   Member
8. **S. THILLANADARAJAH**
   Member
9. **A. MOHAMED NAHIYA**
   Member
10. **M.D.W. ARIYAWANSA**
    Member
    2nd to 10th, all of the Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.
11. **T.M.L.C. SENARATNE**
    Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.

12. **GAMINI NAWARATNE**
    Senior Inspector General of Police (Administration), Police Headquarters, Colombo 01.
13. **P.B. ABEYKOON**
    Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.
14. **W.D. SOMADASA**
    Director General of Establishments, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.
15. **B.P.P.S. ABEYGUNARATHNA**
    Director General of Combined Services, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.
16. **N. GODAKANDA**
    Director General, Ministry of Finance and Planning, The Secretariat, Colombo 01.
17. **HON. ATTORNEY GENERAL**
    Attorney General's Department, Colombo 12.

RESPONDENTS

18. **PROF. SIRI HETTIGE**
    Chairman
19. **P.H. MANATHUNGA**
    Member
20. **SAVITHREE WIJESEKARA**
    Member
21. **Y.L.M. ZAWAHIR**
    Member
22. **ANTON JEYANADAN**
    Member
23. **TILAK COLLURE**
    Member

24. **F. DE SILVA**
    Member
    18th to 24th all of the National Police Commission, Block 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07.
25. **N. ARIYADASA COORAY**
    Secretary, National Police Commission, Block 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07.

ADDED-RESPONDENTS

26. **H.M.N.I. HERATH**
    Near the Police Station, Lunugala.
27. **C.U. JAYASINGHE**
    Kaudella, Bibila.
28. **D.M.K. BANDARA**
    Alpitiya, Dambagalla, Moneragala.
29. **K.M.S. BANDARA**
    No. 59, Kolladeniya, Mariarawa, Dambagalla.
30. **L.M. THUSHARA**
    No. 16, Ruhunudanauwa, Siyambalanduwa.
31. **G.P.H.S. PUNCHIHEEWA**
    No. 19/1 B, Haltotawatta Lane, Avissawella.
32. **E.W.I.K. WEERASINGHE**
    No. 299, Madarangoda, Kadugannawa.
33. **H.K.A. KUMARA**
    No. 52, Nawa Berillawatta, Halpathota, Baddegama.
34. **E.P.R. RUPASINGHE**
    No. 142/C/1, Morahela, Madulla, Uda Pussellawa.
35. **M.P.S. WEERASINGHE**
    No. 396/01, Elawalu Watta, Kirimetiya.
36. **JAINUDEEN NIJAMDEEN**
    Idiman, Kinniya 05, Trincomalee.

37. **E.W.M.S.P. EKANAYAKE**
    No. 49/B, 02nd Cross Road, New Town, Polonnaruwa.
38. **R.C.S. RAJAPAKSHA**
    Gamameda Road, Elawaka, Nikaweratiya.
39. **A.A.A.S. GUNASEKARA**
    No. 25/A/2, Meepanihena, Thibbatuwawa, Wiyalagoda, Eheliyagoda.
40. **R.A.K.U.K. RAMANAYAKA**
    No. 26, Muwandeniya, Mathale.
41. **T.A.P.K. JAYAWEERA**
    07 Mile Post, Rassagala, Balangoda.
42. **C. M. JAYASENA**
    275/21, Galagawela Road, Pahala Gattuwana, Kurunegala.
43. **M.N.N.C. WIJERATHNE**
    No. 02, Emarled Park, Thorawathura, Kohilegedara.
44. **S.T.J. ABEYRATHNA**
    S 42, Narandeniya, Deewalegama.
45. **B.W.C.P. FERNANDO**
    Koswaththa, Nawalagama, Ballaketuwa, Ella, Bandarawela.
46. **K.A. SAMANMALEE**
    No. 18, Shantha Patrick Road, Molligoda, Wadduwa.
47. **W.G.S. JAYASINGHE**
    No. 34, Welipillewa, Kudauduwa, Horana.
48. **L.H.P. KAMAL**
    58/16A, Araliya Pedesa, Aluthgama Road, Elpitiya.
49. **K.S. L. NISHANTHA**
    132/3, 11th Mile Post, Awiththawa Road, Elpitiya.
50. **R.T.A. JAYAWEERA**
    No. 228/03, Tea Factory Road, Balakaduwa, Alawatugoda.

51. **G.G.I. SIRISENA**
    No. 34/A, Parana Ganthenna,
    Ovilikanda, Matale.
52. **W.A.W.M.S. WICKRAMARACHCHIGE**
    Near the Primary College, Udugama,
    Janapadaya, Kitulwitiya.
53. **D.G.P.K. SENAVIRATHNA**
    No. 81, Cinnamon Park, Mananduwa
    Road, Nugagoda, Kalutara.
54. **A.M.K.R. BANDARA**
    No. 716/C/15, 11th Lane, Romiel Lane,
    Panagoda, Homagama.
55. **S.D. RUPASINGHE**
    No. 160/13, Kanaththa Road,
    Thalapathpitiya, Nugegoda.
56. **G.M.A.P. ABESIRI**
    160/01, Siripela, Karakole,
    Nikaweratiya.
57. **W.M.L.R.K. WEERASURIYA**
    No. 247, 'Suramya Sewana',
    Bakmeegolla, Ibbagamuwa.
58. **K.P.S. SAMARATHUNGA**
    No. 291,Galwalagaraya, Avulegama.
59. **H.B.N.H. KUMARA**
    Kulasendawa, Karabe, Mahawa.
60. **H.M.T. BANDARA**
    Kurunaidawetiya, Avulegama.
61. **D.M.A.A. DISSANAYAKA**
    Mahaindigollagama, Galkiriyagama.
62. **D.M.M.P. DISSANAYAKA**
    U/04, No. 456, Dinadhi Sewana,
    Kandaketiya.
63. **E.M. GHANASIRI**
    'Priyangani', Thennepita, Aluthwela
    North, Diyatalawa.
64. **Y.B.S. BANDARA**
    No. 58, Pallegama, Padiyatalawa.
65. **D.M.R. BANDARA**
    No. 26/01, Senpathigama,
    Nannapurawa, Bibile.

66. **A.M.R.G.J.R.K. ABEYRATHNA**
    No. 03, Dumbaragama, Kalugala.
67. **E.C.K. GAMAGE**
    No. 36/76, Nugelanda, Rajagalathenna, Ampara.
68. **D.T.K.A. DEEPAGODA**
    01 Mile Post, Padaviya.
69. **D.M.T.P. DISSANAYAKA**
    Near the Post Office, Galapara, Olukaranda, Kekirawa.
70. **H.M.C.P. GUNAWARDHANA**
    Meegahawewa, Nochchiyagama.
71. **P.A. KUMARA**
    No. 323, Gangurewa, Seeppukulama.
72. **R.M.J. RAJAGURU**
    Walpola, Medawachchiya.
73. **G.P.J.K. RATHNAYAKE**
    School Lane, Palugaswewa, Eppawala.
74. **R.M.S. RAJAPAKSHA**
    No. 247, Mahagalkadawala, Algamuwa.
75. **D.M.S. DISSANAYAKE**
    No. 183/B, Nochchiya, Wannikudawewa, Galgamuwa.
76. **W.G.S.M. DHARMAKEERTHI**
    Siyambalangamuwa, Mahawa.
77. **T. WIDHANAPATHIRANA**
    No. 195, Kajukoratuwa, Witharandeniya, Tangalle.
78. **K. ARUNSHANTHA**
    75/2 B, Weelamahara, Buthpitiya.
79. **U.G.T.A.N. KULARATHNA**
    No. 2472, Samagipura, Nebada.
80. **R.M.H.R.J.B. RAJAPAKSHA**
    No. 20,Heerassagala, Pilimatalawa.
81. **B.G.S.C.C. DE SILVA**
    No. 418, Bihalpola, Nakkawaththa.
82. **K.K.W.A. KUMARA**
    Galpola, Illukhena, Kuliyapitiya.
83. **T. KANCHANA**
    BCP 27, City Paradise, Walahapitiya Road, Nattandiya.

84. I.D.A.T. GUNARATHNA
Aganaketiya Road, Thalgahawatta,
Karandeniya.

85. H.B.M.K. WEERAKOON
Kadaveediya, Madatugama.

ADDED INTERVENIENT-RESPONDENTS

BEFORE:	Buwaneka Aluwihare, PC, J Prasanna Jayawardena, PC, J L.T.B. Dehideniya, J.
COUNSEL:	Faisz Mustapha, PC, with Pasindu Silva and Keerthi Tillekaratne instructed by Sanjeewa Kaluarachchi for the Petitioners. Pradeep Kumarasinghe with Hemathilaka Madukanda for the 10th and 77th Petitioners. J.C. Weliamuna, PC, with Shantha Jayawardena for the Intervenient Petitioners-Respondents. D. Titus Padmasiri for the Petitioners seeking intervention. Sanjay Rajaratnam, PC, SASG, for the Attorney General.
ARGUED ON:	10th January 2019 and 12th February 2019.
WRITTEN SUBMISSIONS FILED:	By the Petitioners on 26th March 2019. By the 1st to 25th Respondents on 18th February 2019. By the 26th to 85th Added Intervenient Respondents on 21st March 2019.
DECIDED ON:	30th July 2019

Prasanna Jayawardena, PC J.

The 93 petitioners who have filed this application, invoked the fundamental rights jurisdiction of this Court alleging that the respondents have violated their fundamental rights guaranteed by Articles 12 (1) and 14 (1) (g) of the Constitution. The respondents include the Inspector General of Police, the Chairmen and members of the Public Service

Commission and National Police Commission, the Director General of Combined Services and the Director General of Management Services.

The petitioners were appointed to the post of "Development Assistants" [*"සංවර්ධන සහකාර නිලධාරීන්"*] in the Department of Police. They continue to hold that post. They are public officers in the Public Service They are not *"Police Officers"* in the Sri Lanka Police Force, which now consists of the Regular Police Force and five specialised Units [*"ඒකක"*] of the Sri Lanka Police Force - *ie:* (i) Police Medical Service; (ii) Police Engineering Service; (iii) Police Technical Service; (iv) Police Support Service and (v) Police Special Service. [It appears that the aforesaid specialised Units of the Sri Lanka Police Force are sometimes referred to using the term *"පොලිස් සහායක සේවා"* (*"Police Support Services"*) and the petitioners have used that term].

The central plank on which the petitioners have rested this application is their claim they have a *"legitimate expectation"* of being absorbed into the Sri Lanka Police Force as police officers [either into the Regular Police Force or into one of its specialised Units] and that the respondents have arbitrarily and irrationally negated that *"legitimate expectation"*, thereby, violating the petitioners' aforesaid fundamental rights. On that basis they seek a declaration that they are entitled to be absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units] and a direction for the implementation of that declaration.

There is a second claim which the petitioners make in support of their application. They allege that a Service Minute issued by the Director General of Combined Services on 14th February 2012 and the two Public Administration Circulars by which this Service Minute was notified to public officers across the Public Service, are arbitrary and irrational and violative of the petitioners' aforesaid fundamental rights. This Service Minute established a new "Programme Officers' Service" and gave the petitioners the entitlement to be absorbed into that newly created Programme Officers Service, if they wished to. However, the Service Minute also provided for the petitioners to remain in their present posts if they did not wish to seek absorption into the Programme Officers Service.

After this application was filed, the parties made efforts to reach a settlement by way of administrative measures. These efforts were unsuccessful. On 31st July 2017, this Court granted the petitioners leave to proceed in respect of an alleged violation of their fundamental rights guaranteed by Article 12 (1) of the Constitution.

The facts

The petitioners are all graduates of recognized universities. By 2004, they had been unemployed for some time after graduation. In that year, the Government implemented a

scheme - known as the “Graduate Scheme” - to recruit a large number of unemployed graduates to the Public Service. The petitioners were among those recruits who entered the Public Service in 2004 under this Graduate Scheme. Recruits under the Graduate Scheme were initially attached, by way of a period of training, to various Divisional Secretariats - as “Graduate Trainees”. After completing that period of initial training, the recruits were attached to various Government Departments for the purpose of serving in specific capacities in those Departments.

In the case of the petitioners, they were attached to the Department of Police on or about 03rd January 2005, as set out in the letter filed with the petitioners’ petition marked “P2”. They were designated “Community Relations Officers”. The petitioners commenced their service in the Department of Police with a period of introductory residential training at the Sri Lanka Police College at Kalutara. After the conclusion of their period of training, the petitioners were attached to the Police Headquarters and to Police Stations throughout the island. The Inspector General of Police [1st respondent] has, in his affidavit, stated that the training given to the petitioners covered the responsibilities and work of Development Assistants and an introduction to Police duties and responsibilities. He says it was not similar to the training given to police officers of the Regular Police Force.

In October 2005, the petitioners were appointed to the aforesaid posts of Development Assistants in the Department of Police. That employment was on a permanent basis but was subject to a period of probation. Upon confirmation in employment at the end of the period of probation, they were to be confirmed in the posts of Development Assistant - *vide:* the letter of appointment marked “P7”. The petitioners successfully passed the period of probation and have been confirmed in the posts of Development Assistant - *vide* the letter dated 21st April 2009 marked “P8”. That was a transferable and pensionable post. The petitioners were placed on Salary Scale MN 4-2006 on 01st June 2007, consequent to the general restructuring of salaries in the Public Service in terms of the well-known Public Administration Circular No. 06/2006. The petitioners have remained on that Salary Scale [which appears to have been subsequently designated as “Salary Scale MN 4-2006(A)” following a revision of Salary Scales], up to the time of filing this application.

At this point, it is relevant to note that the Sri Lanka Police Force [*ie:* the Regular Police Force] was established in 1866 under and in terms of the provisions of section 3 of the Police Ordinance. Section 104 of the Police Ordinance defines a *“police officer”* as a *“member of the regular police force and includes all persons enlisted under this Ordinance.”.* Section 20 read with section 21 (1) of the Police Ordinance makes it clear that *“police officers”* are appointed under the provisions of the Police Ordinance and hold the ranks of: Inspector General of Police, Deputy Inspectors General of Police, Superintendents and Assistant Superintendents of Police, Inspectors, Sergeants and Constables. *“Police officers”* appointed under the provisions of the Police Ordinance are

required to wear designated police uniforms when on duty, unless the specific nature of their duties preclude the wearing of uniform.

Further, a Police Reserve was later established under section 24 of the Police Ordinance for the following purpose: *"to assist the police force in the exercise of its powers and the performance of its duties."*. Section 25 read with section 26 (1) of the Police Ordinance state that the officers in the Police Reserve hold the ranks of Commandant, Deputy Commandant, Reserve Superintendents, Reserve Assistant Superintendents of Police, Reserve Chief Inspectors, Reserve Inspectors, Reserve Sub Inspectors, Reserve Sergeant Majors, Reserve Sergeants and Reserve Constables. Officers in the Police Reserve are also required to wear designated Police Reserve uniforms when on duty, unless the specific nature of their duties preclude the wearing of uniform.

With effect from 01st February 2006, all 27,988 Police Reserve Officers then serving in the Police Reserve were absorbed into the Regular Police Force, as evidenced by the Circular No. 2070/2008 dated 27th June 2008 issued by the Inspector General of Police marked "P16". As set out in "P16", 26,121 of these erstwhile Police Reserve Officers were absorbed into the Regular Police Force and 1527 erstwhile Police Reserve Officers were appointed to the aforesaid five newly created specialised Units of the Sri Lanka Police Force. It is evident from "P16" that these five specialised Units were to be regarded as part of the Sri Lanka Police Force. All the Officers absorbed into these five specialised Units of the Sri Lanka Police Force held the same rank as they did in Police Reserve and were mandatorily required to wear uniforms which were modelled on uniforms worn by police officers in the Regular Police Force. As the petitioners have correctly pleaded in paragraph [23] of their petition, these five specialised Units perform *"supportive services"* to the Regular Police Force.

However, the remaining 340 erstwhile Police Reserve Officers were not absorbed into the Regular Police Force or into the five newly created specialised Units of the Sri Lanka Police Force. Instead, these 340 persons were absorbed into a newly established "Civil Support Services Unit" [*"සිවිල් සහායක සේවා ඒකකය"*] of the Department of Police.

The petitioners have pleaded that they and also the Graduate Employees Union which represents them have addressed letters dated 26th July 2006, 29th November 2006 and 18th January 2012 marked "P17(a)", "P17(b)" and "P17(c)" respectively, to the Defence Secretary, Inspector General of Police and a Senior Deputy Inspector General of Police requesting that the petitioners be absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into a specialised Unit of the Sri Lanka Police Force]. However, a perusal of these three letters reveals that the first two [*ie:* "P17(a)" and "P17(b)"] deal only with some complaints the petitioners had about their day to day working conditions. A written request that the petitioners be absorbed into the Sri Lanka Police Force appears to

have first been made on 18th January 2012 by the letter marked "P17(c)", which was written a few months before filing this application. The petitioners also state that they engaged in several discussions with the Inspector General of Police and other senior police officers to press the aforesaid request and that they had been given an assurance that they would be absorbed into the Regular Police Force or into one of its specialised Unit. But, the documents before us do not substantiate the petitioners' claim that such an assurance was given to them.

The petitioners state that a Senior Deputy Inspector General of Police [the 12th respondent] had, by a letter dated 30th September 2010 addressed to the Inspector General of Police marked "P20" and the Annexure thereto marked "P21", recommended that five *new* specialised Units of the Sri Lanka Police Force be established - to be named: (i) Police Educational Service; (ii) Police Analyst Service; (iii) Community Policing Service; (iv) Police Intelligence Service; and (v) Police Prosecution Service - and that the petitioners be absorbed into these proposed five *new* specialised Units of the Sri Lanka Police Force at a rank of Assistant Superintendent of Police and be placed on Salary Scale SL 1-2006.

However, that recommendation was not acted upon by the Department of Police or the Public Service Commission or National Police Commission and the petitioners were not absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units]. The Inspector General of Police has, in his affidavit, stated that the recommendations made in "P20" and "P21" were *"not practical as there are no vacancies available"* and has also stated that the Department of Management Services disapproved of the recommendations. The Inspector General of Police also states that these recommendations could not be accepted for the reason that the petitioners had not passed the Open Competitive Examination which is held to select appointees [from outside the ranks of the Sri Lanka Police Force] to the rank of Assistant Superintendent of Police and because the petitioners would not necessarily meet the physical specifications which have to be met for appointment to that rank. He further states that appointing the petitioners to the rank of Assistant Superintendents of Police will cause injustice to serving officers of the Sri Lanka Police Force.

On 14th February 2012, the Director General of Combined Services issued the aforesaid Service Minute which is titled "Minute of the Programme Officers' Service" and is marked "P23". This Service Minute created a new "Programme Officers' Service" in the Public Service. Clause 14 of "P23" provided that all public officers in the Public Service who were recruited under the aforesaid Graduate Scheme and are on Salary Scale MN 4-2006 (A), are entitled to be absorbed into the newly created Programme Officers' Service. Clause 14 also specified the procedure to be followed by eligible public officers who wish to apply for absorption into the Programme Officers' Service - *ie:* they had to submit an application in

the specified format to the Director General of Combined Services, through their Head of Department.

However, Clause 17.2 of "P23" specified that officers of the Public Service who did not wish to be absorbed into the Programme Officers' Service, are entitled to remain in their present posts.

"P23" was circulated throughout the Public Service by the first of the aforesaid Public Administration Circulars, which bears No. 10/2012 and is dated 08th May 2012. It has been marked "P24". The petitioners, being officers of the Public Service recruited under the Graduate Scheme and placed on Salary Scale MN 4-2006(A) were eligible for absorption into the Programme Officers' Service under and in terms of "P23", were given notice of "P23" and "P24". Clause 2 of "P24" also clearly stated that eligible public officers were entitled to be absorbed into the newly created Programme Officers' Service only if they so wished and specified that public officers who did not wish to be absorbed into the Programme Officers' Service, were entitled to remain in their present posts. Clause 4 of "P24" required that any public officer, who wished to submit an application to be absorbed into the Programme Officers' Service, should do so by 14th July 2014. This time limit was extended up to 14th August 2014 by the second Public Administration Circular referred to earlier. That bore No. 10/2012 (I) and is dated 21st June 2012. It is marked "P26".

However, none of the petitioners wished to be absorbed into Programme Officers' Service under and in terms of "P23". Therefore, they all sent letters to the Inspector General of Police, on the lines of the letter dated 13th July 2012 marked "P25" written by the 4th petitioner, declaring they did not wish to be absorbed in to the Programme Officers' Service as provided for by "P23'. They went on to say in these letters that, instead, they wished to be absorbed into one of the specialised Units of the Sri Lanka Police Force at a rank of Assistant Superintendent of Police in terms of the aforesaid recommendation marked "P20" and its Annexure marked "P21". [It appears that the aforesaid specialised Units of the Sri Lanka Police Force established in terms of the Circular marked "P16" are sometimes referred to using the term *"පොලිස් සහායක සේවා "* [*"Police Support Services"*] and the petitioners have used that term].

The petitioners' aforesaid request to be absorbed into one of the specialised Units of the Sri Lanka Police Force, was not granted. Consequently, as they had rejected the opportunity given by "P23" for them to be absorbed into the newly created Programme Officers' Service, the petitioners continued to remain in their posts of Development Assistants in the Department of Police.

The petitioners were dissatisfied with this outcome and filed the present application. They claimed that they had a *"legitimate expectation"* to be absorbed into the Regular Police

Force or into one of the specialised Units of the Sri Lanka Police Force. They pleaded that the failure to give effect to that expectation violated their fundamental rights guaranteed by Articles 12 (1) and 14 (1) (g) of the Constitution. The petitioners also pleaded that "P23" and the offer made thereunder to absorb the petitioners into the cadre of Programme Officers, was published without giving the petitioners a hearing.

On the aforesaid basis, the petitioners prayed, *inter alia*, for a declaration that they are entitled to be absorbed into the Regular Police Force or into one of its specialised Units and for a direction that the recommendations made in "P20" and "P21" be implemented - *ie:* a direction that the petitioners be absorbed into a specialised Unit of the Sri Lanka Police Force at a rank of Assistant Superintendent of Police and be placed on Salary Scale SL 1-2006, as recommended in "P20" and "P21". They also pleaded that the Service Minute marked "P23" and Circulars marked "P24" and "P26" are arbitrary and irrational and prayed for a declaration that "P23", "P24" and "P26" are null and void *vis-à-vis* the petitioners.

In his affidavit, the Inspector General of Police has stated, *inter alia*, that the petitioners are not entitled to be absorbed into the Sri Lanka Police Force [the Regular Police Force or one of its specialised Units], for the reasons set out in his affidavit. He also pleads that the petitioners' application is time barred. The petitioners filed a counter affidavit.

Subsequently, 60 officers of the Regular Police Force, who are all Graduates of recognised Universities and who have functioned in the posts of "Community Coordinating Officers" since March/April 2017 [although they have not yet been formally appointed as such due to the fact that this application is pending], filed an application for intervention claiming that they are similarly circumstanced to the petitioners. These Intervenient Petitioners prayed that, in the event the petitioners are absorbed into the Sri Lanka Police Force, the intervenient petitioners also be placed in the same rank and be paid the same salary as the petitioners. This application for intervention was permitted and the Intervenient Petitioners have been added as Intervenient-Added Respondents.

As evident from the aforesaid account of the pleadings and the facts before us, there are two issues to be decided in this application. They are:

(i) Firstly, whether the petitioners have a *"legitimate expectation"* of being absorbed into the Sri Lanka Police Force, which the Court should give effect to, because not doing so will perpetuate a violation of the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution;

(ii) Secondly, whether the Service Minute marked "P23" and Circulars marked "P24" and "P26" are arbitrary and irrational *vis-à-vis* the petitioners and

violate the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

A determination of whether the petitioners are entitled to the first head of relief they claim as set out in (i) above, will require an examination of the scope and ambit of the `doctrine of legitimate expectation', if I may call it that.

I also venture to think that such an examination might be useful at this point since, as far as I am aware, this Court has not had occasion to examine the developments in the law on the subject in some detail since the judgment of Priyantha Jayawardena,PC J in NIMALSIRI vs. FERNANDO [SC FR No. 256/2010 decided on 17th September 2015]. This is especially so because there have been some material developments in the doctrine of legitimate expectation after that judgment was delivered. Another reason why such an examination might be useful at this point is the frequency with which claims of *"legitimate expectation"* are made, sometimes with little justification and it would appear almost by rote, in applications for writs and applications invoking the fundamental rights jurisdiction of this Court. Nearly two decades ago, this led Gunawardana J to observe in the Court of Appeal decision of WICKREMARATNE vs. JAYARATNE [2001 3 SLR 161 at p.177] that *"It is the vogue, nowadays, to invoke the concept of legitimate expectation, without discernment almost blindly and by force of habit - as it were."*. Gunawardana J's observation remains apposite to this day. That was perhaps one reason which led Murdu Fernando,PC J in the recent decision of KALUARACHCHI vs. CEYLON PETROLEUM CORPORATION [SC Appeal No. 43/2013 decided on 19th June 2019 at p.12] to cite Wade and Forsyth [Administrative Law 11th ed at p. 450] and warn that *"legitimate expectation must not be allowed to collapse into an inchoate justification for judicial intervention."*. I am in respectful agreement with Her Ladyship. For these reasons, I consider that carrying out a survey of the parameters of the doctrine of legitimate expectation will be helpful and, I hope, justify the resulting addition to the length of this judgment.

Overview of the doctrine

The doctrine of legitimate expectation, as it is sometimes called, originated in Europe. To put it in the broadest terms, the doctrine envisages that a court may, in appropriate circumstances and where the public interest does not require otherwise, enforce a *"legitimate expectation"* [as distinct from a personal or proprietary *right*] of a person that a public authority will act as it has promised or held out it would. Prof. Endicott of the University of Oxford [Administrative Law 2nd ed. at p. 283] has commented that a legitimate expectation *"might be better called a `legally protected expectation'."*.

It is often said that this doctrine is an application of a court's duty to ensure fairness and certainty on the part of administrative bodies in their dealings with citizens, and also an

affirmation that citizens should be entitled to repose their trust in what administrative bodies tell them and lead them to believe. Thus, Lord Neuberger recently put the doctrine's underlying philosophy in general terms when he said in the Privy Council decision of THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO [2016 1 WLR 3383 at para. 37], *"In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts."*.

As observed by the Israeli legal philosopher Prof. Joseph Raz ['The Authority of Law' (1979) Chapter 11], the concept is rooted in the *grundnorm* [if I may call it that] of the Rule of Law which, *inter alia*, requires fairness, regularity and certainty in a public authority's dealings with the public, and condemns abuse of power by a public authority. Thus, Prof. Schwarze [European Administrative Law (1992) at p. 867] comments *"The principles of legal certainty and the protection of legitimate expectations are fundamental to Community Law. Yet these principles are merely general maxims derived from the notion that the Community is based on the rule of law ….."*. Schwarze observes that the doctrine of legitimate expectation reflects the Germanic concept of *"vertrauensschutz"* which could be translated to mean *"the honouring of a trust"*.

The doctrine has been adopted and adapted by the Courts of England, which have been designated as a *"relative latecomer to the doctrine"* by European writers [*vide:* Schwarze]. Our Courts have consistently looked to the English Law when formulating and applying this doctrine in our jurisdiction. Therefore, it is necessary to look at the manner the doctrine of legitimate expectation developed and now prevails in England.

The doctrine of legitimate expectation in the English Law

In the English Law, the phrase *"legitimate expectation"* had been used in early cases such as IN RE BARKER [1881 LR Ch. D. 241 at p.243] which dealt with the interpretation of a particular statute. The first use of the phrase in the context of public law is said to have been in SCHMIDT vs. SECRETARY OF STATE FOR HOME AFFAIRS [1969 2 Ch.D 149] when Lord Denning, MR recognised that a person who expects a public authority to act as it has assured him it would, should be heard by the public authority if it intends to act differently. The learned Master of the Rolls said *obiter* [at p.170] "*It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say."*. This concept was developed and expanded by the Courts in England in a series of later decisions.

Firstly, with regard to ***locus standi***, the doctrine of legitimate expectation operates where an aggrieved person does not have a proprietary or personal right *stricto sensu* which gives him the *locus standi* to challenge a decision of a public authority under the other

grounds recognised by administrative law. In such situations, the doctrine operates to confer *locus standi* on an aggrieved person to seek judicial review where he only has a *"legitimate expectation"* [and not a "right"] that a public authority will act in a particular way. Thus, in O'REILLY vs. MACKMAN [1983 2 AC 237 at p.275] Lord Diplock said that in public law [as distinguished from private law], a person who held a legitimate expectation had *"sufficient interest"* to challenge the legality of a public authority's decision. On the same lines, Lord Woolf MR said in R. vs. NORTH AND EAST DEVON HEALTH AUTHORITY *ex parte* COUGHLAN [2000 3 AER 850 at para. 56] that when a person claims he had a legitimate expectation which has been negated by a public authority, *"the dispute has to be determined by the court ….."*

To next consider the **scope** of the doctrine of legitimate expectation, it often said to cover two aspects - *ie:* the *procedural* aspect and the *substantive* aspect. As Prof. Craig [Administrative Law 7th ed. at p.677] explains, *"The phrase `**procedural legitimate expectation'** denotes the existence of some **process right** the applicant claims to possess as the result of a promise or behaviour by the public body that generates the expectation ….. The phrase **'substantive legitimate expectation'** captures the situation in which the applicant seeks a **particular benefit or commodity**, such as a welfare benefit or a license, as the result of some promise, behaviour or representation made by the public body."*. [emphasis added]. In R. [BHATT MURPHY AND ORS] vs. INDEPENDENT ASSESSOR [2008 EWCA Civ. 755 at para. 33] Laws LJ succinctly described the two aspects by saying *"In the procedural case we find a promise or practice of notice or consultation in the event of a contemplated change. In the substantive case we have a promise or practice of present and future substantive policy. This difference is at the core of the distinction between procedural and substantive legitimate expectation."*.

It was the doctrine of ***procedural* legitimate expectation** that developed first in England. It applies to ensure natural justice. As Wade and Forsyth explain [at p. 450], *"Where some boon or benefit has been promised by an official (or has been regularly granted by the official in similar circumstances), that boon or benefit may be legitimately expected by those who have placed their trust in the promises of the official. It would be unfair to dash those expectations without at least granting the person affected an opportunity to show the official why his discretion should be exercised in a way that fulfils his expectation. Hence there has developed a doctrine of the protection of legitimate expectations primarily in the context of natural justice ….."*.

There are several well-known decisions on the doctrine of procedural legitimate expectation. While the scope and effect of the doctrine are also well known, it will perhaps not be out of place to briefly refer to three of the leading decisions and then attempt a broad description of the doctrine.

In R. vs. LIVERPOOL CORPORATION *ex parte* LIVERPOOL TAXI FLEET OPERATORS' ASSOCIATION [1972 2QB 299] Lord Denning, MR [at p.306], though he based his decision on estoppel, stated at p.308] *"It is said that a corporation cannot contract itself out of its statutory duties. ….. But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. ….. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it."*.

More than a decade later, the House of Lords decided COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE [1984 3 AER 935], which is usually referred to as the "CCSU case". Considering the question of whether the petitioners had a procedural legitimate expectation to be consulted before the impugned instruction was issued, Lord Diplock [at p.949] formulated the principle that a decision by a public authority which negates a legitimate expectation of a petitioner would be subject to judicial review *if* the impugned decision affects the petitioner *" ….. (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."*. See also Lord Roskill [at p.954].

In the later case of R. vs. SECRETARY OF STATE FOR TRANSPORT *ex parte* RICHMOND-UPON-THAMES L.B.C [1994 1 WLR 74 at p.92], Laws J [as he then was in the High Court] stated, *"A public authority may, by an express undertaking or past practice or a combination of the two, have represented to those concerned that it will give them a right to be heard before it makes any change to its policy upon a particular issue which affects them. If so, it will have created a legitimate expectation that it will consult before making changes, and the court will enforce this expectation save where other factors, such as considerations of national security, prevail …. This species of legitimate expectation may be termed `procedural', because the content of the promise or past practice consists only in the holding out of a right to be heard: a procedural right."*.

If I am to attempt a description in broad terms and without any pretence of trying to achieve a comprehensive definition, a survey of decisions on issues of procedural legitimate expectation shows that: where a public authority, acting *intra vires*, has given an assurance that it will hear a person before it changes its policy with regard to a matter which affects him or has stated or otherwise made known its policy with regard to that matter or has an established practice of holding a hearing before a change of policy is effected, that person will have a procedural legitimate expectation that the public authority

will give him notice and a reasonable and adequate opportunity to make representations and be heard before it decides whether to change its policy with regard to the matter which will affect him. A court will, by way of judicial review, enforce such a procedural legitimate expectation other than in limited circumstances such as, for example, where considerations of national security override that expectation of being consulted or heard - *vide:* R. vs. LIVERPOOL CORPORATION, CINNAMOND vs. BRITISH AIRPORTS AUTHORITY [1980 2 AER 368 at p. 374], O'REILLY vs. MACKMAN, AG OF HONG KONG vs. NG YUEN SHIU [1983 2 AC 629], R. vs. HOME SECRETARY *ex parte* KHAN [1984 1 WLR 1337], the CCSU case, FINDLAY vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [1985 AC 318], RE WESTMINSTER CC [1986 AC 688], R. vs. SECRETARY OF STATE FOR HEALTH *ex parte* UNITED STATES TOBACCO INTERNATIONAL INC. [1992 1 AER 212]; and R. vs. SECRETARY OF STATE *ex parte* RICHMOND-UPON-THAMES L.B.C.

To move on to the second aspect, the **doctrine of *substantive* legitimate expectation** emerged more recently in England, albeit hesitantly and with a considerable amount of judicial discussion on the scope and applicability of the doctrine.

Craig [at p. 679] observes that the doctrine of substantive legitimate expectation is based on the *"principle of legal certainty"* which requires that a person should be *"able to plan action"* on the basis of representations made to him by a public authority and which he has *"reasonably relied on".*

The petitioners' claim that they have a legitimate expectation to be absorbed into the Regular Police Force or into one of its specialised Units is *ex facie* an assertion that they have a *substantive* legitimate expectation to that effect. There have been relatively recent developments in the English Law on the doctrine of *substantive* legitimate expectation, which, as far as I am aware, have not yet been considered by our courts. As mentioned earlier, our courts have consistently applied the principles of English Law when considering claims based on alleged legitimate expectation. Therefore, I think it would be appropriate to examine, in some detail, the development of the doctrine of *substantive* legitimate expectation in England leading up to its present state.

The decision of Taylor J In R. vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT *ex parte* RUDDOCK [1987 2 AER 518] is, perhaps, when the doctrine of substantive legitimate expectation set sail on a voyage that, as will be seen later on, met turbulent seas and altered its course more than once. Taylor J [at p. 528-531] considered several previous decisions which had dealt with claims based on alleged legitimate expectations and concluded that the need to ensure `fairness' had resulted in the recognition of a doctrine of substantive legitimate expectation. The learned judge stated [at p. 531], *"On those authorities I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord*

Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty ……". Three year later, in R. vs. INLAND REVENUE COMMISSIONERS *ex parte* MFK UNDERWRITING AGENCIES LTD [1990 1 WLR 1545 at p.1569-1570] , Bingham LJ, then on the High Court, sailed the same course based on `fairness' and described the concept of legitimate expectation saying, *"If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it …. The doctrine of legitimate expectation is rooted in fairness."*.

However, a few years later, in RICHMOND-UPON-THAMES L.B.C., Laws J took a different tack and commented [at p.93-94] that the reach of the doctrine of legitimate expectation only extended to bestow a procedural right to be heard before a change of policy was effected. The learned judge was of the view that a court was not entitled to give effect to a substantive expectation based on a test of `fairness' and that, instead, a decision by a public authority which negated a legitimate expectation of a petitioner citing a change of policy, could be set aside only if it was unreasonable in the WEDNESBURY sense - *ie:* a reference to the well-known power of a court to review a decision of a public authority on the ground that it was `irrational' or `unreasonable' in the sense described by Lord Greene MR in ASSOCIATED PROVINCIAL PICTURE HOUSES LTD vs. WEDNESBURY CORPORATION [1948 1 KB 223]. Perhaps it should be mentioned here that the other two traditional grounds of judicial review of administrative decisions - *ie:* `illegality' and `procedural impropriety' as Lord Diplock identified in the CCSU case [at p.950] - do not usually come into play in cases where a petitioner invokes the doctrine of substantive legitimate expectation since there would be no need to invoke the doctrine if the administrative decision could be successfully impugned on the other two grounds.

A year later, in R. vs. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD *ex parte* HAMBLE (OFFSHORE) FISHERIES LTD [1995 2 All ER 714] Sedley J [as he then was, on the High Court] navigated back to the course chartered by Taylor J in RUDDOCK. Sedley J emphatically affirmed that the doctrine of substantive legitimate expectation enabled a court to uphold and give effect to a substantive legitimate expectation on broader grounds than being confined to determining whether the public authority's change of policy or decision was unreasonable in the WEDNESBURY sense. The learned judge also observed [at p.723] that the aforesaid views of Laws J in RICHMOND-UPON-THAMES L.B.C. had been expressed *obiter*.

Sedley J stated [at p.724] that there was strong authority to hold that a court would, in appropriate cases, consider judicial review on the basis of substantive legitimate

expectation in order to ensure fairness in public administration and observed "….. *the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step."*.

Sedley J held [at p. 731] in his well-known formulation of the law which I will cite *in extenso* since this Court has referred to it with approval in DAYARATHNA vs. MINISTER OF HEALTH AND INDIGENOUS MEDICINE [1999 1 SLR 393 at p.403-404], *"Legitimacy in this sense is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment. The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the Court's criterion is the bare rationality of the policy-maker's conclusion. While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the Court's concern (as of course the lawfulness of the policy). To postulate this is not to place the judge in the seat of the Minister* ***... but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it****."* The learned judge went on to explain [at p.735] *"****While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy).*** *To postulate this is not to place the judge in the seat of the minister. As the foregoing citations explain,* ***it is the court's task to potency and reasonableness of the applicant's expectations****."* [emphasis added].

Thus, Sedley J held that, where a petitioner seeks judicial review of a decision by a public authority which has negated his substantive legitimate expectation and the public authority cites a change of policy as the reason for doing so, a court is not limited to looking at the *"bare rationality"* [in the WEDNESBURY sense] of the decision. Instead, the `test' formulated by Sedley J was that court should make its ruling by: weighing the reasons and necessity for the change of policy, on the one hand; against the significance of realising the expectation to the petitioner and the prejudice that will be caused to him if his expectation is negated, on the other hand; and then, decide whether the petitioner's substantive legitimate expectation carries so much weight that *"fairness"* demands that the expectation must prevail over the alleged public interest, or whether the public interest is so pressing that the expectation must give way to the public interest.

However, two years later, in R. vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT *ex parte* HARGREAVES [1997 1 WLR 906], the Court of Appeal steered back to the views of Laws J in RICHMOND-UPON-THAMES L.B.C. The Court of Appeal

disapproved of and described as *"heresy"* the aforesaid `test' proposed by Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD. The Court of Appeal held in HARGREAVES that, where a decision of a public authority negated a legitimate expectation of the petitioner based on a change of policy, that decision could be quashed only if it was unreasonable in the WEDNESBURY sense - *vide:* Hirst LJ [at p.921] and Pill LJ [at p.924]. This approach in HARGREAVES has been criticised as being over-rigid by several writers including Craig [English Public Law and the Common Law of Europe (1998)] and Prof. Allan [1997 CLJ 246].

The wind turned again in R. vs. NORTH AND EAST DEVON HEALTH AUTHORITY *ex parte* COUGHLAN in which the Court of Appeal did not view with favour the aforesaid restrictive approach suggested in HARGREAVES. Referring to the test of `WEDNESBURY unreasonableness' applied in HARGREAVES, Lord Woolf MR, with Mummery LJ and Sedley LJ agreeing, reviewed many of the previous decisions and observed [at para. 74] *"Nowhere in this body of authority ….. is there any suggestion that judicial review of a decision which frustrates a substantive legitimate expectation is confined to the rationality of the decision."* Following that line of thought, the Court of Appeal distinguished the decision in HARGREAVES on the basis that it was specific to the facts of that case.

The Court of Appeal's decision in COUGHLAN was a watershed in the establishment of the doctrine of substantive legitimate expectation and requires some exposition here. In COUGHLAN, the petitioner was a severely disabled lady. In 1993, she and seven other comparably disabled patients were moved to Mardon House, which was a National Health Service facility built to care for such patients. The health authorities had assured the petitioner and the other patients that Mardon House would be their home for life. Despite this assurance, the health authorities sought to close Mardon House in 1998. The petitioner sought judicial review of that decision. The Court of Appeal affirmed the lower court's order quashing the decision to close Mardon House.

The Court of Appeal [at para. 57] identified the following three ways in which a court could examine and decide a claim that a public authority's change of policy or decision had negated a legitimate expectation of the petitioner arising from a previous assurance, policy or practice of the public authority: (a) the court may take the view that the circumstances of the case are such that it should *apply the test of WEDNESBURY unreasonableness* when reviewing the change of policy or decision; or (b) the court may decide that the previous assurance, policy or practice which gave rise to the claimed legitimate expectation *entitles the claimant to a consultation before the decision, policy or practice is changed in a manner which affects him*, unless there is a clear overriding reason to deny that consultation - *ie:* the `classic' instance of a *procedural* legitimate expectation as described earlier; or (c) where the court considers that the public authority has given a promise or followed a practice which has caused the claimant to have a legitimate expectation of a

substantive benefit and the public authority later intends to act in a different manner which will negate that substantive legitimate expectation, the court will *decide whether negating the substantive legitimate expectation is so unfair that it will amount to an abuse of process* and, if so, hold the public authority bound to give effect to the expectation.

Referring to the circumstances described in (c) above Lord Woolf, MR with Mummery and Sedley LJJ agreeing, formulated a `test' to be applied in such cases when the learned Master of the Rolls stated [at para. 57] *"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too* ***the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power."***. Lord Woolf, MR went on to say *"….once the legitimacy of the expectation is established,* ***the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*** and *"….. **the court has when necessary to determine whether there is sufficient overriding interest to justify a departure from what has been previously promised."*** [emphasis added].

Thus, in COUGHLAN, the Court of Appeal laid to rest the preceding controversy and emphatically established the principle that a court could exercise its powers of judicial review based on the doctrine of *substantive* legitimate expectation without being restricted to only the test of WEDNESBURY unreasonableness.

Craig comments [at p. 690] that *"the court in Coughlan preferred to use abuse of power as the criterion for testing whether a public body could resile from a prima facie legitimate expectation."* and also observes with regard to instances in which the doctrine of substantive legitimate expectation is applied, *"A power which has been abused has not been lawfully exercised. The court's task was to ensure that the power to alter policy was not abused by unfairly frustrating legitimate expectations."*.

It would appear that the approach set out in COUGHLAN is similar to that propounded by Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD other than for the Court of Appeal going on to observe in COUGHLAN that the frustration of the substantive legitimate expectation should be *"so unfair"* that it will *"amount to an abuse of power"* - essentially, a difference of degree from Sedley J's `test' of *"fairness"*.

Following the decision in COUGHLAN, the doctrine of substantive legitimate expectation sailed on calmer waters and was recognised in a flotilla of later cases which adopted both the views in COUGHLAN that the doctrine was rooted in the prevention of abuse of power and the aforesaid `test' formulated by Lord Woolf, MR. Thus, in R. [BEGBIE] vs. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT [2000 1 WLR 1115 at

p.1124] Peter Gibson LJ cited the decision in COUGHLAN and the aforesaid `test' formulated by Lord Woolf, MR, with approval. Similarly, in R. [WALKER] vs. MINISTRY OF DEFENCE WALKER [2000 1 WLR 806] the House of Lords appears to have applied the `test' formulated in COUGHLAN - *vide:* Lord Hoffman at p. 816 and also Lord Slynn at p. 813. In R. [BIBI] vs. NEWHAM LBC [2002 1 WLR 237] Schiemann LJ [at para. 34] relied on the `test' formulated in COUGHLAN while commenting that this `test' requires *"refinement"*. In the later decision of the House of Lords in R. [REPROTECH (PEBSHAM) LTD] vs. EAST SUSSEX COUNTY COUNCIL [2003 1 WLR 348], Lord Hoffman [at para. 34] stated that the denial of a legitimate expectation could amount to an abuse of power and referred to the `test' formulated in COUGHLAN with apparent approval. Thereafter, in R. [BANCOULT] vs. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS [2008 3 WLR 955] Lord Carswell stated [at para. 133] *"The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in R v North and East Devon Health Authority, Ex p Coughlan in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in R (Reprotech (Pebsham) Ltd) v East Sussex County Council [para 34] Lord Hoffmann accepted Coughlan as correct."*. In PAPONETTE vs. AG OF TRINIDAD AND TOBAGO [2011 3 WLR 219], the Privy Council cited COUGHLAN with approval and Sir John Dyson, SCJ [at paras. 34 and 35] described COUGHLAN as the *"leading case"* on the doctrine of substantive legitimate expectation and applied Lord Woolf MR's `test' in deciding the case before him. Very recently in IN RE FINUCANE [2019 UKSC 7 at para.56] Lord Kerr in the House of Lords with Lady Hale, Lord Carnwath, Lord Hodge and Lady Black agreeing, also described COUGHLAN as *"the leading case"* on the doctrine of substantive legitimate expectation.

However, throughout this chorus of approval of the approach set out in COUGHLAN, the voice of Laws LJ has cautioned that restraint is necessary when applying the doctrine of substantive legitimate expectation since an indiscriminate application of Lord Woolf's `test' in COUGHLAN to every claim of substantive legitimate expectation, may result in unwarranted encroachments upon the ability of public authorities to change policy in the public interest. For that reason, Laws LJ advocated that the doctrine should be applied only in exceptional situations where the facts and circumstances of the case justified doing so - *vide*: Laws LJ's judgments in the Court of Appeal in BEGBIE, R. [NADARAJAH] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2005 EWCA Civ. 1363] and R. [BHATT MURPHY AND ORS] vs. INDEPENDENT ASSESSOR.

The value of these cautionary exhortations enunciated by Laws LJ, have been recognised in several subsequent decisions of the courts in England. Therefore, Laws LJ's aforesaid views bear repetition here, as they set out the manner in which the `test' formulated in COUGHLAN has been moulded and are part of the law as it now stands in England. I should also mention here that, in fact, Lord Woolf, MR recognised in COUGHLAN [at

paras. 59-60 and 71] that the doctrine of substantive legitimate expectation was a developing area of the law and foreshadowed the concerns later voiced by Laws LJ.

In BEGBIE [at paras. 80-83] Laws LJ, in a separate judgment, fired the first shot across the bow of proponents of an unqualified acceptance of the doctrine of substantive legitimate expectation and pointed out that when Lord Woolf, MR formulated the aforesaid `test' in COUGHLAN, the learned Master of the Rolls himself referred to the fact that: (i) the promise on which the applicant relied on was one of great importance to her; (ii) was made to only a few individuals; and (iii) the consequences of the court compelling the health authorities to keep to their promise had only financial consequences to the health authorities *"and not of very great financial consequences at that.",* as De Smith observes [at para 12-050]. Drawing on that, Laws LJ expressed his view that judicial review on the basis of a negation of a substantive legitimate expectation would be unlikely to be available in cases where the public authority's change of policy *"….. involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court);"* since in such cases the judges cannot adjudicate [except on the basis of the WEDNESBURY unreasonableness] without the judges *"themselves donning the garb of policy-maker, which they cannot wear."*. Laws LJ observed that, on the other hand, judicial review might be justified in cases such as COUGHLAN where the *"act or omission complained of may take place on a much smaller stage, with far fewer players….. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. ….."*. Laws LJ went on to say that *"The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy. "*. In fact, the view that a claim of legitimate expectation is unlikely to succeed in cases where the alleged promise had been made to the public at large, had been expressed earlier in the House of Lords by Lord Keith in R. [FIRE BRIGADE UNION] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [1995 2 AC 413 at p.545] and was followed by Roch LJ in the Court of Appeal in R. [EMERY] vs. SECRETARY OF STATE FOR WALES *ex parte* EMERY [1998 4 AER 367 at p.374-375].

Five years later in NADARAJAH [at para. 69], Laws LJ reiterated that a case of legitimate expectation will be easier to establish where the promise has been made to *"an individual or specific group"*, and that it is often difficult to establish a case of legitimate expectation where the promise relied on concerns *"wide-ranging or `macro-political' issues of policy"*.

On similar lines, Laws LJ stated in the subsequent decision of BHATT MURPHY AND ORS [at paras.43-46] that, *"Authority shows that where a substantive expectation is to run the promise or practice which is its genesis ….. must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured ….. These cases [KHAN and COUGHLAN] illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class ….. The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of.".*

It may also be mentioned that in NADARAJAH [at paras. 68 and 69] Laws LJ referred to relevance of the test of proportionality in the application of the doctrine of legitimate expectation. The learned judge was of the view that *both* in cases of procedural legitimate expectation and cases of substantive legitimate expectation, the court should judge whether the public authority's decision to negate the legitimate expectation was a proportionate response in the light of the public duty or requirements of public interest claimed by the public authority. Laws LJ stated *"….. the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. ….. The balance ….. is not precisely calculable, its measurement not exact. ….. These cases have to be judged in the round."*

In BHATT MURPHY AND ORS, Laws LJ further stated [at para. 35] that where a petitioner claims that a public authority has negated his legitimate expectation and the public authority contends that public interest requires negating that expectation, a court should apply a *'rigorous standard"* when determining whether the claimed legitimate expectation should override the public interest and decide the issue *"by the court's own view of what fairness requires."*. In this connection, Laws LJ observed [at paras. 41-42] that cases where the doctrine of legitimate expectation is invoked *"….. are concerned with exceptional situations ….. a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. ….. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest …. . They have to decide the content and the pace of change. …. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise*

be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself …..".

The Court of Appeal of England and Wales has referred to and approved of Laws LJ's aforesaid views in BEGBIE, NADARAJAH and BHATT MURPHY AND ORS, in several subsequent decisions such as R. [MANCHESTER CITY COUNCIL] vs. ST. HELENS' B.C. [2009 EWCA Civ. 1348], R. [MANCHESTER CORPORATION OF HALL OF ARTS AND SCIENCES] vs. WESTMINSTER C.C [2011 EWCA Civ. 430], R. [GODFREY] vs. LONDON BOROUGH OF SOUTHWARK [2012 EWCA Civ. 500], R. [PATEL] vs. GENERAL MEDICAL COUNCIL [2013 EWCA Civ. 327], THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO and THE COMMISSIONERS FOR REVENUE AND CUSTOMS vs. HUTCHINSON [2017 EWCA 1075]. Laws LJ's aforesaid views have been applied by the High Court in England in a host of subsequent decisions of which I will cite only a representative few - *vide:* WHEELER vs. OFFICE OF THE PRIME MINISTER [2008 EWHC 1409 at para. 44], R. [HSMP FORUM UK LTD] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2009 EWHC 711], R. [CHESHIRE EAST BOROUGH COUNCIL, CHESHIRE WEST AND CHESTER BOROUGH COUNCIL] vs. SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS [2011 EWHC 1975], R. [DUDLEY METROPOLITAN BOROUGH COUNCIL] vs. SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2012 EWHC 1729], UNITED KINGDOM ASSOCIATION OF FISH PRODUCERS ORGANISATIONS vs. SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS [2013 EWHC 1959], R. [ALANSI] vs. LONDON BOROUGH OF NEWHAM [2013 EWHC 3722] and SOLAR CENTURY HOLDINGS LIMITED vs. SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE [2014 EWHC 3677]**.**

In the Privy Council decision of THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO, Lord Carnwath [at paras. 79 to 121] reviewed the development of the law on substantive legitimate expectation and approved of the views expressed by Laws LJ in BEGBIE, NADARAJAH and BHATT MURPHY AND ORS. The learned judge, citing Wade and Forsyth [at p. 460] stated that the doctrine would usually be *"narrowly construed"* by a Court. Lord Carnwath concluded by stating [at para. 121] *"In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is `clear, unambiguous and devoid of relevant qualification', has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a `macro-economic' or `macro-political' kind."*. It should be mentioned

here that in the later decision of IN RE FINUCANE, Lord Carnwath stated [at para. 158] that his reference to detrimental reliance being essential in the above passage, was limited to the particular facts in THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO and was not meant to be of general application.

In the recent decision of IN RE FINUCANE, the House of Lords referred with approval [at para. 60] to Laws LJ's view in BHATT MURPHY AND ORS that a *"rigorous standard"* should be applied when deciding whether a claim of a substantive legitimate expectation should prevail over a public authority's wish to change its policy in the public interest and also endorsed [at para. 58 and 75-76] Laws LJ's observation that a claim of substantive legitimate expectation is unlikely to succeed in cases involving *"macro-political"* issues.

On a survey of the decisions which have been available to me, it appears that the following principles may be extracted with regard to the doctrine of substantive legitimate expectation, as it now applies in England. I mention these principles only by way of an indication of how the courts have applied the doctrine in England. The statement set out below does not aim at being a complete summation of the doctrine of substantive legitimate expectation as it now stands in England. Indeed, it would be unwise to try to do so, particularly when this doctrine is evolving and since, as Bingham, MR cautioned in R. vs. INLAND REVENUE COMMISSIONERS *ex parte* UNILEVER PLC [1996 STC 681 at p. 690], *"The categories of unfairness are not closed, and precedent should act as a guide and not as a cage."*: Each case has to be decided on its facts and circumstances with the objective of the court being to ensure fairness, proportionality and justice and prevent an abuse of power, while, at the same time, protecting the public interest. These principles which the courts have developed will only serve to guide that endeavor.

(i) Where a public authority: acting *intra vires* [1]; has, by its words or conduct or a combination of both, given a specific, unambiguous and unqualified assurance [2] which is of a defined and limited nature with identifiable consequences [and not a representation of general policy affecting the entire public or dealing with *"macro-political"* matters] [2a]; to an individual or to a specified and identified group of persons [usually, but not necessarily, a small group] [3]; and has, thereby, created a substantive legitimate expectation held by that individual or group of persons that the public authority will act as it has assured [or, in the absence of a specific assurance of the nature described above, the public authority has followed an established and unambiguous practice which has created such an expectation; or the facts and circumstances of the dealings between the public authority and that individual or group of persons have created such an expectation] [4]; and the individual or group of persons have placed reliance on that assurance [usually, but not necessarily, detrimental reliance]; [5]; and the public authority subsequently seeks to negate that substantive legitimate

expectation on the basis that public interest requires it to do so; the court may, where it determines that the nature of the expectation, and the prejudice caused to that individual or group of persons by the public authority negating it, outweighs the public interest to such an extent that the negation of the substantive legitimate expectation would be unfair or unjust or disproportionate and constitute an abuse of power by the public authority; exercise its power of judicial review and hold that the substantive expectation is a legitimate one which the public authority is bound to fulfil [6] - *vide:* [1] R.[MATRIX SECURITIES LTD] vs. INLAND REVENUE COMMISSIONERS [1994 1 WLR 334 at p.357], HAMBLE (OFFSHORE) FISHERIES LTD [at p.731], BIBI [at p.244], FLANAGAN vs. SOUTH BUCKINGHAMSHIRE D.C. [2002 EWCA Civ. 690 at para.18], ROWLAND vs. THE ENVIRONMENT AGENCY [2003 EWCA Civ. 1885 at para.69], RAINBOW INSURANCE COMPANY LTD vs. FINANCIAL SERVICES COMMISSION, MAURITIUS [2015 UKPC 15 at para.52]; [2] R. [MFK UNDERWRITING AGENCIES LTD] vs. INLAND REVENUE COMMISSIONERS [at p.1570], R. [BAKER] vs. DEVON COUNTY COUNCIL [1995 1 AER 73 at p.88]; R. [ZEQIRI] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2002 UKHL 3 at paras. 44 and 64], R. [ASSOCIATION OF BRITISH CIVILAN INTERNEES (FAR EAST REGION)] vs. SECRETATY OF STATE FOR DEFENCE [2003 EWCA Civ. 473 at para. 71], R. [BEGUM] vs. RETURNING OFFICER FOR TOWER HAMLETS LBC [2006 EWCA Civ. 733 at para. 45], BANCOULT [at paras. 60 and 134], PAPONETTE [at paras. 28-30], R. [ELAYATHAMBY] vs. HOME SECRETARY [2011 EWHC 2182 at para.28], R. [ROYAL BROMPTON AND HAREFIELD NHS FOUNDATION TRUST] vs. JOINT COMMITTEE OF PRIMARY CARE TRUSTS [2012 EWCA Civ. 472 at para. 104], THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO [at para.37]; and IN RE FINUCANE [at paras. 62 and 64]; [2a] BEGBIE, NADARAJAH and BHATT MURPHY and ORS; [3] R. [FIRE BRIGADE UNION] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [at p.545], R [EMERY] vs. SECRETARY OF STATE FOR WALES [at p.374-375], BEGBIE [at paras. 81-82], NADARAJAH [at paras. 68-69], BHATT MURPHY AND ORS [at paras. 43-46], WHEELER vs. OFFICE OF THE PRIME MINISTER [at paras. 43-44] and PATEL [at para. 84], [4] CCSU case [at p.401], UNILEVER PLC [at p.690-691], R. [LOADER] vs. POOLE B.C. [2009 EWHC 1288 (Admin) at para. 28] and ROWLAND vs. THE ENVIRONMENT AGENCY [at para. 68]; [5] R. [RAM RACECOURSES LTD] vs. JOCKEY CLUB [1993 2 AER 225 at p. 236-237], BEGBIE [at p. 1124 and p.1133], BIBI [at p.246], BANCOULT [at para. 60], BIBI [at para.29], OXFAM vs. HER MAJESTY'S REVENUE AND CUSTOMS [2009 EWHC 3078 at paras. 48-54], PATEL [at para. 84] and IN RE FINUCANE [at paras. 72 and 157-159]; [6] the aforesaid discussion on the decisions in HAMBLE (OFFSHORE) FISHERIES LTD, COUGHLAN, BEGBIE,

NADARAJAH, BHATT MURPHY and ORS and THE UNITED POLICYHOLDERS GROUP;

(ii) However, a substantive legitimate expectation will not be protected by judicial review, *inter alia*, if fulfilling the expectation will be in breach of the public authority's statutory duty [1] or where the person who claims the right has not dealt fairly with the public authority or where the granting of the expectation would have an unfair or unjust result [2] - *vide:* [1] AG OF HONG KONG vs. NG YUEN SHIU [at p. 638], RUDDOCK [at p. 531], R. [UNITED STATES TOBACCO INTERNATIONAL INC] vs. SECRETARY OF STATE FOR HEALTH [at p. 223], R. [WOOD] vs. SECRETARY OF STATE FOR EDUCATION [2011 EWHC 3256 at para. 76], MFK UNDERWRITING AGENCIES LTD [at p.1568] and SOLAR CENTURY HOLDINGS LTD vs. SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE [2014 EWHC Admin. 377 at para 90]; [2] MFK UNDERWRITING AGENCIES LTD [at p.1569], R. vs. MATRIX SECURITIES LTD [p.344-346 and p. 356] and R. [MULLEN] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2005 1 AC 1 at paras. 60-61].

Illustrative examples of a court upholding and enforcing a substantive legitimate expectation are found in COUGHLAN's case - where the disabled residents of Mardon House had been promised they could reside in that care home during their lifetime, and the court enforced that promise; and in PATEL's case - where a pharmacist who wished to qualify as a doctor had relied on the General Medical Council's representation that it would recognise a specified qualification and expended much money and effort to obtain that qualification, and the court compelled the General Medical Council to honour that representation.

The doctrine of legitimate expectation in India

Before examining the position of the law in our jurisdiction, a passing glance at the position in **India** is warranted as a matter of comparative interest. On an overview, it appears that, while the concept of procedural legitimate expectation has been regularly applied by the courts in India, there has been hesitation in recognising a doctrine of substantive legitimate expectation outside the confines of WEDNESBURY unreasonableness.

Thus, in UNION OF INDIA vs. HINDUSTAN DEVELOPMENT CORPORATION [1993 Indlaw SC 1085 at paras. 66-70] Reddy J in the Supreme Court observed *" …..the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken ….."*. The learned judge went on to say that the scope of a court granting relief on the basis of a substantive legitimate expectation is limited to instances where the decision of the public authority is *"arbitrary, unreasonable and not taken in public interest."* - *ie:* in the

WEDNESBURY sense. Reddy J went further and said *"If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision."* It is evident from his judgment that Reddy J was in agreement with and drew from the oft-quoted views of Mason CJ in his judgment for the majority in the High Court of Australia's decision of AG FOR NEW SOUTH WALES vs. QUIN [1990 HCA 21 at para. 37]. Mason CJ held that the courts could give effect only to procedural legitimate expectations and that the then emerging doctrine of substantive legitimate expectation had no place in the law since its recognition will result in *"curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances.".*

The approach set out by Reddy J in HINDUSTAN DEVELOPMENT CORPORATION has been followed in several subsequent decisions of the Supreme Court of India such as MADRAS WINE MERCHANTS ASSOCIATION vs. STATE OF TAMIL NADU [1994 Indlaw SC 923 at para 60], PTR EXPORTS [MADRAS] PVT LTD vs. UNION OF INDIA [1996 Indlaw SC 2973 at para.1], BAJAJ HINDUSTAN LTD vs. SIR SHADI LAL ENTERPRISES LTD [2011 1 SCC 640 at para. 37], GHAZIABAD DEVELOPMENT AUTHORITY vs. DELHI AUTO AND GENERAL FINANCE (PVT) LTD [1994 4 SCC 42 at para. 7], MP OIL EXTRACTION vs. STATE OF MADHYA PRADESH [1997 Indlaw SC 2198 at para. 6], NATIONAL BUILDING CONSTRUCTION CORPORATION vs. RAGHUNATHAN [1998 Indlaw SC 1178 at para. 18], PUNJAB COMMUNICATION LTD vs. UNION OF INDIA [1999 4 SCC 727 at paras. 43-49], UNION OF INDIA vs. INTERNATIONAL TRADING COMPANY [2003 5 SCC 437 at paras. 21-21], BANNARI AMMAN SUGARS LTD vs. CTO [2005 1 SCC 625 at para. 15] and UNION OF INDIA vs. CHOUDHARY [2016 Indlaw SC 156 at paras. 43-47] - *cf:* Lodha J's somewhat different views in MONNET ISPAT AND ENERGY LTD vs. UNION OF INDIA [2012 Indlaw SC 230].

In this background, Jain [Principles of Administrative Law 7th ed. at p. 1598] comments *"The doctrine [of] legitimate expectation has not yet struck roots in India as there seems to be some confusion in judicial thinking on the scope and range of the concept of legitimate expectation. The approach of the Indian Courts seems lagging behind the approach of the British Courts. ….. the concept is much more substantive and positive in nature than what Supreme Court has characterised it to be."*. Jain pertinently points out that, *"If an administrative action is irrational or unreasonable in the Wednesbury sense, then it is already invalid and there is no need further to invoke the legitimate expectation doctrine to illegitmize such action and the doctrine will then have no purpose or meaning."*.

The doctrine of legitimate expectation in our Law

The doctrine of legitimate expectation has been adopted and applied by our courts in a series of decisions. When doing so, our courts have consistently regarded the English Law on the use of prerogative writs in judicial review as being authoritative and have applied the principles of English Law when deciding the body of case law that has formed in Sri Lanka. Consequently, principles of English Law are a reliable guide, *mutatis mutandis*, when applying our case law and are applicable where there is a lacuna in our case law.

Thus, in WIJESEKERA vs. A.G.A MATARA [44 NLR 533 at p.538] De Kretser J referred to section 42 of the Courts Ordinance which conferred the power on the court to issue writs *"according to law"* and stated with regard to the issue of writs and the English Law that *"we have hitherto gone to that law for direction and guidance ….. writs would issue in the circumstances and under the conditions known to the English law."*. In NAKKUDA ALI vs. DE JAYARATNE [51 NLR 457 at p.460-461] Lord Radcliffe in the Privy Council also referred to section 42 of the Courts Ordinance and held *"….. it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court, may be moved for the issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon."*. In COLOMBO COMMERCIAL COMPANY LTD vs. SHANMUGALINGAM [66 NLR 26 at p.32] Weerasooriya SPJ simply said *"In the issue of these prerogative writs we follow the English law."*. In MENDIS vs. GOONAWARDENA [1978-79 2 SLR 322 at p.356] Vythialingam J, then in the Court of Appeal, observed that from 1873 onwards, the English Law had been applied by our Courts when dealing with writs. Finally, in COORAY vs. DIAS BANDARANAIKE [1999 1 SLR 1 at p.14-15] Dheeraratne J, with Gunawardena J and Weerasekera J agreeing, authoritatively held that Article 140 of the present Constitution [which confers the power to issue writs] uses the phrase *"according to law"* in the same manner as section 42 of the Courts Ordinance and that a long line of authority has held that the English Law is to be applied by the courts when considering the issue of writs. His Lordship emphatically held *"….. that proposition admits of no controversy."*.

It appears that the first reference by our courts to a concept akin to the modern day rule that a legitimate expectation can be legally protected was in KASSIM HAMIDU LEBBE vs. SAMOON [71 NLR 452 at p. 455] where Alles J stated that the defendant, who had developed a Crown land and paid rents to the Crown based on an assurance that a permit would be issued to him, had a *"reasonable expectation"* that the Crown would issue a permit to him. This case was decided within the province of private law.

To first look at the development of the doctrine of **procedural legitimate expectation** in our law, one of the earliest cases to invoke the concept of a procedural legitimate expectation in the firmament of public law was DAYARATNE vs. BANDARA [1983 BALJR

Vol.1 Part 1 p.23 at p.30]. In that case, Vythialingam J, then in the Court of Appeal, held that the petitioner who had possessed a liquor license for several years had *"a very real expectation that the license would be retained"* and should have been given *"an opportunity to be heard"* before the licensing authority decided to revoke his license. Although the court did not refer to the doctrine of procedural legitimate expectation, which [in 1978] was still nascent in the English Law, this was an instance of the court giving effect to what would now be termed a procedural legitimate expectation. More than a decade later, in SUNDARKARAN vs. BHARATHI [1989 1 SLR 46], Amerasinghe J, considering a set of facts which were similar to those in DAYARATNE vs. BANDARA, held [at p.61] that the petitioner was *"….. an existing license holder with legitimate expectations"* of being granted a hearing before any decision was taken not to renew his license. Accordingly, Amerasinghe J quashed a refusal to renew the petitioner's license and directed that an inquiry be held by the licensing authority to consider the petitioner's application for renewal of the license. This too was an instance of the Supreme Court giving effect to what is now termed a procedural legitimate expectation although it appears that the decisions of the English Courts in LIVERPOOL CORPORATION, AG OF HONG KONG, KHAN, FINDLAY and the CCSU case which had previously examined the concept of procedural legitimate expectations, were not brought to the attention of Amerasinghe J. Thereafter, in DISSANAYAKE vs. KALEEL [1993 2 SLR 135] Fernando J [at p. 186-187] cited the decisions in CINNAMOND, O'REILLY vs. MACKMAN, AG OF HONG KONG and the CCSU case which dealt with procedural legitimate expectations. Fernando J observed that *"pronouncements or undertakings of the authority concerned"* can give a person a *"legitimate expectation"* of the protection of the *audi alteram partem* rule even though he does not have *"legal rights"*. In PERERA vs. COMMISSIONER OF NATIONAL HOUSING [1994 3 SLR 316 at p.328-329] Grero J in the Court of Appeal cited the CCSU case and stated *"the right to be heard"* is the principle *"entrenched"* in the doctrine of legitimate expectation. Later, in LAUB vs. AG [1995 2 SLR 88 at p.95-96], Ismail J, then in the Court of Appeal, referred to SCHMIDT and AG OF HONGKONG and citing Lord Bridge in RE WESTMINSTER C.C. said *"The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation."*. In GUNAWARDENE and WIJESOORIYA vs. MINISTER OF LOCAL GOVERNMENT, HOUSING AND CONSTRUCTION [1999 2 SLR 263 at p;273], this Court referred to the petitioners' *"legitimate expectation"* of purchasing the relevant premises and recognized that the petitioners had a procedural legitimate expectation of being heard in an appeal to the Board of Review before the houses they were occupying as tenants were divested by the Commissioner of National Housing.

As far as I am aware, the first reported decision which specifically recognized that a doctrine of procedural legitimate expectation applies in Sri Lanka was the aforementioned decision of DAYARATHNA vs. MINISTER OF HEALTH AND INDIGENOUS MEDICINE. In

this case, the Ministry of Health called for applications from persons who wished to follow a training course leading to a certificate of competency as an Assistant Medical Officer. The petitioners applied and expected to commence the training course. However, the Ministry of Health then advised the petitioners that they should apply for training to follow a different course leading to a different [and lesser] qualification. The Ministry of Health did not give the petitioners a hearing before changing its decision. The petitioners invoked the fundamental rights jurisdiction of this Court claiming that their *"legitimate expectations"* of following the training course had been negated. They prayed for an order directing the Minister of Health to conduct the original training course for them. Amerasinghe J, with Gunasekera J and Weerasekera J agreeing, held [at p.412] *"No opportunity was given to the petitioners to argue why the change of policy should not affect them: …..When a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably ….."*. Thus, in DAYARATHNA, the Supreme Court held that, where a public authority has given a petitioner an assurance that it will follow a specified policy and then seeks to act in disregard of that assurance, a court will protect and enforce that petitioner's procedural legitimate expectation of being heard, before the public authority changes its policy. [However, the question of giving effect to that *procedural* legitimate expectation did not arise because the court went on to order that the training course be held and, thereby, gave effect to the petitioner's *substantive* legitimate expectation].

The first reported decision which specifically applied the doctrine of procedural legitimate expectation to compel a public authority to grant a hearing before it took a decision affecting the petitioner's legitimate expectation, appears to be MULTINATIONAL PROPERTY DEVELOPMENT vs. URBAN DEVELOPMENT AUTHORITY [1996 2 SLR 51]. Here, the respondent authority had assured the petitioner that a land would be leased to the petitioner and accepted payments from the petitioner on that account. The respondent authority subsequently notified the petitioner that there had been a change of policy and that the land would not be leased to the petitioner. The petitioner was not given an opportunity of being heard before that decision was taken. Ranaraja J applied the principles enunciated in the CCSU case and in KHAN and held that the petitioner had a legitimate expectation of being heard before the respondent authority took a decision in that regard, thereby upholding a procedural legitimate expectation. Accordingly, the Court of Appeal quashed the respondent authority decision and directed it to give the petitioner a hearing and, thereafter, make a determination according to law. Ranaraja J [at p.55] held, *"A substantive change in policy resulting from a change in the Executive Presidency cannot be avoided. But where a new policy is to be applied, the individuals who have legitimate expectations based on promises made by public bodies that they will be granted certain benefits, have a right to be heard before those benefits are taken away from them on the ground that there had been a change of policy."*.

Thereafter, in WICKREMARATNE vs. JAYARATNE, Gunawardana J, in the course of an instructive survey of the doctrine of legitimate expectation [both procedural and substantive], held [at p.176] that the petitioner had a procedural legitimate expectation of being heard before the respondents proceeded with the contemplated action. Further, in SAMARAWEERA vs. PEOPLE'S BANK [2007 2 SLR 362] and CHOOLANIE vs. PEOPLE'S BANK [2008 2 SLR 93], Bandaranayake J discussed the doctrine of procedural legitimate expectation and held [at p.388 and at p.112 respectively] that *"…...legitimate expectation must be given a broad interpretation as it could be used in more than one way utilizing the concept as the foundation for procedural fairness."*. See also Bandaranayake J's judgments in LORNA GUNASEKERA vs. PEOPLE'S BANK [SC No. 524/2002 decided on 20th June 2007], PERERA vs. NATIONAL POLICE COMMISSION [2007 BLR 14], PERERA vs. BUILDING MATERIALS CORPORATION [2007 BLR 59] and KARUPPANNAPILLAI vs. VISVANATHAN [2010 1 SLR 240 at. p.252].

To now turn to the decisions of our courts dealing with **substantive legitimate expectations**, in JAYASENA vs. PUNCHIAPPUHAMY [1980 2 SLR 43], Tambiah J, then in the Court of Appeal, citing the English decision of McINNES vs. ONSLOW FANE [1978 3 AER 211 at p.218] in which Megarry VC observed that a person who has applied for a license and has a *"legitimate expectation"* that it will be issued would be entitled to seek judicial review if license was not issued, quashed a cancellation of a license and issued a writ of *mandamus* compelling the validation of the license up to its expected term. Although Tambiah J did not refer to the doctrine of substantive legitimate expectation as we know it today, His Lordship granted reliefs which gave effect to a substantive legitimate expectation. A few years later, in MOWJOOD vs. PUSSADENIYA [1987 2 SLR 287] Sharvananda CJ issued a writ of *certiorari* quashing an eviction notice and restored the tenant to possession of the premises. The Court [at p. 297] proceeded, *inter alia*, on the basis that the tenant had a *"legitimate expectation"* that he would not be evicted from the premises unless the Commissioner of National Housing had previously notified the District Court that comparable alternative accommodation would be provided. The learned Chief Justice observed that this *"right and expectation"* gave the tenant sufficient interest to seek judicial review of the Commissioner's decision. Here too, although Sharvananda CJ did not refer to the doctrine of substantive legitimate expectation as we know it today, the court gave effect to a claimed substantive legitimate expectation. A few years later, in SANNASGALA vs. UNIVERSITY OF KELANIYA [1991 2 SLR 193] the petitioner had sought a writ of *mandamus* directing the University to confer a degree on him. It transpired that the University did not have the statutory power to do so until the required Rules were promulgated. The petitioner relied, *inter alia*, on AG OF HONG KONG and KHAN. Kulatunga J held that these decisions dealt with a breach of a legitimate expectation of a hearing and were inapplicable and observed that, in any event, the Privy Council had held in AG OF HONG KONG that a *"legitimate expectation"* could not be given effect, if doing so required a public authority to violate a statutory provision.

The decision in DAYARATHNA vs. MINISTER OF HEALTH AND INDIGENOUS MEDICINE appears to be the first reported instance of the doctrine of substantive legitimate expectation being expressly recognised and given effect by our courts. The facts were set out above. Amerasinghe J, with Gunasekera J and Weerasekera J agreeing, observed [at p.402] that *"Essentially, this is an appeal that the respondents should be required to act with fairness."* and went on to refer to the concept of substantive legitimate expectation as it had been developed by the courts in England.

Amerasinghe J [at p.403-404] quoted with approval Sedley J's views [cited above] in HAMBLE (OFFSHORE) FISHERIES LTD. Thereafter, Amerasinghe J went on to hold [at p.404] *"In my view, although the executive ought not in the exercise of its discretion to be restricted so as to hamper or prevent change of policy, yet it is not entirely free to overlook the existence of a legitimate expectation. Each case must depend on its circumstances, but eventually, it seems to me, that* ***the Court's delicate and sensitive task is one of weighing genuine public interest against private interests and deciding on the legitimacy of an expectation having regard to the weight it carries in the face of the need for a policy change.****".* [emphasis added]. In this connection, Amerasinghe J added [at p.405], again citing Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD with approval, *"…. It is also well-established that it is a misuse of power for (a public body) to act unfairly or unjustly towards the private citizen when there is no overriding public interest to warrant it."*.

Thus, it is evident that Amerasinghe J's views on the doctrine of substantive legitimate expectation in DAYARATHNA, were similar to those of Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD, and that the aforesaid `test' set out by Amerasinghe J is on much the same lines as the `test' advocated by Sedley J in that case. Accordingly, in DAYARATHNA, Amerasinghe J has: (i) endorsed Sedley J's view that a court is not limited to the test of *"bare rationality"* [in the WEDNESBURY sense] when deciding whether to give effect to a substantive legitimate expectation which is threatened by a public authority's change of policy or change of decision; (ii) further, Amerasinghe J has set out a `test' which, in such situations, calls on the court to weigh the petitioner's legitimate expectation against the public interest which led the public authority's change of policy or change of decision and then decide whether the public authority has acted *"unfairly or unjustly"* because there was no *"overriding public interest"* to warrant the public authority's change of policy or change of decision - *ie:* in much the same manner Sedley J suggested in HAMBLE (OFFSHORE) FISHERIES LTD.

Applying the aforesaid `test', Amerasinghe J held in DAYARATHNA [at p.412-3413] *"….. there is a substantive requirement that there must be an overriding public interest if a change of policy were to set at nought an individual's prior expectation: R. v. Secretary of State for the Home Dept. (ibid); R v. MAFF, ex p. Hamble Fisheries (ibid). There was no such interest claimed in the matters before me…… it is the duty of this Court to safeguard*

the rights and privileges, as well as interests deserving of protection such as those based on legitimate expectations, of individuals.". On that basis, Amerasinghe J held that the legitimate expectation of the petitioners to follow the promised training would *"survive the policy change that has taken place"* and directed the Ministry of Health to hold the training course for the petitioners.

It should also be mentioned that, in arriving at his aforesaid views, Amerasinghe J considered the aforesaid views expressed in AG OF NEW SOUTH WALES vs. QUIN which had held that recognition of a doctrine of substantive legitimate expectation [as opposed to the ready recognition of the doctrine of procedural legitimate expectation] would constitute an undue fetter on administrative discretion. In this regard, Amerasinghe J stated [at p.404-406] that he was mindful of the *"reluctance of some courts"* to recognise a doctrine of substantive legitimate expectations. However, His Lordship went on to comment that *"the cogency of the 'no fettering' argument …. has been overstated*" and cited, with approval, Craig who has said [Legitimate Expectations: A Conceptual Analysis 1992 Vol. 108 LQR 79 at 90] *"Policies must of course be allowed to develop, and in this sense it is correct to say that they cannot be fettered. One cannot, therefore, ossify administrative policy, which may alter for a variety of reasons …. Nonetheless, the 'no fettering" theme must be kept within bounds. Where a representation has been made to a specific person, or where conditions for the application of policy in a certain area have been published and relied on, then the public body should be under a duty to follow the representation or the published criteria. This does not prevent it from altering its general policy for the future, but it should not be allowed to depart from the representation or pre-existing policy in relation to an individual who has relied, unless the overriding public interest requires it, and then only after a hearing."*.

In the later judgment of MERIL vs. DE SILVA [2001 2 SLR 10] Gunawardena J in the Court of Appeal upheld what was clearly a substantive legitimate expectation of the petitioner to be awarded compensation by the respondent. In the course of doing so, the learned judge stated [at p.30] *"As will now be apparent the decision …….. can be assailed or attacked, under the judicial review procedure, at least, on the two grounds enunciated above: (a) irrationality and (b) legitimate expectation provided the petitioner has the locus standi or sufficient interest to challenge the decision and the issue involved is a public law issue."*. In other words, Gunawardana J held that the respondent's failure to pay compensation could be successfully impugned *both* on the ground that it was irrational and *also* [and separately] on the ground that it negated a legitimate expectation of the employee. Thus, in this decision, the Court of Appeal recognised that a claim based on a substantive legitimate expectation may be judicially reviewed on a standard different to the test of WEDNESBURY unreasonableness. Soon thereafter, in WICKREMARATNE vs. JAYARATNE, Gunawardana J held that a court could grant relief, by way of judicial review, in the case of substantive legitimate expectations and stated [at p.178] *"The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing*

before some right or expectation was affected, but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertakings and assurances." His Lordship held [at p.174-175] *"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 the harm being done to the applicant.".* Thus, although Gunawardana J did not refer to the previous judgment in DAYARATHNA in either of his aforesaid decisions, it is apparent the learned judge was of much the same view as Amerasinghe J in DAYARATHNA - *ie:* that, when a court has to decide whether to give effect to a petitioner's substantive legitimate expectation which is negated by a public authority's change of policy or decision, the court is not limited to the test of WEDNESBURY unreasonableness, but should, instead, weigh the substantive legitimate expectation against the public interest [as described earlier].

However, a markedly different approach was taken in the later decision of SIRIMAL vs. BOARD OF DIRECTORS OF THE CWE [2003 2 SLR 23]. In this case, Weerasooriya J [at p.28] observed that the aforesaid `test' formulated by Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD had been expressly disapproved of by the Court of Appeal in the later decision of HARGREAVES which held that, in cases of substantive legitimate expectation, a court can review a decision of a public authority only on the ground of WEDNESBURY unreasonableness. On that basis, Weerasooriya J, with Silva CJ and Ismail J agreeing, held [at p.29] *"The Court would only intervene if the decision maker's judgment was perverse or irrational. Thus the present position is that the substantive protection of legitimate expectation has to be sought on the more traditional approaches of the English Law namely (a) procedural protection and (b) protection in terms of 'Wednesbury' unreasonableness."*.

It is evident on reading Weerasooriya J's judgment that His Lordship considered the decision in HARGREAVES as having settled the law in this regard and that this was the reason Weerasooriya J stated in SIRIMAL that the *"present position"* is that judicial review on the ground of substantive legitimate expectation must be decided only *"in terms of 'Wednesbury' unreasonableness."* .

However, it appears that the attention of the court in SIRIMAL was not drawn to the decision of the Court of Appeal in COUGHLAN, which had been delivered *after* HARGREAVES. As mentioned above, in COUGHLAN, the Court of Appeal had distinguished the decision in HARGREAVES as being specific to the facts of that case and had rejected the idea that a claim of substantive legitimate expectation can only be upheld if the public authority's impugned change of policy or decision was unreasonable in the WEDNESBURY sense. Thus, the restrictive approach set out in HARGREAVES was no longer of general application when SIRIMAL was decided. Instead, at the time SIRIMAL

was decided, the decision in COUGHLAN was authority for the proposition that a court which is deciding a claim of substantive legitimate expectation should apply the `test' formulated in COUGHLAN of *"weighing"* the competing interests [as described earlier]. Weerasooriya J's attention was also not drawn to the fact that the decision of the Court of Appeal in COUGHLAN had been approved by the House of Lords in WALKER and in REPROTECH [PEBSHAM] LTD and also applied by the Court of Appeal in BIBI, all of which were decided *before* SIRIMAL.

Further, it appears that the attention of the court in SIRIMAL was not drawn to the previous decision of this Court in DAYARATHNA in which, as mentioned earlier, this Court had (i) taken the view that a court is not confined to the test of WEDNESBURY unreasonableness in cases of claimed substantive legitimate expectations; and (ii) set out a `test' which calls on the court to decide such cases by weighing the legitimate expectation against the public interest which led to the public authority's change of policy or change of decision [in the manner described earlier].

The aforesaid circumstances substantially diminish the weight of the view expressed in SIRIMAL that only the test of WEDNESBURY unreasonableness may be applied when a court is considering an application to review a public authority's change of policy which negates a petitioner's substantive legitimate expectation.

In any event a perusal of the judgment in SIRIMAL reveals that, although Weerasooriya J stated [at p.32] that the grounds relied on by the respondent to justify its change of policy *"have to be assessed in the light of the principle of unreasonableness"* crystallised in the WEDNESBURY description of unreasonableness, His Lordship does not appear to have proceeded to explicitly use that test to decide the case. In fact, a reading of the judgment suggests that, Weerasooriya J decided the case on a process of reasoning which resembles the `tests' formulated in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN. Thus, Weerasooriya J stated [at p.36], *"In view of the foregoing material, the decision of the 1st respondent Board to effect a change of policy in respect of extension of service of over 55 employees* ***is not warranted either upon considerations of public interest or upon known principles of fairness****….* ***The duty of the Court is to safeguard rights, as well as interests deserving protection based on legitimate expectations****."* and, on that basis, gave effect to the petitioner's claimed substantive legitimate expectation by granting the petitioners compensation in lieu of the salary they would have received up to the age of 60 years [emphasis added].

Subsequently, in SAMARAKOON vs U.G.C. [2005 1 SLR 119], Bandaranayake J held that a hand book published by the respondent gave the petitioners a *"legitimate expectation"* of being admitted to a Medical Faculty of a State University and directed that the petitioners be admitted to the relevant Medical Faculties This was another instance of the Court giving

effect to a substantive legitimate expectation. However, Bandaranayake J did not refer to the judgments in DAYARATHNA and in SIRIMAL. In JAYAWARDENA vs. FERNANDO [2008 BLR 255], the petitioner claimed that he had a legitimate expectation to be provided with a security escort. Sri Skandarajah J in the Court of Appeal cited the decisions in DAYARATHNA, WICKREMARATNE vs. JAYARATNE and SIRIMAL and stated [at p.259] *"The duty of the Court is to safeguard rights, as well as interests deserving protection based on legitimate expectations."* His Lordship gave effect to a substantive legitimate expectation by issuing a writ of *mandamus* directing the respondents to provide the petitioner with a security escort.

Three judgments which were delivered after the decision in SIRIMAL require closer consideration. In chronological sequence, the first of those is the judgment of Sisira De Abrew J in THIRIMAWITHANA vs. URBAN DEVELOPMENT AUTHORITY [2010 2 SLR 262]. De Abrew J, then in the Court of Appeal, conducted a comprehensive survey of the doctrine of legitimate expectation, referring to several relevant decisions including LIVERPOOL CORPORATION, AG OF HONG KONG, KHAN, the CCSU case, COUGHLAN, BEGBIE, DAYARATHNA, WICKREMARATNE vs. JAYARATNE and SIRIMAL. His Lordship emphatically recognised the validity of the doctrine of substantive legitimate expectation when he stated [at p.296] *"Considering the above judicial decisions, I hold that the public authorities are bound by its undertakings/promises provided (1) that they do not conflict with its statutory duty (2) that there is an (no) overriding public interest justifying the departure from the earlier undertakings or promises."*. De Abrew J proceeded to give effect to the petitioners' substantive legitimate expectation by issuing writs quashing the respondent's decision to transfer the land to a third party and prohibiting the use of the land for any purpose other than as assured to the petitioners . It is evident that, when De Abrew J upheld the petitioner's substantive legitimate expectation, His Lordship did not consider it necessary to apply the test of WEDNESBURY unreasonableness as suggested in SIRIMAL. Instead, De Abrew J applied a `test' of examining whether there was *"an overriding public interest"* which justified the respondent authority negating the petitioner's substantive legitimate expectation. Thus, in THIRIMAWITHANA vs. URBAN DEVELOPMENT AUTHORITY, the court adopted an approach similar to that taken in DAYARATHNA and in WICKREMARATNE vs. JAYARATNE.

The second is NIMALSIRI vs. FERNANDO [SC FR 256/2010 decided on 17th September 2015] in which Priyantha Jayawardena,PC J examined several aspects of the doctrine of legitimate expectation and succinctly summarised the doctrine. His Lordship observed [at p.9] that *"Legitimate expectation can be either based on procedural propriety or on substantive protection."* and went on to say *"In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the doctrine is based on the facts and circumstances of each case."*.

The third is the recent decision of GALLE FESTIVAL GUARANTEE LTD vs. GALLE MUNCIPAL COUNCIL [CA PHC No. 155/2010 decided on 01st March 2019] in which Janak De Silva J in the Court of Appeal referred to the development of the two-fold doctrines of procedural legitimate expectation and substantive legitimate expectation in our jurisdiction. With regard to the latter, De Silva J pertinently observed that the decision in COUGHLAN, which set out the applicable law at that time, does not appear to have been considered by the court in SIRIMAL. His Lordship applied the aforesaid approach set out in COUGHLAN [in category (c) of the aforesaid three types of situations described in that decision] when he decided an application for judicial review in which the petitioner claimed that his substantive legitimate expectation had been frustrated by a change of policy of the public authority.

I should also mention SIRIWARDANA vs. SENEVIRATNE [2011 2 SLR 1 at p.8] in which Bandaranayake J, as she then was, observed that *"A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact."*. and [at p.11] *"…..the concept of legitimate expectation would embrace the principle that in the interest of good administration it is necessary for the relevant authority to act fairly."*. See also Bandaranayake J's judgment in WANNIGAMA vs. INCORPORATED COUNCIL OF LEGAL EDUCATION [2007 2 SLR 281] and Bandaranayake CJ's judgments in DE ALWIS vs. EDIRISINGHE [2011 1 SLR 18 at p.27] and KURUKULASOORIYA vs. EDIRISINGHE [2012 BLR 66]. Further, in 609 MANUFACTURERS (PVT) LTD vs. COMMISSIONER GENERAL OF EXCISE [CA Writ 242/2015 decided on 15th December 2016] Thurairaja J, then in the Court of Appeal, commented [at p. 4] that *"Legitimate expectation arises to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. It is based on the principles of natural justice and fairness, and seeks to prevent authorities from abusing power."*.

Very recently in ZAMRATH vs. SRI LANKA MEDICAL COUNCIL [SC FR 119/2019 decided on 23rd July 2019], Dehideniya J examined the rationale underlying the doctrine of legitimate expectation and observed [at p.9] that the doctrine *"….. ensures legal certainty which is imperative as the people ought to plan their lives, secure in the knowledge of the consequences of their actions. The perception of legal certainty deserves protection, as a basic tenet of the rule of law which this court attempts to uphold as the apex court of the country. The perception of legal certainty becomes negative when the authorities by their own undertakings and assurances have generated legitimate expectations of people and subsequently by their own conduct, infringe the so generated expectations."*. His Lordship went on to state [at p.11] that when deciding cases where a petitioner complains of the negation of a substantive legitimate expectation, *"The main function of this court in this type of case is to strike a balance between ensuring an administrative authority's ability to*

change its policies when required, and make sure that in doing so they do not defeat the legitimate expectations of individuals by acting unfairly and arbitrarily.".

Before concluding this survey of the decisions [of which I am aware] on the subject of substantive legitimate expectation in our jurisdiction, I should mention, for the sake of completeness, some other decisions which have referred to various specific *aspects* of the doctrine of legitimate expectation. In GALAPATHTHY vs. SECRETARY TO THE TREASURY [1996 2 SLR 109 at 114] Ranaraja J in the Court of Appeal held that a claim by a petitioner that he has a legitimate expectation of receiving a benefit based on an assurance given to him by a public authority, cannot succeed if he has breached a condition specified in that assurance as one with which he must comply in order to receive the benefit. In VASANA vs. INCORPORATED COUNCIL OF LEGAL EDUCATION [2004 1 SLR 154 at p.163] Amaratunga J, then in the Court of Appeal held that a court will not give effect to a legitimate expectation which is claimed upon the basis of an assurance given due to a mistake of fact and subsequently withdrawn when the mistake became known. In TOKYO CEMENT (COMPANY) LTD vs. DIRECTOR GENERAL OF CUSTOMS [2005 BLR 24 at p.27-28] Silva CJ, citing Lord Greene, MR in MINISTER OF AGRICULTURE AND FISHERIES vs. HULKIN [1950 1 KBD 148 at p.154], held that a representation not permitted by law and made *ultra vires*, cannot found a legitimate expectation. This approach was followed by the Court of Appeal in CEYLON AGRO-INDUSTRIES LTD vs. DIRECTOR GENERAL OF CUSTOMS [CA Writ 622/2009 decided on 14th February 2011 at p.8], 609 MANUFACTURERS (PVT) LTD vs COMMISSIONER GENERAL OF EXCISE [at p.6-7] and, more recently, in PUSHPARAJA vs. UC OF NAWALAPITIYA [CA PHC No. 161/2008 decided on 15th March 2019 at p.6]. In FERNANDO vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD [2006 3 141 at p.147] Amaratunga J observed that a legitimate expectation *"….. could arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*. In RATHNAKUMARA vs. THE PGIM [SC Appeal No. 16/2014 decided on 30th March 2016] Priyantha Jayawardena,PC J held [at p.13] that a legitimate expectation may arise from the contents of subordinate legislation. In the aforesaid decision of KALUARACHCHI vs. CEYLON PETROLEUM CORPORATION, Murdu Fernando J held [at p. 11-12] that the petitioner could not succeed with the claim that he had an enforceable substantive legitimate expectation because the alleged assurance relied on to create the expectation was *"….ambiguous, vague and not clear and thus will not create a legitimate expectation."*.

Having concluded the aforesaid survey, there is an issue of some importance which needs to be examined. That issue arises from the fact that two decisions of the Supreme Court - in DAYARATHNA and in SIRIMAL - refer to two distinctly different `tests' to be applied by a court when a petitioner claims that his substantive legitimate expectation has been negated by a public authority's change of policy or change of decision - *ie:* Amerasinghe J

in DAYARATHNA was of the view that a court is not confined to the test of WEDNESBURY unreasonableness and held that the court should weigh the competing interests and decide whether the public authority has acted *"unfairly or unjustly"* [in the manner described earlier]. In contrast, Weerasooriya J held in SIRIMAL that a court is confined to applying the test of WEDNESBURY unreasonableness.

Somewhat unusually, it appears that the issue of these two different `tests' has not yet been specifically examined by this Court. Perhaps I should qualify that statement by saying I am not aware of any decision of the Supreme Court which has examined this issue, though the aforesaid decision of the Court of Appeal in GALLE FESTIVAL GUARANTEE LTD vs. GALLE MUNCIPAL COUNCIL touches on the issue. It is clearly time for this Court to examine this ambiguous position and identify which `test' is to be applied.

In order to do so, it will be helpful to first turn to the English Law which, as mentioned earlier, will, *mutatis mutandis*, guide the application of our case law and apply where there is a *lacuna* in our case law. In this regard, as mentioned earlier, the decision of Lord Woolf, MR in the Court of Appeal in COUGHLAN [and, previously, the decision of Sedley J in the High Court in HAMBLE (OFFSHORE) FISHERIES LTD] held that, in such cases, the court is *not* confined to reviewing the public authority's acts on the test of WEDNESBURY unreasonableness and, instead, should weigh the competing interests and then decide by applying a yardstick of what was described as `fairness' by Sedley J and `unfairness which will amount to an abuse of power' by Lord Woolf, MR. As mentioned earlier, during the nearly two decades since COUGHLAN was decided, the aforesaid approach taken in COUGHLAN has been consistently approved by the House of Lords [and Privy Council] and applied by the Court of Appeal and High Court, albeit subject to the aforesaid restrictions identified by Laws LJ in BEGBIE, NADARAJAH and BHATT MURPHY and ORS.

To move on to our law, it should be mentioned here that COUGHLAN had not been decided at the time Amerasinghe J specifically approved of Sedley J's `test' in HAMBLE (OFFSHORE) FISHERIES LTD. However, as observed earlier, Lord Woolf, MR's `test' in COUGHLAN is on much the same lines Sedley J's `test'. Thus, the weight of the English Law stands firmly behind the approach formulated by Amerasinghe J in DAYARATHNA.

Further, Dehideniya J's recent observation in ZAMRATH vs. SRI LANKA MEDICAL COUNCIL [at p.9-10] which I cited earlier, makes it clear that His Lordship was of the view that, in these instances, a court has to *"strike a balance"* between the legitimate expectation of the petitioner, and the public authority's change of policy or change of decision and ensure that the legitimate expectation is not defeated *"unfairly or arbitrarily"*. In taking this view, Dehideniya J cited Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD and Amerasinghe J in DAYARATHNA with apparent approval and had no recourse to

the decision in SIRIMAL. It is evident that the approach taken by this Court in ZAMRATH vs. SRI LANKA MEDICAL COUNCI, is on similar lines to that voiced in DAYARATHNA.

It has to be also kept in mind that several decisions of the Court of Appeal referred to above - *ie:* MERIL vs. DE SILVA, WICKREMARATNE vs. JAYARATNE, THIRIMAWITHANA vs. URBAN DEVELOPMENT AUTHORITY and GALLE FESTIVAL GUARANTEE LTD vs. GALLE MUNCIPAL COUNCIL - have all formulated and applied approaches on broadly similar lines to that set out in DAYARATHNA, when deciding cases of this type.

Turning to the decision in SIRIMAL, I have not been able to find a subsequent reported decision which has followed the view set out therein that, in cases of this type, a court is confined to the test of WEDNESBURY unreasonableness. In any event, for the reasons I set out in some detail earlier on and need not reiterate here, the authority of the decision in SIRIMAL is significantly diminished.

Thus, the weight of authority in our law is clearly in favour of the aforesaid approach formulated by Amerasinghe J in DAYARATHNA.

I should also mention here that, quite apart from the *cursus curiae* in our jurisdiction which broadly follows the approach in DAYARATHNA, there is good reason why it not appropriate, in cases of this type, to confine a court to reviewing the public authority's decision on the traditional test of unreasonableness described in WEDNESBURY.

That is because the test of WEDNESBURY unreasonableness is usually applicable in circumstances where there is a *single* exercise of power by the public authority - *ie:* when it takes a decision affecting a right of the petitioner [or, in some cases, affecting an interest recognised by law such as in the `License cases'] - and the petitioner says that this decision should be set aside. In such cases, the traditional test of WEDNESBURY unreasonableness is usually adequate to ascertain whether this `single' exercise of power by the public authority amounts to an abuse of its power and, therefore, it should be struck down.

However, in cases where the petitioner claims a substantive legitimate expectation, there is typically a *dual* exercise of power by the same public authority. First, an exercise of the public authority's power when it gave the assurance to the petitioner which created his expectation; and, later, another exercise of the same public authority's power when it changed its policy or decision relating to the previous assurance and, thereby, negated the initial expectation which it had created by its previous assurance. A petitioner who claims a substantive legitimate expectation is caught between these two exercises of power by the same public authority. He relies on the first and challenges the second but nevertheless,

his case for judicial review is inextricably linked to both exercises of power. Thus, in COUGHLAN, Lord Woolf, MR commented [at para. 66] that in this type of case the individual is *"trapped"* between "*two lawful exercises of power (the promise and the policy change) by the same public authority"*

In cases of this type, the first exercise of power [*ie:* by which the public authority gave an assurance which created a substantive legitimate expectation] underlies the petitioner's case and the court would typically only be required to look at the legality and procedural propriety of the assurance and not its rationality. Therefore, if a court is confined to applying the traditional test of WEDNESBURY unreasonableness in cases of substantive legitimate expectation, the court will be effectively limited to testing *only* the *latter* exercise of power [*ie:* by which the public authority changed its previous policy or decision] by asking whether it is unreasonable in the WEDNESBURY sense. However, in the majority of cases, that second exercise of power is very likely to satisfy the low bar set to decide what is deemed to be `reasonable' in the traditional WEDNESBURY test which, notwithstanding Lord Cooke's observations in R. vs. CHIEF CONSTABLE OF SUSSEX, *ex parte* INTERNATIONAL TRADER'S FERRY LTD [1999 2 AC 418 at p. 452], permits the court to consider only the *"bare rationality"* of the public authority's second exercise of power. Thus, confining judicial review to the test of WEDNESBURY unreasonableness in cases where a substantive legitimate expectation is claimed, will, in many cases, reduce the doctrine of substantive legitimate expectation to futility. As Lord Woolf, MR observed in COUGHLAN [at para. 66] referring to the aforesaid second exercise of power by the public authority, *"In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process."*

Therefore, it is important that, in cases of this type, a court which is considering judicial review must necessarily consider and evaluate *both* competing interests - *ie:* the assurance [or practice or circumstances] which created the expectation *and* the reasons for the public authority's change of policy or decision which resulted in the negation of that expectation. Considering only one of these competing interests would place the court in the abhorrent realm of inequity.

It is for these reasons that, in my view, applying a test of WEDNESBURY unreasonableness is inappropriate in cases which consider a substantive legitimate expectation. Further, as I mentioned, the authority of the decision in SIRIMAL is diminished for the reasons set out earlier. Consequently, it is with the great respect that I am compelled to say that I am unable to agree with the views expressed in SIRIMAL with regard to the `test' to be applied in cases of this type.

Instead, upon a careful consideration of the issues which arise in this type of case, I am in respectful agreement with the general lines of the `test' set out in DAYARATHNA [and the similar `tests' formulated in HAMBLE (OFFSHORE) FISHERIES LTD and COUGHLAN] which have been described earlier.

An aspect of the [similar] `test' set out in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN is that the character of this `test' resonates with the `principle of proportionality' which originated in European jurisdictions and has been often referred to by the English Courts and also, in some instances, by our Courts - *eg:* in the area of fundamental rights by Fernando J in AYOOB vs. IGP [1997 1 SLR 412 at p. 419] and in the area of administrative law by Gunawardana J in the Court of Appeal in PREMARATNE vs. UGC [1998 3 SLR 395 at p.418] and NEIDRA FERNANDO vs. CEYLON TOURIST BOARD [2002 2 SLR 169 at p.187] and by Gooneratne J in GOONERATNE vs. SRI LANKA LAND RECLAMATION AND DEVELOPMENT CORPORATION [CA 412/2007 decided on 24th February 2011 at p. 12]. Thus, in NADARAJAH, Laws LJ [at paras. 68 and 69] referred to the relevance of the principle of proportionality in the application of the doctrine of legitimate expectation and observed that, in cases where a legitimate expectation is claimed, the court should judge whether the public authority's decision to negate the legitimate expectation was a *proportionate response* in the light of the public duty or requirements of public interest claimed by the public authority. As mentioned earlier Laws LJ stated in this connection, *"….. the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case."*

There is another aspect of the character of the `test' set out in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN which must be examined. That is the issue that, when Sedley J, Amerasinghe J and Lord Woolf, MR set out broadly similar `tests' in all three of these cases, they did so in general terms. As a result, these `tests', by their very nature, vest a great deal of discretion in the court, thereby leaving considerable room for the hazards of subjectivity and inconsistency which can accompany an exercise that calls on the court to weigh two very different competing interests - one a private interest and the other the public interest - and then apply the fluidly supple and unstructured standards of *"fairness",* "*injustice"* and *"abuse of power"* to judicially decide which of those competing interests should prevail. *"Fairness"*, as Lord Wilson said in R. [MOSELEY] vs. HARINGEY LONDON BOROUGH COUNCIL [2014 1 WLR 3947 at para. 24], *"is a protean concept.…."* and it can be correctly said that the concepts of "*injustice"* and *"abuse of power"* are equally variable. Needless to say, each individual's perception of these concepts will be different.

In my view, these factors could make the doctrine of substantive legitimate expectation an unruly and wayward horse if it is left to be guided only by the distinctly `general' guidelines set out in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN. The result would be the standards applied to judicial review in cases of this type varying widely from court to court and from case to case. That, in turn, would reduce the doctrine to *"little more than a mechanism to dispense palm-tree justice"* as once observed by a writer [Watson in SLS Journal Vol. 30 Issue 4 at p.633-652]. The author was referring to Deborah, wife of Lapidoth, who is said to have dispensed judgments under a date palm tree in the land of Ephraim [Book of Judges KJV 4:4-5].

It seems to me that it was this danger which led Laws LJ, in BEGBIE, NADARAJAH and BHATT MURPHY AND ORS, to introduce some guideposts which serve to mark a course on which the doctrine of substantive legitimate expectation could run in a more orderly manner. As mentioned earlier, Laws LJ was of the view that the successful invocation of the doctrine of substantive legitimate expectation would usually require that: (i) the assurance [or practice or circumstances] relied on was specific, unambiguous and unqualified [Laws LJ used the words *"pressing and focussed"*]; (ii) the assurance was given to [or the practice or circumstances were applicable to] an individual or to an identified group and not to innominate or undetermined persons or to the *"public at large"*; (iii) the substance of the assurance [or the result expected from the practice or the circumstances] was definable and limited in scope and applicable to the individual or identified group relying on the assurance [or practice or circumstances] and not to the public at large; (iv) the court is able to reliably assess the consequences of giving effect to the claimed expectation; and (v) the questions in issue are not those relating to *"general policy affecting the public at large or a significant section of it"* nor those in the *"macro-political field"* since deciding such issues would require judges *"themselves donning the garb of policy-maker, which they cannot wear."*.

I am in respectful agreement with these guidelines formulated by Laws LJ. It seems to me that they arise from prudent common sense and offer a practical road map which can direct the application of the doctrine of substantive legitimate expectation. It is often the case that common sense is the genesis of the law, particularly when ideals of justice thrust forth the elemental principles, common sense, which is usually drawn from prudence and practicality, must step in to shape and refine these principles and make the law. Further, the rule that the English Law is to apply, *mutatis mutandis*, where there is a *lacuna* in our law, gives authority to the contention that these guidelines can be readily applied by our courts.

On an intrinsically related note, it is necessary to keep in mind the long-recognised principle that the larger public interest requires that public authorities are able to adjust, alter, amend and, if necessary, abandon previous policies and decisions when it is

necessary to do so in the pursuance of their duties and in the public interest. As Sedley J said in HAMBLE (OFFSHORE) FISHERIES LTD [at p. 731], public authorities should be able *"to formulate and to reformulate policy"* when necessary. On the same lines, Lord Diplock observed in HUGHES vs. DEPARTMENT OF HEALTH [1985 AC 776 at p. 875], *"Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government."*.

It hardly needs to be said here that an indiscriminate application of the doctrine of substantive legitimate expectation to every change of policy or change of decision which affects a person's expectations, could run counter to that normative value. Accordingly, I am in respectful agreement with the aforesaid views of Laws LJ in BHATT MURPHY AND ORS who held [at para. 35] that a court should apply a *'rigorous standard"* when determining whether the claimed legitimate expectation should override the public interest and observed [at paras. 41-42] that cases where the doctrine of substantive legitimate expectation can be successfully invoked *"….. are concerned with exceptional situations ….."*. In such cases, the duties placed on a court, in the course of judicial review of administrative action, to ensure that public authorities act fairly and to strike down abuse of power, justify the court making the public interest defer to the substantive legitimate expectation. Needless to say, in cases where the court considers the public interest in issue is of high importance, the public interest will usually prevail over the prejudice caused to the individual.

In my view, the resulting position is that the doctrine of substantive legitimate expectation applies in our jurisdiction in much the same manner as it now applies in England. I have earlier made an attempt at setting out the applicable principles when considering the doctrine as it now stands in the English Law. Those principles will also apply in our jurisdiction, and here too, subject to the necessity of deciding each case on its own facts and circumstances keeping in mind the court's objective of ensuring fairness, proportionality and justice and preventing an abuse of power while, at the same time, protecting the public interest. It is inherent in such an exercise, that these principles taken from precedent would be a guide and not hard and fast rules.

To sum up, I am of the view that, in cases where a court is deciding a claim that a petitioner's substantive legitimate expectation has been negated by a public authority's change of policy or change of decision which is said to have been adopted in the public interest, the court should adopt a two-step approach. First, to examine whether the constituent elements of the claimed substantive legitimate expectation are in line with the principles referred to earlier which describe the usual characteristics of a substantive legitimate expectation that a court may be inclined to protect and enforce. If those constituent elements or such of them as are deemed appropriate in the facts and

circumstances of the case are present, the second step would be to apply a `test' on the broad lines of that set out in DAYARATHNA. To be more specific, when doing so: the court should weigh the character and substance of the expectation and the prejudice caused to the petitioner by its frustration, on the one hand; against the importance of the public interest which led to the public authority's change of heart, on the other hand; and then decide whether that exercise of weighing the competing interests leads to the conclusion that the petitioner's expectation is of such weight and the consequences of its frustration are so prejudicial to him when compared to the public interest relied on by the public authority, that the public authority's decision to change its policy and negate the expectation was disproportionate or unfair or unjust and amounted to an abuse of power which should be quashed; **or** whether the decision to change the policy should stand because the public authority has acted proportionately, fairly and justly when it decided that the petitioner's substantive legitimate expectation could not be granted since public interest demanded a change of policy.

In my view, a `test' of this nature satisfies the aforesaid policy requirement that a rigorous standard should be applied in cases where the doctrine of substantive legitimate expectation is invoked so as to avoid unnecessarily fettering administrative discretion to change policies or decisions where the public interest requires doing so.

Before moving on to determining the petitioners' application, there are three other matters relating to the doctrine of legitimate expectation, which I would like to briefly mention.

Firstly, it seems to me that, although procedural legitimate expectations and substantive legitimate expectations have been traditionally viewed as two different categories which have to be decided upon different criteria, they are, in reality, often connected and are two shades in one spectrum. It is often the case that the procedural expectation segues into the substantive one, with no discernible pause or break. To borrow a phrase used by Laws LJ in BEGBIE [at para.80], though in a different context, procedural legitimate expectations and substantive legitimate expectations are not *"hermetically sealed"* categories. Instead, as Lord Woolf, MR observed in COUGHLAN [at para. 59], there is often *"…..the difficulty of segregating the procedural from the substantive….."*. An example is the decision in DAYARATHNA where Amerasinghe J held that the petitioner had a procedural legitimate expectation of being heard but did not give effect to that procedural expectation, and, instead, gave effect to the petitioner's substantive legitimate expectation of following the training course. As seen from the previous discussion, the guidelines that should be applied when deciding either type of legitimate expectation are broadly similar. The significant difference being that, in cases where only a procedural legitimate expectation to be heard is invoked, the court would usually apply a liberal standard and be more ready to grant that expectation so as to ensure fairness, and refrain from doing so only in exceptional circumstances where the public interest requires that the petitioner cannot be

given a hearing. On the other hand, in cases where a substantive legitimate expectation is claimed, the court would apply a more rigorous standard, for the reasons I mentioned earlier. However, it is unwise and unnecessary to make too much of seemingly different standards or rules, as they are all aspects of the same approach which, in all cases where a legitimate expectation is claimed, require the court to balance the expectation and the public interest and decide which should prevail in order to ensure proportionality, fairness and justice and quash an abuse of power. In this connection, it is apt to recall Lord Sumption's recent observation in R. [GALLAHER GROUP LTD] vs. THE COMPETITION AND MARKETS AUTHORITY [2018 UKSC 25/ 2018 2 WLR 1583 at para. 50] that, *"In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories.".*

Next, as mentioned earlier, the law, as it presently stands, is that an assurance given *ultra vire*s by a public authority, cannot found a claim of a legitimate expectation based on that assurance. But, it has to be recognised that there may be many instances where a petitioner who relies on an assurance given by a public authority or one of its officials, reasonably believed that the public authority or official who gave it to him was acting lawfully and within their powers. It is also often the case that an individual who deals with a public authority will find it difficult to ascertain the extent of its powers and those of its officials. In such cases, much hardship will be done to an individual who *bona fide* relies on an assurance given to him by a public authority or one of its officials and is later told the assurance he relied on and acted upon, sometime with much effort and at great cost to him, cannot be given effect to because of a flaw regarding its *vires*. In such instances, the principle of legality comes into conflict with the principle of certainty and, the law as it stands now, is that the illegality of the assurance will defeat the value of certainty which contends that the assurance should be given effect. However, that outcome can cause grave prejudice to an individual, for no conscious fault of his own. There has been much discussion among academic writers on how the law should resolve this dilemma. In ROWLAND vs. THE ENVIRONMENT AGENCY, the Court of Appeal referred to these issues and Mance LJ observed [at para. 152] that, in view of recent decisions of the European Court of Human Rights, a public authority's assurance having being given *ultra vires "can no longer be an automatic answer under English Law to a case of legitimate expectation."*. Peter Gibson LJ [at para. 85] referred to the decision of the European Court of Human Rights in PINE VALLEY DEVELOPMENTS vs. IRELAND [199114 EHRR 319] and commented on the possibility, in cases where the legitimate expectation is based on an assurance which turns out to have been given *ultra vires*, of the court ordering *"other relief which it is within the powers of the public body to afford, e.g. the benevolent exercise of a discretion available to alleviate the injustice or payment of compensation."*. These questions will have to await consideration by our courts on a suitable occasion.

Thirdly, it is well established that this Court will take into account an arbitrary or unjust frustration of a petitioner's legitimate expectation by a public authority when determining whether there has been a violation of that petitioner's fundamental rights guaranteed by Article 12 (1) of the Constitution. As Amaratunga J held in FERNANDO vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD at p.147], *"The existence of a legitimate expectation, as opposed to a legally enforceable right, is a relevant factor in considering the just and equitable relief this Court may grant under Article 126 (4) of the Constitution when it is shown that the action of the executive which frustrates the legitimate expectation amounts to a denial of the right to equal protection of the law guaranteed by the Constitution.".* Similarly, in NIMALSRI vs. FERNANDO Priyantha Jayawardena,PC J stated [at p.8] *"In Dayaratne v. Minister of Health and Indigenous Medicine Amerasinghe J. held that destroying of a legitimate expectation is a ground for judicial review which amounted to a violation of equal protection guaranteed by Article 12 of the Constitution."*. In FOOD CORPORATION OF INDIA V. M/S KAMDHENU CATTLE FEED INDUSTRIES [1992 Indlaw SC 426] Verma J, speaking for the Supreme Court of India, outlined the rationale for the aforesaid principle when he said, [at paras. 10-12],*"…… the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet ….. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case ….. this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law."*.

Determination

As mentioned at the outset, the first issue before us is to decide whether the petitioners have succeeded in establishing that they have a *"legitimate expectation"* of being absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units]. It is only if the petitioners have succeeded in doing so, that it will become necessary to examine whether such a *"legitimate expectation"* has been arbitrarily or irrationally negated by the respondents, thereby, making it incumbent on this Court to protect and enforce that *"legitimate expectation"* because its negation has violated the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

As evident from the principles I endeavoured to set out earlier, the first characteristic which will sustain a petitioner's claim that he has a substantive legitimate expectation the respondent public authority will act in a particular manner with regard to him, is that the petitioner must establish the public authority gave him a specific, unambiguous and unqualified assurance that it will act in that manner [or, alternatively, that the respondent

public authority has followed an established and unambiguous practice which entitled the petitioner to have a legitimate expectation the public authority will continue to act in that manner or that the facts and circumstances of the dealings between the public authority and the petitioner have created such an expectation].

Turning to the facts before us, the documents establish that the petitioners were appointed to the post of Development Assistants in the Department of Police in an unmistakably `civilian capacity' and that they continued to serve in that `civilian capacity'. Thus, the letter marked "P2" by which the petitioners were attached to the Department of Police with the designation of "Community Relations Officers", makes it clear that this was done as part of the Graduate Scheme and not as a precursor to appointment to the Sri Lanka Police Force as police officers. The subsequent letter marked "P7" by which the petitioners were appointed to the posts of Development Assistants also makes it clear that the appointment was made as part of the Graduate Scheme and that the petitioners would serve as public officers in the Public Service and not as police officers in the Sri Lanka Police Force. Thereafter, the Circulars and letters marked "P9", "P10" and "P11" issued by the Inspector General of Police referring to the duties of Development Assistants in the Department of Police, make it clear that the petitioners' duties were in fields such as community relations, developing a healthy relationship between the Sri Lanka Police Force and the community and the collection of data. Such duties are very different to the ordinary duties of police officers in the Sri Lanka Police Force which, as stated in section 3 and section 56 of the Police Ordinance, are *"the protection of persons and property"*, *"to use his best endeavours and ability to prevent crimes, offences, and public nuisances", "to preserve the peace"*, *"to apprehend disorderly and suspicious characters"* etc. Thus, the Circular marked "P14(f)" issued by the Inspector General of Police clearly differentiates between police officers serving in the Sri Lanka Police Force on the one hand and persons serving as Development Assistants in the Department of Police on the other hand.

The fact that the petitioners were, at all times, regarded as public officers in the Public Service who were serving in a `civilian capacity' in the Department of Police and not as police officers in the Sri Lanka Police Force, is well illustrated by Clause 7 of the document marked "P21" [which is annexed to the recommendation marked "P20" relied on by the petitioners]. Clause 7 of "P21" observes that, in addition to police officers of the Sri Lanka Police Force, there are several public officers who are members of one of the Combined Services of the Public Service presently serving in the Department of Police in civilian capacities, and that the petitioners too are regarded as public officers serving in a civilian capacity in the Department of Police [*"සාමාන්ය සිවිල් නිලධාරීන් ලෙස සලකා..."*]. Further, the letters dated 26th July 2006 and 29th November 2006 marked "P17(a)" and "P17(b)" written by the Graduate Employees Union on behalf of the petitioners, clearly acknowledge that the petitioners were regarded as public officers in the Public Service serving in a civilian capacity in the Department of Police.

The aforesaid document dated 30th September 2010 marked “P20” which the petitioners rely on, was authored by the 12th respondent, who was then serving as a Senior Deputy Inspector General of Police. It is addressed to the Inspector General of Police. Its contents have been described earlier. A perusal of “P20” makes it clear that it is only a recommendation made by the 12th respondent. The Inspector General of Police has stated that this recommendation could not be accepted for several reasons, which were mentioned earlier. These reasons appear to be rational. More importantly, there is no material before us which suggests that the recommendation made by the 12th respondent in “P20”, went any further. Thus, “P20” cannot be regarded as any more than a recommendation made by a senior police officer, which was not accepted by the Department of Police and the respondents.

In these circumstances, any subsequent decision to completely transform the nature of the employment of the petitioners by absorbing the petitioners into the Sri Lanka Police Force, [*ie:* to change the nature of their position from that of public officers in the Public Service serving in a `civilian capacity’ to the very different position of police officers of the Sri Lanka Police Force appointed under the Police Ordinance], would be reached only after careful consideration and, undoubtedly, be accompanied by comprehensive documentation.

However, the petitioners have been unable to produce a single document which indicates that the Department of Police or some other duly authorised officer of the Sri Lanka Police Force or any of the respondents took a decision to absorb the petitioners into the Sri Lanka Police Force. There is also no material before us which suggests any written or verbal assurance to that effect, was given to the petitioners.

In this regard, the petitioners have also claimed that the Department of Police required the petitioners to sign a Bond by which the petitioners undertook to serve at the Department of Police and not to apply for a transfer to any other Government Department, until the petitioners retired from the Public Service. However, the letter marked “P5” states that the petitioners have refused to sign such a Bond. In any event, a request made by the Department of Police that the petitioners sign such a Bond undertaking to serve in the Department of Police in a `civilian capacity’ cannot be said to result in the Department of Police having given an assurance that the petitioners would be subsequently absorbed into the Sri Lanka Police Force as police officers.

Consequently, the only conclusion that can be reached is that the petitioners were not given any written or verbal assurance whatsoever by any of the respondents, that the petitioners would be absorbed into the Sri Lanka Police Force as police officers [either into the Regular Police Force or into one of its specialised Units].

Having ascertained that there was no written or verbal assurance on which the petitioners can found their claim of the aforesaid legitimate expectation, it is necessary to consider whether the Department of Police has followed an established and unambiguous practice which entitled the petitioners to have a legitimate expectation that they would be absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units] as police officers or whether the facts and circumstances of the dealings between the Department of Police and the petitioners could be said to have created such an expectation.

In this connection, the petitioners appear to have been the first batch of recruits under the Graduate Scheme to be appointed to the posts of Development Assistants in the Department of Police. There is no suggestion that there were any subsequent batches of similar recruits to the same posts. In these circumstances, the petitioners cannot rely on any past practice or on any comparable practice in the Department of Police.

The petitioners have also attempted to establish a practice of appointing public officers recruited to comparable posts in other Departments, to higher positions within those Departments. The petitioners state that: (i) “Development Officers” performing duties associated with the function of planning in Ministries and Government Departments have been given the opportunity of being appointed to Class II Grade II of the Sri Lanka Planning Service on a supernumerary basis, as set out in the Gazette Notification marked “P18”; and (ii) “Development Assistants” serving in the Department of Immigration and Emigration have been appointed as Authorised Officers in the cadre of that Department, as set out in the letter marked “P19”. However, the petitioners are not helped by the aforesaid instances since: (i) a perusal of “P18” shows that the “Development Officers” referred to therein had held that post in a Ministry or Government Department from at least 01st January 2002 onwards and are not similarly circumstanced with the petitioners who had been appointed “Development Assistants” in 2005. In any event, the selection of “Development Officers” referred to in “P18” to be appointed to Class II Grade II of the Sri Lanka Planning Service, was on the basis of a competitive examination and was not on the basis of an absorption into the Sri Lanka Planning Service; and (ii) “P19” is only a letter appointing the addressee to the post of “Authorised Officer” in the Department of Immigration and Emigration and does not bear out the rest of the claims made by the petitioners.

Next, the mere fact that the petitioners were given introductory training at the Sri Lanka Police College does not help them in their claim. A perusal of the documents marked “P3(a)” to “P3(d)” and “P4” show that, during this training course, the petitioners were exposed to a wide range of subjects, with the bulk of the training covering 120 hours each of classes in the Tamil Language and English Language and 42 hours of classes in Computer Training. The training in regular `police work’ was not more than a perfunctory

introduction. It is relevant to mention that "P3(a)" describes the aforesaid training given to the petitioners as *"ජ්‍රජා සංවර්ධන නිලධාරීන් සඳහා පුහුණු පාඨමාලාව"*. In contrast, as set out in "P16", the training given to Police Officers newly recruited to the Regular Police Force is described as *"සාමාන්‍ය පොලිස් රාජකාරී වලට යොමු කිරීමේ පුහුණු පාඨමාලාව"* [*"Basic Induction Training"*] and covers a considerably longer period than the period of training given to the petitioners. Similarly, the petitioners are not helped in their claim by the fact that, from 2005 onwards, the petitioners have received some sporadic training in a variety of fields such as para-legal work, computer operations, the law, human rights, community policing, criminology, human trafficking, counselling, public relations and research methodologies, as evidenced by the documents marked "P6(a)" to "P6(l)".

In these circumstances, the inevitable conclusion is that the petitioners have also failed to show that the Department of Police has followed an established and unambiguous practice which entitled the petitioners to have a legitimate expectation that they would be absorbed into the Sri Lanka Police Force as police officers or to show that the facts and circumstances of the dealings between the Department of Police and the petitioners have created such an expectation.

In UNION OF INDIA vs. HINDUSTAN DEVELOPMENT COPORATION [1993 INDLAW SC 1085 at para. 57], Reddy J observed that a mere *"wish, a desire or a hope"* cannot found a legitimate expectation which will be protected by a court. It is clear that the petitioners had, at best, a *"wish, a desire or a hope"* that they would be absorbed into the Sri Lanka Police Force as police officers. As Reddy J said, that does not help the petitioners to establish the substantive legitimate expectation they claim in this case.

Since the petitioners have failed to establish that there was an assurance or a practice or circumstances on which their alleged *"legitimate expectation"* can be founded, there is no need to go further with what, in effect, would be a sequential exercise of examining whether the other characteristics of a substantive legitimate expectation which a court will protect, are present.

Accordingly, I conclude that the petitioners have failed to establish the first premise on which they rested their case - *ie:* that they have failed to establish their claim that they have a legitimate expectation of being absorbed into the Sri Lanka Police Force as police officers [either into the Regular Police Force or into one of its specialised Units] .

The other premise which the petitioners' have pleaded in support of their case has now to be examined. That is their claim that the Service Minute marked "P23" is arbitrary, irrational and violative of the petitioners' aforesaid fundamental rights for the reason that "P23" does not take into account the petitioners' *"training, qualifications and experience"*

and also because the scheme set out “P23” is *per se* irrational and unfair, *inter alia*, for the reason that the petitioners would *“stagnate”* in one position.

Determining whether there is merit in these claims requires an examination of the Service Minute marked “23”. As mentioned earlier, “P23” constituted a new Programme Officers’ Service in the Public Service. “P23” has been approved by the Public Service Commission and, thereafter, issued by the Director General of Combined Services since the newly constituted Programme Officers’ Service is a ‘Combined Service’. “P23” specifies that there would be an approved Cadre of 45,000 Programme Officers in this Service. These posts are permanent and pensionable and the appointing authority is the Director General of Combined Services. Programme Officers in the new Service are to be placed in the `Associate Officer’ category of the Public Service. There are three Grades in the Programme Officers’ Service - *ie:* Grade III, Grade II and Grade I and there is provision for promotion from Grade III to Grade II and, thereafter, to Grade I, based on seniority in service and merit. The salary points applicable to each Grade are different within the applicable Salary Scale of MN4-2006(A). Recruitment to Grade III of the Programme Officers’ Service comes from two sources - (i) by *“Recruitment under Open Stream”* which enables unemployed Graduates of recognised universities to apply for appointment with selection being based on the results of structured interviews; and (ii) from the ranks of public officers appointed to the Public Service under the Graduate Scheme, who have completed ten years’ service but are not currently placed on the Salary Scale of MN4-2006(A) or its equivalent and public officers appointed to the Public Service under the Graduate Scheme, who have not completed ten years’ service but are currently placed on the Salary Scale of MN4-2006(A) or its equivalent. Both categories of public officers described in (ii) are entitled to submit applications for absorption into the Programme Officers’ Service in terms of “P23”, and, if they do so, will be absorbed into Grade III of the Service. However, “P23” also makes provision for public officers employed in the Public Service under the Graduate Scheme for longer periods, to be absorbed into Grade II of the Programme Officers’ Service if they satisfy specified criteria.

Clause 8 of the Service Minute states that the duties and functions of Programme Officers serving in the newly constituted Programme Officers’ Service would consist of tasks such as *“Investigation, Collection/analysis of information and data/analysis/function in relation to the tasks of achieving the expected goals in development proposals including report compilation and survey and/or other task entrusted.”*.

It is evident that the aforesaid tasks, duties and functions of Programme Officers in the Programme Officers’ Service are not very different to the duties the petitioners presently perform as Development Assistants in the Department of Police. Thus, it was reasonable to give the petitioners the opportunity to be absorbed into the newly constituted Programme Officers’ Service, if they so wished.

It is important to note that, as mentioned earlier, Clause 17.2 of "P23", specifically provides that public officers who had been recruited under the aforesaid Graduate Scheme [such as the petitioners] were given a choice to decide whether or not they wished to be absorbed into the newly constituted Programme Officers' Service. Those who did not wish to become Programme Officers under and in terms of "P23", are entitled to continue in their present posts under the applicable terms and conditions of service. Thus, the petitioners are not obliged or compelled to accept absorption into the Programme Officers' Services. They are free to remain in their present posts in the Department of Police, if they so wish.

It is also evident that the objective and scheme of the Service Minute marked "P23" is to establish a Combined Service, which will be staffed by public officers who have the ability and capacity to serve in various Government Departments across the board of the entire Public Service. They are to perform the important functions of investigation, collection and analysis of data and the preparation of reliable surveys and reports, which are all necessary to enable the efficient operation of Government Departments and assist the overall development efforts of the Government.

It would seem that, in the light of these objectives of the Programme Officers' Service and the nature of the tasks, duties and functions of Programme Officers, the provision of the aforesaid three Grades within the Service with the opportunity for promotion within those Grades, is reasonable. Further, in view of the type of functions allocated to Programme Officers, it seems appropriate for the Programme Officers to have been placed on Salary - Scale MN 4 - 2006(A), which applies to Associate Officers in the Public Service.

It has to be kept in mind that the reasonableness and rationality of "P23" has to be viewed objectively and from the perspective of the overall purpose sought to be achieved by "P23". As mentioned earlier, the purpose of "P23" is to establish a Combined Service staffed with public officers who can serve in various Government Departments across the Public Service, performing essential functions of a particular type which is required for the efficient operation of all those Government Departments. The scheme set out in 'P23" has been structured with that objective in view and makes provision for promotions within the Programme Officers' Service and for payment based upon an appropriate Salary Scale. Further, there is no unequal treatment which is caused by "P23". All public officers who are eligible to be absorbed into the Programme Officers Service, including the petitioners, are entitled to be absorbed into the service, if they wish. However, if they do not wish to be absorbed into the Service, they are free to remain in their present posts.

In the aforesaid circumstances, I see no merit in the petitioners' contention that the Service Minute marked "P23" marked is arbitrary and irrational. I also see no basis for the petitioners' submission that "P23" has been issued *ultra vires* the powers of the Public Service Commission and Director General of Combined Services. Further, since "P23"

only gives the petitioners an option of being absorbed into the Programme Officers' Service, there is no justification in the petitioners' contention that they should have been consulted before "P23", was published. I should also mention here that in the recently decided case of WIMALACHANDRA vs. MAHINDA YAPA ABEYWARDENA [SC 285/2012 decided on 26th July 2019], Thurairaja J upheld the validity and rationality of the Service Minute marked "P23".

Thus, the petitioners have failed to establish either of the two grounds on which they relied and this application has to be dismissed.

Since the petitioners' application has to be dismissed, the intervenient-added respondents' application does not need to be considered, as it is dependent on the petitioners being granted the reliefs they seek. Therefore, that application also has to be dismissed.

Learned Senior Additional Solicitor General has contended that the petitioners' application is time-barred. I note that the application has been filed before the expiry of the time limit given to the petitioners to decide whether they wish to be absorbed into the Programme Officers' Service or remain in their present posts. In view of the aforesaid conclusion that the petitioners' application has to be dismissed on the merits, there is no reason to examine whether the time limit available to the petitioners in terms of Article 126 (2) ended before they filed this application.

The petitioners' application and the intervenient-added respondents' application are both dismissed. 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.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 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S C (F R) Application No. 660/ 2012

Christopher Mariyadas Nevis,

29 / 2,

St. Sebastian Street,

Paasaioor,

Jaffna.

PETITIONER

Mariyadas Nevis Delrokson,

Son of the Petitioner

DECEASED VICTIM

- Vs -

1. Superintendent,
   Vavuniya Prison,
   Vavuniya.

2. Superintendent,
   Anuradhapura Prison,
   Anuradhapura.

3. Superintendent,
   Mahara Prison,
   Mahara.

4. Commissioner General of
   Prisons,
   Prisons Head Quarters,
   Colombo 08.

5. Director,
   Criminal Investigations
   Department,
   Colombo 01.

6. Director,
   Ragama Teaching
   Hospital,
   Ragama.

7. Director,
   Special Task Force,
   Colombo 01.

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

RESPONDENTS

Before: Murdu N B Fernando PC J

P. Padman Surasena J

E. A. G. R. Amarasekara J

Counsel:

J C Weliamuna PC with Thilini Vidanagamage and Pulasthi Hewamanna for the Petitioner.

Madhawa Tennakoon SSC for the Attorney General.

Argued on : 2019 - 01 - 31

Decided on : 2019 - 05 - 23

JUDGMENT

P Padman Surasena J

The facts pertaining to this case could be summarized as follows. The Petitioner's son Mariyadas Nevis Delrokson was arrested by the CID in

Vavuniya on 17th October 2009. He was 36 years of age and an unmarried person.[1]

Thereafter, the Petitioner's son was indicted before the Vavuniya High Court on three separate indictments, copies of which have been produced, marked **P4 A**, **P4 B** and **P4 C**.[2] He was kept in remand custody in Vavuniya Prison.

On or about 2012-06-26, the inmates of Vavuniya prison in which the Petitioner's son was also kept, had commenced a protest campaign and a hunger strike, protesting against the transfer of the prisoner by the name of *Nadaraja Saravanapavan* to Boossa detention camp. The protesting inmates had demanded that the said transferred prisoner be brought back to Vavuniya prison.[3]

The reasons given by the Petitioner in his affidavit[4] for the said protest campaign and the hunger strike are as follows.

i. 'The Boossa detention camp is known to be notorious for the infliction of extreme physical and mental torture on prisoners and

[1] Paragraph 5 of the affidavit of the Petitioner.
[2] Paragraph 7 of the affidavit of the Petitioner.
[3] Paragraph 8 of the affidavit of the Petitioner.
[4] Paragraph 8 of the affidavit of the Petitioner.

that it will adversely affect the prisoner and his fundamental right to a fair trial.'

ii. 'The prisoners also consider that the said Boossa camp is an illegal detention camp.'

Perusal of the material adduced before this Court in this case, clearly shows that the Petitioner has not proved by any yardstick, the veracity of the above two assertions. The Petitioner has not even explained as to how he was able to ascertain the above information and the basis upon which he gives them as the reasons behind the protest campaign and the hunger strike launched by the inmates of Vavuniya prison.

It is to be borne in mind that the Petitioner was not amongst the inmates of Vavuniya prison at that time. In the absence of any indication by the Petitioner regarding the source of the above information, this Court has to conclude that the above assertions by the Petitioner are either based purely on hearsay material or mere speculations by him. This Court cannot treat such material as evidence and hence cannot act upon the Petitioner's above assertions.

Although, the Petitioner in the prayers of his petition has prayed for a declaration by this Court that his fundamental rights guaranteed under

Articles 11, 12 and 13 of the Constitution have been violated, this Court when this application was supported on 03-10-2014, having heard the submissions of the learned counsel for the Petitioner and the submissions of the learned Deputy Solicitor General who appeared for the Respondents, had decided to grant leave to proceed only under Article 11 of the Constitution. Thus, the task of this Court at this moment must be restricted only to a probe to ascertain whether the Respondents have infringed the fundamental rights of the petitioner (or his deceased son) guaranteed under Article 11 of the Constitution. With that in mind, it would be opportune at this moment to turn to the position taken up by the Respondents regarding the incident relevant to this case, which occurred in Vavuniya prison.

According to the affidavit[5] filed by the 4th Respondent (Commissioner General of Prisons) following positions have been revealed.

1) The prisoner *Nadaraja Sarawanapavan* was transferred to Boossa detention camp on the 26th June 2012 consequent to an order made

[5] Affidavit dated 30th March 2015.

by the High Court of Vavuniya on 25th June 2012.[6] (A copy of this order produced marked **R 2** has confirmed this position).

2) On or about 26th June 2012, several inmates of Vavuniya prison including the Petitioner's son (Delrokson) commenced engaging in a hunger strike demanding the said transferred suspect be brought back to the Vavuniya prison.

3) Certain inmates in pursuance of the said demand and in the process of their protest campaign,

   i. had vandalized the visitors area of the Prison[7] and

   ii. had taken three prison guards namely S K G Chandrasiri, N M Rohitha and S B Rathnayaka hostage and continue to hold the said prison guards and a number of other prisoners in their captivity within the Vavuniya prison premises.[8]

4) All attempts to negotiate with the hostage takers and persuade them to release the hostages who were in their custody and all attempts to regain official control of the prison premises and restore order within the prison premises had failed. [9]

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[6] Paragraph 12 of the affidavit of the 4th Respondent.
[7] Paragraph 24(a) of the affidavit of the 4th Respondent.
[8] Paragraph 24(d) of the affidavit of the 4th Respondent.
[9] Paragraph 24(f) of the affidavit of the 4th Respondent.

5) Consequently, as the tension in the Vavunia Prison had increased, the prison authorities were compelled to seek the assistance of the Special Task Force to conduct a rescue operation on the 29th June 2012. [10]

6) Owing to the stiff resistance by the hostage takers, the officers engaged in the rescue operation were compelled to use force to rescue the prison guards and other inmates held hostage in the captivity of the rioters as well as to regain official control and restore law and order within the Prison. [11]

7) Subsequent to the rescue operation, Vavunia Prison was closed and all the inmates were transferred to Anuradhapura and Mahara prisons as the authorities thought it fit to take steps to split up the prisoners/remandees with a view of preventing any possible re-grouping of the hostage takers.[12]

8) The persons requiring medical attention were taken to the hospital and the Petitioner's son was warded in the Ragama hospital. [13]

[10] Paragraph 24(f) of the affidavit of the 4th Respondent.
[11] Paragraph 24(h) of the affidavit of the 4th Respondent.
[12] Paragraph 24(i) of the affidavit of the 4th Respondent.
[13] Paragraph 24(j) of the affidavit of the 4th Respondent.

It is the position of the 4th Respondent that any injury sustained by the Petitioner's son may have been caused during the exchanges that had taken place during the rescue operation. [14]

The prison authorities had subsequently (on 4th July 2012) conducted an inquiry into the relevant incident. The 4th Respondent has produced a copy of the report of the said inquiry marked **R1**, along with his first affidavit dated 23rd June 2014.

Learned Presidents Counsel for the Petitioner in the course of his submissions made clear to this Court that he is not challenging the existence of a necessity to conduct a rescue operation by the Respondents inside the prison to free the three prison guards taken hostage by the rioting inmates. His complaint was limited to the allegation that the authorities had used excessive force during this incident and that resulted in serious injuries being caused to the Petitioner's son who later succumbed to the said injuries.

The Petitioner has alleged that the said use of excessive force was done deliberately to punish or torture the Petitioner's son whom the Petitioner

[14] Paragraph 25 of the affidavit of the 4th Respondent.

states has been identified as one of the masterminds behind the protest and hunger strike launched by the inmates of Vavuniya prison. It is on that basis that the learned President's Counsel appearing for the Petitioner sought to argue that the Respondents had infringed the Petitioner's (or his son's) fundamental rights guaranteed under Article 11 of the Constitution.

The Consultant Judicial Medical Officer of District General Hospital Gampaha has conducted a post mortem examination of the body of the Petitioner's son Mariyadas Nevis Delrokson at the mortuary of Teaching Hospital Ragama. Both the learned President's Counsel for the Petitioner and the learned Senior State Counsel who appeared for the Respondents, relied on the findings contained in the said post mortem report. Thus, this Court would now briefly refer to some of the relevant features contained in the said post mortem report.

Following facts revealed from the said post mortem report would be relevant and useful for the evaluation of the arguments advanced before this Court by both parties in this case.

i. Petitioner's son has died on 2012-08-08.

ii. It was the Petitioner (Christopher Mariyadas Thevis) who had identified the body.

iii. The opinion of the Consultant Judicial Medical Officer regarding the cause of death of Petitioner's son is (i) septicaemia, (ii) prolonged unconsciousness, (iii) head injury.[15]

Comments made by the Consultant Judicial Medical Officer regarding the cause of death of Petitioner's son set out in the last page of the said report would be crucial to the final decision by this Court in this case.

The said comments are as follows;

I. Deceased was admitted to the Teaching Hospital Ragama on 30th June 2012 in an unconscious state. According to the Bed Head Ticket (BHT No. 67462/12), deceased had a tramline contusion on the forehead and a wound on the left knee. X-rays taken at the hospital revealed a fracture in distal part of left ulna. CT scans revealed cerebral oedema and fracture in zygomatic bone of right side of the face. MRI scans showed features of shearing injuries in brain.

[15] Clause 20 of the post mortem report.

II. *Autopsy revealed evidence of diffuse axonal injuries and evidence of septicaemia. These findings are consistent with both ante mortem clinical state and investigations findings.*

III. *Diffuse axonal injury of the brain is used to describe a condition characterized by immediate prolong coma (greater than 6 hours) occurring after head trauma, not associated with intracranial haemorrhage or mass lesion. This is produced by a sudden acceleration - deceleration motion of the head (assault, violent shaking of head or fall) which causes stretching and/ or shearing of nerve fibers. In diffuse axonal injury, the patient becomes unconscious and survives for a long period in vegetative state and death supervenes due to complications of the unconscious state. Fracture zygomatic bone in right side of the face as indicated in CT scan and BHT finding of tramline contusion on the forehead confirm that the deceased had sustained head injury caused by blunt forces resulting diffuse axonal injury before admit to the hospital.*

IV. *Autopsy revealed that the both healed and healing abrasions (injuries 1, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18 and 19). Considering the*

external appearance, all these injuries are recent injuries and could have been sustained during hospital stay in unconscious state.

V. *In summary, the deceased was admitted to the Colombo North Teaching Hospital, Ragama on 30th June 2012 in an unconscious state and died on 08th August 2012 following septicaemia developed as a complication of prolong unconsciousness due to diffuse axonal injury caused by blunt force trauma to the head.*

This Court observes that the post mortem examination has revealed the existence of 19 external injuries (injuries Nos. 1-19) and two internal injuries (injuries Nos. 20-21) on the body of the deceased. The Consultant Judicial Medical Officer was of the considered opinion that the both healed and healing abrasions found on the body of the Petitioner's son (injuries 1, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18 and 19) could have been sustained during the hospital stay in unconscious state.[16] This means that the Petitioner's son could not have sustained the above set of injuries before his admission to the hospital. One has to bear in mind that the Petitioner's son was admitted to the hospital in an unconscious state.

[16] Last page of the post mortem report. (clause 20.4)

In the above circumstances, this Court has to conclude that the Petitioner's son could not have sustained the said set of injuries during the rescue operation conducted in the Vavunia prison.

The external injuries left out from the above list would be the external injuries numbered 2, 3, 6, 7, and 15 only. The said injuries have been described in the post mortem report in the following manner.

Injury No. 02 - *a healing wound with a red surface, measuring 3x3 cm, situated on the outer aspect of left leg 15 cm above the heel.*

Injury No. 03 - *a healing wound with a red surface, measuring 3x1 cm, situated on the left shin 25 cm above the heel.*

Injury No. 06 - *a triangular slightly curved healing wound with a pigmented surface over the distal part and reddish surface over the proximal part, measuring 4x1 cm, situated on the front and inner aspect of left thigh 53 cm above the heel.*

Injury No. 07 - *a healed tramline contusion measuring 7x2 cm with a pale center surrounded by a dark pigmented area situated obliquely on the left calf 33 cm above the heel.*

Injury No. 15 - *a healed tramline contusion measuring 14x2 cm with a pale center surrounded by dark pigmented area situated in the back of the left elbow and forearm.*

A notable feature of the above set of injuries is that all of those injuries were found on the heel and the forearm of the deceased.

The Consultant Judicial Medical Officer, upon dissection of the skin and subcutaneous tissues has found two internal injuries. It would be useful at this stage to consider the nature of the said two internal injuries found on the body of the deceased. They have been described in the post mortem report as follows.

Injury No. 20 - *A resolving intramuscular contusion measuring 5x4 cm situated in the left buttock.*

Injury No. 21 - *A healing fracture was found in distal part of left ulna.*

However, according to the post mortem report, the fracture of zygomatic bone in right side of the face as indicated in CT scan and BHT finding of tramline contusion on the forehead has confirmed that the deceased had sustained head injury caused by blunt forces. This had caused diffuse axonal injury before the deceased was admitted to the hospital. Thus, it is

clear that the above injury is the only serious injury the Petitioner's son had sustained in the course of the rescue operation.

This Court observes that the Magistrate along with Mr. Anton Pulithanyagam Attorney-at-Law had taken steps with the help of a ladder to climb down into the area where the rioting inmates had been continuing with their protest campaign. They had then urged the rioting inmates to release the three prison guards held hostage by them. According to the inquiry report (**R 1**), the rioting inmates at that time had shown the three prison guards held in their captivity to the Hon. Magistrate and Mr. Anton Pulithanyagam Attorney-at-Law who had climbed down to that area.

Respondents have admitted that the officers of the Special Task Force had gone into the prison to rescue the three prison guards and the other inmates kept as hostages. The Petitioner does not allege that the officers involved in the rescue operation were either armed or had used firearms. Indeed the Petitioner does not allege that there was any shooting inside. The post mortem report also does not reveal any gunshot injuries.

Perusal of the material adduced before this Court shows clearly that the rioters were not prepared for a peaceful settlement of any grievance they may have had. On the other hand, as has been mentioned before, Petitioner has not convinced this Court that any of those inmates has had any substantial grievance for their questionable behaviour, which had sparked off the whole incident.

The Petitioner has not denied the fact that the rioters within the prison premises had continued to hold three prison guards hostage in their captivity. Thus, this Court cannot reject the position taken up by the Respondents that it has become necessary for them to launch a rescue operation.

In view of the observations made by the Consultant Judicial Medical Officer, and in the light of the circumstances that prevailed in the prison at that point of time, there is no justification for this Court to hold that the Respondents have used more force than necessary at this instance to curb the then prevailing situation.

Learned President's Counsel for the Petitioner also complained that the chaining of the leg of the Petitioner's son to the hospital bed amounts to a

degrading treatment, which violates the fundamental rights, guaranteed under Article 11 of the Constitution.

According to section 252 B (1)(c) of the Prisons Ordinance, a light chain with single wrist cuff may be used in order to secure any prisoner who may at any time be an inmate at a civil hospital.

In terms of the Department of Prisons standing order 732 produced marked **4R A** it is lawful for a prisoner to be chained to a bed when the prisoner is warded in a civil hospital. In this instance, the Petitioner's son was in an unconscious state in the hospital. As this is something authorized by the law and as the Respondents had not done this deliberately to humiliate the Petitioner's son, this Court does not see any merit in the above argument advanced by the learned President's Counsel for the Petitioner.

Considering all the above material in its totality, this Court is of the view that the Respondents in the given situation had not acted outside the law and hence had not violated, the fundamental rights guaranteed to the Petitioner's son under Article 11 of the constitution.

In these circumstances, and for the foregoing reasons, this Court decides that the Petitioner is not entitled to a declaration by this Court to the effect that his fundamental rights under Article 11 of the Constitution have been infringed by the Respondents. Hence this Court decides to refuse this application.

This Application should therefore stand dismissed without costs.

JUDGE OF THE SUPREME COURT

Murdu Fernando PC J

I agree,

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara J.

I had the advantage of reading in draft, the Judgment written by Honourable Justice Surasena. With all due respect to his analysis of facts and conclusions, I intend to dissent and come to a different conclusion with regard to the facts revealed before us in this case. Since my brother Judge has summarised the facts of this case, I need not repeat some of them here again. My brother Judge has observed that many of the assertions made by the Petitioner are based on hearsay material or mere speculation by the Petitioner that cannot be given any evidential value. I also agree with that. However, the fact that the Petitioner's son Mariyadas Thevis Delrokson died on 08.08.2012 at the Ragama Teaching Hospital while he was in the custody of Prison authorities is not a disputed fact. Furthermore, the 4th Respondent, the Commissioner General of Prisons in reply to paragraph 6 of the Petition has stated that the deceased was remanded in Vavuniya Prison on 19.04.2010 and he had not complained of any assault by the CID. – Vide paragraph 10 of the affidavit of the 4th Respondent dated 30.03.2015. The document marked as R1 and tendered with the said affidavit also confirms that the deceased had no serious health condition at the time he was remanded.

Thus, the facts placed before this court establish;

- that the deceased was a remand prisoner,
- that he was handed over to Vavuniya Prison on 19th April 2010 in good health and

- that he died while in prison custody at Ragama Teaching Hospital on 08.08.2012.

My brother judge Surasena, J. has referred to the Post Mortem Report and the injuries found there in that report. He correctly observes that out of the 21 injuries listed on the 3rd page, the injuries Nos. 2, 3, 6, 7, 20 and 21 were sustained before the deceased was admitted to the hospital. As per the Judicial Medical Officer (hereinafter sometimes referred to as the JMO) who did the autopsy, other injuries listed on the 3rd page of the Post Mortem Report, namely injuries Nos.1,4,5 and 8 to 19 would have been sustained during the hospital stay while the deceased was in an unconscious state. However, commenting on the autopsy, the JMO, among other things, has explained the following injuries revealed by the Bed Head Ticket, CT & MRI Scans:

- A tram line contusion on the forehead (from the entries in the bed head ticket)
- Cerebral oedema and Fracture in Zygomatic bone of right side of the face (By CT Scan.)
- Shearing injuries in brain, (By MRI Scan.)
- Fracture in the distal part of left ulna. (By X-ray report)

Fracture in the left ulna is also found in the list given on the 3rd page of the Post Mortem Report as injury No. 21. These findings indicate that the brain of the deceased was swollen and fractures in bones have occurred on the right side of the face as well as on the left forearm.

The JMO further states in his report that the autopsy revealed evidence of diffuse axonal injuries and evidence of septicemia. The JMO further clarifies 'diffuse axonal injury' as follows;

"Diffuse axonal injury of the brain is used to describe a condition characterised by immediate prolong coma (greater than 6 hours) occurring after head trauma, not associated with intracranial haemorrhage or mass lesion. This is produced by sudden acceleration-deceleration motion of the head (assault, violent shaking of head or fall) which causes stretching and/or shearing of nerve fibers. In diffuse axonal injury, the patient become unconscious and survives for a long period in vegetative state and death supervenes due to complications of the unconscious state. Fracture zygomatic bone in right side of the face as indicated in CT scan and BHT finding of tram line contusion on the forehead confirm that the deceased had sustained head injury caused by blunt forces resulting diffuse axonal injury before admit to the hospital." (Sic)

As per the Post Mortem Report, death was caused due to Septicemia, Prolonged Unconsciousness and Head Injury. – Vide comment of the JMO at the last page of the Post Mortem Report.

Respondents have not taken up a position that a fall or an accident caused those injuries. Injury No. 6 on the 3rd page of the Post Mortem Report refers to a healing wound on the inner part of the left thigh. This injury suggests that legs of the deceased were open towards the side the blow came from. Fracture in the left ulna would have been caused while trying to cover or protect him from a beating. Nevertheless, the Post Mortem Report confirms

that the death of the deceased was not due to a natural cause but due to the injuries caused to the head of the deceased while he was in the custody of the prison. The deceased was the son of the Petitioner, but the Petitioner was not with the deceased at the Prison. Thus, what caused the injuries to the deceased is not within the knowledge of the Petitioner, but the Prison Authorities must have the knowledge with regard to the incident or background or circumstances that caused the injuries. 1st to 4th Respondents might not have been with or around the deceased always, but they have the authority to collect information from the relevant officers and the related books, records and journals maintained by the prisons. Thus, the circumstances that caused the injuries and/or when and where the injuries were inflicted were within the special knowledge of the prison officers, in other words within the knowledge of the State through its officers.

It is true that the prison officers have authority even to use a degree of force to maintain discipline in the prison- vide section 13 of the Prisons Ordinance. Article 4(d) of the Constitution expects all the organs of the state to respect, secure and advance fundamental rights of the people. In ***Kupugeekiyana Vs Hettiarachchi & two others (1984) 2 Sri LR 153*** it was held that even a person on the blackest of criminal charges is entitled to his fundamental rights.

Article 11 of the Constitution confirms freedom against torture, cruel and inhuman and degrading treatment or punishment. The said Article is not subject to any restriction under Article 15 of the Constitution. Thus, no derogation of the rights guaranteed by the said Article is permissible for any reason.

In **Jayasinghe Vs. Samarawickrama SCFR 157/91, SCM 12.01.1994, (1994) 2 Sri L R 18** Kulatunge, J. commented as follows:

"*At the time Petitioner was handed over to Police he had no injuries, and when he was handed over to the hospital, he was a physical wreck and comatose, and I, therefore, hold that allegation of torture had been established*."

When a person is handed over to prison as a prisoner, it is expected that the prison authorities would respect his fundamental rights. In the case at hand, the deceased was handed over to the prison in good health, and after few months he was admitted to Ragama hospital in an unconscious state, with injuries including severe internal head injuries caused by blunt forces - vide Post Mortem Report. As elaborated above, the prison authorities must have the exclusive knowledge with regard to the circumstances that caused the injuries and when and where they were inflicted or occurred. Unless there is a proper explanation by the prison authorities the facts mentioned above establish prima facie a high probability of an infringement of Article 11 since there is evidence of assault while the deceased was in prison custody.

In reply to the application made by the Petitioner, two affidavits dated 23.06.2014 and 30.03.2015 have been filed in objection by the respective officers who held the office of the 4th respondent. The affidavit dated 23.06.2014 was submitted by one Chandrarathne Pallegama, the Commissioner General of Prisons as at that date. He has not denied the averments in the petition and affidavit of the Petitioner but has stated that:

1. Consequent to a transfer of a prisoner to Boossa Prison as per an order of the Vavuniya High Court, on or around 27.06.2012, several inmates of the Vavuniya Prison engaged in a hunger strike.
2. In pursuance of their demand, on 28.06.2012, certain inmates of the Vavuniya Prison took 3 prison guards as hostages and held those 3 prison guards and other prisoners captive within the said prison premises.
3. Since negotiations to get the hostages released and regain the official control of the Prison failed, with the assistance of the Special Task force (STF), the Prison Authorities conducted a rescue operation on the 29.06.2012, where they had to use a degree of force due to the stiff resistance by the hostage-takers.
4. Subsequent to the rescue operation, fearing re-grouping, it became necessary to split up the prisoners and transfer them to different prisons.
5. Thus, they were transferred to Anuradhapura & Mahara Prisons while taking prisoners requiring medical attention to hospitals. In that process, the deceased was warded in the Ragama Hospital.

The affirmant of the said affidavit has tendered an inquiry report made in relation to the aforesaid incident as R1 and certain statements made during that inquiry by the Superintendent of Vavuniya Prison and the aforesaid hostages as R2, R3A, R3B, and R3C. The affirmant does not state that he was present in person when the aforesaid incident or transfer of prisoners that followed took place. Therefore, most of the contents may have been taken from the information he received and may be hearsay. No affidavit

is tendered in support of the contents of his affidavit from a person who was present at the incident or to verify the contents of R1, R2, R3A to R3C by the makers of such report or the statements. However, the gist of this affidavit is to indicate that the deceased would have got injured during the aforesaid incident and later on taken care by admitting him to Ragama Hospital.

Manikka Badathuruge Rohana Pushpakumara, who appears to have succeeded the affirmant of the previous affidavit dated 23.06.2014 as the Commissioner General of Prisons, by the affidavit dated 30.03.2015, denies the averments of the Petitioner's affidavit. However, he also does not state that he was present at the incident or when prisoners were transferred to other prisons. He even in support of his objection does not annex any affidavit from a person who has first-hand knowledge of the incident and/or the steps taken afterwards. Thus, his affidavit may also contain unverified hearsay evidence. Nonetheless, he, inter alia, states as follows in his affidavit.

1. That the deceased was a LTTE suspect, who had 3 indictments pending against him in the High Court of Vavuniya.
2. That the deceased was remanded in the Vavuniya Prison on 19.04.2010 and became an inmate of the Vavuniya Prison.
3. That on or around 26.06.2012 the inmates of the Vavuniya Prison, including the deceased engaged in a hunger strike consequent to a transfer of an inmate to the Boossa Detention Camp.
4. That before staging the hunger strike, the deceased and another inmate met the Chief Jailor and demanded the return of the inmate

who had been transferred to Boossa and later on, the deceased and several other prisoners vandalised the visitors' area of the prison and forced the inmates of the prison to stage the hunger strike.

5. That the inmates who staged the hunger strike took 3 prison guards as hostages and held the said 3 prison guards and other prisoners captive within the Vavuniya Prison.
6. That since all negotiations failed, the prison authorities had to seek the assistance of Special Task Force (STF).
7. That during the night of 29.06.2012, the situation escalated into a situation of a riot, and the STF had no choice but to force an entrance into the prison premises. (It is pertinent to note that as per the documents marked as R1, R2 and R3a to R3c with the affidavit dated 23.06.2014, the STF appears to have entered during day time just after 12 noon.)
8. That tear gas had to be used to dispel the rioters and a degree of force had to be used in order to rescue the prison guards and other inmates held hostage due to stiff and violent resistance by the perpetrators who were armed with iron rods.
9. That subsequent to the rescue operation, it was necessary to transfer all prisoners from the Vavuniya Prison and first they were sent to the Anuradhapura prison. However, fearing regrouping of the perpetrators, it was considered prudent to split up the prisoners and have them placed in different prisons. As such, prisoners from Vavuniya prison were transferred to Anuradhapura, Bogambara and Mahara prisons.

10. That the deceased was among the prisoners, who were transferred to Mahara Prison and the medical officers at Mahara Prison examined all the injured persons and transferred the prisoners who needed medical attention to Ragama Hospital. Consequently, the deceased was admitted to the Ragama Hospital.

11. That any injury sustained by the deceased would have been caused during the rescue operation – (vide paragraph 22 and 25 of the said affidavit).

The affirmant of the said affidavit has tendered another set of documents marked as R1, R2, R3a, R3b, R4a, R4b, R4c, R5, R6a, R6b, R7a, R7b and R8. I have already referred to R1 which indicates that the deceased was in good health when he was handed over to the prison. R3a, R3b, R4c, R6a, R6b, R7a, R7b and R8 have been marked to explain the allegations made with regard to the visits to see the deceased when he was warded in the Ragama Hospital. R4a and R4b have been marked in reply to the allegation that the deceased was chained to the bed when he was under treatment. R5 is a report sent to the Human Rights Commission which also refers to the riot that took place in the Vavuniya prison and the admittance of the deceased to the Ragama Hospital for treatment. The said R5 does not exactly state that the deceased received injuries at the riot mentioned above or that he was immediately or as soon as possible given treatment for the injuries. Since I intend to discuss the infringement of Article 11 of the constitution with regard to the injuries caused and the medical attention given, I do not expect to discuss matters concerning R2, R3a, R3b, R4a, R4b, R4c, R6a, R6b, R7a, R7b, and R8.

However, the affidavits filed on behalf of the 4th Respondent take up the positions that the injuries sustained by the deceased would have been or may have been caused during the riot. When one uses 'would have been caused' or 'may have been caused', the time of sustaining injuries is not definite. It does not exclude the possibility of sustaining injuries after the riot was quelled. However, it appears that the Petitioner and the Respondents agree that there was a riotous situation within the prison and the deceased was an inmate at that time. If the injuries were sustained after the riot, as there is no explanation from the Respondents, there is a clear infringement of Article 11 of the constitution. If the injuries were caused during the riot even the use of excessive force may sometimes absolve the Respondents from the responsibility, since the use of excessive force does not per se amount to cruel, inhuman or degrading treatment, that would depend on the person and the circumstances. [-vide **Wijesiriwardena V Kumara Inspector of Police, Kandy (1989) 2 SRI LR 312**.]. In my view this stance with regard to the time of sustaining injuries, that the injuries would have been caused during the riot, is not a statement of a responsible officer since the 4th Respondent and his department had the full authority to hold a proper inquiry and his officers involved in the incident had the full knowledge with regard to the incident and its background. They should be able to state at least that injuries were caused before the deceased was transferred from Vavuniya Prison and/or Anuradhapura Prison if the officers of the prison department responsibly followed the provisions of the Prison Ordinance. Now I prefer to refer to the relevant provisions from the Prison Ordinance.

Section 46.

"All prisoners, previously to being removed to any other prison, shall be examined by the Medical Officer."

Section 66.

" The names of prisoners desiring to see the medical officer or appearing out of health in mind or body shall be reported by the officer attending them to the jailer, and the jailer shall without delay call the attention of the medical officer to any prisoners desiring to see him, or who is ill or whose state of mind or body appears to require attention, and shall carry into effect the medical officer's written recommendations respecting alterations of the discipline or treatment of such prisoner."

Section 67

"All recommendation given by the medical officer in relation to any prisoner, with the exception of orders for the supply of medicines or directions relating to such matters as are carried into effect by the medical officer himself or under his superintendence, shall be entered day by day in his journal, which shall have a separate column, wherein entries shall be made by the Superintendent stating in respect of each recommendation the facts of its having or not having been complied with, accompanied by such observations, if any, as the Superintendent thinks fit to make, and the date of the entry."

Thus, it is the duty of the prison authorities to do a medical examination before a prisoner is transferred to another prison (Section 46). Even if the prisoner appears to be out of health in mind or body, the attending officer must report him to the jailor, and the jailor shall, without delay, call the attention of the medical officer.

The deceased had a fracture in the left ulna and a fracture in Zygomatic bone of the right side of the face. Most probably the deceased would have had a swollen face and a swollen left arm. The tram line contusion on the forehead the deceased had could be visible to the naked eye. Diffuse axonal injuries of the brain are described as a condition characterized by ***immediate*** prolong coma occurring after head trauma which is produced by sudden acceleration and deceleration motion of the head that causes stretching and/or shearing of nerve fibres. (highlighting by bold letters is mine).

The JMO further states in his report that the patient becomes unconscious due to this type of injuries. If this injury was caused during the riot and if the deceased did not fall into an immediate prolong coma as described by the JMO, the deceased would have shown some symptoms that he was not well and was not in good health. If the above injuries were caused during the riot as assumed by the affidavits of the 4th Respondent, the attending officer/s should have observed that the deceased was out of health and reported to the relevant officer/s. On the other hand, if the medical officer did the medical examination as per the section quoted above, the medical officer should have observed that the deceased was out of health. Thus, it is highly probable that, if the injuries were sustained during the riot, proper

medical attention was not given to the deceased until he was brought to the Mahara Prison.

At this juncture, it is pertinent to note the contents of the statement of Indrajith Udunuwara, Assistant Superintendent of Prison marked as R2 with the 1st affidavit filed on behalf of the 4th Respondent. In that statement relied by the Respondents, the said Assistant Superintendent of Prison had stated that, at the Anuradhapura Prison, while preparing to transfer prisoners to Mahara and Bogambara Prisons, he got the doctor of the prison hospital to treat the injured persons at the main gate. He also had stated that the injured who needed to be admitted to the hospital as per the recommendation of the doctor were admitted to the hospital. He further had revealed in that statement (R2) that he allowed taking police statements from all the suspects on a request made by the ASP Senarathna of Vavuniya Police. If entries relating to such medical examination in the doctor's journal or the police statements made at that time were submitted, it would have been the best evidence to show that the deceased was not in a situation that needed immediate medical care even when he was at Anuradhapura Prison or the deceased had sustained injuries before him being transferred from Anuradhapura.

Even if one assumes that it was not possible to do a medical examination before transferring from Vavuniya to Anuradhapura due to the riotous situation, non-production of the journal entries relating to medical examination done at Anuradhapura before transferring to Mahara gives rise to following assumptions.

1. That the said statement in R2 that proper medical attention was given before transferring to Mahara and Bogambara is false. As such, the prison authorities neglected to attend to the deceased prisoner as required by Section 46 and/or 66 of the Prison Ordinance, which sections are there to preserve the rights of the prisoners and their health. Such negligence amounts to inhuman or degrading treatment; or
2. That the result of such medical examination is not produced before this court because it is adverse to the interests of the respondents due to reasons such as follows;
   (a) It reveals that the deceased was not in good health and needed immediate medical attention which the prison authorities failed to attend to which is indicative of inhuman or degrading treatment, or
   (b) It reveals that the deceased was in good health, but the injuries were sustained after the removal from Anuradhapura prison which is indicative of torture, cruel and inhuman or degrading treatment or punishment after the incident of the riot.

If a police statement was taken at Anuradhapura prison as stated in said R2, it could have been tendered to show that the deceased was considerably in good health to make a police statement and he did not ask for medical attention. Non-production of such statement made to the police creates doubts

a) as to the truthfulness of R2 and whether reference to making of such statements by the prisoners is a lie to cover up the true story and to

propose that no medical attention was needed by the deceased at Anuradhapura prison, and/or

b) that if such statement exists, the production of such statement is adverse to the interests of the Respondents and supportive of the stance of the Petitioner.

Section 21 of the Prison ordinance provides that on the death of a prisoner the medical officer shall forthwith, among other things, record in writing the followings:

(a) when the deceased was taken ill,

(b) when the medical officer was first informed of the illness.

(c)the nature of the disease

(d) when the prisoner died etc.

Though such entries should have been with the 4th Respondent, they were not tendered to Courts. Such entries could have revealed when it was reported for the first time that the deceased was not well.

I think it is correct to have an adverse inference against the respondents due to the non - production of medical journals and entries maintained by the medical officers.

As per the Section 26 of the Prison Ordinance, the jailer shall give immediate notice of the death of a prisoner to the Magistrate having jurisdiction over the area and Section 37(1) of the Criminal Procedure Code among other things provides that when a person dies while in the custody of a prison, the officer in charge of the prisoner or the officer who had the custody of the

prisons shall forthwith give information to the Magistrate whose jurisdiction the body is found and the Magistrate shall view the body and hold an inquiry into the cause of death. Thus, the Magistrate of the area where the body is found has the power to hold an inquest with regard to death of a person who was under prison custody. As per the Post Mortem Report, the autopsy was done due to a request came from the Negombo Magistrate. As per the Journal Entry dated 18.02.2013 the learned Deputy Solicitor General who appeared that day had stated that the inquest proceedings would be submitted to this Court in due course. For the reasons best known to the State and the 8th Respondent, it has not been tendered to this Court. Thus, this court is devoid of the advantage of perusing the proceedings of an inquiry held before an impartial officer. As the inquest proceedings are not in the possession of the Respondents, I do not intend to make any adverse inference for not producing the inquest proceedings.

Facts and material placed before this court establish that the deceased who was the son of the petitioner was handed over to prison by the C I D in good health. After about four months, he died at Ragama hospital while in the custody of the prison. Among the causes of death were head injuries. The deceased also had two fractures, one in the left ulna and the other in the zygomatic bone on the right side of the face. There was a contusion on the forehead. In addition, the Injuries Nos.2,3,6,7 and 20 would have been sustained while the deceased was in Prison custody. The above are not injuries caused by natural causes. The Respondents have not taken a stance that they were caused by an accident. Thus, the injuries confirm that the deceased was assaulted while in prison custody. Those facts prima facie

establish a case of torture, cruel and inhuman and degrading treatment caused while in the prison custody unless there is an acceptable explanation by the prison authorities that the assault was needed for a reason such as the maintenance of discipline and law & order within the prison premises or among prisoners. The explanation given is that the injuries would have been caused during a riot that took place on 29.06.2012 at Vavuniya prison. This explanation only suggests how and when it happened but does not give a definite explanation as to how and when the injuries were inflicted since it does not exclude the possibility of sustaining injuries after the riot. It should be noted that the circumstances, incidents and background that caused the injuries are within the exclusive knowledge of the prison authorities and not with the petitioner. The petitioner may not know even who were the other inmates at the time the assault took place and when and where it took place. As such it is up to the prison authorities to establish those circumstances. If the assault had taken place after the riot was quelled, it amounts to torture, cruel and inhuman and degrading treatment or punishment. If it took place during the riot, the issue is whether the prison authorities took steps to give proper and timely medical treatment to the injuries caused during the actions taken to control the riot. If the entries made by medical officers, which should be with the Respondents, were produced such entries could have clearly exposed the medical condition of the deceased prior to him being transferred to Mahara Prison. Non-production of such entries has to be considered against the Respondents.

As per the Post Mortem Report, 'Defuse Axonal Injuries of the Brain' describe a condition characterised by immediate prolong coma. Thus, I am of the

view it is highly probable that the prison authorities should have observed that the deceased was in a condition that required immediate medical attention before he was brought to the Mahara Prison if the assault took place at the riot in Vavuniya Prison. The fractures and the external injuries on the forehead should have taken the attention of the medical officers before he was transferred to Mahara Prison and even the attendant prison officers would have observed the medical condition of the deceased before he was transferred to Mahara Prison If the injuries were inflicted during the riot. As such, it is my considered view that the prison neglected to give proper and timely medical treatment and attention if the injuries were caused during the riot. Not attending to the medical needs of a prison inmate by the relevant prison officers, amount to cruel & inhuman and degrading treatment.

It is true that there is no evidence to say that the named Respondents in the caption are directly involved in the infringement, but it is clear that the infringement took place and the State is liable. Not naming the exact officer or officers involved in the infringement as respondents is not a bar to grant relief since the relief is principally granted against the State. {vide **Gunawardena V. Perera (1983) 1SLR 305, Mariyadas Raj v Attorney General FRD (2) 397, Vivienne Goonewardena v. Perera FRD (2) 426}**

The Petitioner has stated that the deceased victim, the Petitioner and his family members have suffered immense mental agony and loss by the torture and the death of the deceased victim, his son in violation of rights guaranteed under Article 11 of the Constitution. I also observe that there is

no specific denial of the allegations made under paragraph 19 of the petition and the corresponding paragraph in the affidavit of the Petitioner.

The counsel for the Petitioner in his written submissions has dealt with denial of timely medical care which I cannot recollect him emphasizing during the oral submissions but the state was given a time to file written submissions in reply after four weeks from the date given to file written submissions of the Petitioner. No written submissions were filed by the Respondents. —Vide Journal Entries dated 31.01.2019,15.02.2019 and 22.03.2019.

Therefore, I hold that rights granted under Article 11 were infringed by the officers of the State and order to pay Rs. 200000/= as compensation to the Petitioner.

Had any assault taken place after the riot was controlled it may constitute a serious criminal offence since it caused the death of a prisoner at the end. Entries made by the relevant medical officers should provide necessary information in this respect. Thus, I bring the attention of the 5th and 8th respondents as it is within their scope to hold necessary investigations.

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E.A.G.R. Amarasekara J.

Judge of the Supreme Court.